

**IN THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT, STATE OF FLORIDA**

**CASE NO. 2D23-2775**

LYNN JOSEPH SIMON, JR., as  
Personal Representative of the  
Estate of Matthew Joseph Simon

Appellant,

vs.

L.T. Case No. 2018-CA-6676NC

ANHEUSER-BUSCH,  
COMPANIES, LLC, COYOTE  
LOGISTICS, LLC, FAISAN  
TRANSPORT, CORP, and  
FERNANDO L. IRIZARRY  
RIVERA.

Appellees/Respondents.

**ON APPEAL FROM THE CIRCUIT COURT, TWELFTH JUDICIAL  
CIRCUIT, IN AND FOR SARASOTA COUNTY, FLORIDA**

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**INITIAL BRIEF OF APPELLANT**

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## **STATEMENT OF THE CASE AND FACTS**

A 27-year-old died after his motor vehicle and a tractor-trailer collided. According to the trial court, a federal act preempted all the tort claims of the decedent's Estate against the broker that hired the tractor-trailer. *See* Federal Aviation Administration Authorization Act of 1994 (FAAAA or the Act), Pub. L. No. 103-305, 108 Stat. 1569. The court erred.

### **A. Background and procedural history**

A motor vehicle driven by Matthew Joseph Simon collided with a tractor-trailer driven by Fernando Irizarry-Rivera, resulting in Mr. Simon's death. *See* R.1021, 1032; SR.3580. Mr. Rivera, an employee of a motor carrier—Anephna Transport, Inc.—was hauling a load of beer from Jacksonville to Fort Myers. R.1028 ¶22, 1981:5–22, 3003–04. Defendant-Appellee Coyote, a transportation broker headquartered in Illinois, hired Anephna and arranged the transportation of the load. R.1067 ¶8, 1186:7–1187:14.

The personal representative of Mr. Simon's Estate—his father—sued Coyote and others. R.1021–58. This appeal concerns the Estate's claims against Coyote in counts 7 and 8 of the first amended complaint. Count 7 alleges Coyote negligently selected the motor

carrier, Anephna, to haul the load and that negligence caused Mr. Simon's death. R.1051-53. Count 8 alleges Coyote had a right to control the motor carrier and thus was vicariously liable for the carrier's negligence. R.1053-54.

Both counts share a common foundation: they are based on the negligent maintenance and operation of a tractor-trailer. Pertinent to Count 7, the complaint alleges Coyote "had a duty and obligation to the driving public to exercise reasonable care to select safe, competent and conscientious motor carriers ... and to verify that the [motor carriers] they selected had adequate safety management systems in place, had a good safety record, and only utilized safe drivers and safe equipment that was properly inspected and maintained." R.1027 ¶18. Count 7 asserts Coyote breached that duty "by retaining [Anephna], an incompetent, unfit, inexperienced motor carrier with unsafe equipment and inadequate drivers." R.1052 ¶102.

Count 8 alleges Coyote "acted as, contracted for, and was listed on the bill of lading as the motor carrier of the Load[; and] arranged for, controlled, and had the right to control[ ]all of the transportation of the Load." R.1053 ¶108. Count 8 asserts Coyote is vicariously liable for the negligence of the motor carrier (i.e., Anephna and its

driver). R.1053–54 ¶¶108–12. That negligence is set forth in Count 1, which alleges, among other things, that the driver was negligent by “operating the Tractor and Trailer in a negligent and unsafe manner,” “negligently equipping, maintaining, and/or repairing the Tractor,” and “negligently equipping, maintaining, and/or repairing the Trailer.” See R.1034–38 ¶¶48–52. Count 1 also asserts the driver’s operation of the tractor-trailer violated traffic statutes and motor-carrier safety regulations. R.1034–37 ¶¶48–49.

Coyote moved for summary judgment, asserting the FAAAA preempted both counts, and that the counts failed on the merits. SR.3580–3607. The trial court granted summary judgment based solely on preemption. R.3521–3534.

## **B. The summary judgment evidence**

### 1. Negligent-selection action

#### *a. The motor carrier’s history of safety violations*

Coyote’s corporate representative, Chris Jordan, testified that Coyote relies on “carrier safety ratings” from the Federal Motor Carrier Safety Administration (FMCSA) to determine whether a motor carrier is “safe” or “unsafe.” R.1740:21–1741:13. The highest rating is “satisfactory,” meaning the carrier has “adequate safety

management controls to meet the safety fitness standard prescribed in [49 C.F.R.] § 385.5.” R.1745:13–22. An unsatisfactory rating “means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard.” Anephna was “unrated,” as it had not been issued a safety rating by the FMCSA—despite being well beyond the new entry period for a carrier. R.1759:12–18.

Mr. Jordan testified that Coyote selects “satisfactory” or “unrated” carriers. R.1755:6–8. However, he agreed the FMCSA safety rating “does not necessarily reflect the safety of the carrier.” R.1765:7–9. Indeed, Anephna’s “snapshot” in the FMCSA’s database disclaims: “*The Federal safety rating does not necessarily reflect the safety of the carrier ....*” R.2901. Nevertheless, Mr. Jordan asserted that Coyote was required to simply check for a safety rating before selecting a carrier. R.1757:4–8.

Anephna’s FMCSA snapshot showed a history of regulatory violations during the 23 months preceding the crash. R.2901; R.1761:16–19. In two of three vehicle inspections, an Anephna driver was “out of service.” R.2901. An “out-of-service order” is “a declaration by an authorized enforcement officer ... that a driver, a

commercial motor vehicle, or a motor carrier operation, is out-of-service pursuant to” various laws and criteria. 49 C.F.R. § 383.5. A driver may be deemed out of service based on safety concerns such as alcohol use, hours-of-service violations, and other issues listed by the Commercial Vehicle Safety Alliance (CVSA). See CVSA, “Out-of-Service Criteria,” <https://www.cvsa.org/inspections/out-of-service-criteria/> (last accessed June 24, 2024). A vehicle is out of service if “by reason of its mechanical condition or loading would likely cause an accident or a breakdown.” 49 C.F.R. § 396.9(c)(1).

In addition to the publicly available information, Coyote knew, one week before the crash, that a customer rejected an Anephna trailer after deeming it unsafe. See R.1786:8–1787:11, 1853:11–16.

*b. The motor carrier’s safety violations contributed to the crash.*

Coyote’s corporate representative agreed that trailer maintenance issues contributed to the crash. R.1789:1–9. Five experts opined that poor trailer maintenance contributed to the crash. A human-factors engineering expert opined that “Defendants’ slow moving tractor trailer was a hazard to eastbound motorists,” and that the absence of functional taillights and top marker lights on

the trailer “created a dangerous condition” which made the crash “unavoidable.” R.2757–58. A crash reconstruction expert observed that the trailer was missing functional taillights and marker lights, and its required conspicuity tape was ineffective, dull, and dirty. R.2792–93. He further opined that these factors, combined with the slow speed of the tractor-trailer, rendered the crash “unavoidable.” R.2793. Similar opinions were rendered by: a commercial vehicle maintenance expert, R.2817–18; a trucking safety company director, R.2801–03; and Dr. Corsi, an expert in transportation and logistics safety, R.2766–68.

## 2. Vicarious-liability action

To prove vicarious liability, the Estate relied on the broker-carrier agreement between Coyote and the motor carrier. *See* R.2965–3002. The agreement begins: “[Coyote] hereby agrees to cause freight to be tendered to [Anephna], and [Anephna] ... hereby agrees to pick up, transport, deliver and provide all such services as [Coyote] shall request on all freight tendered by [Coyote]....” R.2966, ¶1. It then lists requirements Anephna had to follow when transporting the load:

- Anephna had to use only equipment that it owned or leased for more than 30 days. R.2966 ¶1.

- Anephna could not subcontract, broker, or tender the load to third parties. *Id.*
- Anephna had to notify Coyote of any changes to its FMCSA safety rating. R.2967 ¶5C.
- Anephna’s vehicles and equipment had to be clean, odor-free, dry, leakproof, and free of contamination and infestation. R.2968 ¶5E.
- Anephna had to comply with all shipping and handling requirements of Coyote’s customers and maintain the required cargo temperature. R.2969 ¶5G(iii).
- Anephna had to use certain locking systems and security seals to protect cargo. R.2970 ¶5L.

Coyote imposed further requirements in an amendment to the broker-carrier agreement (R.3003–08; *see* R.1685:11–18):

- Tandem axels on trailers had to be in “working condition” and “slid all the way rear upon check in.” R.3003.
- Trailers had to be equipped with a bulkhead bracing system. R.3006.
- Drivers had to place cardboard separators and void fillers in trailers. R.3006.

- Tractor-trailers had to meet certain weight specifications. R.3007.
- Trailers had to be capable of maintaining a 36-degree internal temperature. R.3006.

Dr. Corsi opined that “[t]he transportation contracts, load documents, and the conduct of the parties in this case were anything but a traditional broker/shipper/motor carrier arrangement, with significant control over the manner of the transportation services.” R.2766–67 ¶3c. Coyote’s corporate representative acknowledged that the broker-carrier agreement does much more than simply establish a price and a route. R.1831:2–21.

All the agreement’s requirements cannot be listed in this brief. They were listed in the “Control Chart,” an exhibit submitted below and included in the appendix to this brief. See R.3009-15; App. 5–11.

3. Coyote’s brokering of the load was an interstate service.

Coyote argued that because the route was from Jacksonville to Fort Myers, the pertinent FAAAA provision is 49 U.S.C. § 14501(b)(1)—the *intrastate* preemption provision. SR.3593–94. But Coyote is a foreign company headquartered in Illinois, R.1067 ¶8,

and the load it brokered occurred in Florida, R.1186:11–13. Accordingly, the Estate argued Coyote’s brokering of the load was an *interstate* service, meaning the any-commerce preemption provision, § 14501(c)(1), applied instead. R.2878. The intrastate provision is not subject to a safety exception, while the any-commerce provision is. 49 U.S.C. § 14501(b)(1), (c)(1), (c)(2)(A).

### **C. The trial court’s ruling**

The trial court determined there was a factual dispute as to whether Coyote’s brokering service was performed interstate or intrastate. R.3526. Thus, it applied the any-commerce preemption provision, § 14501(c)(1). R.3526. The court decided that provision preempted the Estate’s actions against Coyote because they “relate[d] to” Coyote’s rates, routes, or services as a broker. R.3526–27.

The court further determined the Estate’s actions were not “with respect to motor vehicles” and thus were not saved by § 14501(c)(2)(A)’s safety exception. R.3527–3530. The court adopted the reasoning of: *Ye v. GlobalTranz Enterprises, Inc.*, 74 F.4th 453 (7th Cir. 2023), *pet. for cert. denied*, 144 S. Ct. 564 (2024); *Aspen American Insurance Company v. Landstar Ranger, Inc.*, 65 F.4th 1261 (11th Cir. 2023); and the partial dissent in *Miller v. C.H. Robinson*

*Worldwide, Inc.*, 976 F.3d 1016 (9th Cir. 2020), *pet. for cert. denied*, 142 S. Ct. 2866 (2022). R.3527–3530.

Because the trial court’s preemption analysis did not distinguish between the negligent-selection and vicarious-liability actions, the Estate moved for rehearing, arguing the decisions relied upon by trial court were inapposite to the vicarious-liability action. R.3552–59. The court summarily denied the rehearing motion on the same day it was filed. R.3547. The Estate appealed. R.3565–72.

## **SUMMARY OF ARGUMENT**

To advance economic deregulation of transportation industries, Congress enacted the FAAAA. Pub. L. No. 103-305, § 601, 108 Stat. 1569 (1994). Two of section 601’s adjoining subsections preempt state laws. *Id.* § 601(b), (c), 108 Stat. 1605–06 Both subsections preempt laws “related to a price, route, or service,” subject to several exceptions. One provision—in § 601(b)—governs when air carriers or their “affiliate[s]” are “transporting property *by aircraft or by motor vehicle.*” (Think FEDEX.) The other provision—in § 601(c) and applicable here—governs motor carriers, and as later amended, brokers and freight forwarders, “with respect to the transportation of property.” By definition, the “transportation” may be by “motor vehicle,” “vessel,” wharf,” or “equipment of any kind,” among other things. 49 U.S.C. § 13102(23).

Both preemption provisions are subject to an identically worded “safety exception” that saves state laws from preemption: “[The preemption provision] shall not restrict the safety regulatory authority of a State with respect to motor vehicles.” FAAAA, § 601(b), (c) (codified at 49 U.S.C. §§ 41713(b)(4), 14501(c)). The primary question presented is whether common-law actions for vicarious

liability and negligent selection against a broker—arising out of a motor-vehicle accident caused by the negligence of a motor carrier hired by the broker—are part of a State’s “safety regulatory authority ... with respect to motor vehicles.” Most courts have answered “yes” and held that the FAAAA does not preempt such common-law actions.

Indeed, almost all courts, consistent with Supreme Court precedent, have concluded a State’s tort law is part of its “safety regulatory authority.” And the second phrase—“with respect to motor vehicles”—most naturally reads as limiting the exception to save only a State’s *motor-vehicle* safety laws. In other words, other state safety laws unrelated to motor vehicles—*e.g.*, those regulating aircraft, vessels, wharfs, etc.—are not saved from preemption.

Nevertheless, the Seventh and Eleventh Circuits have reasoned that a negligent-selection action is not “with respect to motor vehicles” and thus is not saved from preemption. This brief explains why that reasoning, adopted by the trial court, is erroneous or inapplicable. The brief also argues an alternative ground for reversing the summary judgment and rebuts anticipated tipsy-coachman arguments.

## **ARGUMENT**

*Standard of review.* Because this case involves preemption and summary judgment, the standard of review on all issues is *de novo*. See *Vreeland v. Ferrer*, 71 So. 3d 70, 73 (Fla. 2011).

**I. Section 14501(c)(2)(A)’s safety exception saves from preemption the common law of vicarious liability and negligent selection because it is part of Florida’s “safety regulatory authority ... with respect to motor vehicles.”**

**A. Background**

This is an express-preemption case, as the FAAAA “displaces state law by so stating in express terms.” *E.g., Aspen*, 65 F.4th at 1266 (internal quotations omitted). Thus, this Court “must ... focus on” the Act’s plain words, as they are “the best evidence of Congress’ e-emptive intent.” *Id.* (internal quotations omitted); *accord Ye*, 74 F.4th at 458 (citing *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013)); *Miller*, 976 F.3d at 1021.

The FAAAA’s origins are in the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705. The ADA largely eliminated federal economic regulation of the airline industry. “In keeping with the statute’s aim to achieve ‘maximum reliance on competitive market forces,’ ... Congress sought to ‘ensure that the States would

not undo federal deregulation with regulation of their own.” *Dan’s City*, 569 U.S. at 255–56 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)). In 1980, Congress similarly deregulated the trucking industry. see Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793.

In 1994, Congress determined that “certain aspects of the State regulatory process should be preempted.” FAAAA, Pub. L. No. 103-305, § 601(a)(2) , 108 Stat. 1569, 1605 (1994). Accordingly, Congress enacted two adjoining, similarly worded preemption provisions, both of which were subjected to identically worded exceptions for safety laws “with respect to motor vehicles.” *Id.* § 601(b), (c), 108 Stat. 1605–06. One provision was titled “Economic Regulation of Motor Carriers,” and the other governed when air carriers or their “affiliate[s]” are “transporting property by aircraft or by motor vehicle.” *Id.*

As later amended, the motor-carrier preemption provision—applicable here—preempts state laws “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.” 49 U.S.C. § 14501(c)(1). Congress, however, also sought “to ensure that its preemption of States’ economic authority over motor carriers

of property” would “‘not restrict’ the preexisting and traditional state police power over safety.” *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002) (hereinafter *Ours Garage*) (quoting 49 U.S.C. § 14501(c)(2)(A)). Congress therefore enacted a savings clause—the safety exception—specifying 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); *see also* 2 David G. Owen and Mary J. Davis, *Owen & Davis on Products Liability* § 15:7 (4th ed. May 2024 update) (“[Congress] often include[s] a ‘savings clause’ in express preemption provisions to make clear that some state laws are saved from preemption.”).

For the first issue on appeal, the Estate assumes, without conceding, that the preemption provision in § 14501(c)(1)—standing alone—preempts the Estate’s common-law actions against the broker, Coyote. *But see infra* § II, at 55–58 (arguing to the contrary). But that provision does not stand alone; it is limited by the safety exception: “Paragraph [(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).

Are the Estate’s common-law actions against Coyote part of Florida’s “safety regulatory authority ... with respect to motor vehicles?” See 49 U.S.C. § 14501(c)(2)(A). If they are, then subparagraph (c)(2)(A)’s safety exception saves the Estate’s actions from paragraph (c)(1)’s preemption provision—meaning the trial court erred. The question presented actually consists of two separate sub-questions, one directed at the vicarious-liability action and another directed at the negligent-selection action.

Most courts have concluded the FAAAA does not preempt common-law negligent-selection and vicarious-liability actions against a broker that hired a motor carrier:

Negligence not preempted: *Hawkins v. Milan Express, Inc.*, No. 3:22-CV-51, 2024 WL 2559728, at \*3-\*5 (E.D. Tenn. May 24, 2024); *Crawford v. Move Freight Trucking, LLC*, No. 7:23-cv-433, 2024 WL 762377, at \*7–8 (W.D. Va. Feb. 20, 2024); *Milne v. Move Freight Trucking, LLC*, No. 7:23-cv-432, 2024 WL 762373 at \*8 (W.D. Va. Feb. 20, 2024); *Johnson v. Herbert*, No. 1:22-CV-00411, 2023 WL 9503459 at \*6 (E.D. Tex. Oct. 20, 2023); *Wardingley v. Ecovyst Catalyst Techs., LLC* 639 F.Supp.3d 803, 810–12 (N.D. Ind. 2022); *Ortiz v. Ben Strong Trucking, Inc.*, 624 F.Supp.3d 567, 583–84 (D. Md. 2022); *Carter v. Khayrullaev*, No. 4:20-CV-00670-AGF, 2022 WL 9922419, at \*4 (E.D. Mo. Oct. 17, 2022); *Mata v. Allupick, Inc.*, No. 4:21-cv-00865, 2022 WL 1541294, at \*4–6 (N.D. Ala. May 16, 2022); *Dixon v. Stone Truck Line, Inc.*, No. 2:19-cv-000945, 2021 WL 5493076, at \*9–14 (D.N.M. Nov. 23, 2021); *Taylor v. Sethmar Transp., Inc.*, No. 2:19-cv-00770, 2021 WL 4751419, at \*12–16 (S.D.W. Va. Oct. 12, 2021); *Bertram v. Progressive Se. Ins.*, No. 2:19-cv-01478, 2021 WL 2955740, at \*2–6 (W.D. La. July 14, 2021); *Covenant*

*Imaging, LLC v. Viking Rigging & Logistics, Inc.*, No. 3:20-CV-00593 (KAD), 2021 WL 973385 at \*6 (D. Conn. Mar. 16, 2021); *Ciotola v. Star Transp. & Trucking, LLC*, 481 F.Supp.3d 375, 380–81 (M.D. Pa. 2020); *Skowron v. C.H. Robinson Co.*, 480 F.Supp.3d 316, 321 (D. Mass. 2020); *Mendoza v. BSB Transp., Inc.*, No. 4:20 CV 270 CDP, 2020 WL 6270743 at \*4 (E.D. Mo. Oct. 26, 2020); *Uhrhan v. B&B Cargo, Inc.*, No. 4:17-cv-02720-JAR, 2020 WL 4501104 at \*4–\*5 (E.D. Mo. Aug. 5, 2020); *Gilley v. C.H. Robinson Worldwide, Inc.*, No. 1:18-00536, 2019 WL 1410902, at \*3–5 (S.D. W. Va. Mar. 28, 2019); *Nyswaner v. C.H. Robinson Worldwide Inc.*, 353 F.Supp.3d 892, 895–96 (D. Ariz. 2019); *Finley v. Dyer*, No. 3:18-CV-78, 2018 WL 5284616, at \*6 (N.D. Miss. Oct. 24, 2018); *Mann v. C.H. Robinson Worldwide, Inc.*, No. 7:16-cv-00102, 2017 WL 3191516, at \*8 (W.D. Va. July 27, 2017); *Morales v. Redco Transp. Ltd.*, No. 5:14-cv-129, 2015 WL 9274068, at \*2 (S.D. Tex. Dec. 21, 2015); *Owens v. Anthony*, No. 2–11–0033, 2011 WL 6056409, at \*2–4 (M.D. Tenn. Dec. 6, 2011); *Lagrange v. Boone*, 337 So. 3d 921, 929–30 (La. Ct. App. 2022); *Quinones v. Ladejo*, 174 N.E.3d 407, 499–501 (Ohio Ct. App. 2021).

Vicarious liability not preempted: *Wardingley*, 639 F.Supp.3d at 810–12; *Ciotola*, 481 F.Supp.3d at 380–81; *Mendoza*, 2020 WL 6270743 at \*4; *Gilley*, 2019 WL 1410902, at \*3–5; *Owens*, 2011 WL 6056409, at \*2–4; *Quinones*, 174 N.E.3d at 499–501; *see also Girardeau v. Hobbs*, No. 4:21-cv-01265-MTS, 2023 WL 5348770, at \*2 (E.D. Mo. Aug. 21, 2023) (concluding negligence claim was preempted but vicarious-liability claim was not); *Ye v. Global Sunrise, Inc.*, No. 1:18-CV-01961, 2020 WL 1042047, at \*2–\*5 (N.D. Ill. Mar. 4, 2020) (same).

Three federal appellate courts have answered the question presented here—but *only* for a negligent-selection action and *not* for a vicarious-liability action. Two of those courts (Seventh and Eleventh Circuits) have held such actions are preempted, while one (Ninth Circuit) has held it is not. Though these federal decisions do

not bind state courts,<sup>1</sup> the trial court focused on them. R.3527–30. So does this brief. *Infra* § I.C, at 26. The three decisions cite two Supreme Court FAAAA decisions—*Dan’s City* and *Ours Garage*—that do bind this Court and that, when read properly, support the safety exception’s application here. *Infra* § I.D., at 37. Based on precedent and the statutory text, this Court should conclude that the safety exception saves common-law actions for vicarious liability and negligent selection from preemption. *Infra* § I.E., at 44. Finally, even if this Court agrees with the Seventh and Eleventh Circuits’ decisions, it still should reverse the summary judgment on the vicarious-liability action. *Infra* § I.F., at 55.

But the “step-one question” in any federal preemption analysis is: “What is [the state] law?” *United States v. Swenson*, 971 F.3d 977, 990 (9th Cir. 2020) (N.R. Smith, J., concurring in part). We start our analysis by answering that question.

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<sup>1</sup> “State courts are not required to follow the decisions of intermediate federal appellate courts on questions of federal law,” although they “are bound by the decisions of the United States Supreme Court construing federal law.” *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007) (internal quotations omitted).

## **B. Florida common law**

“[S]tate-based tort liability falls within [Florida’s] prerogative to regulate matters of health and safety.” *Vreeland*, 71 So. 3d 76. “The law of negligence effectively creates a social contract of safety.” *Monroe v. Sarasota Cnty. Sch. Bd.*, 746 So. 2d 530, 535 (Fla. 2d DCA 1999). “[T]he principles of the common law” include those “that are designed to conserve the public safety,” and in the context of motor vehicles, these principles “require the exercise of due care in the use on the public highways of instrumentalities that are peculiarly dangerous in their operation.” *S. Cotton Oil Co. v. Anderson*, 86 So. 629, 636 (Fla. 1920) (concurring opinion of Whitfield, J., adopted by the majority). “In the absence of controlling statutes,” Florida’s “principles of the common law” apply “to the operation of vehicles on public highways.” *Id.*

Here, the Estate’s actions against Coyote for vicarious liability and negligent selection seek to enforce common-law duties to safely maintain and operate a motor vehicle.

### 1. Vicarious-liability action

“Vicarious liability ... is derivative of the liability of the active tortfeasor; it is not based on a separate breach of duty to the plaintiff

by the vicariously liable party.” *Dabasse v. Reyes*, 963 So. 2d 288, 291 (Fla. 2d DCA 2007). Accordingly, “[t]he vicariously liable party is responsible to the plaintiff to the same extent as the primary actor; both are jointly liable for all of the harm that the primary actor has caused.” *Grobman v. Posey*, 863 So. 2d 1230, 1235 (Fla. 4th DCA 2003). The crux of vicarious liability is the defendant’s “relationship with the negligent tortfeasor.” *Id.*

In *Southern Cotton*, 86 So. at 461, the Florida Supreme Court established the dangerous-instrumentality doctrine, which this Court has described as “a species of vicarious liability.” *Lambert v. Emerson*, 304 So. 3d 364, 367 (Fla. 2d DCA 2020). Although the present case involves a different species of vicarious liability (agency), *Southern Cotton* exemplifies the exercise of Florida’s safety regulatory authority—via its common law—to hold a party vicariously liable for another party’s negligent operation of a motor vehicle. *See Aspen*, 65 F.4th at 1270 (“Florida’s ‘dangerous instrumentality doctrine’ reflects a special safety concern with those who negligently place unfit drivers on the road.”).

Here, to hold Coyote vicariously liable for the negligence of the motor carrier (Anephna), the Estate must prove the motor carrier’s

underlying negligence, as well as an agency relationship between Coyote and the motor carrier. To establish agency, the Estate must show “(1) acknowledgment by [Coyote] that [Anephna] will act for [Coyote], (2) [Anephna’s] acceptance of the undertaking, and (3) control by [Coyote] over the actions of [Anephna].” *Goldschmidt v. Holman*, 571 So. 2d 422, 424 n.5 (Fla. 1990). To prove Coyote’s control over Anephna, the Estate must show Anephna is “subject to the control of [Coyote] as to the means to be used” in performing its carrier services. *Cawthon v. Phillips Petroleum Co.*, 124 So. 2d 517, 519 (Fla. 2d DCA 1960).

To prove Coyote’s vicarious liability, the Estate relies on Coyote’s broker-carrier agreement with Anephna. *See* R.2965–3002. That agreement imposes multiple requirements on Anephna pertaining to the “operat[ion]” and “maint[enance]” of “all motor vehicles, trailers and allied equipment necessary to perform [the] transportation services.” R.2967 ¶5.D.; *see* R.3009–14; App. 5–11 (detailing Coyote’s contractual right to control Anephna).

By retaining a right of control over the transportation of the load, Coyote went beyond its role as a broker and engaged in the business of a motor carrier—that is, “providing motor vehicle

transportation for compensation.” 49 U.S.C. § 13102(2), (14); see R.1053 ¶108 (alleging Coyote “acted as the motor carrier of the Load”). Coyote thus should be held vicariously liable for any negligence arising from the motor carrier’s transportation of the load, as “a business enterprise should not be able to disclaim responsibility for accidents which may fairly be said to be the result of its activity.” *McKee v. Crestline Hotels & Resorts, LLC*, 376 So. 3d 758, 763 (Fla. 4th DCA 2024) (citation omitted).

In sum, the relationship between Coyote and the motor carrier centers on the provision of motor-vehicle transportation, and the vicarious-liability action seeks to hold Coyote liable for the motor carrier’s negligent operation and maintenance of a motor vehicle.

## 2. Negligent-selection action

Like vicarious liability, an employer’s liability for negligent selection of a contractor is a form of derivative liability. *Grobman*, 863 So. 2d at 1237. For derivative liability, “no cause of action [exists] unless the directly liable tortfeasor commits a tort[,] and ... the derivatively liable party is liable for *all* of the harm that such a tortfeasor has caused.” *Id.* at 1236. To hold Coyote derivatively liable for the motor carrier’s negligence, the Estate must prove (1) that the

motor carrier, Anephna, “was incompetent or unfit” to transport the load, (2) that Coyote “knew or reasonably should have known of [Anephna’s] particular incompetence or unfitness,” and (3) that “the incompetence or unfitness was a proximate cause of [Mr. Simon’s death].” *Davies v. Com. Metals Co.*, 46 So. 3d 71, 73–74 (Fla. 5th DCA 2010).

The Estate alleges, and has presented evidence, to establish each element. First, the motor carrier, Anephna, had a history of safety regulatory violations pertaining to both drivers and vehicles. R.1027–28 ¶21; *supra* at 3. Second, Coyote knew or should have known of Anephna’s history of violating “state and federal laws, regulations, and industry standards governing the *safe operation of commercial motor vehicles*.” R.1052 ¶103 (emphasis added); *supra* at 4–5. Third, Mr. Simon’s death was proximately caused by the deficient maintenance and operation of a tractor-trailer. R.1034–38 ¶¶48–52; *supra* at 5–6.

Regarding proximate cause, Florida’s common law requires a *direct causal link* between a defendant’s negligence and the plaintiff’s

injury.<sup>2</sup> See Fla. Std. Jury Instr. 401.12 (negligence is a legal cause of injury if it “*directly* and in natural and continuous sequence produces or contributes substantially” to the injury) (emphasis added); *Lake Parker Mall, Inc. v. Carson*, 327 So. 2d 121, 125 (Fla. 2d DCA 1976) (“there must be evidence of such a *direct* and continuous sequence of events flowing between the negligent act and the injury”) (emphasis added); *Trembath v. Beach Club, Inc.*, 860 So. 2d 512, 515 (Fla. 4th DCA 2003) (same).

Indeed, Florida law is “well settled ... that a remote condition or conduct which furnishes only the occasion for someone else’s supervening negligence is not a proximate cause of the result of the subsequent negligence.” *Matthews v. Williford*, 318 So. 2d 480, 481 (Fla. 2d DCA 1975); accord *Seminole Lakes Homeowner’s Ass’n, Inc. v. Esnard*, 263 So. 3d 56, 58 (Fla. 4th DCA 2018). Thus, to prove a Florida negligent-selection action against a broker, a plaintiff must prove a *direct connection*—not a mere indirect connection—between the broker’s negligence in selecting the carrier and the motor-vehicle accident and resulting injuries.

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<sup>2</sup> This causation principle also applies to the vicarious-liability action and the motor carrier’s underlying tort.

Unlike this brief, the three federal appellate opinions did not examine whether the applicable state common law required a *direct* causal link between the broker’s negligence and the motor-vehicle accident and resulting injuries. *Infra* § I.C.2, at 26–37. Despite this analytical omission, the Seventh and Eleventh Circuits rested their holdings on the premise that the safety exception “requires a *direct connection* between the potentially exempted state law and motor vehicles.” *Ye*, 74 F.4th at 462 (emphasis added); *accord Aspen*, 65 F.4th at 1271 (“[T]he phrase ‘with respect to motor vehicles’ limits the safety exception’s application to state laws that have a *direct* relationship to motor vehicles.”). On the other hand, the Ninth Circuit determined that a showing of a mere *indirect connection* would satisfy the safety exception. *Miller*, 976 F.3d at 1030–31.

### **C. The three federal appellate courts’ opinions**

#### 1. Common ground on the safety exception

All three federal appellate courts agree that, for the FAAAA’s safety exception to save a state law from preemption, the state law must be: (1) “part of [the State’s] safety regulatory authority,” and (2) “with respect to motor vehicles.” *See Ye*, 74 F.4th at 460; *Aspen*, 65 F.4th at 1270–71; *Miller*, 976 F.3d at 1026–30.

The three courts generally agree on the first part of the test. The Eleventh Circuit held: “Florida’s common law negligence standard, which allows claims against a broker based on negligent selection of a carrier” was “within Florida’s ‘safety regulatory authority.’” *Aspen*, 65 F.4th at 1270. Similarly, the Ninth Circuit panel unanimously “conclude[d] that ‘the safety regulatory authority of a State’ encompasses common-law tort claims.” *Miller*, 976 F.3d at 1026. The Seventh Circuit agreed there was “much to say” supporting the argument “that a state’s tort law is part of its ‘safety regulatory authority,’” but it concluded that it “need [not] reach this issue” because of its conclusion regarding “the second half of the safety exception’s text.” *Ye*, 74 F.4th at 460.

In contrast, the three courts’ interpretation of the second part of the safety exception—“with respect to motor vehicles”—is not harmonious, as discussed next.

2. The courts’ interpretation of the phrase “with respect to motor vehicles”

- i. *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (9th Cir. 2020)

In *Miller*, the broker argued that “because it neither owned the vehicle nor selected the driver who caused the accident, [the

plaintiff's] claim [was] not 'with respect to motor vehicles.'" 976 F.3d at 1030. The plaintiff countered that his claim—which alleged the broker breached its duty to select a competent carrier to transport the load, *id.* at 1020–21—“indirectly regulate[d] the use of motor vehicles by creating incentives for brokers to select safer carriers and thereby reduce the risk of trucking accidents.” *Id.* at 1030 (cleaned up).

The Ninth Circuit agreed with the plaintiff. Relying on circuit precedent, the court reasoned that “‘with respect to’ in the safety exception is synonymous with ‘relating to.’” *Id.* Citing the Supreme Court’s decision in *Dan’s City*, the court held that “the FAAAA’s safety exception exempts from preemption safety regulations that have a connection with motor vehicles, whether directly or indirectly.” *Id.* (cleaned up); *see also Dan’s City*, 569 U.S. at 260 (“The phrase ‘related to[]’ [in § 14501(c)(1)] ... embraces state laws ‘having a connection with or reference to’ carrier ‘rates, routes, or services,’ whether directly or indirectly.”). The Ninth Circuit acknowledged other Supreme Court precedent giving a narrower construction to the words “with respect to,” but it concluded that precedent was inapplicable because the safety exception was “a savings clause, not

a preemption clause.” *Miller*, 976 F.3d at 1030 n.14 (discussing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 501 (1996)).

The Ninth Circuit conceded—unnecessarily and incorrectly in our view—that negligent-selection claims against brokers do not “directly regulate[] motor vehicles.”<sup>3</sup> Yet, the court concluded such claims “promote safety on the road.” *Id.* Thus, it held, such claims, “to the extent that they arise out of motor vehicle accidents, have the requisite ‘connection with’ motor vehicles” to be saved by the safety exception.<sup>4</sup> *Id.* at 1031.

Judge Fernandez dissented. Reciting the FAAAA’s definitions, he noted that a broker is “a principal or agent [that] sells, offers for

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<sup>3</sup> In conceding this point, the Ninth Circuit failed to analyze Nevada tort law and its causation element. That law, like Florida law, precludes liability when the causal link between a defendant’s conduct and the injury is remote, attenuated, or indirect. *See, e.g., Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 101 P.3d 792, 797 & n.18 (Nev. 2004) (“[P]roximate cause ... limits a defendant’s liability to foreseeable consequences that have a *reasonably close connection* with both the defendant’s conduct and the harm which that conduct created.”) (emphasis added).

<sup>4</sup> The broker in *Miller* petitioned for a writ of certiorari, which was denied. *C.H. Robinson v. Miller*, No. 20-1425 (<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1425.html>). The United States argued to the Supreme Court that the Ninth Circuit correctly applied the safety exception. *Id.* ([http://www.supremecourt.gov/DocketPDF/20/20-1425/226161/20220524152825488\\_20-1425%20CH%20Robinson-US%20Invitation%20Br.pdf](http://www.supremecourt.gov/DocketPDF/20/20-1425/226161/20220524152825488_20-1425%20CH%20Robinson-US%20Invitation%20Br.pdf)).

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.* at 1031 (Fernandez, J., concurring in part and dissenting in part)<sup>5</sup> (alteration in original) (quoting 49 U.S.C. § 13102(2)). By contrast, “[a] motor carrier” is “a person providing motor vehicle transportation for compensation.” *Id.* (quoting 49 U.S.C. § 13102(14)).

These definitions, in the dissent’s judgment, made “clear” that the “broker ... and the services it provide[d] ha[d] no direct connection to motor vehicles or their drivers” and that “[a]ny connection [was] merely indirect,” “attenuated,” and “too remote for the safety exception to encompass” the negligent-selection claim. *Id.* Citing policy reasons and Judge Andrew’s famed dissent in *Palsgraf*,<sup>6</sup> the *Miller* dissent concluded that “there comes a point at which the [unending] series [of connections] must end as a legal matter.” *Id.* at 1032. This consideration of public policy was error. *Infra* § I.E.3, at 54.

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<sup>5</sup> Citations in this and the ensuing paragraph are to the dissent.

<sup>6</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

ii. *Aspen American Insurance Company v. Landstar Ranger, Inc.*, 65 F.4th 1261 (11th Cir. 2023)

The Eleventh Circuit in *Aspen* concluded—like Judge Fernandez’s *Miller* dissent—“that the phrase ‘with respect to motor vehicles’ limits the safety exception’s application to state laws that have a *direct* relationship to motor vehicles.” 65 F.4th at 1271. The court gave three reasons for its conclusion, one based on *Dan’s City* and two based on the surplusage canon. However, the Eleventh Circuit did not consider whether Florida’s proximate-cause standard requires a direct causal link between the broker’s negligent conduct and the motor-vehicle accident. *Cf. supra* § I.B.2, at 23–24 (in Florida, the negligence must “directly” cause the injury) (quoting Fla. Std. Jury Instr. 401.12).

First, borrowing from *Dan’s City* and a Justice Scalia dissent, the *Aspen* court noted that “the phrase ‘with respect to the transportation of property’” in § 14501(c)(1) “‘massively limits’ the scope of that [preemption] provision.” 65 F.4th at 1271 (citing *Dan’s City*, 569 U.S. at 261); *see also Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting). Just as that phrase “‘massively limits’ the *preemption provision*,” the court reasoned “the phrase ‘with respect to motor

vehicles’ ... impose[s] a meaningful limit” on the *savings clause* (i.e., the safety exception). *Aspen*, 65 F.4th at 1271 (emphasis added). The Eleventh Circuit misread this phrase and incorrectly analyzed the precedent. *Infra* § I.D.2, E.3 at 42, 49.

Second, the *Aspen* court reasoned that “if an indirect connection between a state law and a motor vehicle satisfied the safety exception,” then “the phrase ‘with respect to motor vehicles’ would have no meaningful operative effect,” and such an interpretation would be surplusage. 65 F.4th at 1271. This reasoning was misplaced. *Infra* § I.E.3., at 50–51.

Third, the *Aspen* court opined that its “direct connection” interpretation left “a separate field of operation for the other exceptions in the statute.” *Aspen*, 65 F.4th at 1271. For example, another exception “preserves ‘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.’” *Id.* at 1271–72 (quoting 49 U.S.C. § 14501(c)(2)(A)). Thus, the court reasoned, “[i]f an *indirect* connection to motor vehicles” satisfied the safety exception, “then Congress’s inclusion of a separate exception” for state laws on “highway route controls and cargo limits would almost

certainly be redundant.” *Id.* at 1272. This reasoning also was misplaced. *Infra* § I.E.3, at 52–53.

Echoing Judge Fernandez’s *Miller* dissent, the Eleventh Circuit recited the statutory definitions of “broker” and “motor carrier” and declared the safety exception inapplicable because “all that exists between [the plaintiff’s] broker-negligence claims and motor vehicles” was “an indirect connection.” *Id.* Like Judge Fernandez, the court did not discuss the elements of negligent selection requiring a plaintiff to prove that a motor carrier unsafely operated or maintained a motor vehicle and that the broker’s negligent selection directly caused the motor-vehicle accident. *Cf. supra* § I.B.2, at 22–24. (discussing Florida negligent-selection law).

The *Aspen* court did note that the complaint there said “nothing at all about motor vehicles.” 65 F.4th at 1272. By contrast, the complaint here says a lot about motor vehicles. *Supra* at 1–2. Indeed, factually, *Aspen* and this case are miles apart. In *Aspen*, the shipper’s subrogee alleged that the broker negligently hired a thief and impostor who stole the shipper’s load. 65 F.4th at 1265. The broker’s negligence in *Aspen* did not cause a motor-vehicle accident; did not render a motor vehicle unsafe to operate; did not damage any motor

vehicle; and did not injure or kill any occupant of a motor vehicle. See 65 F.4th at 1265. Here, in contrast, the Estate’s action is premised on the motor carrier’s unsafe maintenance and operation of a motor vehicle for which Coyote is responsible under state law because it had a right to control the motor carrier, or alternatively, because it negligently selected the motor carrier. *Supra* at 1–2.

In conclusion, the Eleventh Circuit held that that the plaintiff’s “negligence claims [were] not ‘with respect to motor vehicles’ under the FAAAA’s safety exception” in § 14501(c)(2)(A), and thus were saved from preemption. *Id.* at 1272.

iii. *Ye v. GlobalTranz Enterprises, Inc.*, 74 F.4th 453 (7th Cir. 2023)

Like the Eleventh Circuit, the Seventh Circuit in *Ye* decided the plaintiff’s negligent-selection claim was not “one ‘with respect to motor vehicles’ ... because, in [its] view, the [safety] exception requires a *direct link* between a state’s law and motor vehicle safety,” and the court did not “see” any “such *direct link* between negligent hiring claims against brokers and motor vehicle safety.” 74 F.4th at 460 (emphasis added). The court did not “see” such a direct link because it failed to consider the elements of such claims under

Illinois’s common law. *Cf. Brettman v. M&G Truck Brokerage, Inc.*, 127 N.E.3d 880, 892 (Ill. App. Ct. 2019) (affirming a summary judgment for a broker in a truck-accident case because of Illinois’s “rigorous proximate-cause standard” for negligent-hiring actions).

The *Ye* court conceded that *Dan’s City* had “broadly interpreted ‘with respect to’ to mean ‘concerns.’” 74 F.4th at 460 (alteration omitted) (quoting *Dan’s City*, 569 U.S. at 261). But, the *Ye* court reasoned, the “focus” was on the “entire phrase, ‘with respect to motor vehicles,’” and “the Supreme Court [had] determined” that phrase “‘massively limits the scope’ of the *safety exception*.” *Id.* (emphasis added) (quoting *Dan’s City*, 569 U.S. at 261 (quoting *Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting))). This was a misstatement. In fact, *Dan’s City* determined that a different phrase in the *preemption provision*—“with respect to the *transportation of property*”—“‘massively limits the scope of *preemption*’ ordered by the FAA.” 569 U.S. at 261 (emphasis added) (quoting *Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting)); *infra* § I.D.2, E.3, at 42, 49.

Next, the *Ye* court examined other provisions near the safety exception. 74 F.4th at 461. It found it significant that the *preemption provision* in paragraph (c)(1) expressly mentions brokers and their

services, whereas the savings clauses in paragraph (c)(2) do not. *See id.* This reasoning was faulty. *Infra* § I.D.1, E.3 at 38, 49.

After parsing the different verbal formulations in § 14501, the *Ye* court relied on this assumption: “Absent unusual circumstances, the relationship between brokers and motor vehicle safety will be indirect, at most.” 74 F.4th at 461. The court conceded that “motor vehicles have some relationship to brokers and, in turn, to considerations of motor vehicle safety.” *Id.* at 462. Yet, the court did “not see how Congress authorized such a broad reading of the safety exception.” *Id.* The court also did not find any “evidence in Title 49 that Congress [saw] a direct relationship between broker services and motor vehicles.” *Id.* at 463. Instead, it concluded, “Congress required motor carriers—not brokers—to bear responsibility for motor vehicle accidents.” *Id.* But the pertinent inquiry is the relationship between the *state law* (not brokers or federal law) and motor-vehicle safety. *Infra* § I.E.3, at 53.

After praising the Eleventh Circuit’s *Aspen* decision, the *Ye* court directed three criticisms at the Ninth Circuit’s *Miller* decision. *Id.* at 464–66.

First, the *Ye* court did “not see how Congress’s deregulatory goals can overcome the clear statutory mandate that ... § 14501(c)(2)(A) saves only those safety regulations *directly* concerning motor vehicles.” *Id.* at 465 (emphasis added). However, neither the word “directly” nor any synonym to that word appears in the statutory text. *See* 49 U.S.C. § 14501(c)(2)(A).

Second, the *Ye* court criticized the Ninth Circuit for relying on “a presumption against preemption to resolve any ambiguity in the breadth of the safety exception’s scope.” *Ye*, 74 F.4th at 465 (citing *Miller*, 976 F. 3d at 1021). But the *Miller* court applied that presumption when construing “safety regulatory authority”—not “with respect to motor vehicles.” *Miller*, 976 F. 3d at 1029. In any event, the *Miller* court is not alone in applying a presumption against preemption to the FAAAA’s safety exception. So has the Supreme Court. *See Ours Garage* 536 U.S. at 432; *infra* § I.D.1, at 38.

Third, the *Ye* court disagreed with the Ninth Circuit that “the phrase ‘with respect to’ in § 14501(c)(2)(A) is ‘synonymous’ with ‘relating to,’” 74 F.4th at 465 (quoting *Miller*, 976 F.3d at 1030)). The *Ye* court read *Dan’s City* “to say that ‘with respect to’ more narrowly means ‘concerns,’” *id.* (quoting 569 U.S. at 261). Paradoxically, the

Ye court also had “[n]o doubt ‘with respect to’ is broad,” but it “decline[d] to equate it to ‘relating to.’” *Id.* The court construed “Congress’s choice” to use different phrases—“relating to” in the preemption provision and “with respect to” in the safety exception—to “impl[y] a different scope” in the two phrases’ meanings. *Id.* The Ye court’s comparative reading of these two provisions was inconsistent with Supreme Court precedent.

#### **D. The Supreme Court’s opinions**

The Supreme Court has twice decided whether the FAAAA preempts laws governing tow trucks. A 2002 case decided § 14501(c)(2)(A)’s safety exception saved municipal tow-truck regulations from preemption. *Ours Garage*, 536f U.S. at 431–32, 442. A 2013 case decided § 14501(c)(1) did not preempt statutory and common-law actions “stemming from the storage and disposal of a car, once towing has ended.” *Dan’s City*, 569 U.S. at 255, *accord id.* at 266. Though neither case is factually on all fours with this case, the cases addressed the FAAAA provisions at issue here.

1. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002)

In *Ours Garage*, tow-truck companies argued that the safety exception saved only the laws of a *State*—not its *political subdivisions*—from preemption. 536 U.S. at 433. To support their argument, the companies “home[d] in on [§ 14501’s] repeated references” in multiple provisions “to both States and their political subdivisions,” which “contrast[ed]” with the safety exception’s “singularly bare reference” to “a State.” *Id.*; see § 14501(c)(2)(A). The companies and Justice Scalia’s dissent relied on the principle that “[w]here Congress includes particular language in one section of a statute but omits it in another section ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Id.* at 433–34, 444.

The companies’ and the dissent’s arguments were similar to the Seventh and Eleventh Circuits’ reasoning in *Ye* and *Aspen*. *Supra* at § I.C.2.ii & iii, at 30–37. The Supreme Court acknowledged the arguments had “some force.” *Id.* at 434. But it rejected them in large part because the “basic tenets of our federal system” precluded reading the statute as having “the requisite clear and manifest

indication that Congress sought to supplant local authority.” *Id.* (internal quotations omitted).

*Ours Garage* repeatedly invoked the presumption against preemption when interpreting the safety exception. *E.g., id.* at 438 (“Preemption analysis starts 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.”) (internal quotations omitted). *Our Garage’s* decision to apply the presumption to § 14501(c)(2)(A)’s safety exception remains good law. *See Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 & n.5 (3d Cir. 2018) (citing *Ours Garage* and applying the presumption in a FAAAA case, notwithstanding *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115 (2016)); *see also Joe Nagy Towing, Inc. v. Lawless*, 101 So. 3d 868, 875 (Fla. 2d DCA 2012) (applying the presumption in a FAAAA case).

*Our Garage* rejected another argument akin to *Ye’s* reasoning. Recall *Ye* found significant that the preemption provision in § 14501(c)(1) mentions brokers, whereas the savings clauses in § 14501(c)(2) do not. *See* 74 F.4th at 461. *Ours Garage*, however, rejected an argument that the “difference in verbal formulation”

between § 14501(c)(1) and § 14501(c)(2)(A) was significant. While the safety exception is more “concise” than the preemption provision, the different wording did not “imply” that the safety exception should be read “restrictively.” See 536 U.S. at 435. Indeed, the safety exception’s wording—“safety regulatory authority ... with respect to motor vehicles”—is efficient, not restrictive. It is more economical than saying: “safety regulatory authority ... with respect to the motor-vehicle ‘*service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder.*’”<sup>7</sup>

Finally, Justice Scalia’s dissent bears mentioning. In his view, the Court’s interpretation of the safety exception made the term “‘political subdivision ...,’ which appears throughout [§ 14501(c)], *utterly superfluous* throughout.” *Ours Garage*, 536 U.S. at 447 (Scalia, J. dissenting). He criticized the Court’s reliance on “federalism concerns” as “overblown” and its treatment of § 14501(c)(1) “as some extraordinary federal obstruction of state

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<sup>7</sup> The italicized language is from § 14501(c)(1).

allocation of power” as “absurd.” *See Ours Garage*, 536 U.S. at 447–49 (Scalia, J. dissenting). In support, Justice Scalia emphasized that:

[The preemption] provision preempts the authority of political subdivisions to regulate “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.*” The italicized language massively limits the scope of preemption to include only laws, regulations, and other provisions that single out for special treatment “motor carriers of property.”

*Id.* at 449 (Scalia, J. dissenting) (quoting 49 U.S.C. § 14501(c)(1)). The portion of Justice Scalia’s dissent quoted immediately above—but no other portion—was later adopted by the Court in *Dan’s City*.

2. *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013)

A tow truck company, Dan’s City, disposed of Mr. Pelkey’s car after he had notified the company that he wanted to pay any charges and reclaim the vehicle. *Dan’s City*, 569 U.S. at 258. Mr. Pelkey sued Dan’s City under state statutes and common law. *Id.* at 259. The Court granted certiorari to decide whether “§ 14501(c)(1) preempts a vehicle owner’s state-law claims against a towing company regarding the company’s post-towing disposal of the vehicle.” *Id.* Section 14501(c)(2)(A)’s safety exception and its interpretation were not before the Court.

Examining solely the preemption provision, the Court held:

Pelkey’s claims escape preemption ... because they are not “related to” the service of a motor carrier “with respect to the transportation of property.” § 14501(c)(1). Although § 14501(c)(1) otherwise tracks the ADA’s air-carrier preemption provision, ... the FAAAA formulation contains one conspicuous alteration—the addition of the words “with respect to the transportation of property.” That phrase “massively limits the scope of preemption” ordered by the FAAAA. *Ours Garage*, 536 U.S., at 449 (Scalia, J., dissenting). ... [I]t is not sufficient that a state law relates to the “price, route, or service” of a motor carrier in any capacity; the law must also *concern* a motor carrier’s “transportation of property.”

*Id.* at 261 (emphasis added) (internal footnote omitted).

The *Ye* and *Aspen* courts seized on *Dan’s City*’s “massively limits” description of a § 14501(c)(1) phrase—“with respect to transportation of property”—and engrafted that description into a § 14502(c)(2)(A) phrase—“with respect to motor vehicles.” *Supra* § I.C.2. ii & iii, at 30–37. However, as the United States correctly argued in its *Miller* Supreme Court brief:

[T]he limitation to which the [*Dan’s City*] Court referred was not in the meaning of the phrase “with respect to,” ... but in the object of that phrase, “transportation of property.” That limitation ensures that [§]14501(c)(1) preempts only state law concerning “motor carriers of property” (not passengers), ... and only regarding the “movement” of property (not its storage or handling before transportation or after delivery).

Brief for the United States as Amicus Curiae, pp. 16–17 n.4, *Miller*, 142 S.Ct. 2866 (2022).

In other words, the “massively limits” descriptor does not modify the words shared by the preemption provision and the safety exception (“with respect to”). Rather, that descriptor modifies words that are *only* in the preemption provision (“transportation of property”). The “transportation of property” phrase does most—if not all—the work to limit the preemptive scope of § 14501(c)(1). The “with respect to” phrase does little—if any—of the work.

The “with respect to” phrase merely means “the [state] law must ... *concern*” the object of the phrase. *Cf. Dan’s City*, 569 U.S. at 261 (emphasis added). If a state law *concerns* the “transportation of property” and satisfies § 14501(c)(1)’s other criteria, then it is preempted unless saved by another provision. However, if that state law is part of a State’s “safety regulatory authority” and *concerns* (i.e., is “with respect to”) “motor vehicles,” then it is saved from preemption by § 14501(c)(2)(A)’s safety exception. Florida’s common law of vicarious liability and negligent selection is saved by the safety exception, as argued next.

**E. The common law of vicarious liability and negligent selection is part of Florida’s “safety regulatory authority ... with respect to motor vehicles” and thus is saved from preemption by the safety exception.**

All three federal appellate courts correctly concur that a two-part test determines whether § 14501(c)(2)(A)’s safety exception applies. *Supra* § I.C.1, at 25–26. Both parts of the test—“safety regulatory authority” and “with respect to motor vehicles”—are satisfied here. *Ye, Aspen*, and the *Miller* dissent—representing the minority of courts—relied on faulty reasoning in concluding that the second part of the test (“with respect to motor vehicles”) was not satisfied.

1. Both common-law actions are part of Florida’s “safety regulatory authority.”

The Ninth and the Eleventh Circuits agreed that a common-law action for negligent selection against a broker is part of a State’s “safety regulatory authority.” *Supra* § I.C.1, at 25–26. The Seventh Circuit agreed there was “much to say” in support of such a holding. *Ye*, 74 F.4th at 460. While the three courts did not address the issue with respect to a vicarious-liability action, the analysis and holding would not be any different. If anything, the argument is stronger for a vicarious-liability action; the only negligence litigated in that action

is the *motor carrier's negligence* in maintaining and operating the motor vehicle. *Supra* § I.B.1, at 19–22.

The Supreme Court has repeatedly recognized in preemption cases that a State's common law of torts is a part of its regulatory authority. “[S]tate common-law duties and standards of care” are a form of “state regulation” that “is designed to be[] a potent method of governing conduct and controlling policy.” *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (citation and internal quotations omitted); *see, e.g., Wyeth v. Levine*, 555 U.S. 555, 578 (2009) (state law underlying “common-law tort suits” has long been regarded “as a complementary form of ... regulation”). The common-law rules reflected in such “state regulation” authorizing “an award of damages” for “harm” caused by a breach of a state-law duty of care are not materially different for preemption purposes from rules that a State could impose through positive enactments in, for instance, its codification of “general tort provisions.” *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239, 246–47 (1959).

The Court has rejected the argument that a common-law action is “not regulatory” by explaining that “common-law causes of action for negligence ... impose affirmative duties” designed to regulate

conduct. *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480, 482 n.1 (2013) (citation omitted). “State tort laws, after all, plainly intend to regulate public safety.” *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1905 (2019) (plurality opinion).

In sum, both common-law actions are part of Florida’s “safety regulatory authority.”

2. Both common-law actions are “with respect to motor vehicles.”

Are the common-law, safety-regulatory actions in this case “with respect to motor vehicles”? In other words, do the actions “concern” motor vehicles? *Cf. supra* § I.D.2, at 42–43 (discussing *Dan’s City*, 569 U.S. at 261). Of course they do.

As the preceding sections of this brief illustrate, these common-law actions concern the motor carrier’s negligent maintenance and operation of a motor vehicle (i.e., a tractor-trailer). If the Estate fails to establish that the motor carrier negligently maintained or operated the tractor-trailer, then both actions against the broker (Coyote) fail. *Supra* § I.B.1–2, at 19–25. If the causal link between the broker’s or motor carrier’s negligence and the motor-vehicle accident is merely indirect or remote—and not direct—then Florida causation law

forecloses both actions. *Id.* Simply put, these actions concern—and thus are “with respect to”—motor vehicles.

To hold that these two actions are not “with respect to motor vehicles” defies reality. To establish its causes of action, the Estate will present evidence:

- about motor-carrier safety regulations, ratings, and standards;
- how Coyote relied on, or ignored, these regulations, ratings, and standards when selecting the motor carrier (Anephna);
- that Coyote knew a customer had recently rejected an Anephna trailer because it was deemed unsafe;
- how the negligent maintenance of the trailer caused the motor-vehicle accident;
- about the lack of adequate maintenance and inspection programs for the tractor-trailer;
- about the trailer’s condition (missing or inoperable taillights, brake lights, and marker lights and ineffective conspicuity tape);
- how the slow speed of the tractor-trailer was a hazard to other motor vehicles;

- that Coyote directed Anephna on what equipment it could use in transporting the load; and
- that Coyote directed Anephna that its vehicles, trailer, and equipment had to satisfy certain conditions and weight specifications.

*Supra* at 3–8.

The evidence and legal issues described above are typical of common-law actions alleging a transportation broker is liable for a motor-vehicle accident. How then could the *Ye* and *Aspen* courts, and the *Miller* dissent, plausibly conclude that such actions are not “with respect to motor vehicles”? These courts committed multiple analytical errors, as argued next.

### 3. The minority’s reasoning is flawed.

The minority’s reasoning—represented by *Ye*, *Aspen*, and the *Miller* dissent—suffers from several analytical errors. A foundational error is the assumption that a negligent-selection action against a broker only has an *indirect* connection to motor vehicles. *Supra* I.C.2, at 29, 31, 35. Under Florida common law, a negligent-selection action exists only when the broker’s negligence is *directly* connected to the motor-vehicle accident. *Supra* § I.B.2, at 23–24. Likewise, in a

vicarious-liability action, a broker is responsible for the *motor carrier's negligent operation and maintenance of a motor vehicle*. *Supra* § I.B.1, at 20. Thus, even under the minority's "direct connection" interpretation, the safety exception saves the Estate's actions from preemption.

The minority also misreads *Dan's City* insofar as that decision adopted Justice Scalia's colorful "massively limits" language. *Supra* § I.D.1-2, at 41-43. *Ye*, for example, erroneously concluded that *Dan's City* had "determined" that the "phrase 'with respect to motor vehicles'" "massively limits the scope" of *the safety exception*." 74 F.4th at 460 (emphasis added). *Dan's City* did not "determine" anything about the safety exception or the phrase "with respect to motor vehicles." It construed a different provision (§ 14501(c)(1)) and a different phrase ("with respect to transportation of property") under different circumstances. The words "transportation of property"—not "with respect to"—did most, if not all, the work of precluding preemption of laws that regulated carriers when they were not transporting property. *See* § I.D.2, at 42.

Just as "with respect to transportation of property" works to limit the preemptive scope of § 14501(c)(1), so too does the safety

exception and its phrases. The phrases primarily doing that work are “the safety regulatory authority of a State” and “motor vehicles”—not the connecting phrase (“with respect to”). *Aspen* claimed, however, the “the phrase ‘with respect to motor vehicles’ would have no meaningful operative effect,” unless it required a direct connection between the state law and motor vehicles. 65 F.4th at 1271. This and other claims by the minority are grounded in the surplusage canon. *Supra* § I.C.2.ii&iii, at 30, 34. Statutory history shows these claims are misplaced. See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012) (statutory history may be considered as “part of the context of the statute”).

In the same FAAAA section that enacted the motor-carrier preemption provision and safety exception at issue here, Congress also enacted the *air-carrier* preemption provision and safety exception. See FAAAA, Pub. L. No. 103-305, § 601(b)(1), (c), 108 Stat. 1569, 1605, 1606 (1994). The air-carrier preemption provision preempts state laws “related to a price, route, or service” of “an air carrier or *a carrier affiliated with a direct air carrier*” when such a carrier is “transporting property by aircraft *or by motor vehicle.*” *Id.* (emphasis added) (codified as amended at 49 U.S.C. § 41713(b)(4)(A)).

The italicized “affiliated” carrier could be a motor carrier. *See* 49 U.S.C. § 13102(3). Thus, the air-carrier preemption provision preempts state laws related to the transportation of property by *both* aircraft *and* motor vehicles. *See* 49 U.S.C. § 41713(b)(4)(A).

The air-carrier safety exception, however, saves from preemption a State’s “safety regulatory authority” only “*with respect to motor vehicles*”—not aircraft. *Id.* § 41713(b)(4)(B)(i) (emphasis added). Unquestionably, the italicized phrase has a meaningful operative effect; it clarifies that Congress saved from preemption only state safety laws “with respect to motor vehicles,” and not those that concern aircraft. The phrase has meaning—and is not surplusage—regardless of whether one accepts or rejects the minority’s “direct connection” interpretation of that phrase.

For the motor-carrier safety exception at issue here, Congress used the same words it used in the air-carrier exception—“safety regulatory authority of a State with respect to motor vehicles.” *Compare* 49 U.S.C. § 14501(c)(2)(A), *with* 49 U.S.C. § 41713(b)(4)(B)(i). This statutory history thus counsels against applying the surplusage canon, which “must be applied with

judgment and discretion, and with careful regard to context.” Scalia and Garner, *supra*, at 176.

The context is that Congress enacted in the same section of the same act two slightly different preemption provisions and two identically worded safety exceptions. In one of those exceptions, the purpose of the “with respect to motor vehicles” phrase was to clarify that the only state safety laws saved from preemption were those regulating motor vehicles—not those regulating aircraft. Given this, a court need not invoke the surplusage canon to give meaning to the phrase. “[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.” Scalia and Garner, *supra*, at 170 (cleaned up). Thus, the minority’s reliance on the surplusage canon is misplaced.

Equally misplaced is the minority’s concern that the safety exception may be redundant of the other savings clauses in § 14501(c)(2). Drafters “[s]ometimes” are redundant because they take the “common belt-and-suspenders approach.” Scalia and Garner, *supra*, at 176–77. Moreover, the minority’s construction of the safety exception does not eliminate the redundancy problem. The saved safety laws on highway route controls and cargo limits (also in

§ 14501(c)(2)(A) directly relate to motor vehicles and thus are redundant of the safety exception—even under the minority’s direct-connection interpretation.

The minority also erroneously focused on the relationship between, on the one hand, brokers and federal law, and on the other, motor vehicles. *Supra* § I.C.2.iii, at 35. But under the safety exception’s plain text, the court should have examined the relationship between the state common law and motor-vehicle safety—not between brokers/federal law and motor vehicles. *See* 49 U.S.C. § 14501(c)(2)(A) (“safety regulatory authority of a State with respect to motor vehicles”).

The minority, moreover, incorrectly emphasized the safety exception’s failure to expressly mention brokers. *Supra* § I.C.2.iii, at 34–35. The exception also does not mention motor carriers, freight forwarders, or other persons listed in § 14501(c)(1). Thus, under the minority’s reasoning, the exception would not save state safety laws regulating motor carriers or freight forwarders. This cannot be right. Using the term “motor vehicle” is more concise than re-listing all the categories of persons mentioned in § 14501(c)(1) whose conduct

impacts the safety of motor vehicles and who historically have been regulated by motor-vehicle safety laws. *Supra* § I.D.1, at 40.

Finally, the minority embedded their own policy preferences in the phrase “with respect to.” *See, e.g., Miller*, 976 F. 3d at 1031–32 (Fernandez, J., concurring in part and dissenting in part). Granted, at common law, “[d]etermination[s] ... of proximate cause by courts” were “policy decisions that the range of danger [was] too remote to be reasonably foreseeable and thus [the courts] refuse[d] to extend liability for bizarre or remote injuries.” *Barati v. Aero Indus., Inc.*, 579 So. 2d 176, 178 (Fla. 5th DCA 1991). But textualism is supposed to prevent judges from “extending their lawmaking proclivities from the common law to the statutory field.” *Cf. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law* 17–18 (1997). The three words—“with respect to”—do not evince a congressional choice to preempt safety laws concerning motor vehicles that lack some undefined, unknowable “direct connection” to motor vehicles.

**F. Even if this Court adopts the minority’s reasoning, it should reverse the summary judgment on the vicarious-liability action.**

Vicarious-liability claims were not considered in *Miller*, *Aspen*, or *Ye*. The *Ye* district court concluded that the FAAAA preempted the

negligent-hiring claim against the broker, but not the vicarious-liability claim against the broker. *See Ye*, 2020 WL 1042047, at \*4 (“Unlike plaintiff’s negligent hiring claim, which seeks to hold [the broker] liable for its own actions, her vicarious liability claim seeks to hold [the broker] liable for the actions of [the driver] and [the motor carrier].”) The Seventh Circuit did not review the district court’s ruling on the vicarious-liability claim. *Ye*, 74 F.4th at 456–57.

After the Seventh Circuit decided *Ye*, another federal district court adopted the Seventh Circuit’s reasoning in dismissing a negligent-selection claim against a broker, but nonetheless the court agreed that reasoning did not warrant a dismissal of the vicarious-liability claim against the broker. *See Girardeau*, 2023 WL 5348770, at \*2 (concluding the vicarious-liability claim against the broker “may not be preempted given Plaintiffs’ allegations that [the broker] performed actions beyond those typical of a mere broker”).

This case is analogous to *Ye* and *Girardeau*. Accordingly, even if this Court adopts the minority’s reasoning, it should reverse the summary judgment on the vicarious-liability action.

**II. Alternatively, § 14501(c)(1)'s preemption provision does not preempt the negligent-selection and vicarious-liability actions.**

As an alternative to § 14501(c)(2)(A)'s safety exception, the Court should hold that the Estate's common-law actions are not preempted under § 14501(c)(1)'s preemption provision. That provision preempts only state laws "related to a price, route, or service of any motor carrier ... [or] broker ... with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). This language "tracks the [text of the] ADA's air-carrier preemption provision." *Dan's City*, 569 U.S. at 261. This Court has construed the "related to" language of section 14501(c)(1) as contemplating laws with a "significant impact ... on ... rates, routes, or services." *Joe Nagy*, 101 So. 3d at 875 (quoting *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 375 (2008)). Florida's common law of negligence does not meet this definition.

In *Rowe*, the Supreme Court held that the ADA preempted state statutes regulating intrastate tobacco delivery because the statutes "produce[d] the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining ... the

services that motor carriers will provide.” 552 U.S. at 372. The Court emphasized that the statutes “aim[ed] directly at the carriage of goods, a commercial field where carriage by commercial motor vehicles plays a major role,” and they did not “affect truckers solely in their capacity as members of the general public.” *Id.* at 375–76.

Unlike the statutes in *Rowe*, Florida’s common law of negligence does not interfere with Congress’s objectives. The FAAAA’s enacted findings expressed congressional concern that “the regulation of intrastate transportation of property by the States has ... imposed an *unreasonable* burden on interstate commerce; ... impeded the free flow of trade, traffic, and transportation of interstate commerce; and ... placed an *unreasonable* cost on the American consumers.” FAAAA, Pub. L. No. 103-305, § 601(a)(1), 108 Stat. 1569, 1605 (1994) (emphasis added). What burden does Florida’s common law of negligence impose? The exercise of “*reasonable* care under the circumstances,” and nothing more. *Stroud by Schuette v. Strawn*, 675 So. 2d 646, 647 (Fla. 2d DCA 1996) (emphasis added). It does not “require [brokers or carriers] to offer a system of services that the market does not now provide (and which the [brokers or carriers] would prefer not to offer),” nor does it “freeze into place services that

[brokers or carriers] might prefer to discontinue in the future.” *Cf. Rowe*, 552 U.S. at 372. Rather, it regulates carriers and brokers to the same extent it regulates the general public.

In sum, the negligent-hiring and vicarious-liability actions are not preempted under § 14501(c)(1)’s preemption provision. If the Court agrees, then it need not address § 14501(c)(2)(A)’s safety exception argued *supra*.

### **III. Coyote’s anticipated tipsy-coachman arguments fail.**

“Under the tipsy coachman doctrine, an order will be affirmed if the trial court reaches the correct result, even if it employed the wrong reasoning.” *Century-Nat’l Ins. Co. v. Frantz*, 369 So. 3d 739, 745 (Fla. 2d DCA 2023). The Court, however, should not invoke that doctrine for the following reasons.

#### **A. This Court should decline to address Coyote’s arguments on the factual merits because the trial court did not address them, and in any event, genuine issues of material fact exist.**

In granting summary judgment, the trial court declined to reach the “factual merits” of the Estate’s actions. R.3525. Accordingly, this Court should not consider in the first instance the factual merits of the actions. *See, e.g., Frantz*, 369 So. 3d at 746 (“Although the

Insured raised these arguments below, the trial court did not reach them.... We decline to reach these arguments, as the trial court should address these issues in the first instance.”) (cleaned up); *Wells v. Wells*, 239 So. 3d 179, 183 (Fla. 2d DCA 2018) (“We leave it to the trial court to decide this issue on remand because to do otherwise would require us to rule on the [issue] in the first instance, which is contrary to our function as a reviewing court.”).

If this Court does consider the factual merits, it should reverse the summary judgment because genuine disputes of material fact exist. A court “must review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence.” *Cole v. Plantation Palms Homeowners Ass’n, Inc.*, 371 So. 3d 413, 417 (Fla. 2d DCA 2023). “Summary judgment should only be entered if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” *Lassiter v. Citizens Prop. Ins. Co.*, No. 2D2022-2609, 2024 WL 2744676 at \*4 (Fla. 2d DCA May 29, 2024). This “remains the general rule even under the new summary judgment standard.” *Id.*

Sections B and C, respectively, address the factual merits of the vicarious-liability and negligent-selections actions—which the trial court did not address. Section D argues that the trial court correctly decided a genuine issue of material fact exists as to whether Coyote’s broker services were intrastate or interstate.

**B. A genuine dispute of material fact exists as to Coyote’s vicarious liability for the motor carrier’s negligence.**

Sufficient evidence exists for the Estate to establish vicarious liability under an agency relationship. *Supra* § I.B.1, at 20–22 (listing the elements to show agency and describing the supporting evidence).

Coyote’s *right* to control—not actual control of—Anephna is determinative. *See Villazon v. Prudential Health Care Plan*, 843 So. 2d 842, 853 (Fla. 2003). The broker-carrier agreement governs the relationship between Coyote and Anephna. *See* R.2965–3002. The introductory clause provides: “[Coyote] hereby agrees to cause freight to be tendered to [Anephna], and [Anephna] ... hereby agrees to pick up, transport, deliver, and provide all such services as [Coyote] shall request on all freight tendered by [Coyote]....” R.2966. Coyote’s agreement with the motor carrier imposed myriad requirements

pertaining to the transportation of the load. These included requirements to use specific equipment, equipment maintenance standards, trailer weight and temperature requirements, sanitation standards, and many others. See R.3009-15; App. 5-11.

Any disclaimers in the agreement do not negate the agency relationship. See, e.g., *Villazon*, 843 So. 2d at 854 (holding that “contractual independent contractor status does not alone preclude a finding of agency”); *Cantor v. Cochran*, 184 So. 2d 173, 174 (Fla. 1966) (whether one party is an independent contractor “depends not on the statements of the parties but upon all the circumstances of their dealings with each other”).

This case is similar to *Parker v. Domino’s Pizza, Inc.*, 629 So. 2d 1026, 1027 (Fla. 4th DCA 1993). Relying on a franchise agreement and an operations manual, the Fourth District found a genuine dispute of material fact existed as to whether Domino’s’ franchisee was also its agent. *Id.* at 1028-29. Analogous to the broker-carrier agreement in this case, the franchise agreement and operations manual had detailed requirements for food and beverage preparation, cleanliness, quality control, and food delivery. *Id.*

In sum, if the Court considers the merits of the vicarious-liability action, it should reverse the summary judgment because a genuine dispute of material fact exists as to whether Coyote had a right to control the motor carrier's transportation of the load.

**C. A genuine dispute of material fact exists as to whether Coyote negligently selected the motor carrier.**

Sufficient evidence exists to support each element of the negligent-selection action. *Supra* § I.B.2, at 22–23 (listing the elements to show a negligent-selection action and describing the supporting evidence).

The motor carrier's FMCSA "snapshot" revealed a history of safety regulatory violations. R.2901. The snapshot reflected that Anephna's vehicles and drivers were "out of service" at rates greatly exceeding national averages. R.2901. *See id.*

Based on this evidence, a reasonable jury could find that Anephna was not a competent carrier. *E.g., Ortiz v. Ben Strong Trucking, Inc.*, 624 F.Supp.3d 567, 585–86 (D. Md. 2022) (the fact that a carrier's driver and vehicle out-of-service rates exceeded the national averages was sufficient evidence of incompetence); *Scott v. Milosevic*, 372 F.Supp.3d 758, 768 (N.D. Iowa 2019) (safety violations

in four out of seven FMCSA inspections was sufficient evidence of a carrier's incompetence); *Ruiz v. Minh Trucking, LLC*, No. 5:19-CV-1191-DAE, 2020 WL 8361992 at \*1, \*5 (W.D. Tex. Dec. 3, 2020) (driver out-of-service rate "almost five times the national average" was evidence of incompetence).

Mr. Jordan, Coyote's corporate representative, acknowledged that Coyote was aware a customer had rejected an Anephna trailer as "unsafe" just days before the crash. R.1786:8-1787:11, 1853:11-16. Based on this fact and the FMCSA public information, Coyote should have known of Anephna's unfitness. Coyote did not argue below that it had no duty to vet Anephna; rather, it argued that it satisfied this duty. *See* SR.3600. The Estate put forth contrary evidence, including Mr. Jordan's testimony that Coyote's vetting process is limited to a safety rating check. R.1757:4-8. Given this conflicting evidence, a jury should decide whether Coyote breached its duty of care by selecting Anephna.

Proof of proximate causation in a negligent-selection action requires evidence that the plaintiff's injury was the foreseeable result of the incompetence about which the employer either knew or should have known. *Davies*, 46 So. 3d at 74. Coyote's corporate

representative agreed that two factors contributed to the crash: (1) trailer maintenance issues, and (2) the slow speed of the tractor-trailer. R.1789:1–10. Two of the Estate’s experts opined that these same two factors rendered the crash “unavoidable.” R.2757–58, 2792–93. The Estate’s other three experts all agreed the trailer’s maintenance condition was poor. R.2766–68, 2801–03, 2817–18.

The FMCSA’s inspections of Anephna identified vehicle-related and driver deficiencies. R.2901. These deficiencies mirror the two factors identified by the Estate’s experts and Coyote’s corporate representative (Mr. Jordan) as having contributed to the crash. Mr. Jordan also acknowledged that just a few days before the crash, a customer refused an Anephna trailer because it was unsafe. R.1786:8–1787:11, 1853:11–16.

This case is analogous to *Ortiz*. There, the hired carrier’s vehicle out-of-service rating was 40%—exceeding the national average of 20.72%. 624 F.Supp.3d at 585. Here, Anephna’s rate was even higher: 66.7%. R.2901. In *Ortiz*, the truck had a faulty governor and was traveling at a dangerous speed. *Id.* at 585–86. The court concluded that, given the carrier’s history, “a reasonable jury still could find that [the broker] negligently selected a carrier with higher-

than-average vehicle malfunction rates tied to speed where the collision was caused in part by a truck with a malfunctioning speed governor traveling at an excessive speed.” *Id.* at 586. Likewise, here, a reasonable jury could find that Coyote negligently selected a carrier with higher-than-average driver and vehicle out-of-service rates, given the evidence that the crash was caused by a slow-moving tractor-trailer with inadequate safety features.

This case is distinguishable from *Davies*, the primary case on which Coyote relied below. SR.3601-02. In *Davies*, the plaintiff alleged the shipper negligently hired a motor carrier with a history of violating federal hours-of-service regulations. 46 So. 3d at 72. The Fifth District affirmed summary judgment for the shipper because “nothing in the record” supported the plaintiff’s theory of causation, and it was undisputed that the driver had complied with the hours-of-service regulations on the day before the accident. *Id.* at 74. Here, however, evidence exists that the very deficiencies of Anephna that Coyote knew or should have known about were substantial factors in causing the crash. *Supra* at 63-64.

In sum, if the Court considers in the merits of the negligent-selection action, the Court should reverse the summary judgment

because a genuine dispute of material fact exists as to whether Coyote negligently selected Anephna and whether that negligence caused Mr. Simon's death.

**D. A genuine issue of material fact exists as to whether Coyote's broker services were interstate or intrastate.**

Section 14501 has two express preemption provisions: the intrastate provision in paragraph (b)(1) and the any-commerce provision in paragraph (c)(1). *Supra*, at 8–9. The trial court decided to apply the any-commerce provision because a genuine issue of material fact exists as to whether Coyote's broker services were interstate or intrastate. R.3526 ¶4A. The trial court was correct given Coyote's admission that it is a foreign company headquartered in Illinois, R.1067 ¶8, combined with the fact that the transportation of the load occurred in Florida, R.1186:11–13. *See Loyd v. Salazar*, 416 F.Supp.3d 1290, 1294–95 (W.D. Okla. 2019) (intrastate provision inapplicable because broker and carrier were in different states).

**CONCLUSION**

This Court should reverse the summary judgment and remand for further proceedings. Alternatively, this Court should reverse the summary judgment on Count 8, the action for vicarious liability.

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I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 12,806 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

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