

No. 19-15981

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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ALLEN MILLER.,

*Plaintiff-Appellant,*

v.

C.H. ROBINSON WORLDWIDE, INC.,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the District of Nevada  
Case No. 3:17-cv-00408-MMD-WGC  
Honorable Miranda Du

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**AMICUS CURIAE BRIEF OF  
THE NATIONAL ASSOCIATION OF MANUFACTURERS  
IN SUPPORT OF DEFENDANT-APPELLEE  
AND AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1, and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amicus curiae* hereby state that the National Association of Manufacturers is a nonprofit 501(c)(6) association and has no parent corporations and has issued no stock.

## **RULE 29 DISCLOSURE STATEMENT**

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amicus curiae* hereby states that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person — other than the *amicus curiae*, its members, or its counsel — contributed money that was intended to fund the preparation or submission of the brief. Pursuant to Rule 29(a)(2), all parties have consented to the filing of this brief.

Respectfully submitted this 13<sup>th</sup> day of November, 2019.

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## TABLE OF CONTENTS

Corporate Disclosure Statement.....	ii
Rule 29 Disclosure Statement.....	ii
Table of Contents .....	iii
Table of Authorities.....	iv
Interest of Amicus Curiae .....	1
Introduction and Summary of Argument .....	2
Argument.....	3
I.    Congress has carefully created a federal-state partnership to regulate the safety of drivers and carriers. ....	3
II.   There is not a viable source of information for brokers to use when evaluating carriers. ....	7
A.   The CSA System is Designed for Law Enforcement, Not Brokers. ....	8
B.   There are Serious Flaws with the Data that Make it an Unreliable Tool. ....	10
Conclusion .....	17
Certificate of Compliance.....	19
Certificate of Service .....	20

## TABLE OF AUTHORITIES

<b>STATUTES</b>	<b>PAGE(S)</b>
49 U.S.C. § 14501(c)(2)(A) .....	5
Fixing America’s Surface Transportation Act, Pub. L. 114-94, 129 Stat. 1312 (2015) .....	2, 15
Indiana Code § 8-2.1-24-18(a) .....	5
Nevada Revised Statute § 484B.165 .....	6
 <b>REGULATIONS</b>	
49 C.F.R. part 40 .....	3, 4
49 C.F.R. § 355.25 .....	5
49 C.F.R. part 371 .....	7
49 C.F.R. part 382 .....	3, 4
49 C.F.R. part 383 .....	3
49 C.F.R. part 385 .....	4
49 C.F.R. § 385.11 .....	10
49 C.F.R. § 385.13 .....	10
49 C.F.R. § 385, Appendix B .....	9
49 C.F.R. part 387 .....	4
49 C.F.R. part 390 .....	4
49 C.F.R. part 391 .....	4
49 C.F.R. part 392 .....	4
49 C.F.R. § 392.82 .....	6
49 C.F.R. part 393 .....	4
49 C.F.R. part 395 .....	4
49 C.F.R. part 396 .....	4
49 C.F.R. part 397 .....	4-5

Nevada Admin Code § 706.2472 ..... 3-5

**OTHER AUTHORITIES**

*Continuing to Improve Truck Safety on Our Nation’s Highways: Hearing Before the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security of the Committee on Commerce, Science, and Transportation*, 115 Cong. (2017) ..... 14

David Randall Peterman, *Commercial Truck Safety: Overview*, U.S. Congressional Research Service (2017)..... 5

Department of Transportation & FMCSA, *Safety Measurement System (SMS) Methodology: Behavior Analysis and Safety Improvement Category (BASIC) Prioritization Status, Compliance, Safety, Accountability*, (2019), available at <https://csa.fmcsa.dot.gov/Documents/SMSMethodology.pdf>..... 9

FMCSA, *Compliance, Safety, Accountability (CSA)*, <https://csa.fmcsa.dot.gov/About> (last visited Nov. 6, 2019) ..... 8

FMCSA, *CSA Interventions*, <https://csa.fmcsa.dot.gov/About/Intervene> (last visited Nov. 6, 2019) ..... 9

FMCSA, *Get the Facts. Get Road Smart.*, [https://csa.fmcsa.dot.gov/Documents/Safety\\_Ratings\\_Fact sheet\\_GRS\\_M.pdf](https://csa.fmcsa.dot.gov/Documents/Safety_Ratings_Fact_sheet_GRS_M.pdf) (last visited Nov. 6, 2019)..... 10

FMCSA, *Safety and Fitness Electronic Records (SAFER) System*, <https://safer.fmcsa.dot.gov/CompanySnapshot.aspx> (last visited Nov. 6, 2019) ..... 16

FMCSA, *The Safety Measure System (SMS)*, <https://csa.fmcsa.dot.gov/About/Measure> (last visited Nov. 6, 2019)..... 9

Office of Inspector General, U.S. Dept of Transportation, Report No. ST2019084, *FMCSA’s Plan Addresses Recommendations on Prioritizing Safety interventions but Lacks Implementation Details* (2019) ..... 12, 13

National Academy of Science, *Improving Motor Carrier Safety Measurement* (2017)..... 13, 14

Nevada Highway Patrol, *Commercial Vehicle Safety Plan for the Federal Motor Carrier Safety Administration’s Motor Carrier Safety Assistance Program Fiscal Year 2018 4* (2018), available at <https://nhp.nv.gov/uploadedFiles/nhp2nvgov/Content/Commercial/CVSP2018%20ADA.pdf> ..... 6

U.S. Gov’t Accountability Office, GAO-14-114, *Federal Motor Carrier Safety: Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers* (2014)..... 11

U.S. Gov’t Accountability Office, GAO-17-132, *Motor Carriers: Establishing System for Self-Reporting Equipment Problems Appears Feasible, but Safety Benefits Questionable and Costs Unknown* (2016). ..... 12

## **INTEREST OF AMICUS CURIAE**

The National Association of Manufacturers (“NAM”) is the largest manufacturing association in the United States, representing more than 14,000 member companies ranging from small businesses to global leaders in every industrial sector and in all 50 states. Manufacturing employs more than 12.8 million men and women in the United States, contributes \$2.25 trillion to the United States economy each year, and has the largest economic impact of any major sector. NAM is committed to ensuring that the manufacturing sector continues to grow and provide more Americans with jobs, and to remain a leading contributor to our Nation’s economy.

Transporting the goods NAM’s members make from the factory to the store or consumer is essential. NAM’s members need safe and efficient roads to deliver their goods throughout the United States. NAM submits this brief to explain that the way to ensure the safety of the nation’s roads is through the well-established federal-state division of uniform laws that govern the safe operation of trucks and effective federal-state administration of those laws, and not through an ad hoc patchwork of state negligence law imposed on brokers.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Appellee C.H. Robinson Worldwide, Inc. (“C.H. Robinson”) in this case explains why, under the plain reading of the Federal Aviation Administration Authorization Act, state-law negligence claims against brokers are clearly preempted. NAM submits this brief to provide the court with two important points of context to make clear why the District Court’s decision finding preemption should be upheld on appeal:

- 1.) The trucking industry is highly regulated through joint federal and state efforts; that regulation focuses on drivers and carriers because they are most immediately responsible for safety. Negligence claims against brokers are not necessary to protect the safety of the roads.
- 2.) Even if brokers were responsible, there is no effective tool by which they can evaluate carriers and drivers; the database maintained by the Federal Motor Carrier Safety Administration (“FMCSA”) is not a reliable tool to use. Third parties, inspectors general, and Congress all recognize the short-comings of the Compliance, Safety, Accountability system. In fact, Congress has mandated that FMCSA include a disclaimer on the data saying that it is not to be used to select drivers. There is no simple and accurate way for a broker to determine whether



a carrier or specific driver is safe or not.

## ARGUMENT

### **I. Congress has carefully created a federal-state partnership to regulate the safety of drivers and carriers.**

Truck safety is a joint effort between federal and state governments. Congress has crafted a system where the federal government works in partnership with state governments to ensure that unsafe drivers and carriers are identified and removed from the road. While the federal government largely focuses on regulating interstate commerce, states have adopted laws that incorporate the federal standards for commercial trucks into their state laws, so that there is a uniform set of rules that applies to most trucks on the road. In Nevada, for example, motor carrier regulations are overseen by the Department of Public Safety, Nevada Highway Patrol. Nevada regulations regarding motor carrier safety incorporate by reference specific parts of the Federal Motor Carrier Safety Regulations (“FMCSR”). The regulations incorporated by reference include:

- Drug and alcohol testing programs, 49 C.F.R. parts 40 and 382;
- Commercial Drivers License standards, 49 C.F.R. part 383;

- Safety and fitness determinations, inspections, and processes and procedures for those inspections and determinations, 49 C.F.R. part 385;
- Minimum levels of insurance coverage for carriers, 49 C.F.R. part 387;
- A variety of general safety regulations, standards, and processes, 49 C.F.R. part 390;
- Specific rules for larger trucks, 49 C.F.R. part 391;
- Lengthy rules governing driving of trucks, such as use of equipment, speeds, use of alcohol, railroad crossing procedures, use of hand-held devices and texting, and a bevy of similar rules, 49 C.F.R. part 392;
- Requirements for equipment safety, such as lights, brakes, windows, fuel systems, tires, and virtually every other important part of a truck, 49 C.F.R. part 393;
- Limitations on hours of service, 49 C.F.R. part 395;
- Inspection, repair, and processes for placing vehicles out of service for violation of the rules, 49 C.F.R. part 396; and
- Specific requirements for transporting hazardous materials,

49 C.F.R. part 397.

Nevada Admin Code § 706.2472.

By incorporating these federal regulations into state regulations, Nevada law enforcement and regulators can enforce the federal law, conduct inspections for compliance with federal law, and ensure that trucks meet a uniform national standard for safe operation.<sup>1</sup> They can also enforce state law standards that exist on top of these rules (such as speed limits and other unsafe driving rules).

While Nevada incorporates the FMCSRs into state regulations, other states accomplish the same thing by using state law. *See, e.g.*, Indiana Code § 8-2.1-24-18(a). Regardless of the exact legal mechanism, states can regulate both inter-and intrastate trucks using consistent standards across the country. 49 C.F.R. § 355.25. Simply put, these safety standards are the “safety regulatory authority of a State with respect to motor vehicles” contemplated by the savings clause in the Federal Aviation Administration Authorization Act. 49 U.S.C. § 14501(c)(2)(A).

This state and federal partnership is the front line to protect the

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<sup>1</sup> David Randall Peterman, *Commercial Truck Safety: Overview*, U.S. Congressional Research Service 1 (2017).

safety of the roads. In Nevada, for example, the Department of Public Safety, Nevada Highway Patrol works with allied agencies to enforce state and federal laws to ensure safety.<sup>2</sup> As part of the state's commercial vehicle safety plan, the Nevada Highway Patrol conducts roadside inspections to make certain that the drivers and the vehicles comply with state and federal law.<sup>3</sup> When conducting those inspections, the inspectors check for compliance with the FMCSRs that have been incorporated into the Nevada regulations.

The Nevada Highway Patrol also enforces safety standards.<sup>4</sup> Troopers can pull trucks over for driving violations such as speeding or using a handheld phone, which is illegal under both state law, Nevada Revised Statute § 484B.165, and under the FMCSRs incorporated into Nevada law. 49 C.F.R. § 392.82.

Thus, if this Court upholds the district court's decision that the

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<sup>2</sup> Nevada Highway Patrol, *Commercial Vehicle Safety Plan for the Federal Motor Carrier Safety Administration's Motor Carrier Safety Assistance Program Fiscal Year 2018* 4 (2018), available at <https://nhp.nv.gov/uploadedFiles/nhp2nvgov/Content/Commercial/CVSP2018%20ADA.pdf>.

<sup>3</sup> *Id.* at 13-17.

<sup>4</sup> *Id.* at 20-22.

Federal Aviation Administration Authorization Act preempts the state negligence claims brought against the broker, there will still be ample protection for motorists on the road. In fact, as C.H. Robinson notes, federal law imposes specific insurance requirements on carriers to make certain that they are responsible for their actions and the actions of their drivers. Appellee's Br. at 7, 13, 25-26. There are no federal or state laws that impose specific hiring standards or practices on brokers within this carefully crafted safety framework (the FMCSRs that deal with brokers focus on consumer protection issues, not selection of drivers or safety, 49 C.F.R. part 371).

**II. There is not a viable source of information for brokers to use when evaluating carriers.**

Appellant asserts that C.H. Robinson "knew or should have known" about the carrier company's "documented history of safety violations." See Appellant's Br. at 1, 4. Unfortunately, there is no realistic option for where a broker could access such reliable documentation for several reasons. At the outset, brokers generally cannot pick the specific driver they want (unless the carrier chosen is an individual owner-operator). More importantly, as explained below, the best option available for brokers to review documentation of carriers' safety would be the

“Compliance, Safety, Accountability” (“CSA”) program, which does not provide as useful of framework as appellant suggests exists. And finally, there are serious questions about the data, as recognized by inspectors general, the Government Accountability Office, third parties, and Congress.

**A. The CSA System is Designed for Law Enforcement, Not Brokers.**

FMCSA has worked to develop a comprehensive system to aid law enforcement to identify problematic carriers. While that system is helpful to government officials, it is less helpful to brokers when it comes to selecting their carriers. That system includes the CSA program, which has three core components: (1) The Safety Measurement System; (2) Interventions; and (3) The Safety Fitness Determination rating system to determine the safety fitness of motor carriers.<sup>5</sup>

The Safety Measurement System (“SMS”) uses roadside traffic enforcement inspections and crash investigations to identify motor carriers with serious safety problems. This allows motor carriers with bad safety ratings to be prioritized for interventions such as warning

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<sup>5</sup> FMCSA, *Compliance, Safety, Accountability (CSA)*, <https://csa.fmcsa.dot.gov/About> (last visited Nov. 6, 2019).

letters and investigations. This information is organized into seven Behavior Analysis and Safety Improvement Categories (“BASIC”).<sup>6</sup>

Using the seven BASICs, SMS calculates performance for each of these categories, and assigns carriers a score between zero and 100, where a higher percentile indicates a higher risk of safety issues. 49 C.F.R. § 385, Appendix B.<sup>7</sup> Based on that score, FMCSA then prioritizes carriers for intervention.

FMCSA has a variety of intervention tools at its disposal, ranging from warnings, to additional inspections, to more fulsome investigations, to notifications of fines and penalties, and ultimately, placing an operator out of service.<sup>8</sup>

Based on the scores and interventions, carriers receive ratings of “satisfactory,” “conditional” or “unsatisfactory.” A carrier is identified as

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<sup>6</sup> FMCSA, *The Safety Measure System (SMS)*, <https://csa.fmcsa.dot.gov/About/Measure> (last visited Nov. 11, 2019).

<sup>7</sup> See also Department of Transportation & FMCSA, *Safety Measurement System (SMS) Methodology: Behavior Analysis and Safety Improvement Category (BASIC) Prioritization Status, Compliance, Safety, Accountability*, (2019), available at <https://csa.fmcsa.dot.gov/Documents/SMSMethodology.pdf>.

<sup>8</sup> FMCSA, *CSA Interventions*, <https://csa.fmcsa.dot.gov/About/Intervene> (last visited Nov. 11, 2019).

“unsatisfactory” when a determination has been made that the carrier is unfit to continue operating. 49 C.F.R. § 385.11. Without improvements it can be placed out of service, and the operating authority of the owner or operator revoked. 49 C.F.R. § 385.13.

Satisfactory scores are only generated after an onsite comprehensive investigation is done. Typically, such an investigation is done only in response to a BASIC SMS score that suggests there is a safety concern. As such, many carriers operate without any rating assigned to them and a satisfactory rating does not mean that that a carrier is safer than a carrier without a rating.<sup>9</sup>

Thus, the suggestion that only a carrier with a satisfactory safety rating is an acceptable carrier is simply not a valid assertion. Even if a broker were to try to use the SMS data and BASIC percentiles, there would still be a major problem with such reliance.

**B. There are Serious Flaws with the Data that Make it an Unreliable Tool.**

The Government Accountability Office, Department of

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<sup>9</sup> FMCSA, *Get the Facts. Get Road Smart.*, [https://csa.fmcsa.dot.gov/Documents/Safety\\_Ratings\\_Factsheet\\_GRS\\_M.pdf](https://csa.fmcsa.dot.gov/Documents/Safety_Ratings_Factsheet_GRS_M.pdf) (last visited Nov. 11, 2019).



Transportation Inspector General, the National Academy of Science, and Congress have all recognized that the FMCSA's data tools are seriously flawed. Thus, the information available to the broker would not be an accurate or a fair basis for excluding drivers and carriers.

The GAO has explained that “for SMS to be effective in identifying carriers more likely to crash, the violations that FMCSA uses to calculate SMS scores should have a strong predictive relationship with crashes.”<sup>10</sup> Unfortunately, GAO has found that “most regulations used to calculate SMS scores are not violated often enough to strongly associate them with crash risk for individual carriers.”<sup>11</sup> Moreover, GAO has observed that “[t]he relationship between violation of most regulations FMCSA included in the SMS methodology and crash risk is unclear, potentially limiting the effectiveness of SMS in identifying carriers that are likely to crash.”<sup>12</sup> Two years after making those observations, GAO found that “We recommended that FMCSA revise the SMS methodology to better

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<sup>10</sup> U.S. Gov't Accountability Office, GAO-14-114, *Federal Motor Carrier Safety: Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers* (2014).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 15.

account for limitations in drawing comparisons of safety performance information across carriers...FMCSA has not implemented our recommendation.”<sup>13</sup>

The Department of Transportation Inspector General has repeatedly criticized CSA, most recently in September of this year. It stated that “FMCSA’s corrective action plan addresses carrier safety interventions, but lacks implementation details for improving SMS transparency and its assessment of carrier safety rankings.”<sup>14</sup>

Specifically, the Inspector General noted that:

- FMCSA’s plan for collecting more accurate and complete Data lacks implementation details;
- FMCSA’s plan to make SMS more transparent lacks clarity;
- FMCSA’s plan to better understand percentile ranks lacks specificity; and
- FMCSA’s plan to improve absolute and relative safety

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<sup>13</sup> U.S. Gov’t Accountability Office, GAO-17-132, *Motor Carriers: Establishing System for Self-Reporting Equipment Problems Appears Feasible, but Safety Benefits Questionable and Costs Unknown* 9 (2016).

<sup>14</sup> Office of Inspector General, U.S. Dept of Transportation, Report No. ST2019084, *FMCSA’s Plan Addresses Recommendations on Prioritizing Safety interventions but Lacks Implementation Details* (2019).

measures lacks timely actions.<sup>15</sup>

The National Academy of Sciences has found that although the SMS “is structured in a reasonable way, and its method of identifying motor carriers for alert status is defensible[,]...much of what is now done is ad hoc and based on subject-matter expertise that has not been sufficiently empirically validated.”<sup>16</sup> The Academy found that these flaws suggest that FMCSA should adopt “a more statistically principled approach that can include the expert opinion that is implicit in SMS in a natural way.”<sup>17</sup> Some of the specific criticisms the Academy found were:

- Not all BASICs are predictive
- There are data sufficiency standards
- Using an absolute versus a relative metric would produce better results
- Using data from nonpreventable crashes results in poor statistics

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<sup>15</sup> *See id.*

<sup>16</sup> National Academy of Science, *Improving Motor Carrier Safety Measurement* 3 (2017).

<sup>17</sup> *Id.*

- Better measures of exposure
- Lack of quality in crash data
- Appropriateness of severity weights and violation coding
- Transparency of the SMS algorithm
- Making percentile ranks public.<sup>18</sup>

Congress has repeatedly heard about these flaws as well. Senator Deb Fisher of Nebraska, the Chair of a Transportation subcommittee noted that “the FAST Act also included measures to correct FMCSA’s flawed truck safety scoring system, known as the Compliance, Safety, and Accountability Program.”<sup>19</sup> She explained that “in January 2015 in Cincinnati, Ohio, there was an incident where a bridge collapsed on a truck. The CSA system counted this event as the fault of the truck driver. Obviously, the carrier was not at fault in this instance.”<sup>20</sup>

In 2015, Congress made changes to the CSA requirements as part

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<sup>18</sup> *See id.* at 16-21.

<sup>19</sup> *Continuing to Improve Truck Safety on Our Nation’s Highways: Hearing Before the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security of the Committee on Commerce, Science, and Transportation*, 115 Cong. (2017) (opening statement of Hon. Deb Fischer, U.S. Senator from Nebraska).

<sup>20</sup> *Id.*

of the FAST Act. Notably, in addition to mandating that FMCSA make substantive changes, Congress required the FMCSA website to provide users with the following warning:

Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier has received an UNSATISFACTORY safety rating under part 385 of title 49, Code of Federal Regulations, or has otherwise been ordered to discontinue operations by the Federal Motor Carrier Safety Administration, it is authorized to operate on the Nation's roadways.

The FAST Act, Pub. L. 114-94, 129 Stat. 1312 (2015)

The FAST Act therefore has specifically recognized that it is only when there has been an unsatisfactory rating issued that the public should draw a conclusion about the safety of a carrier. The language recognizes the enormity of FMCSA's task in rating all carriers on the roads. FMCSA focuses on identifying when a carrier is unfit to be on the roads, and therefore, instead of looking to those carriers with a satisfactory label, the FAST Act makes clear that the public should only draw a conclusion when they see that FMCSA has found a carrier unsafe to be on the road.

In their brief, appellant asserts that C.H. Robinson "knew or should have known" about the carrier company's "documented history of safety

violations.” See Appellant’s Br. at 1, 4. While appellant does not specify, this allegation is likely an attempt to reference data available through the FMCSA’s SAFER website. However, information from that website alone is insufficient for the public to draw meaningful conclusions regarding a carrier’s safety. For instance, while SAFER indicates the number of crashes for the preceding 24 months, it also contains a note that the crashes “listed represent a motor carrier’s involvement in reportable crashes, without any determination as to responsibility.”<sup>21</sup> Further, while the website contains a safety rating for motor carriers, it also contains a disclaimer that “The Federal safety rating does not necessarily reflect the safety of the carrier when operating in intrastate commerce.” Moreover, the SAFER website links to a SMS website that contains the mandatory FAST Act disclaimer reminding users that they should not draw conclusions about the overall safety of a carrier based on the data presented.<sup>22</sup>

There is thus no website or other database on which a broker may

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<sup>21</sup> See FMCSA, *Safety and Fitness Electronic Records (SAFER) System*, <https://safer.fmcsa.dot.gov/CompanySnapshot.aspx> (last visited Nov. 11, 2019).

<sup>22</sup> *Id.*

rely in order to draw its own conclusion as to the overall safety of a carrier. FMCSA makes safety fitness determinations and issues an unsatisfactory rating to unsafe carriers and otherwise requests that unsafe carriers and drivers be removed from the roads. Congress has made it clear that it is only after FMCSA has determined a carrier is unsatisfactory, that a conclusion should be drawn about a carrier's safety. It would therefore be contradictory to federal law under the FAST Act and confusing for the public, if this court establishes a negligence standard where brokers are required to rely on the same data that the government also says the public should not draw conclusions from.

### **CONCLUSION**

The plain text arguments for preemption of state law tort claims against brokers are clear, and the court should affirm the decision of the District Court. It can do so knowing that preemption of tort claims against brokers will not increase the risk to the driving public because there are extensive federal-state partnerships in enforcing safety standards for commercial vehicles. It can also do so knowing that there is no simple way for brokers to determine which carriers and drivers are safe. The FMCSA system suggested by the appellant is a long way from

perfect, and Congress has mandated disclaimers to reduce the public's reliance on such data.

Respectfully submitted,

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Dated: November 13, 2019



## 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 2,863 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 Office Word 2016 in 14-point Century Schoolbook type style.

Dated this 13<sup>th</sup> day of November 2019.

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## CERTIFICATE OF SERVICE

I, Ronald M. Jacobs, counsel for amicus curiae and a member of the Bar of this Court, certify that on November 13, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I 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. I also certify that all participants in the case are registered CM/ECF users.

*/s/ Ronald M. Jacobs*

Ronald M. Jacobs