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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Robert Nyswaner, et al.,

10 Plaintiffs,

11 v.

12 C.H. Robinson Worldwide Incorporated, et  
13 al.,

14 Defendants.

No. CV-17-04130-PHX-GMS

**ORDER**

15 Pending before the Court is Defendant C.H. Robinson Worldwide Incorporated's  
16 ("Robinson's") Motion for Summary Judgment (Doc. 35). For the following reasons, the  
17 motion is denied.

18 **BACKGROUND**

19 At the summary judgment stage, "[t]he evidence of the non-movant is to be  
20 believed, and all justifiable inferences are to be drawn in his favor," *Anderson v. Liberty*  
21 *Lobby, Inc.*, 477 U.S. 242, 255 (1986). Disputed facts are "viewed in the light most  
22 favorable to" Plaintiff Robert Nyswaner, the non-moving party. See *Scott v. Harris*, 550  
23 U.S. 372, 380 (2007).

24 C.H. Robinson Worldwide Incorporated ("Robinson") is a federally licensed  
25 property freight broker that contracts with motor carriers to haul freight shipments. (Doc.  
26 36, ¶¶ 1-2). In August 2015, Robinson contracted with Luga Transportation to transport  
27 Glyphosate from Texas to Arizona. (Doc. 26 ¶ 6). While transporting the Glyphosate,  
28 Manuel Prado, an employee of Luga Transportation, lost control of the trailer-truck, which

1 rolled over on its side and blocked the lanes of the interstate near Gila Bend. (Doc. 26 ¶ 9).  
2 Following the rollover, Plaintiff Robert Nyswaner collided with the trailer-truck and asserts  
3 that he suffered injuries as a result. (Doc. 26, ¶ 11).

4 Mr. Nyswaner filed a lawsuit in Maricopa County Superior Court against Luga  
5 Transportation and Mr. Prado. That case settled. (Doc. 42-1 at 1). Mr. Nyswaner then  
6 filed this lawsuit against Robinson, seeking damages under several different legal theories.  
7 (Doc. 1, Doc. 11).

8 In its Motion for Summary Judgment, Robinson raises a single issue: whether the  
9 Federal Aviation Administration Authorization Act of 1994 (“FAAAA”) preempts Mr.  
10 Nyswaner’s claim that Robinson negligently hired Luga Transportation to provide  
11 services.

## 12 DISCUSSION

### 13 I. Analysis

#### 14 1. The Federal Aviation Administration Authorization Act

15 In 1994, Congress sought to deregulate certain aspects of the trucking industry, and  
16 enacted the Federal Aviation Administration Authorization Act (“FAAAA”). “Concerned  
17 that state regulation impeded the free flow of trade, traffic, and transportation of interstate  
18 commerce, Congress resolved to displace certain aspects of the State regulatory process.  
19 The target at which it aimed was a State’s direct substitution of its own governmental  
20 commands for competitive market forces in determining the services that motor carriers  
21 will provide.” *Dan’s City Used Cars*, 569 U.S. 251, 263 (2013). The FAAAA’s “driving  
22 concern was preventing States from replacing market forces with their own, varied  
23 commands, like telling carriers they had to provide services not yet offered in the  
24 marketplace.” *California Trucking Ass’n v. Su*, 903 F.3d 953, 961 (9th Cir. 2018) (internal  
25 citation and quotation marks omitted). To create parity between air and motor carriers,  
26 Congress enacted a preemption clause that is nearly identical to the Airline Deregulation  
27 Act. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d  
28 1184, 1187 (9th Cir. 1998). “The one difference between the Airline Deregulation Act and

1 the FAAAA is that the latter contains the additional phrase ‘with respect to the  
2 transportation of property,’ which is absent from the Airline Deregulation Act and which  
3 ‘massively limits the scope of preemption ordered by the FAAAA.’” *Dilts v. Penske*  
4 *Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 2014) (citing *Dan’s City Used Cars*, 569 U.S.  
5 at 260).

6 An “inquiry into the scope of a statute’s pre-emptive effect is guided by the rule that  
7 the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Altria*  
8 *Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal quotation marks omitted). When  
9 analyzing Congressional intent, courts must be “mindful of the adage that Congress does  
10 not cavalierly preempt state law causes of action.” *Montalvo v. Spirit Airlines*, 508 F.3d  
11 464, 471 (9th Cir. 2007). This is particularly true where “Congress neither provided nor  
12 suggested any substitute for the traditional state court procedure for collecting damages for  
13 injuries caused by tortious conduct.” *United Const. Workers v. Laburnum Const. Corp.*,  
14 347 U.S. 656, 663-664 (1954).

15 In cases of express preemption, courts look to the text of the preemption clause  
16 “which necessarily contains the best evidence of Congress’ preemptive intent.” *CSX*  
17 *Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). The FAAAA provides: “States  
18 may not enact or enforce a law . . . or other provision having the force and effect of law . .  
19 . related to a price, route, or service of any . . . broker. . . with respect to the transportation  
20 of property.” 49 U.S.C. § 14501 (c)(2)(A). The phrase “other provision having a force of  
21 law” can include traditional common law claims. *See Northwest Inc. v. Ginsberg*, 572 U.S.  
22 273, 284 (2014).

23 The Ninth Circuit has repeatedly analyzed the scope of the FAAAA’s preemption  
24 clause, as well as the similar preemption clause of the ADA. *See California Trucking Ass’n*,  
25 903 F.3d at 957 (finding that a California common law standard was not preempted by the  
26 FAAAA); *Hickcox-Huffman v. US Airways Inc.*, 855 F.3d 1057, 1062 (9th Cir. 2017)  
27 (finding that a state breach of contract claim was not preempted by the ADA); *National*  
28 *Federation of the Blind v. United Airlines Inc.*, 813 F.3d 718, (9th Cir. 2016) (holding that

1 the ADA does not preempt claims under California’s antidiscrimination laws); *Dilts v.*  
2 *Penske Logistics, LLC*, 769 F.3d 637, 640 (9th Cir. 2014) (holding that the FAAAA did  
3 not preempt California’s meal and rest break laws because they were not “related to” prices,  
4 routes, or services); *Californians for Safe & Competitive Dump Truck Transp.*, 152 F.3d at  
5 1184 (holding that the FAAAA did not preempt the California Prevailing Wage Law);  
6 *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (holding that  
7 the Airline Deregulation Act does not preempt “run-of-the-mill personal injury claims”  
8 against airlines).

9 In interpreting the FAAAA, the Ninth Circuit has explained that “Congress did not  
10 intend to preempt generally applicable state transportation, safety, welfare, or business  
11 rules that do not otherwise regulate prices, routes, or services.” *Dilts*, 769 F.3d at 644.  
12 Thus, “even if state laws increase or change a motor carrier’s operating costs, broad laws  
13 applying to hundreds of different industries with no other forbidden connection with . . .  
14 services. . . are not preempted by the FAAAA.” *Id.* at 647. And although “general  
15 applicability is not dispositive . . . it is a relevant consideration because it will likely  
16 influence whether the effect on prices, routes, and services is tenuous or significant.”  
17 *California Trucking Ass’n*, 903 F.3d at 966.

18 **2. Nyswaner’s negligent hiring claim is not preempted by the FAAAA.**

19 This issue is controlled by the Ninth Circuit’s decisions in *Dilts* and *California*  
20 *Trucking Ass’n*. As the Ninth Circuit explained in *Dilts*, “laws are more likely to be  
21 preempted where they operate at the point where carriers provide services to customers at  
22 specific prices.” *Dilts*, 769 F.3d at 646. Accordingly, preemption under the FAAAA  
23 occurs where “a *customer* invokes [state law] to obtain certain *rates* or *services*” outside  
24 those provided for in the contract, but not where “the law is a generally applicable  
25 background regulation in an area of traditional state power that has no significant impact  
26 on a carrier’s prices, routes, or services.” *California Trucking Ass’n v. Su*, 903 F.3d at 961  
27 (emphasis in original). The point at which Robinson provides services to its customers is  
28 where it agrees to arrange the transport goods for other businesses—not when it selects a

1 carrier to provide that service. And the dispute in this case does not involve a customer  
2 seeking better rates or services. Instead, the claim is more analogous to other generally  
3 applicable laws that the Ninth Circuit has held are not preempted.

4         Allowing Nyswaner’s negligent hiring claim to proceed would not create a  
5 patchwork of state regulations as Robinson alleges. Rather, it would only require that  
6 Robinson conform to the general duty of care when it hires trucking companies to deliver  
7 goods. *See Factory Mutual Insurance Company v. One Source Logistics*, 2017 WL  
8 2608867 at \*7 (C.D. Ca. 2017) (holding that the FAAAA did not preempt negligent hiring  
9 claims). This duty of care is generally applicable and applies to many industries that make  
10 hiring decisions. In *Charas*, the Ninth Circuit explained that the similarly-phrased ADA  
11 “intended to insulate the industry from possible state economic regulation,” not to  
12 “immunize the [industry] from liability for personal injuries caused by their tortious  
13 conduct.” 160 F.3d at 1266. The same distinction applies here, where the FAAAA did not  
14 likely intend to immunize trucking companies from tortious conduct.

15         This conclusion is supported by the lack of discussion of state common law claims  
16 when Congress enacted the preemption provision of the FAAAA. As the Supreme Court  
17 has explained, “[i]t is difficult to believe that Congress would, without comment, remove  
18 all means of judicial recourse for those injured by illegal conduct.” *Silkwood v. Kerr-*  
19 *McGee Corp.*, 464 U.S. 238, 251 (1984). Here it seems similarly unlikely that Congress  
20 meant to exempt transportation brokers from tortious conduct they would otherwise be  
21 liable for at common law.

22         Robinson argues that the Supreme Court’s decision in *Rowe* controls the outcome  
23 in this case, even when considering the more recent decisions from the Ninth Circuit. (Doc.  
24 42 at 1) (citing *Rowe v. New Hampshire Motor Transport Ass’n*, 552 U.S. 364, 367–68  
25 (2008)). But *Rowe* does not control the outcome here for several reasons. *Rowe* did not  
26 involve a state common law dispute between two private parties. Nor did *Rowe* involve a  
27 generally applicable state law that applied economy wide. Rather, *Rowe* involved a state  
28 regulation that “focuse[d] on trucking and other motor carrier services, which make[] up a

1 substantial portion of all services.” 552 U.S. at 371. The Supreme Court reasoned that the  
2 tobacco labeling laws were thus “related to” the “services” of trucking companies and falls  
3 squarely within the preemption clause. *Id.* But state negligent hiring claims are not focused  
4 on trucking and other motor carrier services. And following *Rowe*, the Ninth Circuit  
5 explained that “*Rowe* did not represent a significant shift in FAAAAA jurisprudence.” *Dilts*,  
6 769 F.3d at 645. Instead, “*Rowe* simply reminds us that, whether the effect is direct or  
7 indirect, the state laws whose effect is forbidden under federal law are those with a  
8 significant impact on carrier rates, routes, or services.” *Id.* (internal citations and quotation  
9 marks omitted).

10 Finally, Robinson repeatedly cites a case from this District, *ASARCO v. England*  
11 *Logistics Inc.*, 71 F.Supp.3d 990, 1006-07 (D. Ariz. 2014), to support its argument that Mr.  
12 Nyswaner’s negligent hiring claim should be preempted. But *ASARCO* does not discuss  
13 the two controlling Ninth Circuit cases on this question—*Dilts* and *California Trucking*  
14 *Ass’n*. And *ASARCO* involved a dispute between two trucking companies over missing  
15 cargo—not a claim relating to a third party’s personal injury. *Id.* at 993.

16 Negligent hiring claims are generally applicable state common law causes of action  
17 that apply to a wide variety of industries. Unlike the regulation at issue in *Rowe*, common  
18 law negligence claims for hiring practices are not targeted or directed at the trucking  
19 industry. 552 U.S. at 371. Nor do they operate at the point where Robinson provides  
20 services to customers at specific prices, when it agrees to arrange transport for goods with  
21 businesses in exchange for a fee. *California Trucking Ass’n*, 903 F.3d at 961. This case  
22 does not involve a customer seeking better or different services or rates under state law. *Id.*  
23 Because this negligent hiring claim is a “generally applicable” state law that does not  
24 “otherwise regulate prices, routes or services,” the Court cannot conclude that it would  
25 have a “significant impact” on Robinson’s services, and so Mr. Nyswaner’s claims are not  
26 preempted.<sup>1</sup>

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27  
28 <sup>1</sup> Because the Court finds that Nyswaner’s negligent hiring of Luga Transportation  
Services is not preempted, it necessarily finds that Mr. Nyswaner’s claims of negligent  
hiring of Mr. Prado are also not preempted.

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**CONCLUSION**

Because the FAAAA does not preempt Mr. Nyswaner’s claim, Robinson’s Motion for Summary Judgment is denied.

**IT IS THEREFORE ORDERED** that Robinson’s Motion for Summary Judgment (Doc. 35) is **DENIED**.

**IT IS FURTHER ORDERED** that Nyswaner’s Motion to Strike (Doc. 59) is **DENIED AS MOOT**.

Dated this 3rd day of January, 2019.

  
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G. Murray Snow  
Chief United States District Judge