No.

In the Supreme Court of the United States

C.H. ROBINSON WORLDWIDE, INC., PETITIONER

v.

ALLEN MILLER

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the Federal Aviation Administration Authorization Act (FAAAA) to deregulate the trucking industry. The statute preempts a "[state] law, regulation, or other provision" that is "related to a price, route, or service of any motor carrier * * * or * * * broker." 49 U.S.C. 14501(c)(1). Another provision—commonly known as the "safety exception"—preserves the "safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A).

The question presented is 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 FAAAA's safety exception.

CORPORATE DISCLOSURE STATEMENT

Petitioner C.H. Robinson Worldwide, Inc., has no parent corporation. BlackRock, Inc., owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (D. Nev.):

Miller v. *C.H. Robinson Worldwide, Inc.*, Civ. No. 17-408 (Nov. 14, 2018)

United States Court of Appeals (9th Cir.):

Miller v. *C.H. Robinson Worldwide, Inc.*, No. 19-15981 (Sept. 28, 2020)

Miller v. *C.H. Robinson Worldwide, Inc.*, No. 19-15981 (Nov. 9, 2020) (order denying petition for rehearing en banc)

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PETITION FOR A WRIT OF CERTIORARI

C.H. Robinson Worldwide, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 976 F.3d 1016. The district court's order granting petitioner's motion for judgment on the pleadings (App., *infra*, 28a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2020. A petition for rehearing was denied on November 9, 2020 (App., *infra*, 39a-40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 14501(c)(1) of Title 49 of the United States Code provides:

> Except 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 motor carrier * * * or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

Section 14501(c)(2)(A) of Title 49 of the United States Code provides:

> Paragraph (1) * * * shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

STATEMENT

This case presents a question of statutory interpretation with enormous practical significance for the transportation industry. The Federal Aviation Administration Authorization Act (FAAAA) broadly preempts any "[state]

law, regulation, or other provision" that is "related to a price, route, or service of any motor carrier * * * or * * * broker." 49 U.S.C. 14501(c)(1). At the same time, another provision—known as the "safety exception"—provides that the preemption provision does not "restrict" the "safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A). The question presented is whether a common-law negligence claim against a freight broker is preempted because it does not constitute the exercise of the "regulatory authority of a State with respect to motor vehicles" within the meaning of the FAAAA's safety exception.

Petitioner is one of the Nation's largest providers of transportation services, including freight brokerage. A freight broker is hired by a shipper to arrange for the transportation of property, ordinarily across state lines. The broker then hires a motor carrier to conduct the transportation. Because most motor carriers are small businesses that lack the resources to solicit loads from shippers, they rely on freight brokers to act as intermediaries, matching available motor carriers with shippers that need goods hauled.

In this case, Costco hired petitioner to arrange the transportation of goods from Sacramento, California, to Salt Lake City, Utah. Petitioner then hired a federally licensed motor carrier. The motor carrier employed a driver whose tractor-trailer collided with respondent's vehicle on a highway in Nevada. Respondent sustained serious injuries.

Respondent sued petitioner in federal district court, alleging that petitioner negligently caused the accident by failing competently to select the motor carrier. The district court granted petitioner's motion for judgment on the pleadings, concluding that the FAAAA preempted the

claim. The district court first reasoned that the claim "related to" a "service" offered by petitioner because a freight broker's core business is selecting motor carriers to transport property. The district court then rejected respondent's contention that his common-law negligence claim fell within the safety exception.

A divided panel of the court of appeals reversed. The court of appeals agreed with the district court that respondent's claim "related to" the services offered by petitioner. But the court of appeals nonetheless concluded that respondent's claim fell within the FAAAA's safety exception. The court reasoned that the exception preserved the State's authority to "regulate safety through common-law tort claims," including claims against freight brokers that "arise out of motor vehicle accidents." App., *infra*, 15a, 23a.

The decision below badly misinterprets the safety exception. A common-law tort claim against a freight broker is not an exercise of the "safety regulatory authority of a State." By its plain text, the safety exception preserves the State's authority to enact and enforce positive-law rules and regulations; it does not encompass private claims brought by private parties to compensate for past injuries. Further, a claim against a freight broker does not operate "with respect to motor vehicles," because brokers do not own or operate motor vehicles on state highways, nor do brokers hire or employ the drivers operating the motor vehicles.

The court of appeals' decision will impose enormous costs on the transportation industry—indeed, the very costs that Congress sought to avoid in enacting the FAAAA. Without this Court's intervention, the decision will subject businesses in the transportation industry, many of which operate nationwide or regionally, to the va-

garies of state common-law negligence doctrines. In effect, freight brokers—and the numerous businesses that themselves hire motor carriers to transport their products—will be forced to comply with the patchwork of rules that Congress determined imposed an "unreasonable burden" on interstate commerce and an "unreasonable cost" on American consumers.

The Court should resolve the question presented now. The Ninth Circuit—which this Court has unanimously reversed for its unduly narrow interpretations of the FAAAA and the similarly worded Airline Deregulation Act—covers enough of the country that the largely national transportation industry must treat its decisions as if they were the law of the land. And given the widespread confusion in the lower courts, plaintiffs will seize on the Ninth Circuit's decision in federal and state courts across the country as if it *is* the law of the land. This case, moreover, presents an ideal vehicle to resolve the question presented. The petition for a writ of certiorari should be granted.

A. Background

In 1994, Congress enacted the Federal Aviation Administration Authorization Act (FAAAA) to preempt certain state regulation of the transportation industry. The FAAAA represented the culmination of a broad deregulatory agenda undertaken by Congress over a 15-year period. In 1978, Congress had deregulated the domestic airline industry in the Airline Deregulation Act (ADA). See Pub. L. No. 95-504, 92 Stat. 1705. The ADA preempted any state laws "relating to rates, routes, or services of any air carrier" to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379 (1992). In 1980, Congress had deregulated the trucking

industry, but without the broad preemption provision of the ADA. See Motor Carrier Reform Act, Pub. L. No. 96-296, 94 Stat. 793.

By the early 1990s, Congress had concluded that the remaining patchwork of state rules presented a "huge problem" for "national and regional" transportation companies "attempting to conduct a standard way of doing business." *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 440 (2002). Such regulation, Congress determined, imposed an "unreasonable burden" on interstate commerce and thus an "unreasonable cost on the American consumers." Pub. L. No. 103-305, § 601(a), 108 Stat. 1605.

Accordingly, in enacting the FAAAA, Congress enacted a preemption provision for the trucking industry that was modeled on the ADA's preemption provision. As amended, the FAAAA provides that a State may not "enact or enforce" a "law, regulation, or other provision having the force and effect of law" if it is "related to a price, route, or service of any motor carrier * * * or * * * broker." 49 U.S.C. 14501(c)(1). As this Court has explained, the purpose of the FAAAA's preemption provision—much like the ADA's—is to ensure that "rates, routes, and services" in the transportation industry reflect "maximum reliance on competitive forces." *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364, 370-371 (2008) (citation omitted). The FAAAA thus preempts state laws that have a "connection with" or "reference to" the prices, routes, or services of a motor carrier or broker. *Id.* at 370 (emphases omitted). That connection may be "indirect," and a state law will be preempted as long as it has a "significant impact" on the FAAAA's "deregulatory and pre-emption-related objectives." *Id.* at 370-371 (internal quotation marks and citations omitted).

At the same time, the FAAAA preserves a sphere of state regulation. This Court has explained that the FAAAA's preemption provision does not reach state laws that have only a "tenuous, remote, or peripheral" effect on prices, routes, and services. *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 261 (2013) (quoting *Rowe*, 552 U.S. at 371). Of particular relevance here, the FAAAA also includes an express exception: 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). The Court has explained that this "safety exception" preserves the "traditional state police power over safety," including the power to ensure "safety on municipal streets and roads." *Ours Garage*, 536 U.S. at 439-440.

The FAAAA also leaves in place significant federal regulation of motor carriers and commercial motor vehicles. Congress has instructed the Department of Transportation and the Federal Motor Carrier Safety Administration (FMCSA) to establish minimum safety standards for commercial motor vehicles. See 49 U.S.C. 31136; 49 U.S.C. 113; 49 C.F.R. 1.87. The FMCSA has promulgated regulations governing, for example, the standards for commercial drivers' licenses (49 C.F.R. pt. 383) and rules for the driving of commercial motor vehicles (49 C.F.R. pt. 392). The FMCSA also monitors federally registered motor carriers for compliance with those regulations—and can revoke the registration of motor carriers that do not comply. See 49 U.S.C. 31144; 49 C.F.R. 385.5, 385.7, 385.13(e). And through a federal grant program, the States coordinate with the FMCSA to enforce those safety standards. See 49 U.S.C. 31102; 49 C.F.R. 350.201.

B. Facts And Procedural History

1. Petitioner is a federally registered property freight broker that was hired by Costco to arrange for the transportation of certain goods from Sacramento, California, to Salt Lake City, Utah. Petitioner hired a federally licensed motor carrier. In 2016, a tractor-trailer driven by an employee of the motor carrier collided with respondent's vehicle on a Nevada highway. Respondent suffered severe injuries and was left paralyzed. App., *infra*, 29a.

2. In 2017, respondent filed suit in the District of Nevada against petitioner, alleging a claim for negligence under Nevada common law. Specifically, respondent asserted that petitioner had breached its common-law duty to "select a competent contractor" when hiring a motor carrier.[1] Petitioner moved for judgment on the pleadings, arguing that the FAAAA preempted respondent's negligence claim. App., *infra*, 3a-4a.

The district court granted petitioner's motion, holding that respondent's claim was preempted. App., *infra*, 28a-38a. The court first concluded that respondent's claim "related to" petitioner's broker services, because it effectively sought to "reshape" how a broker must select a motor carrier to transport property. *Id.* at 32a-35a. The court then rejected respondent's argument that the common-law negligence claim constituted an exercise of the "safety regulatory authority of a State" and thus fell within the safety exception. *Id.* at 36a-37a. The court reasoned that respondent's theory would allow him—and injured persons like him—to "do the [S]tate's work and enforce the [S]tate's police power." *Id.* at 37a.

[1] Respondent also sued Costco, the motor carrier, and the driver. Respondent settled with the motor carrier and driver and agreed to dismiss Costco.

3. Respondent appealed, and a divided panel of the court of appeals reversed and remanded. App., *infra*, 1a-27a.

a. The court of appeals first agreed with the district court that respondent's claim was "related to" petitioner's broker services and thus was subject to the FAAAA's preemption provision. App., *infra*, 8a-12a. The court reasoned that a freight broker's core "service" is "arranging" for transportation by a motor carrier. *Id.* at 10a. Because respondent's claim would hold petitioner "liable at the point at which it provides a 'service' to its customers," the court explained, respondent's common-law negligent-hiring claim was "directly 'connected with' " petitioner's services. *Ibid.* The court therefore concluded that the claim fell within the scope of the FAAAA's preemption provision. *Id.* at 11a.

b. The court of appeals ultimately held, however, that respondent's claim was not preempted on the ground that it fell within the FAAAA's "safety exception." App., *infra*, 14a-24a.

i. The court of appeals first concluded that a common-law negligence claim is an exercise of the "safety regulatory authority of a State." App., *infra*, 14a-21a. Construing the safety exception "broadly," the court of appeals reasoned that Congress sought to preserve the State's authority to regulate safety, which "plainly" included the "ability to regulate safety through common-law tort claims." *Id.* at 15a, 18a. And nothing in the legislative history, the court observed, suggested that Congress intended to limit that authority. *Id.* at 15a.

The court of appeals found support for its conclusion in *American Trucking Associations, Inc.* v. *City of Los Angeles*, 569 U.S. 641 (2013). App., *infra*, 15a-17a. There, this Court interpreted the phrase "force and effect of law" in the FAAAA's preemption provision to "draw[] a rough

line between a [state] government's exercise of regulatory authority" (to which the preemption provision applies) and its "own contract-based participation in a market" (to which it does not). *Id.* at 16a (quoting 569 U.S. at 649). The court of appeals reasoned that this Court's use of the phrase "regulatory authority" to describe the scope of the FAAAA's preemption provision—which includes some common-law claims, see *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 284 (2014) (interpreting the ADA)—meant that Congress's use of the phrase "regulatory authority" in the safety exception "surely" included "at least some common-law claims." App., *infra*, 17a.

The court of appeals proceeded to reject petitioner's contrary arguments. App., *infra*, 17a-21a. The court found unpersuasive petitioner's argument that this Court had made clear in *Ours Garage* that "safety regulatory authority" refers to the "traditional state police power over safety," 536 U.S. at 439, which is usually exercised by the state legislature or administrative agencies. Because *Ours Garage* involved municipal regulations, the court of appeals reasoned, this Court "had no reason to consider whether the safety exception is broader than [the Court's] language suggest[ed]." App., *infra*, 18a.

The court of appeals likewise rejected petitioner's arguments that Congress elsewhere used "regulatory authority" to refer to administrative agencies, and that Congress's use of narrower language in the safety exception ("regulatory authority") than in the FAAAA's preemption provision ("a law, regulation, or other provision") required a narrower scope for the safety exception. App., *infra*, 19a. In the court's view, neither Congress's other uses of "regulatory authority" nor the variation within the FAAAA "clearly" signaled that Congress "intended to exclude all common-law claims from the exception's reach." *Id.* at 22a; see *id.* at 19a & n.11.

ii. The court of appeals then determined that a negligence claim against a freight broker operates "with respect to motor vehicles." App., *infra*, 22a-24a. The court rejected petitioner's argument that a claim against a freight broker falls outside that clause because the freight broker does not own or operate the motor vehicle or select the driver. *Id.* at 23a. The court reasoned that the claim need only be "relat[ed] to" motor vehicles, and it concluded that negligence claims against freight brokers satisfy that low bar as long as they "arise out of motor vehicle accidents." *Id.* at 22a-23a.

iii. The court of appeals thus held that respondent's claim fell within the safety exception and was not preempted by the FAAAA. Accordingly, it reversed the district court's order granting petitioner's motion for judgment on the pleadings and remanded for further proceedings. App., *infra*, 24a.

c. Judge Fernandez concurred in part and dissented in part. App., *infra*, 25a-27a. He joined the portion of the majority's opinion concluding that the claims fell within the preemption provision because they "related to" petitioner's "services" as a freight broker. *Id.* at 25a. But he dissented from the majority's conclusion that the safety exception applied. *Ibid.* Although he agreed with the majority that the safety exception preserved some common-law claims, he concluded that a claim against a freight broker—as opposed to a motor carrier or the driver—did not operate "with respect to motor vehicles." *Id.* at 25a-26a. He reasoned that the connection between the broker's actions and the "actual operational safety of motor vehicles" was "too attenuated." *Ibid.* He further explained that the majority's approach would "conscript brokers" into a "parallel regulatory regime," which would require them to "evaluate and screen motor carriers" according to the "varied common law mandates of myriad states." *Id.* at

27a. Judge Fernandez thus would have held that the safety exception was inapplicable to respondent's negligence claim and that respondent's claim was preempted under the FAAAA. *Ibid.*

4. Petitioner filed a petition for rehearing, which was denied without recorded dissent. App., *infra*, 39a-40a.

REASONS FOR GRANTING THE PETITION

This case presents an important question of statutory interpretation regarding the preemptive scope of the FAAAA: namely, whether a common-law tort claim against a freight broker is preempted because it does not constitute the exercise of the "safety regulatory authority of a State with respect to motor vehicles" within the meaning of the FAAAA's safety exception. In the decision below, a divided panel of the court of appeals concluded that such a claim is not preempted. That decision cannot be reconciled with the FAAAA's text or this Court's decisions interpreting it.

The decision below is yet another from the Ninth Circuit that nullifies Congress's deregulatory aims. This Court has repeatedly reversed the Ninth Circuit for failing to give effect to the preemptive force of the FAAAA and the ADA. Congress enacted the FAAAA to prevent a patchwork of state and local requirements from burdening the trucking industry. But the decision below will significantly undermine that protection by subjecting the industry to the vagaries of state tort law, and the resulting uncertainty will impose tremendous costs on American consumers. Because of the important federal interests at stake, the Court has repeatedly granted review to protect Congress's deregulatory goals in the FAAAA. This petition for a writ of certiorari should likewise be granted.

A. The Decision Below Is Erroneous

The court of appeals badly erred by holding that a common-law claim against a freight broker for negligent hiring of a motor carrier is not preempted because it constitutes an exercise of the "safety regulatory authority of a State with respect to motor vehicles." The FAAAA's safety exception preserves the State's authority to craft and enforce statutory or administrative rules that ensure the safe operation of motor vehicles on local roads. But a common-law negligence claim brought by a private party does not constitute an exercise of the State's "regulatory authority," and a negligence claim against a freight broker does not operate "with respect to motor vehicles" within the meaning of the safety exception. This Court should review and reverse the court of appeals' judgment.

1. A common-law tort claim does not constitute an exercise of the "safety regulatory authority of a State." The court of appeals disregarded the plain meaning of that phrase, and this Court's decisions construing it, in concluding otherwise.

a. The most natural reading of the safety exception is that it excludes common-law tort claims brought by private parties seeking compensation for past wrongs. The plain text of the statute, this Court's precedent, and the broader statutory context compel that conclusion.

As to the text: the phrase "regulatory authority of a State" refers to positive-law enactments promulgated and enforced by state or local officials. The phrase "regulatory authority" is almost always a synonym for "regulatory agency" or, derivatively, the powers of such an agency. Congress has repeatedly used the phrase to refer to either federal or state administrative agencies. See, *e.g.*, 15 U.S.C. 7201(1); 16 U.S.C. 824i(a), (b); 42 U.S.C. 16431(a)(1); 49 U.S.C. 14702(a); cf. *Black's Law Dictionary* 1538 (11th ed. 2019) (defining "regulation" as "official

rule or order, having legal force, usu. issued by an administrative agency"). It is also perfectly natural to refer to Congress's power to enact legislation as "regulatory authority." See, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171-172 (1979). But it would be verging on the eccentric to refer to the "regulatory authority of the courts."

As to precedent: this Court's opinion in *City of Columbus* v. *Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002), is instructive. There, the Court explained that the phrase "safety regulatory authority" preserves the "traditional state police power over safety." *Id.* at 439. As the Court has explained, the core of the State's police power is the power to "*enact legislation* for the public good." *Bond* v. *United States*, 572 U.S. 844, 854 (2014) (emphasis added); see *Torres* v. *Lynch*, 136 S. Ct. 1619, 1625 (2016). And a State generally retains the authority to "delegate" that core power to its constituent parts—like municipal governments (as in *Ours Garage*, 536 U.S. at 429) and administrative agencies. But while a State has broad discretion to determine *how* to exercise its "regulatory authority," the phrase plainly contemplates the State's power to promulgate rules and regulations—on its own or through its agents—and to enforce them through state and local officials.

As to context: the correct interpretation of "regulatory authority" is confirmed by its "neighboring words," which give it "more precise content." *United States* v. *Williams*, 553 U.S. 285, 294 (2008). Tellingly, the other clauses in the safety exception preserve the State's "authority" to "impose highway route controls"; set "limitations based on the size or weight of the motor vehicle, or the hazardous nature of the cargo"; and establish "minimum amounts of financial responsibility relating to insurance requirements." 49 U.S.C. 14501(c)(2)(A). Those

sorts of specific restrictions—for instance, how many tons a particular highway should bear—can realistically be established only by a state legislature or (more likely) an administrative agency. Such restrictions are well beyond the institutional competency of a State's Court of Common Pleas, but well within that of its Department of Transportation. Consistent with those other clauses, the safety exception should be interpreted as preserving the State's authority to legislate and promulgate regulations.

Further, the FAAAA's preemption provision uses different language, confirming that common-law claims fall within that provision but not the safety exception. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The preemption provision broadly provides that a State may not "enact or enforce a law, regulation, or *other provision* having the force and effect of law." 49 U.S.C. 14501(c)(1) (emphasis added). As the Court has explained, interpreting identical language in the ADA, "common-law rules" are routinely called "provisions." *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 282 (2014). Indeed, the Court distinguished an earlier case—*Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002)—that "did not pre-empt a common-law tort claim" because the preemption provision there applied only to "a law or regulation," whereas the ADA's use of "provision" made it "much more broadly worded." *Northwest*, 572 U.S. at 282-283. The safety exception in the FAAAA uses even narrower language than the preemption provision in *Sprietsma*, preserving only the State's "regulatory authority." 49 U.S.C. 14501(c)(2)(A).

Whatever the outer limits of the meaning of the "safety regulatory authority of a state," it cannot extend to common-law tort claims enforced by private parties seeking recompense for past harms. The common law of torts imposes general duties of care, not specific regulatory duties characteristic of statutes and regulations. And

it is not enforced by state or local officials, but rather by private parties and their lawyers; the resulting lawsuits cannot be understood to be an exercise of the "authority of a State." And the primary goal of tort law, even if not the only one, is to "compensate" a victim for "injuries caused," *United States* v. *Burke*, 504 U.S. 229, 235 (1992) (citation omitted)—not to ensure "safety" prospectively. By applying the phrase "safety regulatory authority of a State" to a common-law negligence claim, the court of appeals gave that phrase an expansive meaning that has no basis in the text of the FAAAA.

b. The court of appeals failed to engage in the above analysis, and its interpretation is impossible to square with this Court's precedents.

As an initial matter, the court of appeals repeatedly elided the actual text of the FAAAA's safety exception ("safety regulatory authority of a State"). Instead of asking what meaning that precise phrase conveys, the court of appeals asked whether common-law claims fall within a State's broad "power over safety." *E.g.*, App., *infra*, 15a, 18a. To reframe the question that way is to answer it: of course a common-law negligence claim has *something* to do with a State's interest in safety. The text of the safety exception, however, does not preserve any claim that invokes a State's "power" and has something to do with "safety." The correct question is whether a common-law negligence claim constitutes the exercise of the "safety regulatory authority of a State." And the correct answer to that question is no.

In holding to the contrary, the court of appeals ignored bedrock rules of statutory interpretation. First, the court stated that it was interpreting the safety exception "broadly." App., *infra*, 14a, 18a. The usual rule, of course, is that an "exception" to a "general statement of policy" should be read "narrowly." *Maracich* v. *Spears*, 570 U.S.

48, 60 (2013) (citation omitted). To be sure, the court of appeals cited *Ours Garage*, which stated that a "specific exception" to a "general policy" does not "invariably call for the *narrowest possible construction* of the exception." 536 U.S. at 440 (emphasis added). But that statement provides no support for a *broad* interpretation of an exception. Second, although the Court has explained that "the best evidence of Congress' pre-emptive intent" is "statutory language," *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 260 (2013), the court of appeals repeatedly referred to the absence of legislative history supporting petitioner's view. App., *infra*, 15a, 18a. But petitioner hardly bore the burden of adducing legislative history to support its (plain-text) interpretation.

What is more, the court of appeals badly misconstrued this Court's decision in *American Trucking Associations, Inc.* v. *City of Los Angeles*, 569 U.S. 641 (2013). The court's attenuated chain of reasoning went like this: In *American Trucking Associations*, the Court stated that the FAAAA's preemption provision "draws a rough line between a government's exercise of *regulatory authority* and its own contract-based participation in a market." *Id.* at 649 (emphasis added). The FAAAA's preemption provision includes common-law claims. See *Northwest*, 572 U.S. at 284. Thus, because Congress also used the term "regulatory authority" in the safety exception, it must also include common-law claims. App., *infra*, 16a-17a.

That syllogism is multiply flawed. As a preliminary matter, the Court in *American Trucking Associations* was not interpreting the safety exception—indeed, its only mention of the safety exception was to deem it "not relevant here." 569 U.S. at 647 & n.2. If anything, any hints from *American Trucking Associations* cut the other way. The governmental action at issue there was a core exercise of the "regulatory authority of a State": the

"Board of Harbor Commissioners" (an administrative agency) enforced a "municipal ordinance" (a positive-law enactment), the violation of which was "a violation of criminal law" (enforced by state or local officials). *Id.* at 650. It is little wonder that the Court described the governmental action there as "regulatory authority."

In short, the court of appeals erred by reading too much into this Court's opinion in *American Trucking Associations* and focusing too little on the actual text of the statute. The court of appeals' mode of analysis is impossible to reconcile with this Court's prevailing approach, and the result is a broad interpretation of the safety exception that eviscerates the preemptive scope of the FAAAA.

2. Even if the safety exception could be interpreted to cover some common-law claims, a claim against a freight broker does not operate "with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A). Though the phrase "with respect to" is quite broad, it cannot be interpreted with an "uncritical literalism." *Dan's City*, 569 U.S. at 260-261 (citation omitted). To the contrary, as the Court explained regarding a similar "with respect to" clause in the FAAAA, the phrase "massively limits" the scope of the safety exception. *Id.* at 261.

As Judge Fernandez explained in his partial dissent, the best reading of that phrase restricts the State's "regulatory authority" to the "actual operational safety of motor vehicles." App., *infra*, 26a. That is in part because Congress defined "motor vehicle" narrowly. Specifically, a "motor vehicle" is a "vehicle * * * *used* on a highway in transportation." 49 U.S.C. 13102(16) (emphasis added). The way to "use" a vehicle on a "highway" is, of course, to drive it. So safety rules that are "with respect to motor vehicles" "used on a highway" are those designed to ensure safe driving on any "road, highway, street, and way

in a State." 49 U.S.C. 13102(9) (defining "highway"). The kind of rules within that authority are obvious: speed limits, maintenance rules, licensing requirements, and—assuming for the moment that common-law claims fall within the safety exception—negligence suits against *drivers*.

Properly understood, then, the safety exception plainly excludes negligence claims against freight brokers. A freight broker does not "use" a motor vehicle. The broker does not drive the vehicle, own it, or even employ a driver for it. Instead, as defined by the statute, a broker "arrang[es]" for transportation "by motor carrier," and the "motor carrier" does the rest. 49 U.S.C. 13102(2), (14). In particular, the motor carrier actually provides the "motor vehicle transportation" by, for example, owning the vehicles and employing the driver. *Ibid.* The broker is thus two steps removed from the "use" of the vehicle. That connection is too tenuous to bring a claim against a freight broker within the safety exception.

3. For the foregoing reasons, the court of appeals badly erred by interpreting the "safety regulatory authority of a State with respect to motor vehicles" to preserve a common-law claim against a freight broker. More broadly, the court of appeals' decision also cannot be squared with the general policy of the FAAAA. As Judge Fernandez explained, the court of appeals' interpretation of the safety exception allows a state court to "conscript brokers into a parallel regulatory regime" that requires them to "screen motor carriers" for safety. App., *infra*, 27a. Indeed, to the extent that an individual State applies its negligence standard particularly stringently, the court of appeals' interpretation could "effectively eliminate some motor carriers from the transportation market altogether," or limit them to certain regional markets. *Ibid.*

That result is flatly inconsistent with the FAAAA's "overarching goal": to ensure that "transportation rates, routes, and services" reflect "maximum reliance on competitive market forces," thus stimulating "efficiency, innovation, and low prices." *Rowe*, 552 U.S. at 371 (citation omitted).

B. The Decision Below Implicates An Important Question Of Federal Law That Warrants This Court's Review

This case presents a question of enormous legal and practical importance. The court of appeals' decision severely curtails the preemptive scope of the FAAAA, thus contravening Congress's clear intent to establish a uniform regulatory regime and imposing significant costs on the transportation industry. In addition, this case is an ideal vehicle for resolution of the question presented. The Court should therefore grant review. At a minimum, given the significant federal interests at stake in this case, the Court may wish to call for the views of the Solicitor General.

1. As its frequent grants of certiorari demonstrate, the Court has paid particular solicitude to the scope of the FAAAA's preemption provision. See *American Trucking Associations, Inc.* v. *City of Los Angeles*, 569 U.S. 641 (2013); *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251 (2013); *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364 (2008); *City of Columbus* v. *Ours Garage & Wrecker Services, Inc.*, 536 U.S. 424 (2002). The Court has likewise repeatedly granted certiorari in cases interpreting the analogous preemption provision in the Airline Deregulation Act. See *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273 (2014); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The Court frequently

grants review in such cases for good reason: Congress has indicated that there is a significant federal interest in ensuring uniform regulatory regimes in key sectors of the transportation industry.

Yet the Ninth Circuit has repeatedly ignored this Court's precedents, which have emphasized those statutes' broad preemptive scope. See, *e.g.*, *Ginsberg* v. *Northwest, Inc.*, 695 F.3d 873 (2012), rev'd, 572 U.S. 273 (2014); *American Trucking Associations, Inc.* v. *City of Los Angeles*, 660 F.3d 384 (2011), rev'd in part, 569 U.S. 641 (2013). Most recently, the Court unanimously reversed the Ninth Circuit's interpretation of the ADA in *Northwest.* As the petition for certiorari in that case explained, the Ninth Circuit's "flawed decision" followed a "persistent failure to apply the analytical framework articulated in this Court's ADA and FAAAA jurisprudence." Pet. at 14, *Northwest*, *supra* (No. 12-462). And that erroneous decision, according to the petition there, provided a "model for plaintiffs to eviscerate the preemptive effect of the ADA and FAAAA." *Ibid.*

So too here. This time, instead of interpreting the preemption provision too narrowly, the court of appeals interpreted the safety exception too broadly—once again constricting the statute's preemptive scope. See App., *infra*, 18a. As in *Northwest*, the Ninth Circuit's interpretation has no basis in the statute's text, and it is unsurprising that the decision conflicts with many other lower-court decisions holding the safety exception inapplicable to common-law claims against freight brokers. See, *e.g.*, *Ying Ye* v. *Global Sunrise, Inc.*, Civ. No. 18-1961, 2020 WL 1042047 (N.D. Ill. Mar. 4, 2020); *Lloyd* v. *Salazar*, 416 F. Supp. 3d 1290 (W.D. Okla. 2019); *Creagan* v. *Wal-Mart Transportation, LLC*, 354 F. Supp. 3d 808 (N.D. Ohio 2018); *Krauss* v. *IRIS USA, Inc.*, Civ. No. 17-778, 2018

WL 2063839 (E.D. Pa. May 3, 2018); *Volkova* v. *C.H. Robinson Co.*, Civ. No. 16-1883, 2018 WL 741441 (N.D. Ill. Feb. 7, 2018).[2]

2. The court of appeals' expansive interpretation of the safety exception will also invite the very mischief that Congress sought to abate with the FAAAA. The statute aimed to address the "huge problem" that the "sheer diversity" of state rules created for "national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 87 (1994); see *Ours Garage*, 536 U.S. at 440 (citing the same report). Congress determined that the "unreasonable burden" on interstate commerce imposed by the regulations would ultimately impose an "unreasonable cost on the American consumers." Pub. L. No. 103-305, § 601(a), 108 Stat. 1605. The court of appeals' rule imposes just such a burden on the transportation industry by exposing freight brokers and other business to liability. See Robert D. Moseley & C. Fredric Marcinak, *Federal Preemption in Motor Carrier Selection Cases Against Brokers and Shippers*, 39 Transp. L.J. 77, 83 (2012) (Moseley & Marcinak).

The court of appeals' decision will only invite more (and more creative) common-law claims against freight brokers and other businesses that select licensed motor carriers to transport products. Because jury awards in

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[2] Reflecting the widespread confusion on this question, other lower courts have come to the same conclusion as the court of appeals. See, *e.g.*, *Grant* v. *Lowe's Home Centers, LLC*, Civ. No. 20-2278, 2021 WL 288372 (D.S.C. Jan. 28, 2021); *Uhrhan* v. *B&B Cargo, Inc.*, Civ. No. 17-2720, 2020 WL 4501104 (E.D. Mo. Aug. 5, 2020); *Lopez* v. *Amazon Logistics, Inc.*, 458 F. Supp. 3d 505 (N.D. Tex. 2020); *Huffman* v. *Evans Transportation Services*, Civ. No. 19-0705, 2019 WL 4143896 (S.D. Tex. Aug. 12, 2019); *Finley* v. *Dyer*, Civ. No. 18-78, 2018 WL 5284616 (N.D. Miss. Oct. 24, 2018).

personal-injury cases sometimes exceed insurance limits for motor carriers or the drivers, plaintiffs have begun to target freight brokers and others to attempt to secure large damage awards in such cases. See Moseley & Marcinak 77-78. No doubt, plaintiffs are seeking to expand the universe of liable defendants to *any* business that hires a motor carrier (or hires a broker to hire a motor carrier) to transport goods—thereby sweeping in not just freight brokers but also major national businesses that engage in shipping. And plaintiffs are already invoking the court of appeals' decision in courts across the country as they seek to expand from their beachhead in the Ninth Circuit. See, *e.g.*, *Grant*, 2021 WL 288372, at *3.

The uncertainty about the extent of liability is itself a burden on businesses. The court of appeals' decision subjects the transportation industry to a patchwork of state negligence doctrines, which will "create uncertainty and even conflict" as "different juries in different States reach different decisions on similar facts." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 871 (2000). The uncertainty regarding the substantive legal rules in the States will be compounded by the notorious unpredictability of jury-by-jury damages calculations in personal-injury cases. Cf. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 499-501 (2008) (discussing the "stark unpredictability" of punitive-damages awards). The resulting liability will significantly increase the cost of interstate transportation of goods through any State within the Ninth Circuit. And because of the Ninth Circuit's coast-long reach, that includes pretty much anything coming in from—or going out over—the Pacific Ocean.

3. This case presents an ideal vehicle for addressing and resolving the question presented. The relevant question was fully briefed and decided at every stage of the proceedings. Because the case was dismissed on a motion

for judgment on the pleadings, the issue is cleanly presented. See App., *infra*, 38a. And if the FAAAA preempts respondent's claim, it would obviously be dispositive.

The Court should address this question now. The issue is a plainly recurring one, as evidenced by the number of lower-court decisions addressing the issue. See pp. 21, 22 & n.2, *supra*. Further percolation is also unlikely to be helpful to the Court because the arguments have been fully ventilated in the majority and dissenting opinions below and the opinions of other lower courts. And the Ninth Circuit is unlikely to correct its own errors, given its chronic tendency to narrow the FAAAA's preemptive scope. Waiting will serve no purpose other than to allow the court of appeals' erroneous and costly interpretation of the FAAAA to hang over the entire West Coast—and perhaps to proliferate beyond it.

At a minimum, the Court may wish to invite the Solicitor General to file a brief expressing the views of the United States. Given the federal interest in "achieving the deregulatory objectives" of the FAAAA, the United States has routinely participated as an amicus in FAAAA cases. U.S. Br. at 1, *American Trucking Associations*, *supra* (No. 11-798); see U.S. Br. at 1, *Rowe*, *supra* (No. 06-457); see also U.S. Br. at 1-2, *Northwest*, *supra* (No. 12-462) (ADA). And indeed, this Court has previously requested the views of the Solicitor General at the certiorari stage in those cases. See *American Trucking Associations, Inc.* v. *City of Los Angeles*, 566 U.S. 903 (2012); *Rowe* v. *New Hampshire Motor Transport Association*, 549 U.S. 1109 (2007).

* * * * *

The petition for certiorari in this case provides the Court with an ideal opportunity to consider and resolve the question presented. The decision below is seriously flawed, and the question is undeniably important. Further review is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, in light of the substantial federal interests, the Court may wish to call for the views of the Solicitor General.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-15981

D.C. No. 3:17-cv-00408-MMD-WGC

ALLEN MILLER,
Plaintiff-Appellant,

v.

C.H. ROBINSON WORLDWIDE, INC.; RONEL R. SINGH; RHEAS TRANS, INC.; KUWAR SINGH, DBA RT Service,
Defendants-Appellees,

and

COSTCO WHOLESALE CORPORATION; LOTUS FOODS, INC.; PRIDE INDUSTRIES,
Defendants.

Appeal from the United States District Court for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding
Argued and Submitted July 8, 2020
Seattle, Washington

Filed: September 28, 2020

Before: FERNANDEZ and NGUYEN, Circuit Judges, and BOLTON,[*] District Judge.

Opinion by Judge Nguyen;
Partial Concurrence and Partial Dissent by Judge Fernandez

OPINION

NGUYEN, Circuit Judge.

Allen Miller ("Miller") suffered serious injuries when he was struck by a semi-tractor trailer while driving near Elko, Nevada. Miller sued C.H. Robinson Worldwide, Inc. ("C.H. Robinson"), the freight broker that arranged for the trailer to transport goods for Costco Wholesale, Inc. ("Costco"). Miller alleges that C.H. Robinson negligently selected an unsafe motor carrier.

The Federal Aviation Administration Authorization Act of 1994 (the "FAAAA") preempts state laws that are "related to a price, route, or service of any . . . broker," unless one of the FAAAA's exceptions applies. The district court found Miller's claim preempted under the FAAAA, reasoning that it is "related to" C.H. Robinson's services and does not fall within the exception for "the safety regulatory authority of a State with respect to motor vehicles."

We agree with the district court that Miller's claim is "related to" C.H. Robinson's services. Brokers arrange for transportation by motor carrier, and Miller alleges

[*] The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

that C.H. Robinson was negligent in performing that service. But we hold that the district court erred in holding that the safety exception does not apply. In enacting that exception, Congress intended to preserve the States' broad power over safety, a power that includes the ability to regulate conduct not only through legislative and administrative enactments, but also though common-law damages awards. Miller's claim also has the requisite "connection with" motor vehicles because it arises out of a motor vehicle accident. We therefore reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

C.H. Robinson is a company that is "regularly engaged in the business of shipping, brokering, and logistics." C.H. Robinson selected Kuwar Singh d/b/a RT Service ("RT Service") and/or Rheas Trans, Inc. ("Rheas Trans") to transport Costco's shipment. RT Service and Rheas Trans are federally licensed motor carriers. The driver of the semi-tractor trailer, Ronel Singh, was employed by RT Service and/or Rheas Trans at the time of the collision.

Singh lost control of the trailer while driving in icy conditions on I-80 near Elko, Nevada. The trailer crossed over the median into oncoming traffic and collided with Miller's vehicle, and Miller "became lodged and pinned" under the trailer. Miller suffered extensive injuries in the collision, and he is now quadriplegic.

In June 2017, Miller sued, among others, C.H. Robinson, RT Service, Rheas Trans, Singh, and Costco.[1] Thereafter, Miller filed an amended complaint. Relevant here, the amended complaint alleges that C.H. Robinson breached its "duty to select a competent contractor to

[1] The parties stipulated to Costco's dismissal in September 2017.

transport" Costco's load "by retaining incompetent, unfit or inexperienced contractors or sub-haulers to arrange and/or take th[e] load." It alleges that C.H. Robinson "knew or should have known" of RT Service's and Rheas Trans's "incompetence" because

> [T]here were red flags . . . including that [RT Service] and/or Rheas Trans have a history of safety violations; over 40% of their trucks have been deemed illegal to be on the road when stopped for random inspections; they have been cited numerous times for hours of service violations and false log books; and their percentage of out of service violations is twice that of the national average.

In July 2018, C.H. Robinson moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), arguing that the FAAAA preempts Miller's negligence claim. The district court granted the motion, concluding that the claim "sets out to reshape the level of service a broker must provide in selecting a motor carrier to transport property." For instance, "to avoid negligence liability, a broker would consistently need to inspect each motor carrier's background," and "such additional inspection would result in state law being used to, at least indirectly, regulate the provision of broker services by creating a standard of best practices." The district court went on to hold that Miller's claim does not fall within the exception for "the safety regulatory authority of a State with respect to motor vehicles." *See* 49 U.S.C. § 14501(c)(2)(A). The court reasoned that this exception does not "permit[] a private right of action—allowing for Miller to essentially do the state's work and enforce the state's police power." The court also found significant the fact the exception "is silent regarding broker services."

Thereafter, Miller settled with the remaining defendants. The court entered judgment, and this appeal timely followed.

II. JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1332, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We review questions of preemption de novo. *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 958 (9th Cir. 2018). We also review de novo an order granting a Rule 12(c) motion for judgment on the pleadings. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

III. DISCUSSION

A. The "Related to" Test for FAAAA Preemption

"In considering the preemptive scope of a statute, congressional intent 'is the ultimate touchstone.'" *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 642 (9th Cir. 2014) (quoting *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040 (9th Cir. 2007)). We primarily discern Congress's intent "from the language of the pre-emption statute and the statutory framework surrounding it," but we may also consult "the structure and purpose of the statute as a whole." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996)). The scope of a preemption clause is also tempered by "the presumption that Congress does not intend to supplant state law," particularly in areas of traditional state regulation. *Id.* at 642–43. We therefore presume that Congress has not preempted the "historic police powers of the States . . . unless that was the clear and manifest purpose of Congress." *Cal. Tow Truck Ass'n v. City & County of San Francisco*, 807 F.3d 1008, 1019 (9th Cir. 2015) (quoting *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 438 (2002)).

The FAAAA provides, in relevant part:

> (1) General rule.—Except 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 motor carrier . . . , broker, or freight forwarder with respect to the transportation of property
>
> (2) Matters not covered.—Paragraph (1)—(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . . .

49 U.S.C. § 14501(c).

The phrase "related to" in the FAAAA "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 v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008)). To determine whether a state law has a "connection with" rates, routes, or services, we "examine the actual or likely effect" of the law.[2] *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 396 (9th Cir. 2011), *rev'd in part on other grounds*, 569 U.S. 641 (2013). If, for example, the law "mandates that motor

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[2] Preemption resulting from "reference to" prices, routes, or services occurs when "a State's law acts immediately and exclusively upon" prices, routes, or services, or "where the existence of [a price, route or service] is essential to the law's operation." *Air Transp. Ass'n of Am. v. City & County of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001) (alteration in original) (quoting *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.,* 519 U.S. 316, 325 (1997)). We do not address whether Miller's negligence claim is preempted under this separate prong.

carriers [or brokers] provide a particular service to customers, or forbids them to serve certain potential customers, the effect is clear, and the provision is preempted . . . ." *Id.* By contrast, state laws that affect prices, routes, or services "in only a 'tenuous, remote, or peripheral . . . manner' with no significant impact on Congress's deregulatory objectives" are not preempted. *Su*, 903 F.3d at 960 (quoting *Rowe*, 552 U.S. at 371).

In passing the FAAAA, which is modeled on the Airline Deregulation Act of 1978 (the "ADA"),[3] Congress sought to achieve two broad objectives. *Id.* First, it sought to eliminate the competitive advantage air carriers enjoyed relative to motor carriers. Courts had interpreted the ADA as preempting state regulation of air carriers, but not motor carriers. *Id.* Second, it sought to "address the inefficiencies, lack of innovation, and lack of competition caused by non-uniform regulations of motor carriers." *Id.* In particular, Congress was "concerned about States enacting 'barriers to entry, tariffs, price regulations, and laws governing the types of commodities that a carrier could transport.'"[4] *Id.* at 960–61 (quoting *Dilts*, 769 F.3d at 644); *see* H.R. Conf. Rep. 103-677, at 82–88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754–60 (confirming that in passing the FAAAA, Congress was focused on economic deregulation of the trucking industry).

[3] The ADA provides, in relevant part, that "a State . . . 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 an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1).

[4] For an in-depth discussion of the FAAAA's legislative history, see *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187–88 (9th Cir. 1998).

No circuit court has yet considered an FAAAA preemption challenge brought by a broker, and district courts have reached differing conclusions as to whether negligence claims like Miller's are "related to" broker services. *Compare Scott v. Milosevic*, 372 F. Supp. 3d 758, 769–70 (N.D. Iowa 2019) (holding that personal injury claims alleging negligence are not "related to" broker services), *with Loyd v. Salazar*, 416 F. Supp. 3d 1290, 1295–98 (W.D. Okla. 2019) (holding that such claims are "related to" broker services), *and Creagan v. Wal-Mart Transp., LLC*, 354 F. Supp. 3d 808, 813 (N.D. Ohio 2018) (same). District courts are also divided on the question of whether the safety exception applies in this context. *Compare Lopez v. Amazon Logistics, Inc.*, No. 3:19-CV-2424-N, __ F. Supp. 3d __, 2020 WL 2065624, at *6–8 (N.D. Tex. Apr. 28, 2020) ("[P]ersonal injury tort claims, including a negligent-hiring claim, are within the scope of section 14501(c)(2)'s exception."), *with Creagan*, 354 F. Supp. 3d at 813–14 (holding that the safety exception does not apply to negligence claims asserted against brokers, including those arising out of personal injuries).

B. Miller's Negligence Claim Is "Related to" Broker Services

Miller contends that his negligence claim against C.H. Robinson is not preempted because it is not "meaningfully distinguish[able]" from three state laws we have held escape preemption under the FAAAA. We therefore begin our discussion by briefly reviewing those three cases—*Californians For Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), and *California Trucking Association v. Su*, 903 F.3d 953 (9th Cir. 2018).

In *Mendonca*, we held that the FAAAA does not prohibit California from enforcing its prevailing wage law (the "CPWL") against motor carriers. The CPWL requires contractors and subcontractors awarded public works contracts to pay their workers no less than the prevailing wage in a given locality. *See* Cal. Lab. Code § 1771. We reasoned that although the CPWL "in a certain sense is 'related to' [motor carrier] prices, routes and services . . . the effect is no more than indirect, remote and tenuous," and it does not "*acutely* interfer[e] with the forces of competition." *Mendonca*, 152 F.3d at 1189. Then, in *Dilts*, we held that California's meal and rest break laws are not "related to" motor carrier prices, routes, or services because they "do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly." 769 F.3d at 647. Instead, they are "normal background rules for almost *all* employers doing business in [California]," and the fact "motor carriers may have to take [them] into account . . . when allocating resources and scheduling routes" is insufficient to show that they are preempted. *Id.* Most recently, we held that the FAAAA does not preempt the use of California's common-law test for determining whether a motor carrier has properly classified its drivers as independent contractors because it is not "related to" carrier prices, routes, or services. *See Su*, 903 F.3d at 957.

In arguing that *Mendonca*, *Dilts*, and *Su* "must control here," Miller overlooks an important distinction between his claim and the laws at issue in those cases—namely, the point at which the law affects a broker (or motor carrier's) business. As we have previously observed:

> What matters [for purposes of preemption under the FAAAA] is not solely that the law is generally applicable, but where in the chain of a motor carrier's business it is acting to compel a certain result (*e.g.*, consumer or workforce) and what result it is compelling (*e.g.*, a certain wage, non-discrimination, a specific system of delivery, a specific person to perform the delivery).

Su, 903 F.3d at 966. The wage and hour laws at issue in *Mendonca* and *Dilts*, for example, "[i]n effect . . . compelled new terms in motor carriers' agreements with their workers," but we permitted "California to interfere with th[at] relationship." *Id.* at 963. Miller's claim, by contrast, seeks to hold C.H. Robinson liable at the point at which it provides a "service" to its customers.

Here, as Miller concedes, the "selection of motor carriers is one of the core services of brokers."[5] *See* 49 U.S.C. § 13102(2) (defining "broker," as it is used in the FAAAA, to mean "a person, other than a motor carrier . . . , that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation"); *see also* 49 C.F.R. § 371.2 (defining "brokerage service" as "the arranging of transportation"). Because Miller's negligence claim seeks to interfere at the point at which C.H. Robinson "arrang[es] for" transportation by motor carrier, it is directly "connect[ed] with" broker services in a manner that was lacking in *Mendonca*, *Dilts*, and *Su*. *See Dilts*, 769 F.3d at

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[5] Because C.H. Robinson has not argued that Miller's claim is "related to" its prices or routes, we only address whether it is "related to" C.H. Robinson's services.

649 (observing that state laws have "an impermissible effect" when they "interfer[e] at the point that a carrier provides services to its customers").

We find *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014) instructive on this point. There, the Supreme Court held that the ADA preempted a breach of the implied covenant of good faith and fair dealing claim that stemmed from an airline terminating the plaintiff from its frequent-flyer program.[6] *Id.* at 284–85. The claim "clearly" had the forbidden "connection with" air carrier "services, *i.e.*, access to flights and to higher service categories," as well as air carrier prices. *Id.* at 284. In reaching this conclusion, the Court rejected the plaintiff's argument that he was contesting his termination from the program—not his "access to flights and upgrades"—because it "ignore[d] [his] reason for seeking reinstatement of his membership, *i.e.*, to obtain reduced rates and enhanced services." *Id.* at 284–85. We have found no reasonable ground for distinguishing *Ginsberg* from this case: Just as a claim that seeks reinstatement of frequent-flyer benefits has a forbidden "connection with" air carrier services, a claim that imposes an obligation on brokers at the point at which they arrange for transportation by motor carrier has a "connection with" broker services.

Miller resists this conclusion by arguing that his claim cannot be preempted because it does not "bind" C.H. Robinson to "specific prices, routes, or services." We have occasionally suggested that preemption occurs only when a state law operates in this way. In *American Trucking As-*

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[6] Because the FAAAA is modeled on the ADA, "ADA preemption cases can . . . be consulted to analyze FAAAA preemption." *Su*, 903 F.3d at 960.

sociations, for instance, we observed that in a "borderline" case, "the proper inquiry is whether the provision, directly or indirectly, 'binds the carrier . . . to a particular price, route or service . . . .'" 60 F.3d at 397 (quoting *Air Transp. Ass'n of Am. v. City & County of San Francisco*, 266 F.3d 1064, 1072 (9th Cir. 2001)); *see also Dilts*, 769 F.3d at 646 ("[L]aws mandating motor carriers' use (or non-use) of particular prices, routes, or services in order to comply with the law are preempted."). But even these cases acknowledged that the scope of FAAAA preemption is broader than this language suggests. *See, e.g.*, *Dilts*, 769 F.3d at 647 (describing laws that are preempted under the FAAAA as those that "directly or indirectly mandate, prohibit, or *otherwise regulate certain prices, routes, or services*" (emphasis added)).

We note also that few common-law claims, if any, would be preempted if the FAAAA only preempts state laws that bind brokers to specific prices, routes, or services. As an initial matter, there is no question that common-law claims are within the scope of the preemption clause. *See Ginsberg*, 572 U.S. at 284 ("[W]e conclude that the phrase 'other provision having the force and effect of law' includes common-law claims."). Yet common-law claims typically regulate behavior by imposing broad standards of conduct, not by compelling individuals to engage in (or refrain from engaging in) any specific conduct. *See Medtronic*, 518 U.S. at 489 (observing that common-law actions enforce "general duties"). A negligence claim, for example, demands that an individual or entity exercise ordinary care; it does not require that this standard of care be satisfied in any particular manner. It therefore does not make sense in this context to ask whether a claim "binds" a broker to a particular price, route or service. *See Ginsberg*, 572 U.S. at 284–85 (finding the plaintiff's implied covenant claim preempted not because it bound the

airline to a particular "price" or "service," but because the plaintiff brought the claim to reinstate his access to the "reduced rates and enhanced services" available through the airline's frequent-flyer program).

Nor are we persuaded by Miller's argument that the reasoning of *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc), is applicable here. In *Charas*, we considered whether negligence claims stemming from the provision of certain in-flight amenities, such as luggage handling and beverage services, were preempted under the ADA. We held that Congress used the term "service" in the ADA in the "public utility sense" to refer to "the provision of air transportation to and from various markets at various times," but not to refer to the various amenities airlines offer their customers. *Id.* at 1266. Contrary to Miller's suggestion, there is no tension between *Charas*'s construction of the term "service" and our conclusion that when brokers arrange for transportation by motor carrier, they perform a "service" within the meaning of the FAAAA. Even assuming brokers offer services analogous to airline amenities, motor-carrier selection is plainly not such a service. It is instead the type of "public utility" service that falls squarely within the scope of the FAAAA.[7] *See Nat'l Fed'n of the Blind v. United States*, 813 F.3d 718, 727 (9th Cir. 2016) (confirming that the term "service" in the FAAAA is "focused on 'essential details of the *carriage itself*'" (quoting *Rowe*, 552 U.S. at 373)).

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[7] The FAAAA, like the ADA, does not define the term "service." *See* 49 U.S.C. § 13102.

C. Miller's Negligence Claim Falls Within the Safety Exception

Miller contends that even if his negligence claim is "related to" broker services, it is saved from preemption by the safety exception. This exception 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). In response, C.H. Robinson argues that "the safety regulatory authority of a State" does not encompass common-law claims, and even assuming that it does, Miller's claim is not "with respect to motor vehicles." We consider each of these arguments in turn.

1. The "safety regulatory authority of a State" encompasses common-law tort claims.

The FAAAA does not define the phrase "the safety regulatory authority of a State," and we find little else in the FAAAA's text that clarifies its scope. In general, however, courts have construed the safety exception broadly. *See Ours Garage*, 536 U.S. at 440 (rejecting "the narrowest possible construction of the [safety] exception"); *Cal. Tow Truck Ass'n*, 807 F.3d at 1022 ("Case law . . . has on the whole given a broad construction to the safety regulation exception." (quoting *VRC LLC v. City of Dallas,* 460 F.3d 607, 612 (5th Cir. 2006)). With that background in mind, and in light of the purposes of the FAAAA in general and the safety exception in particular, we conclude that "the safety regulatory authority of a State" encompasses common-law tort claims.

As discussed above, in passing the FAAAA, Congress was primarily concerned with the States regulating *economic* aspects of the trucking industry by, for example, enacting tariffs, price regulations, and other similar laws.

See Su, 903 F.3d at 960. Congress's "clear purpose" in enacting the safety exception, then, was "to ensure that its preemption of States' economic authority over [that industry] . . . 'not restrict'" the States' existing power over "safety." *Ours Garage*, 536 U.S. at 439 (quoting 49 U.S.C. § 14501(c)(2)(A)). That power plainly includes the ability to regulate safety through common-law tort claims. *See Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 86 (2d Cir. 2006) ("Historically, common law liability has formed the bedrock of state regulation, and common law tort claims have been described as 'a critical component of the States' traditional ability to protect the health and safety of their citizens.'" (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 544 (1992) (Blackmun, J., concurring in part and dissenting in part))).

We find nothing in the FAAAA's legislative history that suggests Congress intended to eliminate this important component of the States' power over safety. A House Conference Report, for instance, notes that a key interest group abandoned its opposition to the FAAAA subject to "some conditions that would allow regulatory protection to continue for non-economic factors, such as . . . safety," and that the conferees "attempted to address these conditions" by carving out the various exceptions in § 14501(c)(2). H.R. Conf. Rep. 103-677, at 88. This broad reference to "safety" cuts against the narrow construction C.H. Robinson advances. *See Apollo Grp., Inc. v. Avnet, Inc.*, 58 F.3d 477, 480 (9th Cir. 1995) (observing that "safety rationale[s] underl[ie] the law of tort").

We find additional support for our conclusion that "the safety regulatory authority of a State" encompasses some common-law claims in *American Trucking Associations, Inc. v. City of Los Angeles*, 569 U.S. 641 (2013). There, the Supreme Court considered whether requirements in a

contract between the City of Los Angeles and trucking companies providing drayage services at the Port of Los Angeles (the "Port") fell within the market-participant exception to preemption.[8] That exception applies where, for example, a State "act[s] as a private party" by "contracting in a way that the owner of an ordinary commercial enterprise could mimic." *Id.* at 651.

The Supreme Court held that the market-participant doctrine did not apply, and that the requirements at issue were "preempted as 'provision[s] having the force and effect of law.'" *Id.* at 648 (alteration in original) (quoting 49 U.S.C. § 14501(c)(1)). Significantly, although the requirements were contained in contracts between the City and the trucking companies, a local ordinance authorized the City to punish violations through criminal sanctions. *Id.* at 650; *see id.* at 651 ("Contractual commitments resulting not from ordinary bargaining . . . , but instead from the threat of criminal sanctions manifest the government *qua* government, performing its prototypical regulatory role."). In reaching this conclusion, *American Trucking* reasoned generally that the FAAAA's preemption clause "targets the State acting as a State, not as any market actor—or otherwise said, the State acting in a regulatory rather than proprietary mode." *Id.* at 650. Section 14501(c)(1) therefore "draws a rough line between a government's exercise of regulatory authority and its own contract-based participation in a market." *Id.* at 649.

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[8] Two requirements were alleged to fall within that exception in *American Trucking*. One required trucking companies operating at the Port to affix on each of their trucks a placard with a phone number for reporting environmental and safety concerns, and the other required the companies to submit an off-street parking plan for their trucks. *Am. Trucking Ass'ns*, 569 U.S. at 645.

Of course, the Supreme Court made these observations about the States' "regulatory authority" in the context of clarifying the scope of the FAAAA's preemption clause, not the safety exception. However, we think that what *American Trucking* said about that authority *is* relevant to the scope of the exception. In particular, if the preemption provision targets "a government's exercise of regulatory authority," *id.*, and that provision encompasses common-law claims, *see Ginsberg*, 572 U.S. at 284, then surely "the safety regulatory authority of a State" also includes at least some common-law claims.

A number of other considerations support our interpretation as well. First, if C.H. Robinson were correct that the exception is limited to positive enactments of law, tort claims that are "related to" broker prices, routes, or services might be saved from preemption in states, like California, that have codified their common law,[9] but could not possibly be saved from preemption in states that have not done the same. It seems unlikely that Congress would have made the availability of this exception dependent on codification, particularly in light of the FAAAA's goal of uniformity. *Su*, 903 F.3d at 960.

Second, while it is possible to construe "the safety regulatory authority of a State" more narrowly, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) (quoting *Altria Grp., Inc. v.*

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[9] "[U]nlike many jurisdictions, California's general tort law is codified in its civil code." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132–33 (9th Cir. 2009); *see, e.g.*, Cal. Civ. Code § 1714(a) ("Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . .").

Good, 555 U.S. 70, 77 (2008)). Because a narrower construction of this clause would place a large body of state law beyond the reach of the exception, we find it appropriate to interpret the clause broadly. *See id.* (describing this approach as "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety" (quoting *Medtronic*, 518 U.S. at 485)).

We do not find any of C.H. Robinson's counterarguments persuasive. C.H. Robinson first focuses on the precise language the Supreme Court used in *Ours Garage* to describe the purpose underlying the safety exception—to leave intact "the preexisting and traditional state police power over safety," 536 U.S. at 439—and argues that because the "police power" may only be exercised by the state legislatures, the safety exception excludes common-law claims. The district court relied on similar reasoning in finding the exception unavailable. While the "police power" does generally refer to the States' power to legislate,[10] we think this argument reads too much into *Ours Garage*. At issue in that case were municipal regulations governing tow truck operations—an undisputed exercise of the "safety regulatory authority of a State" and of the "police power." The Supreme Court therefore had no reason to consider whether the safety exception is broader than this language suggests. And, as noted, we have found no indication in the FAAAA's legislative history that Congress intended to limit the safety exception in this way.

[10] *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 854 (2014) ("The States have broad authority to enact legislation for the public good—what we have often called a 'police power.'"); *Budd v. Madigan*, 418 F.2d 1032, 1035 (9th Cir. 1969) ("[W]hen the subject lies within the police power of the state, even debatable questions as to reasonableness are not for the Courts, but for the legislature . . . .").

Nor are we persuaded by C.H. Robinson's argument that Congress must have intended to limit the exception to legislative and regulatory enactments given how it has defined "regulatory authority" in other statutes. None of the statutes C.H. Robinson identifies supplies a general definition for the term "regulatory authority"; instead, in each, the term refers to a specific type of agency.[11] These statutes also undercut C.H. Robinson's own argument that "the safety regulatory authority of a State" refers to the power to enact *legislation* and regulations since each refers only to an administrative body.[12]

Lastly, C.H. Robinson juxtaposes the safety exception against the preemption provision, reasoning that Congress intentionally crafted an exception that encompasses

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[11] *See, e.g.*, 42 U.S.C. § 6807a(e) (defining "State regulatory authority" as "any State agency which has ratemaking authority with respect to the sale of electric energy by any electric utility" (cross-referencing 16 U.S.C. § 2602(17))); 15 U.S.C. § 7201(1) ("The term 'appropriate State regulatory authority' means the State agency or other authority responsible for the licensure or other regulation of the practice of accounting in the State . . . .").

[12] C.H. Robinson also contends that the Supreme Court has "consistently distinguished between state law tort claims and state regulation" when analyzing preemption. C.H. Robinson does not, however, explain how this general observation has any bearing on the interpretive question presented here. Nor do any of the cases C.H. Robinson cites assist us. The preemption clause in *Sprietsma v. Mercury Marine*, for instance, bears little resemblance to the safety exception. *See* 537 U.S. 51, 63 (2002) (holding that 46 U.S.C. § 4306, which prohibits the States from "establish[ing], continu[ing] in effect, or enforc[ing] a law or regulation establishing a . . . safety standard," does not encompass common-law claims because "the article 'a' before 'law or regulation' implies a discreteness" that is absent from the common law, and if "law" were interpreted broadly so as to include common-law claims, it would render the express reference to "regulation" superfluous).

fewer sources of state law than the preemption provision. *Compare* 49 U.S.C. § 14501(c)(1) ("[A] State . . . may not enact or enforce *a law, regulation, or other provision having the force and effect of law* . . . ." (emphasis added)), *with id.* § 14501(c)(2)(A) ("Paragraph (1) . . . shall not restrict *the safety regulatory authority of a State* . . . ." (emphasis added)). As support for this argument, C.H. Robinson relies on *Russello v. United States* for the proposition that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

The Supreme Court rejected a similar argument in *Ours Garage*, and we do so here as well. *Ours Garage* held that municipal regulations governing tow truck operations fell within the safety exception even though the exception refers only to the "safety regulatory authority *of a State*." 536 U.S. at 442 (quoting 49 U.S.C. § 14501(c)(2)(A)). An argument "of some force" was presented that Congress did not intend this result given the inclusion of the term "political subdivisions of a State" in the preemption clause and exclusion of that term from the safety exception. *Id.* at 434. But *Ours Garage* ultimately determined that the "requisite 'clear and manifest indication that Congress sought to supplant local authority'" was lacking for a number of reasons. *Id.* (quoting *Wis. Pub. Intervenor v. Mortier,* 501 U.S. 597, 611 (1991)).

First, the safety exception does not actually "borrow" any language from the preemption clause. *See id.* at 435–36 ("The *Russello* presumption that the presence of a phrase in one provision and its absence in another reveals Congress' design . . . grows weaker with each difference

in the formulation of the provisions under inspection."). Second, section 14501(c)(2) comprises three separate exceptions, and each is stated differently.[13] *See id.* 435 n.2 (characterizing these differences as "relevant to the interpretive weight that may be attached to the variation among [the exceptions]"). For these same reasons, the fact the safety exception concisely refers to "the regulatory authority of a State," instead of spelling out the various ways the States can exercise that broad power, does not clearly signal that Congress intended to exclude all common-law claims from the exception's reach.

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[13] Section 14501(c)(2) provides, in full:

> (2) Matters not covered.–Paragraph (1)–
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> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
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> (B) does not apply to the intrastate transportation of household goods; and
>
> (C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the regulation of tow truck operations performed without the prior consent or authorization of the owner or operator of the motor vehicle.

49 U.S.C. § 14501(c)(2).

2. Negligence claims against brokers that stem from motor vehicle accidents are "with respect to motor vehicles."

C.H. Robinson also contends that Miller's claim does not fall within the safety exception because it does not satisfy the "with respect to motor vehicles" clause. Specifically, C.H. Robinson argues that because it neither owned the vehicle nor selected the driver who caused the accident, Miller's claim is not "with respect to motor vehicles." Miller responds that his claim indirectly "regulate[s] the use of motor vehicles" by "creating incentives for brokers to select safer carriers . . . and thereby reduce the risk of trucking accidents."

We have previously held that the phrase "with respect to" in the safety exception is synonymous with "relating to." *Cal. Tow Truck Ass'n*, 807 F.3d at 1021 (quoting *In re Plant Insulation Co.*, 734 F.3d 900, 910 (9th Cir. 2013)). "Consequently, the FAAAA's safety exception exempts from preemption safety regulations that 'hav[e] a connection with' motor vehicles," whether directly or indirectly.[14] *Id.* at 1021–22 (quoting *Dan's City Used Cars*, 569 U.S. at 260). For example, we have held that the safety exception applies to municipal regulations governing who may ob-

[14] Although not argued by the parties, we note that *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) gave a narrower construction to the phrase "with respect to." *See id.* at 501 (holding that negligence claims stemming from the alleged defective manufacturing and labeling of a pacemaker were not preempted by 21 U.S.C. § 360k(a) in part because the "common-law requirements" at issue "were not specifically developed 'with respect to' medical devices" (quoting 21 U.S.C. § 360k(a))). We do not find *Medtronic*'s construction of that phrase applicable here because we are interpreting a savings clause, not a preemption clause.

tain a tow truck permit, including a requirement that permit applicants disclose their criminal history. *Id.* at 1026–27. In reaching this conclusion, we rejected the argument that the "valid safety rationales" in this context are limited "to those concerned only with the safe physical operation of the tow trucks themselves." *Id.* at 1023. "Rather, regulations that are 'genuinely responsive' to the safety of other vehicles and individuals involved in the towing process may also be exempted from preemption."[15] *Id.*

If criminal history disclosure requirements for tow truck drivers have the requisite "connection with" motor vehicles, then negligence claims against brokers that arise out of motor vehicle accidents must as well: Neither directly regulates motor vehicles, but both promote safety on the road. *See id.* at 1025 (noting that the safety exception "extends to regulations that protect safety in connection with motor vehicles towed and the individuals who interact with tow truck operators and firms"); *see also Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 774 (2d Cir. 1999) (construing the safety exception as "encompass[ing] the authority to enact safety regulations with respect to motor vehicle accidents and break-downs"

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[15] A number of our sister circuits have given the safety exception a similarly broad construction. *See, e.g.*, *Cole v. City of Dallas*, 314 F.3d 730, 732–35 (5th Cir. 2002) (holding that an ordinance prohibiting individuals convicted of specified criminal offenses from obtaining a tow truck permit fell within the safety exception because the regulation has, "at its core, [a] concern for safety"); *Ace Auto Body & Towing, Ltd. v. City of N.Y.*, 171 F.3d 765, 768–69 (2d Cir. 1999) (rejecting the argument that the safety exception "extends only to safety regulation of the mechanical components of motor vehicles . . . and not to municipal management of vehicular accidents").

because such a construction "fully comports with Congress' purpose to leave intact state and local safety regulatory authority").

We hold that negligence claims against brokers, to the extent that they arise out of motor vehicle accidents, have the requisite "connection with" motor vehicles. Therefore, the safety exception applies to Miller's claim against C.H. Robinson.

REVERSED and REMANDED.

FERNANDEZ, Circuit Judge, concurring in part and dissenting in part:

I concur in parts I, II and III A, B, C.1 of the majority opinion. However, I respectfully dissent from part C.2. Therefore, I would affirm the district court's decision.

Put succinctly, in my opinion, Miller's claim does not come within 49 U.S.C. § 14501(c)(2)(A) (the "safety exception"). The safety exception provides that § 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). While I agree that the safety exception includes state common law tort claims in principle, in my opinion, it does not apply to Miller's negligence claim against C.H. Robinson because that claim does not amount to one under "the safety regulatory authority of a State with respect to motor vehicles." *Id.* C.H. Robinson is a broker, which is "a principal or agent [that] sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." *Id. §* 13102(2). A motor carrier, in turn, is "a person providing motor vehicle transportation for compensation." *Id.* at (14). And, a broker cannot be a motor carrier. *Id.* at (2). Those definitions make clear that as a broker, C.H. Robinson and the services it provides have no direct connection to motor vehicles or their drivers. Any connection is merely indirect—for example, via an intermediary motor carrier.

That attenuated connection is simply too remote for the safety exception to encompass Miller's negligence claim. In holding otherwise, the majority opinion relies on cases that applied the safety exception to regulations of the tow truck business, such as those regarding the crim-

inal histories of would-be tow truck drivers[1] and prohibiting certain dangerous conduct by drivers while operating tow trucks.[2] But in those cases, there was a very close connection to the actual operational safety of motor vehicles. Indeed, the regulatory requirements regarding towing were "'genuinely responsive' to [a] set of real safety concerns" related to motor vehicles that had motivated the regulations in the first place. *Cal. Tow Truck*, 807 F.3d at 1026; *see id.* at 1023. By contrast, Miller's claim is not "with respect to motor vehicles," within the meaning of the exception. *See* § 14501(c)(2)(A). Rather, it is with respect to C.H. Robinson's broker services,[3] which are only tangentially "relat[ed] to"[4] or "connect[ed] with"[5] motor vehicles. In other words, while one can envision an almost unending series of connections, there comes a point at which the series must end as a legal matter. *See Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260–61, 133 S. Ct. 1769, 1778, 185 L. Ed. 2d 909 (2013); *cf. Elias v. Arthur Andersen & Co. (In re Fin. Corp. of Am. Shareholder Litig.)*, 796 F.2d 1126, 1130–31 (9th Cir. 1986); *Palsgraf v.*

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[1] *See Cal. Tow Truck Ass'n v. City & County of San Francisco*, 807 F.3d 1008, 1026–27 (9th Cir. 2015) (requiring tow truck driver permit applicants to list all arrests for criminal offenses); *Cole v. City of Dallas*, 314 F.3d 730, 732, 734–35 (5th Cir. 2002) (per curiam) (prohibiting those convicted of certain crimes from receiving tow truck driver permits); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 776 (2d Cir. 1999) (tow truck driver criminal history requirements).

[2] *Ace Auto Body*, 171 F.3d at 769, 774–75 (regulations to curtail tow truck drivers' practice of competitively racing to accident scenes).

[3] *See* Opinion at 13.

[4] *Cal. Tow Truck*, 807 F.3d at 1021 (internal quotation marks omitted).

[5] *Id.* (internal quotation marks omitted).

Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting). Miller's claim is beyond that point. Allowing it to avoid preemption would inevitably conscript brokers into a parallel regulatory regime that required them to evaluate and screen motor carriers (which are already subject to federal registration requirements[6] as well as state and local regulations) according to the varied common law mandates of myriad states. It could even require brokers to effectively eliminate some motor carriers from the transportation market altogether. That is a far cry from municipal ordinances that require tow truck driver applicants to disclose their criminal histories, or that impose a rotational system to discourage competing tow truck drivers from racing each other to accident scenes. *See Cal. Tow Truck*, 807 F.3d at 1020–23, 1026–27; *Cole*, 314 F.3d at 732, 734– 35; *Ace Auto Body*, 171 F.3d at 774–76. The words of the safety exception cannot be stretched that far.

Despite the broad language that we have used in applying the safety exception to some municipal towing regulations,[7] I would not unmoor that reasoning from the factual circumstances presented there, nor would I transpose it to the distinctly different area of broker services. Rather, we should hold that Miller's negligence claim is expressly preempted and the safety exception is inapplicable.

Thus, while I concur in much of what the majority decides, ultimately I respectfully dissent.

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[6] *See* 49 U.S.C. § 13902(a)(1).

[7] *Cal. Tow Truck*, 807 F.3d at 1023.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 3:17-cv-00408-MMD-WGC

ALLEN M. MILLER,
Plaintiff,

v.

C.H. ROBINSON WORLDWIDE, INC., RONEL R. SINGH, RHEAS TRANS, INC., and KUWAR SINGH dba RT SERVICE,
Defendants.

Filed: November 14, 2018

ORDER

DU, United States District Judge.

I. SUMMARY

In this personal injury case, the dispositive issue before the Court is whether Plaintiff Allen M. Miller's ("Miller") common law negligence claim sufficiently relates to the service Defendant C.H. Robinson Worldwide, Inc. ("Robinson") provides as a freight broker, and is thus preempted under 49 U.S.C. § 14501(c)(1), and does not fall

into the exception to preemption under § 14501(c)(2)(A).[1] Robinson moves for judgment on the pleadings ("Motion") (ECF No. 59), and argues that Miller's negligence claim against it is preempted and does not fall into the noted exception. (Id.; ECF No. 75 at 11.) The Court agrees with Robinson and will therefore grant the Motion.[2]

II. RELEVANT BACKGROUND

The relevant facts are taken from the operative complaint—Miller's First Amended Complaint ("FAC") (ECF No. 32), unless otherwise indicated.

The action concerns a motor vehicle accident that rendered Miller a quadriplegic. In early December 2016, Defendant Ronel Singh ("Singh") was operating a commercial semi-tractor trailer on eastbound I-80 in Elko, Nevada. The conditions on the road was snowy and icy, but Singh drove in an unsafe manner, causing the truck to overturn and block the westbound lanes. Miller who was driving westbound could not avoid the semi-tractor trailer and became lodged and pinned under it. Miller sustained severe injuries.

[1] Section 14501 is entitled "Federal authority over interstate transportation," but it is consistently referred to by courts and the parties here as the Federal Aviation and Administration Authorization Act ("FAAAA"). A different regulatory scheme called the Interstate Commerce Termination Act ("ICCTA") contains the same preemption provision. *Compare* 49 U.S.C. § 14501(c)(1) (the FAAAA) *with* 49 U.S.C. § 14501(b)(1) (the ICCTA). Plaintiff concedes that for the purpose of the Court's analysis, there is no difference between the two, and "case law referring to one is applicable to the other." (ECF No. 70 n.3.)

[2] The Court has considered the parties relevant filings, including the Motion (ECF No. 59), Miller's response (ECF No. 70) and Robinson's reply (ECF No. 75).

At the time of the accident, Singh was acting as Defendant Kuwar Singh dba RT Service's ("RT Service") employee. RT Service is an interstate motor carrier that, pertinently, Robinson brokered to haul a load on behalf of shipper Costco Wholesale, Inc ("Costco").

Miller brings seven claims for relief against the various Defendants. He initially asserted two of these claims against Robinson—the sixth and seventh claims. (*Id.* at 6–7.) However, in his response to the Motion, Miller consented to dismiss the sixth claim, a claim of vicarious liability. (ECF No. 70 at 1.) The remaining claim against Robinson is a state common law claim for negligence.

Miller alleges Robinson "had a duty to select a competent contractor to transport" the Costco load. (ECF No. 32 at ¶ 45.) Miller claims Robinson breached this duty by retaining RT Service to take the load. (*Id.* at ¶ 45.) He further alleges Robinson's actions or omissions in choosing RT Service "were reckless and demonstrate a conscious disregard of or indifference to the life, rights or safety of . . . Miller and others." (*Id.* at ¶ 49.) Foundationally, Miller asserts that Robinson knew or should have known of RT Services' and Singh's incompetence because

> there were red flags about [them]. Including that [RT Services] have a history of safety violations; over 40% of [its] trucks have been deemed illegal to be on the road when stopped for random inspections; [it has] been cited numerous times for hours of service violations and false log books; and their percentage of out of service violations is twice that of the national average.

(*Id.* at ¶ 46–47.) But, it is uncontested that "RT Service was a properly authorized motor carrier with an active

motor carrier registration at the time of the accident." (ECF No. 59 at 8; *see generally* ECF No. 70.)

III. LEGAL STANDARD

"Judgment on the pleadings is proper when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Honey v. Distelarth,* 195 F.3d 531, 532, (9th Cir. 1999). A Fed. R. Civ. P. 12(c) motion for judgment on the pleadings utilizes the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted in that it may only be granted when it is clear to the court that "no relief could be granted under any set of facts that could be proven consistent with the allegations." *McGlinchy v. Shull Chem. Co.,* 845 F.2d 802 (9th Cir. 1988) (citations omitted). Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990).

A plaintiff's complaint must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677, (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although the court must accept as true the well-pleaded facts in a complaint, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper [Rule 12(b)(6)] motion. *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a

cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnote omitted).

IV. DISCUSSION

As indicated, the Court examines whether Miller's remaining negligence claim against Robinson is preempted under § 14501(c)(1) of the FAAAA or is saved by the exception to preemption under § 14501(c)(2)(A).

A. Preemption Under § 14501(c)(1)

Robinson argues that Miller's common law negligence claim directly concerns the services a freight broker provides in the transportation of property, particularly, the selection of a motor carrier to transport goods on behalf of a shipper, and is therefore preempted under the FAAAA. (ECF No. 59 at 9.) Miller responds that because his claim concerns personal injury, it is only peripherally related to Robinson's services and thus cannot amount to impermissible state regulation. (ECF No. 70 at 6–11.) The Court agrees with Robinson.

The FAAAA expressly preempts certain state regulation relating to intrastate motor carriage:

> Motor carriers of property.—
>
> (1) General Rule. Except as provided in paragraphs (2) and (3), a [s]tate . . . 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 motor carrier . . . or any private motor carrier, *broker* or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (emphasis added). Under § 14501(c)(1) "[s]tate common law counts as an 'other provision having the force and effect of law.'" *ASARCO LLC v. England Logistics Inc.*, 71 F. Supp. 3d 990, 1004 (D. Ariz. Dec. 23, 2014) (internal quotation and citations omitted). In analyzing the provision, a court may consult air carrier preemption cases arising under the Airline Deregulation Act ("ADA") because § 14501's language closely resembles the ADA's language. *California Trucking Assoc. v. Su*, 903 F.3d 953, 960 (9th Cir. 2018).

The Court's analysis focuses on the relatedness (or connection) between the state law provision and what the FAAAA preempts—state provisions regarding "a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1); *ASARCO*, 71 F. Supp. 3d at 1005–06. In undertaking this analysis, the Supreme Court has determined:

> (1) that "[s]tate enforcement actions having a connection with, or reference to," carrier " 'rates, routes, or services' are pre-empted," . . .; (2) that such pre-emption may occur even if a state law's effect on rates, routes, or services "is only indirect," . . .; (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation, . . .; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and preemption-related objectives, . . .

Rowe v. N.H. Motor Transp. Assoc., 552 U.S. 364, 370–71 (2008). But, "the FAAAA does not preempt state laws that affect a carrier's prices, routes, or services in only a tenuous, remote, or peripheral . . . manner." *California Trucking Assoc.*, 903 F.3d at 991. Thus, a court's task is cen-

tered on the particular claim (or provision) a plaintiff advances and its duty is to discern whether the claim significantly impacts a carrier's prices, routes, or services and therefore preempted, or has only a tenuous, remote, or peripheral connection to the same and thus not preempted. *Id.* at 960 (explaining the task); *ASARCO*, 71 F. Supp. 3d at 1005 (quoting *Ko v. Eva Airways Corp.*, 42 F.Supp.3d 1296, 1302 (C.D. Cal. Feb. 23, 2012)) ("[T]he Court must look to the nature of the particular claim advanced.").

In considering § 14501(c)(1)'s preemptive scope, "congressional intent is the ultimate touchstone." *California Trucking Assoc.*, 903 F.3d at 959. Specifically, a court considers whether the state provision significantly affects Congress's objectives in enacting the FAAAA. *Id.* at 960–61 (explaining Congress' objectives).

Congress's primary objective was "prevent[ing] states from undermining federal deregulation of interstate trucking through a patchwork of state regulations." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 2014). The Ninth Circuit has concluded that "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that *do not otherwise* regulate prices, routes or services." *Id.* (emphasis added). Instead, the impetus for the FAAAA was to prevent states "from replacing market forces with their own, varied commands, like telling carriers they had to provide services not yet offered in the marketplace." *California Trucking Assoc.*, 903 F.3d at 961 (citing *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013)).

The Court finds Miller's negligence claim against Robinson is preempted under § 14501(c)(1). "A fair and commonsense construction of the term 'services', whether

read broadly or narrowly with regard to a 'broker' reasonably leads to no other conclusion than that a broker must find a reliable carrier to deliver the shipment." *ASARCO*, 71 F. Supp. 3d at 1006. Holding Robinson negligent based on Miller's allegations would have a significant impact on Robinson's services as a broker and the connection with trucking is not tenuous, remote, or peripheral.

To be clear, Miller's negligence claim is not a run of the mill personal injury claim. In essence, Miller's negligence claim sets out to reshape the level of service a broker must provide in selecting a motor carrier to transport property. For example, to avoid negligence liability, 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. Surely, 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. *See Rowe*, 552 U.S. at 370 (noting that preemption may occur even if the state law's effect on services "is only indirect"). It is not hard to foresee the forbidden state regulatory patchwork noted in *Dilts*, if Nevada and other states begin to impose varying standards of reasonableness based on negligence claims brought against brokers in providing services. The regulatory effect would also 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.

B. Section 14501(c)(2)(A)'s Exception to Preemption

Miller appears to alternatively argue that even if his claim is preempted under § 14501(c)(1), his claims fall within the exception to preemption under § 14501 (c)(2)(A). (ECF No. 70 at 12–14.) The Court cannot agree.

Section 14501(c)(2)(A) expressly applies to state regulatory authority relative to § 14501(c)(1)'s preemption provision, providing:

> Paragraph (1)—
>
> **(A)** shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization

The Supreme Court has noted that "[i]t is the expressed intent of § 14501(c)(2)(A) that the preemption rule of § 14501(c)(1) 'not restrict' the *existing* 'safety regulatory authority of a [s]tate." *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 438 (2002). The historic police powers of states govern local concerns such as "safety on municipal streets and roads." *Id.* at 440.

But, while it may be argued that Miller's negligence claim falls within Nevada's regulatory authority to police safety on its streets and roads, through the state's common law regulation of misconduct, the inclusion is tenuous at best. Further, there is no indication, either in § 14501(c)(2)(A)'s language, or cases binding on this

Court, that the exception permits a private right of action—allowing for Miller to essentially do the state's work and enforce the state's police power. Thus, even though Miller essentially asserts that Robinson's negligence in selecting motor carriers creates an unreasonable safety risk on Nevada's roadways by increasing the likelihood of death or injury and is thus centered on the state's interest in maintaining safe roadways, the Court finds he cannot avail himself of § 14501(c)(2)(A)'s exception. *See City of Columbus*, 536 U.S. at 442 (suggesting a balancing between Congress's intent to further the particular deregulatory goals of § 14501(c)(1) and the specific exception under § 14501(c)(2)(A), by indicating that the exception applies only to state/local regulatory authority: "§ 14501(c)(2)(A) shields from preemption only '*safety regulatory authority*' (and '*authority of a [s]tate* to regulate . . . with regard to minimum amounts of financial responsibility relating to insurance requirements'). *Local regulation* of prices, routes, or services of tow trucks that is *not* genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)'s preemption rule") (emphasis added).

Additionally, unlike in § 14501(c)(1), § 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." *Id.*

In sum, the Court grants Robinson's Motion (ECF No. 59) because the FAAAA preempts Miller's remaining common law negligence claim.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motion before the Court.

It is therefore ordered that Robinson's motion for judgment on the pleadings (ECF No. 59) is granted.

DATED THIS 14th day of November 2018.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-15981

D.C. No. 3:17-cv-00408-MMD-WGC
District of Nevada, Reno

ALLEN MILLER,
Plaintiff-Appellant,

v.

C.H. ROBINSON WORLDWIDE, INC.; et al.,
Defendants-Appellees,

and

COSTCO WHOLESALE CORPORATION; et al.,
Defendants.

Filed: November 9, 2020

ORDER

Before: FERNANDEZ and NGUYEN, Circuit Judges, and BOLTON,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Nguyen has voted to deny the petition for rehearing en banc, and Judges Fernandez and Bolton have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is denied.

* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.