No. 19-3562

IN THE

United States Court of Appeals for the Sixth Circuit

BARRY CREAGAN JR., ET AL.,

Plaintiffs-Appellants,

V.

WAL-MART TRANSPORTATION, LLC, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio
Case No. 3:16-cv-02788

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Bruce Stern
President
Jeffrey White
Counsel of Record
American Association for Justice
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

Attorneys for Amicus Curiae
American Association for Justice

Peter Kestner
McEwen & Kestner, PLLC
5854 Blackshire Path
Inver Grove Heights, MN 55076
(651) 209-7575
pete@crawfordkestner.com

Matthew E. Wright
Wright Law PLC
840 Crescent Centre Drive, Suite 310
Franklin, TN 37067
(615) 455-3588
mwright@wrightlawplc.com

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-3562 Case Name: Creagan v. Wal-Mart Transportation

Name of counsel: Jeffrey R. White

Pursuant to 6th Cir. R. 26.1, American Association for Justice
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on September 20, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeffrey R. White

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in state tort law claims against freight brokers. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.[1]

This case is of acute interest to AAJ and its members. Based on its members' experience with tort litigation related to the trucking industry—and its organizational concern for the development of the law in this area—AAJ is well positioned to explain why the expansion of federal preemption doctrine by the district court below is both ill-conceived and contrary to the statutory scheme and precedent.

---

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. Freight trucking plays a key role on the American economy, and the safety of the driving public depends upon the safe operation of large trucks transporting freight on our nation's highways. For that reason, holding accountable those who are responsible for placing trucks and drivers on the highway is an overriding safety issue. Freight brokers, who arrange interstate transport by shippers, carriers, and drivers, play an increasingly important role in selecting the drivers and equipment who share the highways, warranting liability if they fail to exercise due care. The ruling below – that Plaintiffs' state-law cause of action is preempted federal statute – effectively immunizes brokers from any accountability for negligence in placing on the road the driver who was responsible for the accident that injured plaintiffs. The district court's ruling violates the basic principles of preemption and increases the risk of highway injuries and deaths, a result that Congress could not have intended.

2. The Federal Aviation Administration Authorization Act ("FAAAA") does not preempt state negligence law holding brokers accountable for injuries or deaths resulting from their failure to use due care. The decision below contravenes the bedrock principle that the purpose of Congress is the ultimate touchstone in preemption. In this case, the legislative history of the FAAAA clearly demonstrates that the purpose of Congress in superseding state law was to secure the deregulation

of the airline and trucking industries by preempting direct economic regulation by states of prices, routes, and services. It was not to bestow upon any entity immunity for unsafe operations. Indeed, the clearest inference from the fact that the FAAAA contains no federal remedy for wrongful death or injury is that Congress intended for plaintiffs to rely on traditional state tort remedies.

The plain language of the statute's express preemption provision preempts only state laws with a significant impact on carrier rates, routes, or services, not generally applicable laws with only a tenuous impact. State liability rules require only that a broker perform the services it undertakes in a reasonably careful manner. Congress surely did not intend to promote carelessness on the nation's highways.

To the extent that there is any ambiguity as to whether the FAAA expressly preempts state tort causes of action, the second cornerstone of the Supreme Court's preemption analysis requires that, in a field which states have traditionally occupied, including highway safety, a court's duty is to accept the reading that disfavors pre-emption of state law.

3. The FAAAA's savings provision expressly exempts state tort law from preemption. Congress explicitly provided that the statute's preemption provision shall not restrict the safety authority of the states with respect to motor vehicles. It is clear that tort liability, which has historically served not only to compensate injured victims of negligent conduct, but also to deter others from engaging in such

unreasonably dangerous conduct, falls squarely within the safety regulatory authority of the State of Ohio.

ARGUMENT

I. THE ACCOUNTABILITY OF THE TRUCKING INDUSTRY AND OF TRUCKING BROKERS FOR FAILING TO USE DUE CARE WHEN PLACING LARGE TRUCKS ON AMERICA'S HIGHWAYS IS AN OVERRIDING SAFETY ISSUE.

A. The Potential Dangers Posed by Large Trucks on Our Nation's Highways Requires the Exercise of Due Care on the Part of All Who Participate in Interstate Freight Transport.

There is no doubt that the freight trucking industry is "the lifeblood of the U.S. economy." American Trucking Associations, Reports, Trends & Statistics, *available at* http://www.trucking.org/News_and_Information_Reports.aspx. The honored adage is no exaggeration: "If you bought it, a truck brought it." *See* Trucking industry in the United States, WIKIPEDIA, https://en.wikipedia.org/wiki/Trucking_industry_in_the_United_States (last visited Sept. 17. 2019).

But this human activity also exacts a grievous human toll. One in ten fatal motor vehicle crashes involves a large truck, which can be either a single-unit vehicle or a combination tractor-trailer. Insurance Institute for Highway Safety, Large Trucks, Fatality Facts 2017 (Dec. 2018), http://www.iihs.org/iihs/topics/t/large-trucks/fatalityfacts/large-trucks. Because of the massive size and weight of tractor-trailer units, drivers of surrounding vehicles

are most at risk. “Ninety-seven percent of vehicle occupants killed in two vehicle crashes involving a passenger vehicle and a large truck in 2017 were occupants of the passenger vehicles.” *Id.*

Unhappily, the U.S. Department of Transportation reports that these dangers are increasing. Between 2009 and 2017, the number of fatal crashes involving large trucks and buses increased by 40 percent, and injury crashes increased by more than 62 percent. From 2016 to 2017 alone, the number of large trucks involved in fatal crashes increased 10 percent, to 4,657, an increase of 6 percent in fatal crashes per 100 million miles traveled by large trucks. The number of injury crashes has likewise increased. Driver-related factors, including speeding, distraction, fatigue, and alcohol, were involved in one-third of the fatal crashes. USDOT Federal Motor Carrier Safety Administration, Large Truck and Bus Crash Facts 2017 (May 6, 2019), https://www.fmcsa.dot.gov/safety/data-and-statistics/large-truck-and-bus-crash-facts-2017.

B. Brokers Play an Increasingly Important Role in Facilitating Interstate Freight Transport.

Most shippers do not own and operate their own freight transport equipment. As Supreme Court Justice Blackmun explained, “Demand for a motor carrier’s services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are necessary and continuing objectives.” *Transamerican*

Freight Lines, Inc. v. Brada Miller Freight Sys., Inc., 423 U.S. 28, 35 (1975). These realities have given rise not only to the leasing arrangements involved in *Transamerican*, but also to the crucial importance of freight brokers who arrange the transport of the shipper's freight by a federally-licensed motor carrier, using equipment owned by a trucking company and operated by a commercial driver.

Those services are becoming increasingly important with the demand for rapid fulfillment and streamlined inventories. Industry analysts report that freight brokers arranged 16 percent more shipments in 2017 compared to the previous year, leading to a 26 percent increase in revenue for that period. Daniel Weimann, *Freight Brokers Moved 16% More Loads in 2017*, DAT (Feb. 1, 2018, 2:29 PM), https://www.dat.com/blog/post/freight-brokers-moved-16-more-loads-in-2017. The adoption of technically advanced apps has attracted substantial investment and expected growth in the digital freight brokerage market. Zion Market Research, *Global Digital Freight Brokerage Market Will Grow USD 21,355.49 Million by 2026*, GlobeNewswire (Aug. 14, 2018, 2:47 PM), https://www.globenewswire.com/news-release/2018/08/14/1551292/0/en/Global-Digital-Freight-Brokerage-Market-Will-Grow-USD-21-355-49-Million-by-2026-Zion-Market-Research.html.

At the same time, increased demand has drawn new entrants into the freight brokerage sector. Recently, Amazon "opened an online freight brokerage platform

to connect shippers with available trucks, offering service in five Eastern states" with "plans to digitize the inefficient, sometimes cumbersome business of booking freight transport." Jennifer Smith, *Amazon's Freight Push Rattles Logistics Sector*, Wall St. J. (Apr. 30, 2019), https://www.wsj.com/articles/amazons-freight-push-rattles-logistics-sector-11556656885. "Amazon joins several tech-focused brokerage startups like Convoy and Transfix Inc., armed with more than $611 million in funding, and Uber Freight, whose online load-matching platform generated $359 million in gross freight bookings last year. The increased competition appears to have driven prices downward and is reflected in decline in share prices for most established brokers." *Id. See also* Lisa Baertlein, *Amazon's nascent freight service has a truckload of rivals*, Reuters (May 1, 2019), https://www.reuters.com/article/us-amazon-freight/amazons-nascent-freight-service-has-a-truckload-of-rivals-idUSKCN1S735V (noting the increased competition among truck brokers).

Plaintiffs in this case were injured when a tractor-trailer, transporting a shipment for Wal-Mart and traveling at excessive speed for conditions, caused a chain collision on the Ohio Turnpike. *Creagan v. Wal-Mart Transportation, LLC*, 354 F. Supp. 3d 808, 811 (N.D. Ohio 2018). Plaintiffs alleged that trucking broker Kirsch Transportation Services was negligent in hiring the driver's employer. Defendant asserted, and the district court agreed, that Congress has shielded brokers

from negligence liability under state tort law by enacting an express preemption of state law in the Federal Aviation Administration Authorization Act. *Id.* at 814.

AAJ submits that the driving public is not well served by the ruling below, which confers immunity upon an important actor in placing large freight transport trucks on the highways. The district court's ruling not only violates the basic principles of preemption, it will result in an increased risk of highway injuries and deaths that Congress could not have intended.

II. THE FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT ("FAAAA") DOES NOT PREEMPT THE ACCOUNTABILITY OF TRUCKING BROKERS UNDER STATE TORT LAW FOR PERSONAL INJURIES OR DEATHS RESULTING FROM THEIR FAILURE TO USE DUE CARE.

The Supreme Court has instructed that courts assessing whether federal legislation displaces state law "must be guided by two cornerstones of our pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The first is the bedrock principle that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted). Second, is "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Lohr*, 518 U.S. at 485 and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

Both of these fundamental principles compel the conclusion that the FAAAA does not preempt the state negligence causes of action of Plaintiffs in the case before this Court.

A. The Intent of Congress in Enacting the FAAAA Was to Protect the Transportation Marketplace from State Economic Regulation, Not To Shield Trucking Carriers or Brokers from Tort Liability for Negligence Resulting in Death or Injury on the Highway.

1. The legislative history of the FAAAA demonstrates that Congress intended to preempt only direct economic regulation by states of prices, routes, and services.

In 1978, Congress began to eliminate the federal economic regulation of the transportation industry. Economic deregulation began with the Airline Deregulation Act of 1978 ("ADA"), which largely deregulated the domestic airline industry. Pub. L. No. 95-504, 92 Stat. 1705. The ADA's aim was to achieve "maximum reliance on competitive market forces." *Id.* at 1706. The ADA included a preemption provision prohibiting States from enacting or enforcing laws "related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1), "[t]o 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 (1992).

In 1980, Congress extended its economic deregulation legislation to the trucking industry with the Motor Carrier Act of 1980. That legislation did not include a preemption clause. Over the following fourteen years, however, many states regulated "prices, routes and services" of motor carriers. H.R. Conf. Rep. No. 103-677, at 86-87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715-1760. By 1994, Congress found the States' intrastate regulation of motor carriers had "unreasonably

burdened free trade, interstate commerce, and American consumers." *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 440 (2002).

Congress enacted the FAAAA, Pub. L. No. 103-305, § 601(c), 108 Stat. 1606, in 1994 to address those findings, and included an express preemption of certain state law:

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

49 U.S.C. § 14501(c)(1).

The legislative history of this provision shows a clear congressional purpose to prevent state interference with the economic deregulation of the transportation sector, not to bestow immunity from liability for unsafe practices. As the Supreme Court has stated, Congress designed the preemption provision to preclude "a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 372 (2008) (quoting *Morales*, 504 U.S. at 378). Consistent with that congressional intent, the Supreme Court has held that the scope of FAAAA preemption is limited to "state *economic* regulation," and does not extend to "state *safety* regulation." *City of Columbus*, 536 U.S. at 440-41 (emphasis in original).

Significantly, Defendants can point to nothing in the legislative history that

indicates that Congress intended to limit tort causes of action. The Tenth Circuit, rejecting a constitutional challenge to the statute, rejected the suggestion that the preemption provision extends to state tort law as "purely speculative" and based on an interpretation "not shared by the Department of Justice or the Department of Transportation." *Kelley v. United States*, 69 F.3d 1503, 1508 (10th Cir. 1995).

2. Plain language of the statutory text indicates that Congress did not intend to preempt state tort liability.

When addressing the scope of express preemption, the statutory language itself "necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (internal quotation marks and citation omitted).

In this instance, if Congress had intended to preempt state common-law remedies, it chose "singularly odd" language to do so. *See Lohr*, 518 U.S. at 487. A state does not "enact" the common law of negligence. Nor does the state "enforce" due care. Enforcement rests in the hands of private individuals if they have been harmed and if they pursue legal redress. The statutory text more clearly evinces an intent to preempt positive state law, i.e., statutes, ordinances, or administrative orders or regulations.

Of course, Congress could easily have preempted tort causes of action explicitly, if that had been its intent. "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires." *Taylor v. General*

Motors Corp., 875 F.2d 816, 824 (11th Cir. 1989) (citing examples). In the FAAAA, Congress did not do so. "Mere silence," the Supreme Court has held, "cannot suffice to establish a clear and manifest purpose to pre-empt local authority." *City of Columbus*, 536 U.S. at 432.

The stronger inference from the statutory text is that Congress was aware of and relied upon the States' administration of traditional and historical common law of negligence to promote safety and compensate who have been negligently harmed. "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Indeed, the more likely inference from the absence of explicit mention of state tort law in the preemption provision, along with the absence of a federal cause of action for redress of negligent injury, is that Congress chose to rely on traditional state tort remedies. *See, e.g.*, *Wyeth v. Levine*, 555 at 574 ("Evidently, [Congress] determined that widely available state rights of action provided appropriate relief for injured consumers" and motivation for "manufacturers to produce safe and effective drugs.").

Even if FAAAA preemption of state law might be construed to encompass state negligence lawsuits, the provision is limited to state law "related to a price, route, or service" of a broker. Though the phrase "related to" is undoubtedly broad, that "does not mean the sky is the limit." *Pelkey*, 569 U.S. at 260. The Supreme

Court has pointed out that Congress was focused on preventing "a State's *direct* substitution of its own *governmental commands*" for competitive market forces in determining the services that motor carriers will provide. *Rowe*, 552 U.S. at 372 (emphasis added). For example, the Court suggested that state laws that "requir[e] a motor carrier to offer services not available in the market" or "freez[e] into place services that carriers might prefer to discontinue" fall within the scope of preemption. *Pelkey*, 569 U.S. at 263-64 (quoting *Rowe*, 552 U.S. at 372) (internal quotation marks omitted). On the other hand, preemption is limited to state laws "with a '*significant* impact' on carrier rates, routes, or services." *Rowe*, 552 U.S. at 375. State laws that affect prices, services, and routes in only a "tenuous, remote, or peripheral . . . manner" fall outside the FAAAA's preemptive scope. *Id.* at 371 (quoting *Morales*, 504 U.S. at 390) (internal quotation marks omitted).

A recent decision by the Ninth Circuit illustrates this application. In *California Trucking Ass'n v. Su*, 903 F.3d 963 (9th Cir. 2018), the court held that the FAAAA does not preempt use of the common-law standard to assess whether owner-operators who hauled freight for motor carriers had been misclassified as independent contractors rather than carrier employees. The court held that that the common-law standard was a rule of general applicability that did not impact prices, routes, or services "in any significant way." *Id.* at 966. *See also Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649-50 (9th Cir. 2014) (holding state law meal and

rest break requirements not preempted as having no "significant effect" on prices, routes, or services).

The due care standard of the state common law of negligence is a generally applicable legal standard that does not target the motor carrier industry. Potential liability for harm resulting from failure to use due care is not a "governmental command," but instead is an incentive for businesses to use due care. *See Bates*, 544 U.S. at 444 (tort standards requiring manufacturers to use due care do not require manufacturers to act "in any particular way" and are not preempted "requirements.").

Nor do state liability rules have a significant impact on prices, routes, or services. They require only that the carrier or broker carry out the service they choose to provide in a reasonably careful manner. To the extent that liability concerns lead a carrier or broker to avoid services that pose an unreasonable danger to the driving public or forego cost-cutting measures, the impact on prices must be deemed "remote" or "tenuous." Congress surely did not intend to immunize carelessness on the nation's highways.

B. The Presumption Against Preemption Requires an Express Statutory Presumption to be Construed Narrowly to Avoid Intrusion on Areas Historically Governed by State Law.

The second "cornerstone" of the Supreme Court's preemption analysis is the strong presumption against preemption of state law. *Lohr*, 518 U.S. at 485. The Court has made clear:

> "In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"

Wyeth v. Levine, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485).

It is beyond dispute that "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985). *See also Hill v. Colorado*, 530 U.S. 703, 715 (2000) (internal quotation marks and citation omitted) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens."); *De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (same). Indeed, the Supreme Court has declared it "the duty of every state to provide, in the administration of justice, for the redress of private wrongs" under the Fourteenth Amendment Due Process Clause. *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

Because the FAAAA does not provide a means to obtain compensation for injury, the ruling below effectively eliminates Plaintiffs' legal redress altogether. Justice Stevens termed it "implausible" that "Congress would have barred most, if not all, relief for persons injured by" tortious misconduct. *Lohr*, 518 U.S. at 487 (plurality). "It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.'" *Id.* (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). *See also Bates*, 544 U.S. at 449 (2005) ("The long history of tort litigation . . . adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.").

This strong presumption against preemption is not only an important canon of statutory construction. It arises from the Constitution's fundamental "respect for the States as 'independent sovereigns in our federal system.'" *Wyeth*, 555 U.S. at 1195 n.3 (quoting *Lohr*, 518 U.S. at 485 (1996)). Requiring clear and unambiguous evidence that Congress intended to prohibit state tort liability prevents "unintended encroachment[s] on the authority of the States." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). As Justice O'Connor pointedly observed, to protect the states "against intrusive exercises of Congress' Commerce Clause powers, [courts]

must be absolutely certain that Congress intended such an exercise." *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

Consequently, even if the FAAAA express preemption provision might be construed as extending to state negligence law, and even if that alternative interpretation "were just as plausible," this Court "would nevertheless have a duty to accept the reading that disfavors pre-emption." *Bates*, 514 U.S. at 449. *See also Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

III. THE FAAAA'S SAVINGS PROVISION EXEMPTS STATE TORT LAW FROM THE EXPRESS PREEMPTION PROVISION.

Even if this Court determines that Plaintiffs' cause of action comes within the express preemption provision of 49 U.S.C. § 14501(c)(1), that subsection is clearly limited by the statute's savings provision, which states that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A).

The district court ruled this savings provision inapplicable because Plaintiffs' "negligent hiring claim seeks to impose a duty on the service of the broker rather than regulate motor vehicles." *Creagan*, 354 F. Supp. at 814. But the statutory exemption from preemption is not limited to the regulation of motor vehicles. It sweeps much more broadly to preserve a state's exercise of regulatory authority *with respect to* motor vehicles.

There can be no serious dispute that requiring a broker to compensate the injured victim when the broker's negligence has resulted in a highway accident is an exercise of the state's regulatory authority. Tort liability serves not only to compensate those who have been wrongfully injured, it disincentivizes and deters such misconduct, resulting in safer highways for all.

"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.'" *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 86 (2d Cir. 2006) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 544 (1992) (Blackmun, J., concurring in part and dissenting in part)). Indeed, "one is hard pressed to find a credible argument asserting that tort law does not promote public safety." Andrew F. Popper, *In Defense of Deterrence*, 75 Alb. L. Rev. 181, 190 (2012).

Consequently, broker liability for negligence falls comfortably within the FAAAA savings provision. As one district court recently concluded,

> [T]here can be no serious dispute that common law claims arising from the negligent procurement of a trailer represent a valid exercise of the state's police power to regulate safety. Nor can there be any question that such claims, which are centered on a defendant's efforts to place trailers on the highways, concern motor vehicles so as to fall under the exemption provision.

Finley v. Dyer, No. 3:18-CV-78-DMB-JMV, 2018 WL 5284616, at *6 (N.D. Miss. Oct. 24, 2018). Similarly, Plaintiffs' negligence claims against Kirsch

Transportation Services are explicitly preserved by 49 U.S.C. § 14501(c)(2)(A) as an exercise of "the safety regulatory authority" of the State of Ohio.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to reverse the judgment of the district court.

Date: September 20, 2019

Respectfully submitted,

/s/ Jeffrey R. White
Jeffrey R. White
Counsel of Record
American Association for Justice
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

Attorney for Amicus Curiae
American Association for Justice

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4,163 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: September 20, 2019

/s/ Jeffrey R. White
JEFFREY R. WHITE

CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae and a member of the Bar of this Court, certify that on September 20, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ Jeffrey R. White
JEFFREY R. WHITE