Federal Preemption in Motor Carrier Selection Cases Against Brokers and Shippers

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I. INTRODUCTION

In the past several years jury awards in personal injury cases have exceeded motor carriers' financial responsibility minimum limits, causing plaintiffs to look to other parties as sources to fund large personal injury

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awards. Brokers have become a common target. Because brokers merely facilitate the transfer of goods from a shipper to a motor carrier—and do not actually transport the goods themselves—plaintiffs must develop theories of liability to support recoveries from brokers. One of the most common allegations made against brokers is that they have acted negligently in assigning the goods to an unqualified or unsafe carrier for transport (typically asserted as negligent hiring/retention and negligent entrustment claims).[1] The question then becomes whether the carrier selected by the broker was qualified or safe, and how the broker makes that determination.[2] One answer is provided by the federal regulations that provide for the qualification and fitness of motor carriers.[3] Other, often differing answers, are provided by state laws, primarily through the mechanism of common law tort awards.

This article examines the relationship between the federal statutes, regulations, and policies governing interstate transportation and state tort law and concludes that because of the comprehensive regulation of motor carrier safety and fitness by the federal government, state laws—including the common law of torts—imposing differing obligations on brokers' selection of motor carriers are preempted.

II. PRINCIPLES OF PREEMPTION

Article VI, section 2 of the Constitution contains the Supremacy Clause, which provides that the Constitution and "Laws of the United States" are "the supreme Law of the Land . . . [, the] Laws of any State to the Contrary notwithstanding."[4] In applying the Supremacy Clause, the Supreme Court has recognized two types of preemption:

Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit preemptive language, we have recognized at least two types of implied preemption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[5]

1. *See, e.g.*, Jones v. C.H. Robinson Worldwide, Inc., 558 F. Supp. 2d 630, 634 (W.D. Va. 2008); Schramm v. Foster, 341 F. Supp. 2d 536, 540 (D. Md. 2004).

2. *See, e.g.*, Jones, 558 F. Supp. 2d at 642-43.

3. *See* 49 C.F.R. §§ 385.5, 387, 390-393, 395-397 (2012).

4. U.S. CONST. art. VI, § 2.

5. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (citations omitted) (internal quotation marks omitted).

The Supreme Court has also held that state common law, specifically tort actions, may qualify as a state law subject to preemption under the Supremacy Clause, absent a demonstration of a contrary intent by Congress.[6] In analyzing preemption claims, the Court has recognized two governing principles: (1) Congress' intent is the "ultimate touchstone in every preemption case;"[7] and (2) the courts must start with the presumption that the states' plenary police powers are not to be preempted by federal legislation "unless that was the clear and manifest purpose of Congress."[8]

A. Express Preemption—the FAAAA

In 1980, Congress deregulated interstate trucking so that the rates and services offered by trucking companies and related entities would be set by the market rather than by government regulation.[9] Later, in 1994, to bolster deregulation, Congress included a provision within the Federal Aviation Administration Authorization Act ("FAAAA"),[10] which expressly provides that state regulation of the trucking industry is preempted:

[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (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 with respect to the transportation of property.[11]

The first question in analyzing whether state tort claims against a broker for negligent hiring/retention and negligent entrustment are preempted is determining whether § 14501(c)(1) expressly preempts these claims.

In interpreting § 14501(c)(1), the Supreme Court has determined:

(1) that [s]tate enforcement actions having a connection with, or reference to carrier rates, routes, or services are preempted; (2) that such pre-emption may occur even if a state law's effect on rates, routes, or services is only indirect; (3) that, in respect to pre-emption, it makes no

6. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521-24 (1992).

7. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted) (citing Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

8. *Id.* (quoting *Lohr*, 518 U.S. at 485) (internal quotation marks omitted).

9. *See* Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (codified as amended in scattered sections of 49 U.S.C.).

10. Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-105, 108 Stat. 1569 (codified as amended in scattered sections of 49 U.S.C.).

11. 49 U.S.C. § 14501(c)(1) (2006).

difference whether a state law is consistent or inconsistent with federal regulation; and (4) that pre-emption occurs at least where state laws have a significant impact related to Congress' deregulatory and pre-emption-related objectives.[12]

Therefore, under *Rowe*, FAAAA preemption is broad in scope, and "may occur even if a state law's effect on rates, routes, or services 'is only indirect.'"[13] Although the outer limits of FAAAA preemption have not been articulated, the Court has recognized that some state laws, such as those that affect trucking in only a "'tenuous, remote, or peripheral . . . manner,' such as [those] forbidding gambling," might not be preempted.[14] Following *Rowe*, the courts continue to broadly apply FAAAA preemption against state laws that fall within the preemption clause's reach.[15] Importantly, the FAAAA preempts not only state statutes and administrative regulations governing the trucking industry, but also state law private causes of action that come within its terms.[16]

In determining which state causes of action are preempted by the FAAAA, the lower courts have applied the Supreme Court's guidance by crafting at least two distinct approaches. Each approach focuses on the *type of activity* on the part of the airline/motor carrier/broker that forms the basis for the causes of action raised in the plaintiff's complaint. One approach draws a distinction between activity that is related to "services" furnished by an airline and conduct connected with "operation and maintenance" of the aircraft.[17] Under this view, certain causes of action aris-

12. Rowe v. N. H. Motor Transp. Ass'n, 552 U.S. 364, 370-71 (2008) (alteration in original) (citations omitted) (emphasis omitted) (internal quotation marks omitted) (quoting and citing Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)). In relying on its prior decision in *Morales*, the *Rowe* Court noted that because the FAAAA's preemption provision is identical to a separate preemption provision applicable to deregulated airlines, it is appropriate to look to decisions interpreting the airline preemption provision for guidance. *See id.* at 367-70. Accordingly, this article cites case law on the airline preemption provision interchangeably with case law on the FAAAA preemption provision.

13. *Id.* at 370 (quoting *Morales*, 504 U.S. at 386).

14. *Id.* at 371 (quoting *Morales*, 504 U.S. at 390) (alteration in original).

15. *See infra* notes 40-47 and accompanying text.

16. *See, e.g.*, Smith v. Comair, Inc., 134 F.3d 254, 259 (4th Cir. 1998) (holding that Airline Deregulation Aact preempts intentional tort claim based on boarding procedures); Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc., 972 F. Supp. 665, 672 (N.D. Ga. 1997) (holding that FAAAA preempts tort claim related to shipping pricing).

17. *See generally* Hodges v. Delta Airlines, Inc., 44 F.3d 334, 339 (5th Cir. 1995) (en banc) The *Hodges* Court noted that "no strict dichotomy exists" between "services and operation and maintenance of aircraft." *Id.* "Generally . . . state tort laws concerning the *operation and maintenance* of aircraft can be enforced consistently with and distinctly from the *services* that Congress deregulated.") (emphasis added). *Id.* However, the *Hodges* Court also noted that "Congress explicitly preserved airlines' duty to respond to tort actions, inferentially state law actions, for physical injury or property damage." *Id.* "[F]ederal preemption of state laws, even certain common law actions 'related to services' of an air carrier, does not displace state tort actions for

ing from the operation and maintenance of an aircraft are not preempted, while causes of action related to airlines' services are preempted.[18] A second approach rejects the operations/services distinction and focuses on Congress' intent to achieve deregulation of the airline and trucking industries.[19] The courts adopting this approach conclude that Congress used "services" in reference to the "prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail."[20] Thus, under this approach, "service" refers to things such as "'the frequency and scheduling of transportation,' and 'the selection of markets' for that activity, in short, in a 'public utility sense.'"[21]

In *Rowe*, the seminal case on FAAAA preemption in the trucking context, the Supreme Court adopted the latter approach. There, the Court examined a Maine statute which forbade licensed tobacco retailers to employ a delivery service unless that service followed particular delivery procedures designed to control the distribution of tobacco products in the interest of public health and safety.[22] The Maine statute required motor carriers to offer a system of services for the delivery of tobacco that verified the licensing of the retailer and provided for certain labeling on the shipments of tobacco.[23] The Court found that these requirements had a "significant and adverse impact" on Congress' goals in enacting the FAAAA preemption provision.[24] This was so because the Maine statute required motor carriers to utilize certain procedures and to offer a "system of services that . . . [they] would prefer not to offer," and which, in a free and deregulated market, they might not offer.[25] "The Maine law thereby produces 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 (to a significant degree) the services that motor carriers will provide."[26] In other words, "the effect of the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the

personal physical injuries or property damage caused by the operation and maintenance of aircraft." *Id.* at 336.

18. *See id.* at 336.

19. Charas v. Trans World Airlines, 160 F.3d 1259, 1263-66 (9th Cir. 1998) (en banc) (amended on *denial of reh'g*, 169 F.3d 594 (9th Cir. 1999)).

20. *Id.* at 1261.

21. Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 193 (3d Cir. 1998) (quoting *Charas*, 160 F.3d at 1265-66).

22. Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 367-69 (2008).

23. *Id.* at 368-69 (citing Me. Rev. Stat. tit. 22, § 1555(C)-(D) (2003), *invalidated by Rowe*, 552 U.S. at 367).

24. *Id.* at 371-72 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992) (internal quotation marks omitted)).

25. *Id.*

26. *Id.* at 372 (quoting *Morales*, 504 U.S. at 378).

regulation, the market might dictate."[27] It "thereby . . . regulates a significant aspect of the motor carrier's package pickup and delivery service."[28] Because, under FAAAA, the states cannot re-regulate what Congress has chosen to de-regulate, the Court found the Maine statute to be preempted by the FAAAA.[29]

Like the Maine law at issue in *Rowe*, claims against brokers for negligent hiring and negligent entrustment seek to dictate the manner in which the broker provides services (*i.e.* the selection of a carrier) thereby displacing the market-driven means chosen by brokers. When analyzing whether these claims are preempted as impacting, either directly or indirectly, a broker's services, courts must look beyond the bare labeling of the causes of action alleged to "the facts underlying the specific claim."[30] Although that can be difficult to do in the absence of a specific factual context, negligent hiring/retention and negligent entrustment claims usually assert common facts.

Typically, plaintiffs contend that the broker was negligent in its method of selecting the motor carriers to whom it brokers goods because it has selected a carrier who it knew or should have known was, for some given reason (e.g., the hiring of an unqualified driver, the failure to maintain a driver qualification file, the failure to maintain adequate safety policies) unsafe and dangerous to the public. Of course, plaintiffs' contentions that brokers should require that the motor carriers they hire comply with certain safety practices, or that brokers should require certain safety practices in excess of those required by federal safety standards, seek to force brokers to alter the manner in which they select carriers by imposing state-law requirements that are not found in federal law, thereby impacting the brokers' services.

Brokers structure their hiring practices so as to use the advantages of the deregulated interstate trucking and brokerage market for the benefit of themselves, their customers, and the American consumer. As the Supreme Court has noted, this was Congress' intent when deregulating the trucking industry.[31] In *Rowe*, the Court held that state regulations—including *non-economic regulations*[32]—which regulate a company's activities impermissibly substitute "governmental commands for 'competitive market forces' in determining . . . the services that motor carriers will

27. *Id.*

28. *Id.* at 373.

29. *See id.* at 368, 377.

30. Smith v. Comair, Inc., 134 F.3d 254, 259 (4th Cir. 1998).

31. *See, e.g., Rowe*, 552 U.S. at 367-68 (citations omitted).

32. *See id.* at 374 (rejecting Maine's argument that Congress intended to only preempt economic regulations).

provide."[33]

State tort claims for negligent hiring and entrustment impose a similar restraint by forcing brokers to alter their services by engaging in a time-consuming process of verifying the safety status—beyond that determined by the Secretary of Transportation—of each motor carrier they hire. Were brokers to take steps to avoid state regulation through the medium of tort liability, numerous inefficiencies—most importantly a patchwork of competing and unknowable requirements for the selection of a motor carrier[34]—would result and *de facto* regulation of interstate brokerage of goods would arise. As a result, the efficiencies—to be realized through market forces—which Congress sought to achieve would be hindered or blocked by state regulation.[35] The Supreme Court has made clear that Congress foresaw this and enacted the FAAAA's preemption provisions to prevent it.[36]

The courts have begun to recognize the preemptive effects of the FAAAA on state law claims against brokers, beginning in the context of cargo claims. In a recent decision in *Huntington Operating Corp. v. Sybonney Express, Inc.*, the United States District Court for the Southern District of Texas granted summary judgment in favor of a broker sued for damage to cargo on a theory of negligent selection of a motor carrier it hired to transport a shipment of goods.[37] There, the allegation was that the broker failed to ensure the motor carrier had adequate insurance coverage and "failed to disclose information regarding" the motor carrier's licensing history when hiring the motor carrier.[38] Thus, the allegation was that the broker had negligently selected an independent contractor.[39] In granting summary judgment in favor of the broker on preemption grounds, the court noted that the FAAAA "broadly" preempts state law claims, including those for negligent selection of an independent contractor.[40] Another court applied the same reasoning in *Chatelaine, Inc. v. Twin Modal, Inc.* and dismissed claims against a broker for negligence, deceptive trade practices, and negligent hiring.[41] The *Chatelaine* court

33. *Id.* at 372 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992)).

34. See *id.* at 373.

35. *See id.*

36. *Id.* at 368 (noting that, similarly to when Congress enacted the Airline Deregulation Act to "ensure that the States would not undo federal deregulation with regulation of their own," Congress enacted the FAAAA with the intent to preempt state law) (quoting *Morales*, 504 U.S. at 378)).

37. Huntington Operating Corp. v. Sybonney Express, Inc., No. H-08-781, 2010 WL 1930087, at *1-3 (S.D. Tex. May 11, 2010).

38. *Id.* at *1.

39. *See id.* at *1-2.

40. *See id.* at *3.

41. 737 F. Supp. 2d 638, 642-43 (N.D. Tex. 2010).

allowed only the claim for breach of contract to proceed, under an exemption to preemption recognized in *American Airlines, Inc. v. Wolens*.[42]

There is no logical reason why the holdings of *Huntington* and *Chatelaine* would not extend to preempt personal injury claims. However, it must be recognized that the Supreme Court has not yet fully addressed this question.[43] Nonetheless, Justice O'Connor (in dissent on other grounds) has noted that personal injury claims are non-preempted only when they do not relate to an airline's "services":

[M]y view of *Morales* does not mean that personal injury claims against airlines are *always* pre-empted. Many cases decided since *Morales* have allowed personal injury claims to proceed . . . [where] . . . the particular tort claims at issue [do] not "relate" to airline "services," much as we suggested in *Morales* that state laws against gambling and prostitution would be too tenuously related to airline services to be preempted.[44]

Of course, the converse of this is that, under the plain language of the FAAAA,[45] personal injury claims *are* preempted when they *do* relate to a motor carrier's or broker's "services." Indeed, other courts have found state personal injury claims preempted when they relate to the "services" a carrier performs.[46]

Therefore, a court faced with a claim of FAAAA preemption must undertake an examination of "the facts underlying the specific claim[s]" raised in each case.[47] Where that examination reveals that the facts on which a plaintiff seeks to impose liability do not relate to a "price, route, or service" of a motor carrier or broker—or relate only tangentially—no express preemption will occur.[48]

The lower federal courts have agreed and have followed this logic when addressing FAAAA or ADA preemption. For example, in *Hodges*, the Fifth Circuit held that a negligence claim arising from a box falling from an airline's overhead bin was not preempted because it did not relate to a service but was akin to an ordinary negligence claim.[49] In *Charas*, the Ninth Circuit similarly held that claims such as those arising

42. *See id.* at 642 (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228-33 (1995).

43. *See* Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1264 (9th Cir. 1998) (en banc) (amended on *denial of reh'g*, 169 F.3d 594 (9th Cir. 1999) (noting that the United States Supreme Court has not directly addressed whether personal injury tort claims are preempted).

44. *Wolens*, 513 U.S. at 242 (O'Connor, J., concurring in part and dissenting in part) (emphasis added).

45. *See* 49 U.S.C. § 14501(c) (2005).

46. *See* Rockwell v. United Parcel Serv., Inc., No. 2:99 CV 57, 1999 WL 33100089, at *2 (D. Vt. July 7, 1999) (collecting cases).

47. Smith v. Comair, Inc., 134 F.3d 254, 259 (4th Cir. 1998).

48. *See id.* at 257 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992)).

49. *See* Hodges v. Delta Airlines, Inc., 44 F.3d 334, 340 (5th Cir. 1995).

from the "provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities" were not preempted.[50] Again, these claims of ordinary negligence do not relate to an airline's "services."[51] The Fourth Circuit has adopted this approach as well.[52] In *Smith*, the court held that the plaintiff's state-law claims for false imprisonment and intentional infliction of emotional distress *were* preempted because they arose from the airline's refusal of permission for the plaintiff to board the aircraft—a "service"—while other claims in the same case that were unrelated to the airline's services were not preempted.[53]

B. Objections to Express Preemption

1. Preemption is Narrow

In response to claims of express preemption under the FAAAA, plaintiffs often contend that statutes providing for preemption of state and local laws must be read narrowly based on the principle that the states' plenary police powers are not to be preempted by federal legislation[54] "unless that was the clear and manifest purpose of Congress."[55] However, the Supreme Court has recognized that FAAAA preemption, in contrast with other areas of the law, sweeps broadly and includes state laws whose effect on a carrier's "rates, routes and services 'is only indirect . . . .'"[56] The Court further emphasized that any state law "having a connection with, or reference to . . . rates, routes, or services [is] preempted[.]"[57]

Therefore, under *Rowe*, a state law need not directly impinge on a

50. Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc) (amended on *denial of reh'g*, 169 F.3d 594 (9th Cir. 1999).

51. *See id.* at 1265-66.

52. *See Smith*, 134 F.3d at 259.

53. *Id.* at 259 ("[T]o the extent Smith's claims are based upon Comair's boarding practices, they clearly relate to an airline service and are preempted. . . . [T]o the extent his claims are based on conduct distinct from Comair's determination not to grant permission to board, his false imprisonment and intentional infliction of emotional distress claims are not preempted."). Some courts have attempted to preserve personal injury actions from preemption by opining that Congress intended to preempt only "economic" regulation by the states. *See, e.g.*, *Hodges*, 44 F.3d at 339. However, the Supreme Court expressly rejected this distinction in *Rowe* when it held that Congress did not distinguish between economic and other classes of regulation in enacting the FAAAA preemption provision. Rowe v. N. H. Motor Transp. Ass'n., 552 U.S. 364, 374 (2008). This distinction is also inconsistent with some lower court precedent. *See, e.g.*, Travel All Over The World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1433 (7th Cir. 1996).

54. *See, e.g.*, Kuehne v. United Parcel Serv., Inc., 868 N.E.2d 870, 877 (Ind. Ct. App. 2007).

55. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

56. *Rowe*, 552 U.S. at 370 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

57. *Id.* (quoting *Morales*, 504 U.S. at 384) (internal quotation marks omitted).

carrier's routes, rates, or services to be preempted.[58] Instead, it is enough that the state law only indirectly affects, has "a connection with, or a reference to a carrier's routes, rates, or services."[59] In addition, the *Rowe* Court found that Congress, through the FAAAA, has sufficiently and directly expressed its desire to preempt even state public health laws and regulations if those laws relate to a carrier's routes, rates, or services.[60] In so doing, the Court rejected Maine's argument that because its regulations related to tobacco products were not economic but were instead public health regulations enacted pursuant to its police powers they did not come within the FAAAA's reach.[61] Because Maine's regulations "produce[d] the very effect that the [FAAAA] sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide," the regulations were preempted.[62] In the Court's analysis, it did not matter whether the regulations were enacted pursuant to a state's power to regulate public health[63]

2. Savings Clause

In response to claims of FAAAA preemption, it is often argued that personal injury actions are exempt from FAAAA preemption by virtue of the savings clause found in 49 U.S.C. § 14501(c)(2)(A) (2005), which provides that FAAAA preemption:

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

At least one court, the Louisiana Third Circuit Court of Appeal in *Ryes v. Home State County Mutual*, has relied on the savings clause to find that personal injury actions are not preempted.[64] However, *Ryes* is unpersuasive for several reasons, at least in the context of preemption claims by brokers. First and most importantly, *Ryes* and the cases it relies on all involve the issue of whether negligence claims *against a carrier* are preempted.[65] None involves a claim of preemption *by a broker*.[66] This

58. *Id.* at 370-72.
59. *Id.* at 370 (quoting *Morales*, 504 U.S. at 384).
60. *See id.* at 375.
61. *See id.* at 374-76.
62. *Id.* at 372.
63. *See id.* at 374.
64. 983 So. 2d 980, 984-85 (La. Ct. App. 2008).
65. *See id.* at 983 (citing Beyer v. Acme Truck line, Inc., 802 So. 2d 798, 800 (La. Ct. App.

distinction between carriers and brokers is vital.

As noted above, not all state-law negligence claims against carriers are preempted by the FAAAA.[67] Ordinary personal injury actions that arise from, for example, a driver speeding, generally would not relate to a carrier's routes, rates, or services and, thus, may survive FAAAA preemption.[68] However, where a plaintiff seeks to hold a broker liable based on the way it structures its business and the criteria it uses to select motor carriers to whom it assigns loads, the analysis is fundamentally different from that applied by the court in *Ryes*. The cases cited by the court in *Ryes* were right to conclude that these acts of spilling an item from an overhead bin, leaving a package in front of a door, and the like did not relate to—or at most only tenuously related to—a carrier's services.[69]

However, the fact that these state law negligence claims were not preempted does not lead to the conclusion that negligent hiring claims against brokers are non-preempted merely because they also are captioned as negligence claims. As the courts have noted, in analyzing FAAAA preemption, courts must look beyond the mere label assigned to a cause of action to the "facts underlying the specific claim" to determine whether the claim relates to a route, rate, or service of a carrier.[70] No court has held that claims against a broker survive FAAAA preemption *because* they sound in negligence.[71] To the contrary, negligence claims against a broker have been dismissed as preempted, as in *Huntington* and *Chatelaine*.[72] The correct analysis, then, focuses not on how a claim is denominated—*e.g.*, negligence or personal injury—but on whether the claim relates to the rates, routes, or services of the broker.[73]

The blanket application of the exemption found in 49 U.S.C. § 14501(c)(2)(A) to personal injury actions also fails on the text of the exception itself. The exception provides that preemption will not apply to a state's "safety regulatory authority," the authority of a state to im-

2001) (citing Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc., 972 F. Supp. 665 (N.D. Ga. 1997))).

66. *See* cases cited *supra* note 70.

67. *See* cases cited *supra* note 69 and 70.

68. *See, e.g.*, Kuehne v. United Parcel Serv., Inc., 868 N.E.2d 870, 872, 876-77 (Ind. Ct. App. 2007) (holding that negligence claim related to fall from tripping over a package placed on front step of home was not preempted).

69. *See* Vinnick v. Delta Airlines, Inc., 93 Cal. App. 4th 859, 860 (Cal. Ct. App. 2001) (carry-on bag fell on seated passenger); *Kuehne*, 868 N.E.2d at 870, 872.

70. *See, e.g.*, Smith v. Comair, Inc., 134 F.3d 254, 259 (4th Cir. 1998).

71. *See, e.g.*, Chatelaine, Inc. v. Twin Modal, Inc., 737 F.Supp.2d 638, 642 (N.D. Tex. 2010); Huntington Operating Corp. v. Sybonney Express, Inc., No. H-08-781, 2010 WL 1930087, at *1 (S.D. Tex. 2010).

72. *See* cases cited *supra* note 76.

73. *See, e.g.*, *Smith*, 134 F.3d at 259; Travel All Over The World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1433 (7th Cir. 1996).

pose route or weight limits, and the authority of a state to impose minimum insurance requirements.[74] This language evinces Congress' intent that the exception include state statutes and regulations but not private causes of action, and, as noted, Congress' intent is the "touchstone" of a preemption analysis.[75] First, the term "regulatory authority" more naturally means regulations issued by a state and not a private cause of action brought in state courts.[76] Second, the surrounding statutory language referring to route or weight limits and minimum insurance requirements—all of which are statutory or regulatory enactments—lends support to the conclusion that the general term "regulatory authority" refers to statutes and regulations as well.[77] These surrounding, more specific terms must be employed to aid in the definition of the more general term "regulatory authority."[78] Third, the exemption to preemption in subsection (c)(2)(A) refers narrowly to not restricting a state's "regulatory authority," while, in contrast, the preemption section itself in subsection (c)(1) provides, in broad terms, that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law."[79] Clearly, the sweep of the preemption found in subsection (c)(1) is broader than the exemption found in (c)(2)(A).[80] Congress' deliberate choice of contrasting terms in these two subsections should be given effect.[81] Fourth, courts examining the application of the exception to private causes of action have readily concluded that it does not apply in that context. In *A.J.'s Wrecker Service of Dallas, Inc. v. Salazar*, for example, the court concluded:

> [T]he safety exception does not apply to [the plaintiff's] causes of action. The safety exception applies only to specific legislation directed at motor carriers. [The plaintiff] attempts to apply the safety exception to

74. 49 U.S.C. § 14501(c)(2)(A).

75. *Wyeth*, U.S. at 565.

76. *See* 49 U.S.C. § 14501(c)(2)(A) (2011); *Regulatory Authority*, DICTIONARY.COM, http://dictionary.reference.com/browse/Regulatory+Authority (last visited Feb. 16, 2012) (stating regulatory authority involves a "governmental agency that regulates businesses in the public interest").

77. *See* sources cited *supra* note 81.

78. *See* United States v. Parker, 30 F.3d 542, 553 n.10 (4th Cir. 1994) ("'[T]he principle of *ejusdem generis* [provides] that a general statutory term should be understood in light of the specific terms that surround it.'" (alteration in the original) (quoting Hughey v. United States, 495 U.S. 411, 419 (1990))).

79. *See* 49 U.S.C. § 14501(c)(1)–(2)(A).

80. *Compare* 49 U.S.C. § 14501(c)(1) (preemption provisions express that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law"), *with* 49 U.S.C. § 14501(c)(2)(A) (preemption will not "restrict the safety regulatory authority of a State with respect to motor vehicles").

81. *See* Air Line Pilots Ass'n Int'l v. U.S. Airways Grp., Inc., 609 F.3d 338, 342 (4th Cir. 2010) (noting that where Congress uses two contrasting terms in close proximity, the choice is presumed to be intentional and is to be given effect).

general causes of action as opposed to legislation directed at the towing industry. We conclude the safety exception is inapplicable to [the plaintiff's] claims.[82]

Similarly, in *Huntington,* the court found the exception "refers solely to the ability of the several states to define safety standards and insurance requirements. The exception is not read to permit a private right of action."[83] Thus, in *Huntington*, the court found the plaintiff's *negligence* claim preempted.[84] Finally, and importantly, the language in the exemption found in § 14501(c)(2)(A) differs substantially from other "savings clauses" in which Congress has stated its express intent to preserve common law actions.[85] If Congress had wanted to preserve common law negligence actions from FAAAA preemption, it would have been easy enough for it to say so, as it did in the statutes at issue in *Grier v. American Honda Motor Co.* and *Sprietsma v. Mercury Marine.*[86]

Finally, even if the exception found in § 14501(c)(2)(A) applies to private causes of action, it should not apply to claims against a broker because it cannot be said that a negligence cause of action against a broker arises under a state's regulatory authority "with respect to motor vehicles."[87] Where a case against a broker rests on the manner in which the broker conducts its business, how it selects motor carriers to carry loads, and how it structures its operations, imposing liability on the broker cannot, under a fair reading of the statute, constitute the exercise of state regulatory authority "with respect to motor vehicles."[88]

C. Policy Behind FAAAA Preemption

Congress has clearly and expressly stated its purpose in enacting the FAAAA preemption clause.[89] It did so to create an environment of uniformity of regulation by the market rather than by a "patchwork" of state laws in order to "assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and

82. 165 S.W.3d 444, 450 (Tex. App. 2005) (citations omitted).

83. Huntington Operating Corp. v. Sybonney Express, Inc., No. H-08-781, 2010 WL 1930087, at *3 (S.D. Tex. May 11, 2010) (citing City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424 (2002); Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex., 180 F.3d 686 (5th Cir.1999)).

84. *See id.*

85. *See, e.g.*, Grier v. Am. Honda Motor Co., 529 U.S. 861, 868 (2000) (noting the applicable savings clause expressly preserves "liability under common law" from preemption); Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002) (same).

86. *See* cases cited *supra* note 90.

87. 49 U.S.C. § 14501(c)(2)(A) (2011).

88. *Id.*

89. *See supra* pp. 7–8 and note 40.

'quality.'"[90] Allowing state regulation of a broker's business and operations impermissibly allows "a State's direct substitution of its own governmental commands for 'competitive market forces'" and destroys the uniformity of regulation governing the broker's activities.[91]

For example, brokered goods typically travel in interstate commerce.[92] If the individual states through which goods travel are permitted to impose various regulations which affect a broker's selection of a motor carriers to haul loads or to dictate to brokers how they must structure their relationships with customers and carriers, the uniformity and efficiency of market regulation desired by Congress would not be achieved. Instead, brokers would face a patchwork of state laws regarding which carriers they could assign loads to and the routing of shipments, while also affecting broker's services. Clearly, then, claims of negligent hiring of a carrier have at least an "indirect" "connection with, or a reference to" a broker's rates, routes, or services.[93] The FAAAA, then, should apply to these claims, given Congress' intent in this area of law.

B. Implied Preemption

As noted, even where Congress has not expressly provided for preemption, preemption can be implied in certain circumstances:

[F]ield preemption, where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' and conflict preemption, where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]'[94]

Since the passage of the Interstate Commerce Act of 1887,[95] interstate transportation has been a heavily regulated industry, with regard to both economics and safety. Beginning with the Carmack Amendment to the Interstate Commerce Act, and continuing with the Motor Carrier Act of 1935 and successive amendments, Congress extended federal regula-

90. Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 371, 373 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992)).

91. *See id.* at 372 (quoting *Morales*, 504 U.S. at 378).

92. *See* Jeffrey S. Kinsler, *Motor Freight Brokers: A Tale of Federal Regulatory Pandemonium*, 14 Nw. J. Int'l L. & Bus. 289, 294–97 (1994) (indicating that brokers play a vital role in interstate commerce).

93. *See Rowe*, 552 U.S. at 370 (indicating preemption of a state regulation even if the state regulation only indirectly effects the federal regulation) (quoting *Morales*, 504 U.S. at 384, 386).

94. Gade v. Nat'l Solid Wastes Mgmt., 505 U.S. 88, 98 (1992) (quoting Fid. Fed. Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153 (1982); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Felder v. Casey, 487 U.S. 131, 138 (1988); Perez v. Campbell, 402 U.S. 637, 649 (1971)).

95. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

tion of transportation to motor carriers.[96] As early as 1935, Congress declared that it was the federal government's policy "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest."[97] Thereafter, in the 1950s, Congress sought further regulation of the industry by ensuring that motor carriers were identifiable and financially responsible for accidents.[98] These goals were further clarified by the federal government with the passage of the Motor Carrier Act of 1980 ("Motor Carrier Act").[99]

The Motor Carrier Act achieved economic deregulation of the trucking industry in the United States by abolishing rate, route, and pricing regulations governing interstate trucking companies.[100] At the same time, however, the Act preserved the authority of the Secretary of Transportation ("Secretary") to regulate safety.[101] Thus, under the Act as currently in force, the Secretary is required to "prescribe regulations on commercial motor vehicle safety" in accordance with the National Transportation Policy.[102] The National Transportation Policy, currently embodied in 49 U.S.C. § 13101, has as its goal achieving an efficient, safe, and uniform system of interstate transportation.[103] To ensure that the deregulation of the trucking industry and the goals of the National Transportation Policy were not compromised by state regulation, Congress in 1994 enacted the above-mentioned FAAAA, which clarifies and expands the original preemption provisions contained in the Motor Carrier Act.[104] The FAAAA stands as an express indicator of Congress' continued desire for economic deregulation of interstate trucking while preserving federal safety regulations intact.[105]

96. Carmack Amendment to Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584 (1906); Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543.

97. Motor Carrier Act of 1935, 49 Stat. 543.

98. *See* Interstate Commerce Act, Pub. L. No. 84-957, 70 Stat. 983, (1956). *See also* James R. Lilly, *Insurance Coverage and Conflicting Interpretations of the MCS-90*, 74 DEF. COUNS. J. 343, 343–44 (2007) (stating that "'[s]ignificant aims' of this amendment included eliminating the difficulties inherent in fixing financial responsibility for damage and injuries to members of the public." (quoting Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc., 423 U.S. 28, 37 (1975))).

99. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified as amendments to subtitle IV of 49 U.S.C.).

100. *Id.*

101. *Id.*

102. 49 U.S.C. § 31136 (2006).

103. *See* Transportation Policy, 49 U.S.C. § 13101(a) (2006).

104. Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 (codified as amended in scattered sections of 49 U.S.C.).

105. *See id.*

Pursuant to his authority under the Act, the Secretary has promulgated a comprehensive system of federal regulations governing the safety and qualification of motor carriers.[106] Compliance with these safety regulations is the exclusive method of obtaining licensure as an interstate motor carrier.[107] Under the regulations, a carrier is evaluated based on a number of criteria, including:

(a) Adequacy of safety management controls. . . .

(b) Frequency and severity of regulatory violations.

(c) Frequency and severity of driver/vehicle regulatory violations during inspections . . . .

(d) Number and frequency of out-of-service driver/vehicle violations . . . .

(e) Increase or decrease in similar types of regulatory violations discovered during safety or compliance reviews.

(f) . . . Frequency of accidents; hazardous material incidents; accident rate per million miles; indicators of preventable accidents; and whether such accidents, hazardous materials incidents, and preventable accident indicators have increased or declined over time.

(g) Number and severity of violations of . . . safety rules, regulations, standards, and orders [of state or foreign authorities that] are compatible with Federal rules, regulations, standards, and orders.[108]

After evaluation, the carrier is assigned a safety rating of satisfactory, conditional, unsatisfactory, or unrated.[109] The assignment of a safety rating is the exclusive means used by the Secretary to determine whether a motor carrier is qualified—from a safety perspective—to operate in interstate commerce.[110] Once the Secretary determines a motor carrier is qualified under the applicable federal statutes and regulations, he "shall register" the motor carrier to provide interstate transportation.[111]

106. *See* Safety Fitness Procedures, 49 C.F.R. pt. 385 (2011); *see also* Purpose & Scope, 49 C.F.R. § 385.1 (2011).

107. 49 U.S.C. §§ 13901-13902 (2006).

108. 49 C.F.R. § 385.7 (2011). The breadth and exclusivity of the safety regulations in §§ 385.1-.819 is demonstrated by the fact that, unlike safety regulations found in other parts, *see, e.g.*, 49 C.F.R. § 390.9 (2011), the regulations in §§ 385.1-.819 do not contain any provision providing that states may enact additional safety requirements or that state safety requirements are not preempted.

109. 49 C.F.R. §§ 385.3, 385.9 (2011).

110. 49 C.F.R. § 385.13 (2011).

111. 49 U.S.C. § 13902(a)(1) (2006); *see* Dept. of Transp. v. Pub. Citizen, 541 U.S. 752, 758-59 (2004) (noting Secretary "must grant registration" to qualified motor carriers). Brokers are also regulated by the Act and its accompanying regulations and are required by the Secretary's regulations to use an "authorized motor carrier" for the transportation of property. 49 C.F.R. § 371.2 (2011); 49 C.F.R. § 371.105 (2011) (an authorized carrier is one that has been authorized by the

In promulgating some of the foregoing regulations, the Secretary has noted that the various congressional enactments, including the Motor Carrier Act, were intended to address a lack of uniformity in state regulations, which led to "allegations of disturbing abuses and concerns in both the economic and safety arenas."[112] Accordingly, the Motor Carrier Act and these regulations make clear that the federal government has prescribed an exclusive safety credentialing system for interstate motor carriers and has designated the Secretary of Transportation as the exclusive judge of highway safety fitness.[113] Once the Federal Motor Carrier Safety Administration ("FMCSA") judges a motor carrier fit to operate under the regulations he has issued, he must permit the motor carrier to operate in interstate commerce.[114] The Act and regulations support the National Transportation Policy of administering a uniform system that encourages competition and efficiency.[115] Consistent with this Policy, once the FMCSA grants a motor carrier authority to operate in interstate commerce, the inquiry as to the motor carrier's fitness should be at an end.

Attorneys representing injured parties will argue that finders of facts should consider the FMCSA's internal safety scoring systems, which include SafeStat (in effect until December of 2010) and the FMCSA's Compliance, Safety, Accountability ("CSA") initiative, which uses the Safety Management System ("SMS") to collect data.[116] However, there are numerous reasons why shippers and brokers should not use these internal FMCSA tools to judge carriers. First, unlike the safety rating process, the SMS and CSA methodologies have not been through the rulemaking process of the Administrative Procedures Act.[117] Thus, they are both the product of FMCSA with none of the protections and due process of rulemaking.[118] Second, the specifics of the methodology used is undisclosed.[119] Thus, there is input data but no explanation of how the data is

Secretary to transport property in interstate commerce); *see generally* Brokers of Property, 49 C.F.R. §§ 371.1-.121 (2011).

112. Hours of Service of Drivers, 61 Fed. Reg. 57252-01 (proposed Nov. 5, 1996) (to be codified at 49 C.F.R. pt. 395).

113. *See* 49 U.S.C. § 31136 (2006); 49 C.F.R. § 385.1 (2011).

114. *Public Citizen*, 541 U.S. at 758-59.

115. Transportation Policy, 49 U.S.C. § 13101 (2006).

116. The Motor Carrier Safety Status Measurement System (SafeStat) was an automated analysis system that measured the safety fitness of interstate motor carriers by looking at four Safety Evaluation Areas (SEAs): accident, driver, vehicle, and safety management. It was replaced in 2010 with the Safety Management System. *See* http://csa.fmcsa.dot.gov (providing information on CSA and SMS).

117. *See* 5 U.S.C. § 553 (2006); *cf.* SRM Chem. LTD, Co. v. Fed. Mediation & Conciliation Serv., 355 F. Supp. 2d 373, 375-77 (D.D.C. 2005) (holding that a federal agency using three arbitrators instead of only one as required by law was implementing procedural rules which are exempt from the Administrative Procedure Act's rulemaking process).

118. *See* 5 U.S.C. § 533 (2006).

119. *See* Federal Motor Carrier Safety Regulations, 49 C.F.R. §§ 350-399 (2011); *How Does*

processed.[120] Third, the input data is flawed in that it is not uniformly reported or categorized by the state reporting agencies.[121] Fourth, the overall scoring is based on a presumption that there are always carriers who need to be removed from the carrier pool, regardless of safety scoring.[122] Because the carriers are judged against each other, all of the carriers within a peer grouping can be "unsafe," but only the bottom of the peer group will be eliminated.[123] On the other hand, all of the members of a peer group could perform excellently yet the excellent carrier at the bottom will be eliminated.[124] Fifth, the carriers are judged by peer groups based on miles traveled.[125] However, the peer groups are not broken down into types of transit.[126] For example, short-haul dray carriers, long haul truckload carriers, and less-than-truckload carriers, who have completely different accident exposures, are all grouped together.[127] This is by no means an exclusive listing.

In recent cases discussing implied preemption of state tort suits, the Supreme Court has emphasized that "conflict preemption" will apply where the state standard to be enforced stands as an "'obstacle to the accomplishment' of a significant federal regulatory objective."[128] As noted above, the federal regulatory objective, embodied in the National Transportation Policy, is the creation of a uniform system of interstate transportation that is safe and efficient.[129] The Secretary is directed to enact regulations—including safety regulations—to implement this policy and to register motor carriers who are "willing and able" to meet the regulations.[130] In response, the Secretary has enacted a comprehensive safety scheme, in part to address disparity in state laws governing safety.[131] Brokers, in turn, are required to use a carrier authorized by the

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CSA Work?, http://csa.fmcsa.dot.gov/about/csa_how.aspx (last visited Feb. 27, 2012) (explaining the CSA evaluation process).

120. *See supra* note 124.

121. In fact, the Inspector General issued a scathing report on the accuracy of the reporting process. *See* Improvements Needed in the Motor Carrier Safety Status Measurement System, Inspector General of the Office of the Secretary of Transportation, Report MH-2004-034. *See also*, FCCI Ins. Group v. Rodgers Metal Craft, Inc., 2003 WL 4185997 (M.D.Ga. 2008) (data in Safestat is not the type of evidence capable of being accepted for judicial notice).

122. *See Safety Measurement System*, http://csa.fmcsa.dot.gov/about/basics.aspx (last visited 2/27/12)(discussing CSA Behavior Analysis and Safety Improvement Categories (BASICs)).

123. *See id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Williamson v. Mazda Motor of Am., Inc., 131 S.Ct. 1131, 1136 (2011) (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000)).

129. *See supra* text accompanying note 108.

130. 49 U.S.C. § 13902(a)(1) (2006).

131. *See supra* note 111.

Secretary for the transportation of goods.[132]

State laws, including tort suits, that seek to force brokers to discriminate between authorized carriers based on the carriers' safety practices run afoul of these regulatory purposes. Specifically, state personal injury actions that allege claims of negligent hiring based on a broker's selection of an authorized motor carrier that is allegedly unsafe in some way would impose a different standard for motor carrier fitness than the one implemented by the Secretary. As a result, a patchwork of state laws would arise that would threaten the congressionally declared purposes of the National Transportation Policy, and transportation would become less uniform and less efficient and competitive. In addition, the Secretary's finding that a motor carrier is qualified, and his subsequent registration of the carrier, would be meaningless since brokers could not use the carrier without further delving into the carrier's safety practices. The significant federal regulatory objectives embodied in the Policy and the Secretary's regulations would thereby be impeded. Accordingly, state laws imposing liability based on a broker's negligent selection of a motor carrier are preempted.[133]

III. PRACTICAL APPLICATION

As an example of how state tort actions against brokers for negligent selection of a carrier could impact interstate transportation, consider the following hypothetical:

ABC Brokerage has been requested by a shipper to arrange transportation from South Carolina to Arizona. ABC must select a carrier to haul the freight. It considers 123 Trucking, but 123 has a conditional safety rating. Assume, for illustrative purposes only, that Texas has held that brokers may be held liable for utilizing conditional-rated carriers. Therefore, ABC can assign the load to 123 but may choose to request the carrier travel a route that avoids transit of the State of Texas.

Alternatively, ABC may select 456 Trucking, who has a satisfactory safety rating and agree to a route through Texas. However, 456 has a poor score in one of the BASICS of the FMCSA's CSA system. Assume, again, that Arkansas has allowed recovery against a broker for selecting a carrier with a poor CSA BASIC score. In that case, ABC may choose to route the shipment around, or not to serve, locations in Arkansas.

To take advantage of this situation, 789 Trucking raises its rates because it has a satisfactory safety rating and BASIC scores below the mini-

132. *See supra* note 116.

133. Preemption in the field of interstate trucking is not unusual. In the context of cargo damage, the courts have long recognized that federal law preempts the field so that state laws are of no effect. *See, e.g.*, Adams Express Co. v. Croninger, 226 U.S. 491, 505-06 (1913).

mums for CSA and, therefore, considers itself the only viable carrier for ABC's needs.

IV. CONCLUSION

The Eisenhower Interstate Highway System was successful because it was founded upon standardization and uniformity from state to state.[134] Federal preemption in transportation means that brokers arranging freight for trucks on those highways would have that same uniformity. Deregulation of the airline and trucking industries likewise depends on the same freedom from state regulation—indeed Congress has mandated that freedom in provisions such as the FAAAA. This uniformity of treatment and ease of movement with freedom from state-by-state regulations is consistent with and required by not only the FAAAA but also our National Transportation Policy. Any attempt by the states to regulate the selection of carriers by brokers through the medium of state tort law is not consistent with the goals Congress announced in the National Transportation Policy and should be defeated.

134. *Interstate System – Design*, FEDERAL HIGHWAY ADMINISTRATION, http://www.fhwa.dot.gov/programadmin/interstate.cfm (last visited Mar. 10, 2012).