No. 13-260

IN THE
SUPREME COURT OF THE UNITED STATES

DYNAMIC TRANSIT COMPANY AND
KNIGHTS COMPANY/AUTO TRANSPORTERS,
A MISSOURI BUSINESS ENTITY,
Petitioners,

v.

TRANS PACIFIC VENTURES, INC. AND
TREVOR SMALL,
Respondents.

On Petition for a Writ of Certiorari to
the Supreme Court of the State of Nevada

MOTION OF THE TRUCKING INDUSTRY DEFENSE ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Trucking Industry Defense Association ("TIDA") moves for leave to file the accompanying brief in support of the position taken by Dynamic Transit Company / Auto Transporters, under U.S. Supreme Court Rule 37.2. On September 10, 2013, Counsel for Respondents Trans Pacific Ventures, Inc. and Trevor Small received timely notice of the intent to file this motion. Counsel withheld consent to allow TIDA to file this brief.

TIDA is an international organization that includes over 1,900 members comprised of motor carriers, transportation logistics companies, insurers of motor carriers, third party claims administrators, and defense counsel. The motor carrier members of TIDA include common carriers, private carriers, and private fleets that haul cargo throughout the United States and internationally. The insurance company members provide transportation cargo insurance for the trucking industry. It is TIDA's commitment to provide training and assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, cargo damage / loss, insurance and workers' compensation claims. Because of this commitment, TIDA seeks to address issues germane to its members and improve the civil justice system.

TIDA participates as an *amicus curiae* in cases that raise issues of vital concern to its membership. The case of *Dynamic Transit Co. v. Trans Pac. Ventures, Inc.,* 128 Nev. Adv. Op. 26, 291 P.3d 114 (2012) is such a case. Pet. App. 1a-13a.

TIDA is interested in the case because TIDA's members, involved in both the operation of motor carriers and involved in the insurance aspects of the trucking industry, have a substantial interest in having this Court properly balance the rights and interests of the shippers and motor carriers and their insurers according to the plan set forth by the U.S. Congress under the Carmack Amendment, 49 U.S.C. §14706.

TIDA believes that resolution of the important issue raised by this petition is necessary because the Nevada Supreme Court has misread or misunderstood the opinions of the courts that have considered this issue. The confusion created by the opinion will be used as a lever to open up a floodgate of litigation in the various states as claimants seek to test the boundaries of Carmack preemption. These disparate state cases will destroy the balance reached by Congress as between the shippers and motor carriers. The uniform and consistent system that both enjoy under Carmack will be no more. The issue presented affects not only the motor carrier industry. It will also affect consumers by driving up the cost of the interstate transportation of goods.

TIDA's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

20 September 2013

Respectively submitted.

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INTERESTS OF THE *AMICUS CURIAE*

The interests of the *amicus curiae* are stated in the accompanying motion for leave to file this brief.[1]

STATEMENT OF THE CASE

The *amicus curiae* adopts the statement of the case offered by the petitioner and incorporates that statement here.

SUMMARY OF ARGUMENT

The Court should grant this petition. TIDA does not condone the actions of the motor carrier in converting the shipper's vehicle. However, as a result of the Nevada Supreme Court's misunderstanding or misapprehension of the

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the intention of the Trucking Industry Defense Association (TIDA) to file this brief. Counsel for the Petitioners has filed a letter of blanket consent to filing *amicus* briefs and that letter is lodged with the Clerk. Counsel for respondent would not grant consent. Pursuant to this Court's Rule 37.6, the TIDA *Amicus* and its counsel hereby represent that no party to this case, nor their counsel, authored this brief in whole or in part, and that no person other than the TIDA *Amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

Carmack Amendment, 49 U.S.C. §14706, the opinion in *Dynamic Transit Co. v. Trans Pac. Ventures, Inc.*, 128 Nev. Adv. Op. 69, 291 P.3d 114 (2012) (Pet. App. 1a-13a) will undermine the preemptive effects of the Carmack Amendment. The opinion will create confusion, risks and costs not anticipated by Congress when it balanced the interests of the shippers and the motor carriers. The court should grant the petition and restore that balance envisioned by Congress.

ARGUMENT

I.
THE NEVADA SUPREME COURT'S DECISION MISAPPREHENDED OR OVERLOOKED THE PURPOSE AND SCOPE OF THE CARMACK AMENDMENT

The Nevada Supreme Court's opinion – concerned as it properly was about the fact of the motor carrier's "conversion" of the shipment – evidences that it either misunderstood or misapprehended the scope of Congress's plan under Carmack and why Carmack's preemption of state law claims is key to the success of that plan.

A. By The Carmack Amendment, Congress Gave Shippers A Means Whereby They Could Recover From Motor Carriers For The Loss Or Damage To Goods In Transit Without Having To Prove Negligence.

Goods being transported in interstate commerce do not always go from point of origin to point of delivery in the hands of the same carrier. The Carmack Amendment protects shippers, allowing them to recover for the loss of or damage to shipped goods without having to prove the negligence of any one carrier who may have transported the goods. 49 U.S.C. §14706(a)(1); *Reider v. Thompson*, 339 U.S. 113, 119 (1950). Congress granted shippers this unique and generous advantage under Carmack. *See* W. Chused, *The Evolution of Motor Carrier Liability Under the*

Carmack Amendment Into the 21st Century, 36 Transp. L. J. 177 (2009).

B. In Exchange For The Strict Liability Given Shippers, Congress Gave Motor Carriers Uniformity

The Nevada Supreme Court's decision overlooked or failed to appreciate that Congress gave motor carriers uniformity and preemption in exchange for the benefit it gave shippers, namely strict liability-type recovery against the motor carrier.

1. Without Full State Law Preemption, The Balance That Congress Struck Between The Shippers And The Motor Carriers Fails Because The Motor Carriers Are Deprived of Uniformity And Consistency Among The States In Dealing With Interstate Cargo Claims

The court in *Nichols v. Mayflower Transit, LLC,* 368 F.Supp.2d 1104 (D. Nev. 2003) explained the purpose behind the Carmack Amendment. It said that "Congress enacted the Carmack Amendment . . . to establish uniformity and consistency among states in the application and resolution of interstate shipping loss and damage cases." *Id.* at 1106.

To enforce the Congressional vision of nationwide uniform law over interstate cargo, courts have found that Carmack must preempt state law

claims arising from loss of or damage to goods in interstate commerce. In *Missouri, K. & T.R. Co. of Tex. v. Harris*, 234 U.S. 412, 420 (1914), the U.S. Supreme Court said that under Carmack "the special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded." See also *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.,* 237 U.S. 597, 603 (1915).

The scope of the preemptive effect of Carmack is seen in *Moffit v. Bekins Van Lines,* 6 F.3d 305, 306 (5th Cir. 1993). In *Moffit*, the Plaintiffs' Complaint included a litany of state law claims including: 1) the tort of outrage; 2) intentional and negligent infliction of emotional distress; 3) breach of contract; 4) breach of implied warranty; 5) breach of express warranty; 6) violation of the a state's deceptive trade practices or consumer protection statutes; 7) slander; 8) misrepresentation; 9) fraud; 10) negligence and gross negligence; and 11) violation of the common carrier's statutory duties as a common carrier under state law. The Fifth Circuit upheld the trial court's decision dismissing all of the Plaintiff's state law claims. The *Moffit* court quoted the language from *Adams Express Co. v. Croninger,* 226 U.S. 491 (1913) where it held:

> To hold that the liability therein declared may be increased or diminished by local regulation or local views of public

> policy will either make the [Carmack] provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment.

6 F.3d at 486 (quoting *Adams Express Co.,* 226 U.S. at 505-06)

2. In Addition To State Law Preemption, Congress Restricted The Shipper's Recovery To Actual Damages And Gave Motor Carriers The Opportunity To Limit Their Liability

Under Carmack, a shipper may recover no more than the actual loss or injury caused to the property. 49 U.S.C. §14706(a)(1). After imposing a strict liability system on interstate motor carriers, Congress, in turn, created a mechanism whereby motor carriers could further limit the extent of their liability for loss of or damage to goods in transit under certain circumstances. 49 U.S.C. §14706(c)(1). The *Nichols* court explained this Carmack principle as well where it quoted the statute and said that the damages were limited to the actual loss. 368 F.Supp.2d at 1106. In addition, if conditions were met, Carmack would allow the shipper and the

motor carrier to negotiate for a reduced shipment rate if the shipper would agree to limit its recovery for any loss or damage.

For example, the Court in *American Cyanamid Co. v. New Penn Motor Exp., Inc.,* 979 F.2d 310 (3d Cir. 1992) enforced a $2,084.00 limitation on liability for the loss of a $53,000.00 shipment of vaccines where the limit was set in the bill of lading. In fact, the *American Cyanamid* court explained that it is this negotiated limitation on liability that motor carrier loses if it intentionally destroys or steals the good. *Id.* at 315-16. Carmack preemption remained intact.

II.
THE NEVADA SUPREME COURT MISAPPREHENDED THE OPINIONS ON WHICH IT RELIED TO REACH THE CONCLUSION THAT THERE IS AN EXCEPTION TO STATE LAW PREEMPTION IN CASES OF A "TRUE CONVERSION"

In its opinion, the Nevada Supreme Court ruled that state law claims for "true conversion" are not preempted by the Carmack Amendment. *Dynamic,* 291 P.3d at 117. Pet. App. 7a – 8a. The decisions that the Court relied on in reaching that conclusion either do not stand for the proposition cited or are inapposite on the facts.

A. The Glickfeld *Opinion Does Not Stand For The Proposition That There Is A Conversion Exemption From Carmack's Preemption Doctrine*

In its opinion, *Dynamic,* 291 P.3d at 117, (Pet. App. 7a – 8a) the Nevada Supreme Court cites *Glickfeld v. Howard Van Line,* 213 F.2d 723, 727 (9th Cir. 1954). in support of its assertion that there is a "true conversion" exception to the rule of state law preemption. Because the Nevada Supreme Court's opinion misapprehends Carmack, it misreads *Glickfeld*. By reading the context surrounding the language quoted from the *Glickfeld* opinion, one can see that the "limitation" to which *Glickfeld* referred was the negotiated limitation of damage that is still authorized under today's version of Carmack at 49 U.S.C. §14706(c)(1). See Section I.B.2 above.

In no instance does the *Glickfeld* court hold that Carmack preemption is inapplicable. In fact, *Glickfeld* enforced the limitation on damages authorized under the Carmack Amendment. This concept of "Released Valuation" is well explained in the case of *Deiro v. American Airlines, Inc.*, 816 F.2d 1360 (9th Cir. 1987). The *Deiro* court cites *Glickfeld* to explain that it is the negotiated limits on liability that are lifted in cases of "true conversion," but not the application of Carmack preemption. See also *American Cyanamid,* 979 F.2d at 315-16. Stated differently, *Glickfeld* stands for the principle that where there is a "conversion" of the shipment by the

motor carrier, it loses the benefit of a properly negotiated and documented limitation on liability that it would otherwise enjoy under 49 U.S.C. §14706(c)(1). *Glickfeld* does not stand for the proposition that Carmack preemption is lost where there is a conversion.

B. The Tran *Decision Also Talks About Avoiding The "Limitations On Liability" And Not About Avoiding Preemption*

The court also relies on *Tran Enterprises, LLC. v. DHL Exp. (USA), Inc.,* 627 F.3d 1004, 1009 (5th Cir. 2010). See *Dynamic,* 291 P.2d at 117. Pet. App. 8a. Like *Glickfeld,* the *Tran* court talks about lifting "limitations on liability." Read in the context of the case, those "limitations" are the ones negotiated under 49 U.S.C. §14706(c)(1) and not an avoidance of preemption altogether. Furthermore, any reference to a "true conversion" exception to state law preemption is dicta because there were no facts to support such a finding.

C. The Mayflower *Case Is Inapposite Because That Case Involves The Conversion Of Property That Was Not Subject To Carmack Preemption Because It Was Not Even Intended To Be Shipped*

Finally, in its opinion, the court also cites to *Mayflower Transit, Inc. v. Weil, Gotshal & Manges, L.L.P.*, No. Civ.A. 3:00-CV-549-P, 2000 WL 34479959 (N.D. Tex. Oct. 18, 2000) in support of the proposition that there is an exception to the rule of

Carmack preemption in conversion cases. *Dynamic,* 291 P.3d at 117, (Pet App. 8a). The *Mayflower* case is inapposite in that the property stolen (a diamond ring) was not shipped and the record demonstrated that the ring was not even intended to be shipped.

This is not that case. In this case there was an intent to ship the vehicle with a bill of lading issued. *Dynamic,* 291 P.3d at 116. Pet. App. 3a.

D. The Controlling Case Is Hall v. North American Van Lines, Inc., *476 F.3d 683 (9th Cir. 2007).*

TIDA argues that *Hall v. North American Van Lines, Inc.*, 476 F.3d 683 (9th Cir. 2007) is the controlling case. In *Hall*, the Plaintiff alleged that her household goods were held hostage by the Defendant motor carrier in an attempt to extract payments from her that she did not owe. 476 F.3d at 685. Plaintiff brought a complaint in State Court comprised of three causes of action premised on California State law (e.g. breach of contract, fraud and conversion). 476 F.3d at 686. The case was removed to the U.S. District Court, Northern District of California. The District Court dismissed Hall's claims based upon the Carmack preemption. *Id.*. The Ninth Circuit upheld the District Court's decision to dismiss all of the shipper's state law claims. 476 F.3d at 689-90.

The Nevada Supreme Court refused to apply the *Hall* decision to the facts of this case. *Dynamic,* 291 P.3d at 117. Pet. App. 7a. The Nevada Supreme Court then attempted to fashion a "true conversion" exception to the Carmack Amendment. This court should grant the petition and apply the *Hall* ruling and reestablish Carmack's doctrine of preemption.

III.
THE COURT SHOULD GRANT THE PETITION IN ORDER TO REINSTALL THE PROPER BALANCE REACHED BY CONGRESS IN THE CARMACK AMENDMENT AND THEREBY AVOID THE CONFUSION, RISKS AND COSTS INEVITABLY CREATED BY THIS OPINION

It would be ill advised to create an exception to the doctrine of state law preemption under the Carmack Amendment based upon cases that have been misread. It is one thing to deny a motor carrier a claimed limitation on liability due to "conversion." It is quite another to deny the application of the federal statute governing interstate motor carriage altogether and allow a state conversion claim including punitive damages, which the underlying decision would do.

First, TIDA anticipates if preemption of state law under Carmack is set aside for conversion claims

it will open a floodgate of litigation, much of which will happen in the state courts.

Second, if the Nevada Supreme Court's opinion stands, the balance of rights, duties and liabilities between shippers and motor carriers prescribed by Carmack Amendment will be destroyed and supplanted by disparate state law remedies. Interstate motor carriers and shippers will no longer have a uniform and consistent system under which they can operate.

Finally, the impact of disparity, uncertainty and the resulting litigation will eventually drive up the costs of interstate transportation of goods nationwide, negatively impacting shippers and consumers alike.

CONCLUSION

The Carmack Amendment is the law of the land. Under the Carmack Amendment, Congress balanced the interests of shippers and motor carriers. Shippers enjoy the benefit of almost strict liability for damage or loss to the goods that they are shipping. In exchange, Congress gave motor carriers the uniformity and consistency that they need to be able to effectively do business in the 50 states. In order to provide that uniformity and consistency, the U.S. Supreme Court has ruled that all state law claims must be preempted. This court should grant the petition and restore the balance of interests

envisioned by Congress when it passed the Carmack Amendment.

20 September 2013 Respectively submitted.

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