No. 20-1425

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

REPLY BRIEF FOR THE PETITIONER

MICHAEL E. SULLIVAN
ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, NV 89503

DANIEL F. POLSENBERG
ABRAHAM G. SMITH
LEWIS ROCA ROTHGERBER CHRISTIE, LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169

KANNON K. SHANMUGAM
Counsel of Record
STACIE M. FAHSEL
MARIA E. ELIOT*
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

[*] Admitted in Maryland and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 20-1425

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

REPLY BRIEF FOR THE PETITIONER

In the decision below, the Ninth Circuit interpreted the FAAAA's safety exception to save a common-law tort claim against a freight broker from federal preemption. The question of the scope of that exception has been percolating in the lower courts for nearly a decade, resulting in discord in the courts and confusion for the transportation industry. Respondent concedes that there is substantial disagreement on the question presented, focusing instead on the lack of a conflict at the circuit level. But respondent fails to come to grips with the enormous practical consequences of the Ninth Circuit's decision—which

the many amicus briefs amply confirm. And settlement pressure has prevented (and will continue to prevent) these cases from reaching the courts of appeals, much less this Court. There is no compelling reason that the Court should wait another decade for another case; the Court's intervention is warranted now in order to correct the Ninth Circuit's erroneous interpretation.

Respondent's lengthy defense of the merits of the Ninth Circuit's decision is unconvincing. Respondent does not even deign to offer an affirmative interpretation of the language of the safety exception, much less explain how that exception interacts with the preemption provision. Respondent's position appears to be that the "exception" saves everything that the preemption provision preempts. That is obviously wrong, and respondent's failure to offer a coherent interpretation underscores the need for this Court's review.

As to the practical consequences, respondent does not dispute that the Ninth Circuit's interpretation would allow a patchwork of common-law rules to govern the core business of freight brokers. Respondent touts the purported benefits of that patchwork. But in so doing, he ignores the comprehensive regulatory regime specifically designed by Congress to ensure motor-carrier safety.

This case is an ideal vehicle, presenting a pure question of law that was briefed and decided below. And another opportunity to address the question may not arise anytime soon. The Court should therefore grant the petition. But if the Court has any doubt about the decision's practical significance or the need for immediate review, petitioner respectfully submits that the Court may wish to request the views of the Solicitor General in light of the substantial federal interests implicated here.

A. The Decision Below Is Erroneous

A common-law tort claim against a freight broker, brought by a private party to compensate for previous harm, is not an exercise of the "safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A). By its plain terms, the safety exception preserves a State's authority to promulgate positive-law rules enforced by government officials and designed prospectively to ensure the operational safety of motor vehicles. It does not encompass common-law tort claims brought by private parties alleging violations of general duties of care and seeking compensation for previous harms from entities that do not own, operate, or control motor vehicles.

Respondent never offers an alternative interpretation of the safety exception, and respondent's criticisms of petitioner's interpretation (Br. in Opp. 9-18) are shallow and unavailing.

1. Respondent offers no persuasive defense of the Ninth Circuit's holding that a common-law tort claim against a freight broker is not preempted.

a. Respondent largely dispenses with any textual analysis, instead citing two cases in which this Court described common-law damages actions as "regulation." See Br. in Opp. 10 (citing *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625 (2012) and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959)). Those cases did not interpret the language of an express preemption provision, let alone the specific statutory phrase at issue here; at most, they stand for the generic (and uncontroversial) proposition that tort law "regulates" behavior in some sense. But the specific question presented here is whether Congress's use of the phrase "safety regulatory authority of a State" covers the common-law tort claim in this case.

It does not. Respondent does not dispute that Congress typically uses the phrase "regulatory authority" to "refer to either federal or state administrative agencies." Br. in Opp. 10. And respondent does not identify a single instance in which Congress used that phrase in a way that could encompass a common-law tort claim—nor are we aware of any. Respondent suggests only that petitioner's interpretation may raise difficult questions at the margin, such as where a State exercises "regulatory authority" by "codify[ing] the common law." *Id.* at 11. No doubt, there may be hard cases involving the outer bounds of the phrase "regulatory authority of a State." But the easy case—and the one vexing the transportation industry, see pp. 10-11, *infra*—is whether an ordinary common-law tort claim, brought by a private party, is an exercise of a State's "regulatory authority." It plainly is not.

b. Respondent also fails to offer any compelling response to the contextual arguments that buttress petitioner's plain-text argument.

First, respondent concedes that the other two clauses in Section 14501(c)(2)(A) address "very specific topics." Br. in Opp. 12. The related canons of *noscitur a sociis* and *ejusdem generis* counsel that the "general clause" (here, the critical "safety regulatory authority" clause) should be "construed to embrace only objects similar in nature" to the "specific" ones. *Yates* v. *United States*, 574 U.S. 528, 545 (2015) (plurality opinion); see *id.* at 550 (Alito, J., concurring in the judgment).

Respondent contends that those three clauses are "too few" and "too disparate" to justify application of the canons. Br. in Opp. 13 (citation omitted). But this Court has applied the *noscitur a sociis* and *ejusdem generis* canons to groups of three. See, *e.g.*, *Yates*, 574 U.S. at 545 (plurality opinion); *id.* at 550 (Alito, J., concurring in the judgment); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307

(1961); 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 47:16 (7th ed. 2014). And respondent does not dispute that the second and third clauses concern specific rules that can "realistically" be established and enforced only by legislatures and agencies. See Br. in Opp. 12. That is the shared characteristic that binds the clauses, and the canons thus reinforce petitioner's interpretation.

Second, respondent also concedes that the relevant phrases in the preemption provision ("law, regulation, or other provision") and the safety exception ("safety regulatory authority of a State") are "wholly different." Br. in Opp. 13. Indeed they are, and the obvious inference is that the variation is meaningful. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). In refusing to credit that variation, respondent makes the striking claim that the language of the safety exception is "not narrower" than the language in the preemption provision itself. Br. in Opp. 14. Respondent's apparent reading of "regulatory authority" would thus nullify the preemption provision altogether. That cannot be correct.

Third, discounting the foregoing contextual arguments, respondent relies instead on the statute's preamble. In respondent's view, because the FAAAA's preamble states that "certain aspects of the State's regulatory process should be preempted," § 601(a)(2), 108 Stat. 1605-1606 (1994), and because that phrase includes tort law, so too does "safety regulatory authority of a State." Br. in Opp. 14-15. But that argument lacks merit. "Regulatory process" is not the same as "safety regulatory authority," and, regardless, the preamble does not purport to enumerate every type of law that is preempted. In any event,

aspirational language in a preamble cannot trump the operative text of the statute. See, *e.g.*, *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009).

2. Respondent has remarkably little to say about the other, independent reason that the safety exception excludes a common-law tort claim against a freight broker: namely, that such a claim does not operate "with respect to motor vehicles." See Pet. 18-19. That deficiency is especially noteworthy in light of Judge Fernandez's dissent on that basis. See Pet. App. 25a-27a.

What little respondent does say on this score cannot withstand scrutiny. Respondent contends that his claim "concerns the safety of motor vehicles" because petitioner "select[ed] a motor carrier to provide motor vehicle transportation." Br. in Opp. 17 (citation and alteration omitted). But that sweeping interpretation of the safety exception would make the exception even *broader* than the preemption provision. Surely if selection of a motor carrier "concerns" the safety of motor vehicles, then *anything* that "relates to" the "price, route, or service" of a "motor carrier" or "broker" also "concerns" the safety of motor vehicles. Under that interpretation, what is the point of the preemption provision? Respondent has no answer.

By contrast, petitioner's interpretation properly limits the safety exception to the "actual operational safety of motor vehicles." Pet. 18 (citing Pet. App. 26a (Fernandez, J., dissenting)). That limitation is rooted in the text: Congress defined "motor vehicle" narrowly to include only a vehicle "*used* on a highway" for transportation, 49 U.S.C. 13102(16), and a regulation concerning a vehicle "used on a highway" is one that regulates that vehicle's operational safety. The set of rules covering operational safety—such as speed limits and weight restrictions—is easily defined and narrower than what the FAAAA preempts in the first

place. And it is exactly those sorts of rules that give rise to an exercise of the "safety regulatory authority of a State": state troopers and local officers tend to enforce promulgated speed limits, and a state's department of transportation enforces weight restrictions.

3. Eager to avoid joining issue on the question presented, respondent changes tack, arguing that the negligent-selection claim is not covered by the preemption provision in the first place because it is not "related to" the "price, route, or service" of a broker. Br. in Opp. 17-18. That argument is wrong, and the court of appeals easily rejected it. See Pet. App. 8a-13a. Respondent conceded below that the core service of a broker is the "selection of motor carriers." *Id.* at 10a (citation omitted). And respondent alleged in his complaint that petitioner had breached its "duty to *select* a competent" motor carrier. *Id.* at 3a-4a (emphasis added). The claim thus seeks to hold petitioner liable for the manner in which it offered a core service, and as such is "related to" a broker's "service." Respondent's feeble attempt to argue that the FAAAA's preemption provision does not apply at all only underscores the weakness of his arguments on the question presented.

In short, respondent fails to offer a valid defense of the court of appeals' interpretation. Respondent nitpicks petitioner's interpretation but offers no alternative; indeed, the upshot of respondent's arguments is to read the safety exception so broadly as to gut the preemption provision entirely. The Court should grant review and reject the court of appeals' untenable interpretation.

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

Respondent does not seriously argue that the question presented is unimportant, but instead contends that the

question does not warrant the Court's review at this time. See Br. in Opp. 6-9, 19-21. That contention lacks merit. The lower courts plainly disagree on the question presented, and because FAAAA preemption cases are only rarely appealed, there is no obvious path to resolution. This case presents an ideal vehicle to resolve that question, which is of enormous importance to the transportation industry.

1. Respondent concedes that, beginning with a decision ten years ago, a substantial number of lower courts have addressed FAAAA preemption of common-law claims against freight brokers. See Br. in Opp. 6 & n.2. And the courts that have considered the question have repeatedly recognized that they are "sharply divided" on this issue. *Loyd* v. *Salazar*, 416 F. Supp. 3d 1290, 1295 (W.D. Okla. 2019); see, *e.g.*, *Morrison* v. *JSK Transport, Ltd.*, Civ. No. 20-1053, 2021 WL 857343, at *3 (S.D. Ill. Mar. 8, 2021); *Gillum* v. *High Standard, LLC*, Civ. No. 19-1378, 2020 WL 444371, at *3-*5 (W.D. Tex. Jan. 27, 2020); *Creagan* v. *Wal-Mart Transportation, LLC*, 354 F. Supp. 3d 808, 812 (N.D. Ohio 2018).

Respondent insists that the Court should let the issue continue to "percolate in the lower courts." Br. in Opp. 7. But to what end? Respondent does not dispute that the arguments have been fully ventilated below and in the many other lower-court cases. Nor is additional percolation likely to have any significant effect. The court of appeals' decision already conflicts with the decisions of district courts in major shipping hubs and along critical interstate trade routes. See, *e.g.*, *Ying Ye* v. *Global Sunrise, Inc.*, Civ. No. 18-1961, 2020 WL 1042047 (N.D. Ill. Mar. 4, 2020); *Gillum*, *supra* (W.D. Tex.); *Creagan*, *supra* (N.D. Ohio); *Krauss* v. *IRIS USA, Inc.*, Civ. No. 17-778, 2018 WL 2063839 (E.D. Pa. May 3, 2018); see also Adie Tomer

& Joseph Kane, *Mapping Freight: The Highly Concentrated Nature of Goods Trade in the United States* 18 (2014). There is intra-circuit and even intra-district disagreement. Compare, *e.g.*, *Gillum*, *supra* (W.D. Tex.), with *Popal* v. *Reliable Cargo Delivery, Inc.*, Civ. No. 20-39, 2021 WL 1100097 (W.D. Tex. Mar. 10, 2021), and *Huffman* v. *Evans Transportation Services, Inc.*, Civ. No. 19-705, 2019 WL 4143896 (S.D. Tex. Aug. 12, 2019).

Respondent urges the Court to wait for another case (Br. in Opp. 7), but it is unlikely that one will come along anytime soon. The Ninth Circuit's decision is the first appellate decision applying the FAAAA to a negligent-selection suit against a broker, even though district courts have been addressing the question for a decade. See Br. in Opp. 6 & n.2. These cases tend to settle before appeal because of the risk of unpredictable jury awards and pressure from insurance companies, among other reasons. Indeed, in *Creagan*, *supra*, the district court concluded that the plaintiffs' claims were preempted, yet the defendants *still* settled the case shortly before the scheduled argument on appeal. *See* Dkt. 78, *Creagan* v. *Wal-Mart Transportation, LLC* (6th Cir.) (No. 19-3562).

2. There is thus no reason to delay, and this case presents a rare and ideal opportunity to resolve the question presented. Respondent asserts that the Court should await a "future vehicle[]" where there has been "entry of a final decision." Br. in Opp. 8. But as a practical matter, such a decision may never come: if a freight broker's motion to dismiss is denied, the only way to tee the issue up for appellate review is to go to trial—a costly gambit. And in ADA and FAAAA cases, the Court regularly grants review when the district court has resolved an issue on a pretrial dispositive motion and the court of appeals has reversed. See, *e.g.*, *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 279 (2014); *Dan's City Used Cars, Inc.* v. *Pelkey*, 569

U.S. 251, 259 (2013). With good reason: the procedural posture cleanly presents a dispositive legal issue. Factual development will not help the Court resolve the question of statutory interpretation presented here.

3. Further percolation would have an affirmatively harmful effect, because it would permit the Ninth Circuit's erroneous decision to inflict enormous costs on the transportation industry. Respondent asserts that petitioner "exaggerate[s]" those costs. See Br. in Opp. 7. But that argument is belied by the host of amicus briefs submitted in support of the petition. Those briefs explain that the Ninth Circuit's decision imposes serious economic harm on carriers, manufacturers, and consumers (NAM Br. 21-23); that brokers lack the information to screen carriers for safety (TIA Br. 14-17; NAM Br. 14-20); and that juries in these cases are especially unpredictable (DRI Br. 13-14).

Respondent fails to engage with petitioner's arguments about the practical consequences of the Ninth Circuit's decision. In particular, respondent does not dispute that the Ninth Circuit's interpretation would create a regulatory regime for an interstate transportation market with different rules in 50 different States—with those rules being applied differently from judge to judge, and damages awarded variously from jury to jury. See Pet. 23.

While respondent suggests that such a patchwork of rules is necessary to ensure that motor carriers and drivers "operate safely" (Br. in Opp. 21), Congress has already legislated to that end: the Federal Motor Carrier Safety Administration (FMCSA) regulates motor carriers and drivers. See Pet. 7; NAM Br. 11-14. Those regulations are comprehensive, specifying everything from a truck's tire pressure (see 49 C.F.R. 393.75(i)) to the right way to haul radioactive materials (see 49 C.F.R. 397.101).

And because the FMCSA coordinates with the States through a grant program, enforcement is largely uniform. See NAM Br. 11-12.

While playing down the impact of the Ninth Circuit's decision, respondent exaggerates the consequences of a decision in petitioner's favor. Respondent claims that petitioner's view would cause a "race to the bottom" because "motor carriers would be incentivized to cut safety corners." Br. in Opp. 20. But again, the FMCSA already regulates motor-carrier safety. And the FMCSA is in a much better position than a broker to assess the safety of a carrier, and in a much better position than the States (and their judges and juries) to set safety standards. If respondent thinks that motor carriers are operating unsafely, the solution is to ensure appropriate enforcement of the FMCSA's safety standards or to adopt new standards—not to impose liability on brokers in contravention of the FAAAA's plain terms.

* * * * *

Absent this Court's intervention, the lower courts will remain hopelessly confused about how to apply the FAAAA. Respondent fails to identify any valid obstacle to the Court's review in this case. And if allowed to stand, the court of appeals' erroneous decision will exacerbate the confusion in the lower courts and work a great deal of harm in the Ninth Circuit and beyond. The Court should grant certiorari now to answer the question presented and make clear that the FAAAA preempts claims like respondent's.

* * * * *

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.

MICHAEL E. SULLIVAN
ROBISON, SHARP,
SULLIVAN & BRUST
71 Washington Street
Reno, NV 89503

DANIEL F. POLSENBERG
ABRAHAM G. SMITH
LEWIS ROCA ROTHGERBER
CHRISTIE, LLP
3993 Howard Hughes
Parkway, Suite 600
Las Vegas, NV 89169

KANNON K. SHANMUGAM
STACIE M. FAHSEL
MARIA E. ELIOT*
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

JULY 2021

* Admitted in Maryland and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).