No. 20-55106

In the United States Court of Appeals

for the Ninth Circuit

California Trucking Association, et al.,

Plaintiffs-Appellees,

v.

Xavier Becerra, et al.,
Defendant-Appellants.

and

International Brotherhood of Teamsters,
Intervenor-Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:18-CV-02458-BEN-BLM
The Honorable Roger T. Benitez, Judge

BRIEF *AMICUS CURIAE* BY The California Employment Lawyers Association (CELA)

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STATEMENT OF INTEREST

The California Employment Lawyers Association (CELA) is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour class actions involving allegations of independent contractor misclassification under California law. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers. CELA submits this brief on behalf of its members and their clients, because a ruling against Defendant-Appellants may adversely affect workers and employees throughout California.

CELA submits this brief in support of reversal of the District Court's Order below. CELA does not intend to repeat the arguments made by the parties but instead seeks to bring the Court's attention to its unique perspective of the experience of low-wage workers, including its understanding of the legislative history of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") and the fact that Congress did ***not*** intend to preempt generally applicable state employment laws that protect low-wage workers, as well as CELA's observations of how some delivery companies hire workers as employees to perform deliveries, while still offering competitive delivery services.

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, CELA avers that no counsel for the parties have participated in the drafting of this brief, nor has any party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. In addition, no person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing and submitting this brief.

INTRODUCTION

The crux of this case is whether motor carriers can evade the worker misclassification framework that the California Legislature enacted in passing Assembly Bill 5 ("AB-5") in 2019 (which codified the California Supreme Court's ruling in Dynamex Operations W., Inc. v. Superior Court, 4 Cal. 5th 903 (2018)), and avoid paying transportation employees lawfully owed minimum wages, overtime wages, and benefits, by claiming that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") preempts the AB-5 independent contractor test, codified at Cal Lab Code § 2750.3 (the "ABC test"). They must not be allowed to do so, because the FAAAA was never intended to relieve motor carriers of liability under generally applicable state wage and employment laws, as this Court has held on prior occasions.

The FAAAA proscribes: "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 …with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).[1] The FAAAA was enacted in 1994 by Congress to ensure that federal deregulation of the trucking industry was not thwarted by states. It focuses exclusively on the relationship between those companies and their customers and seeks to enhance competitive market forces between them. The Supreme Court has confirmed that the FAAAA only preempts state laws that have a "significant impact" on a motor carrier's routes, prices, or services. Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364, 375 (2008). Nowhere in the legislative history is there any indication that Congress wanted to provide special protections to trucking companies not available to other employers who generally must follow a state's wage and hour law. Indeed, basic state wage laws, such as the California Labor Code, affect motor carriers' routes, rates, and services in only "indirect, remote and tenuous" ways. Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1189 (9th Cir. 1998); see also Cal. Trucking Ass'n v. Su, 903 F.3d 953, 961 (9th Cir. 2018). The California Supreme Court agrees. People ex rel Harris v. Pac Anchor Transportation, Inc., 59 Cal. 4th

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[1] The preemption provision of the FAAAA borrows language from the Airline Deregulation Act of 1978 ("ADA"), which preempts state laws and regulations "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). Because the 1978 Airline Deregulation Act (ADA) is "nearly identical to the" FAAAA it is "instructive for . . . FAAAA analysis." Dilts v. Penske Logistics, LLC, 769 F.3d 637, 644 (9th Cir. 2014).

772, 783 (Cal. 2014). So too do the Seventh and Third Circuits. Johnson & Son, Inc. v. Transport Corp. of America, Inc., 697 F.3d 544, 558 (7th Cir. 2012); Gary v. Air Group, Inc., 397 F.3d 183, 189 (3d Cir. 2005); Bedoya v. Am. Eagle Express, 914 F.3d 812, 826 (3d Cir. 2019). This Circuit has further provided that the FAAAA only preempts a generally applicable law that "binds the carrier to a particular price, route or service . . . ." Dilts, 769 F.3d at 646.

Circuit precedent has foreclosed any possibility that the AB-5 "ABC test" has a "significant impact" on or "binds" motor carriers to "particular" route, rates, or services. Dilts, 769 F.3d at 646. The ABC test merely constitutes the definitional language for "employee" status, which then triggers other statutes that provide employees with rights and benefits. Many of those rights and benefits have already been held by this Court to ***not*** have a significant impact on motor carrier rates, routes, or services. See Mendonca, 152 F.3d 1184 (statute mandating that public works contractors comply with local prevailing wages); Air Transport Ass'n of Am. v. City & Cty. of San Francisco, 266 F.3d 1064, 1068 (9th Cir. 2001) (non-discrimination statute mandating provision of benefits to employees' domestic partners); Dilts, 769 F.3d at 637 (meal and rest break laws); Ridgeway v. Walmart, Inc., 946 F.3d 1066 (9th Cir. 2020) (statute providing minimum wage requirement for layovers). Thus, it makes no sense to find that the ABC test, which imposes no substantive requirement of its own, is likely preempted, while many if not all of the

substantive requirements triggered by employee status are not.[2] Indeed, in the proceedings below, neither the lower court nor the Plaintiffs-Appellees identified any substantive, tangible effect that AB-5 would have on motor carriers' prices, routes, or services. Indeed, many carriers already use employee drivers to competitively provide carrier services in California and across the country.

For all these reasons, this Court should reverse the District Court's order granting the California Trucking Association's (CTA) motion for a preliminary injunction, because the District Court erred in finding that CTA has shown a likelihood of success on the merits of the FAAAA preemption claim.

ARGUMENT

1. The District Court Erred in Finding that the CTA Established a Likelihood of Success of Its FAAAA Preemption Claim.

Under the FAAAA, a state "may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." 49 U.S.C. §14501(c)(1). This provision preempts state laws that "aim directly at the carriage of goods" or have a "'significant impact' on carrier rates, routes, or services," but does not disturb laws that apply to motor carriers and have only a "tenuous, remote, or peripheral" connection to rates, routes, or services. Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 375-76 (2008) (quoting Morales

[2] The alleged "effect" of employee status would be the same under the ABC test or under the California common law "Borello" test.

v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992)). By finding that the CTA established a likelihood of success of the claim that the FAAAA preempts the AB-5 ABC test, the District Court erred.

a. Congress Did Not Intend for the FAAAA to Preempt State Wage Laws Like Those Governed by the AB-5 ABC Test, Which Are Too Tenuously Connected to Rates, Routes, and Services.

The CTA bears the heavy burden of overcoming the presumption that Congress did not intend to preempt standard and basic state wage laws like the Labor Code when it enacted the FAAAA. See Stengel v. Medtronic, Inc., 704 F.3d 1224, 1227 (9th Cir. 2013) ("Parties seeking to invalidate a state law based on preemption bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law."). "In all preemption cases"—and "particularly in those in which Congress has 'legislated in a field which the States have traditionally occupied'"—courts must "start 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." Wyeth v. Levine, 555 U.S. 555, 565 (2009). Because "the establishment of labor standards falls within the traditional police power of the State," the Supreme Court has emphasized that "preemption should not be lightly inferred in this area." Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987). "States possess broad authority under their police powers to regulate the employment relationship to

protect workers" through "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws." DeCanas v. Bica, 424 U.S. 351, 356 (1976); see also Bedoya, 914 F.3d at 818.

Even where federal statutes broadly preempt state law relating to labor relations, the Supreme Court has historically been reluctant to extend preemption to the field of "wages, hours, or working conditions." Terminal R.R. Ass'n of St. Louis v. Bhd. Of R.R. Trainmen, 318 U.S. 1, 6–7 (1943); see also California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 334 (1997) ("We could not hold preempted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort."). Importantly, the Supreme Court has adhered to this presumption against preemption in cases involving the FAAAA. See City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424, 438 (2002) ("Preemption analysis 'start[s] 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.'").

Not only is the protection of workers historically within the province of state law and thus presumptively saved from preemption, it is also quite remote from Congress' purpose in enacting the FAAAA. Wyeth, 555 U.S. at 565 ("The purpose of Congress is the ultimate touchstone in every preemption case."). In passing the

FAAAA's preemption provision, Congress sought to eliminate a "patchwork of … service-determining laws" that had arisen among the states; typically, "entry controls, tariff filing and price regulation, and types of commodities carried." H.R. Conf. Rep. No. 103-677, 87 (1994); President William J. Clinton, Statement on Signing the Federal Aviation Administration Authorization Act of 1994, 2 Pub. Papers 1494 (Aug. 23, 1994) ("State regulation preempted under [the FAAAA] takes the form of controls on who can enter the trucking industry within a State, what they can carry and where they can carry it, and whether competitors can sit down and arrange among themselves how much to charge shippers and consumers.").[3] In Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251 (2013), the Court emphasized that the statutory phrase "related to a price, route, or service of any motor carrier" should not be read "with an uncritical literalism" as if the "sky is the limit." 569 U.S. at 260. Rather, "§ 14501(c)(1) **does not** preempt state laws affecting carrier prices, routes, and services 'in only a tenuous, remote, or peripheral . . . manner.'" Id. at 261 (citing Rowe, 552 U.S. at 371) (emphasis added).

Congress clearly did not intend to preempt laws that merely regulate employment relationships. In Mendonca, the Ninth Circuit found it "revealing"

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[3] Congress expressly recognized that states could continue to regulate matters such as insurance, financial responsibility, and vehicle safety, and that "[t]his list is not intended to be all inclusive . . ." H.R. Conf. Rep. No. 103-677, at 84–85.

that "Congress identified forty-one jurisdictions which regulated intrastate prices, routes and services of the trucking industry followed by ten jurisdictions which did not," and that "[o]f the ten jurisdictions which Congress found *did not* regulate intrastate prices, routes and services, seven of these jurisdictions had, and continue to have, general prevailing wage laws[.]" Mendonca, 152 F.3d at 1187 (emphasis in original), citing H.R. Conf. Rep. 103-677, at 86 (1994).[4] In fact, many of the jurisdictions identified by Congress as not having laws regulating prices, routes, or services of motor carriers also had wage payment statutes in effect when Congress enacted the FAAAA. See, e.g., Arizona Revised Stat. § 23-352; 1992 Delaware Laws Ch. 217 (H.B. 353); 1992 District of Columbia Laws 9-248; 1991 Me. Legis. Serv. Ch. 507.

Indeed, as the Seventh Circuit determined in Costello v. BeavEx, Inc., 810 F.3d 1045, 1054 (7th Cir. 2016), cert. denied 137 S. Ct. 2289 (2017), "there is a relevant distinction for purposes of FAAAA preemption between generally applicable state laws that affect the carrier's relationship with its customers and those that affect the carrier's relationship with its workforce." 810 F.3d at 1054.

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[4] See also Alaska Airlines v. Brock, 480 U.S. 678, 680 (1987) ("Congress sought to ensure that the benefits to the public flowing from [airline] deregulation would not be paid for by airline employees…"); H.R. Conf. Rep. No. 103-677 at 88 ("The purpose of [the FAAAA] is to preempt economic regulation by the States, not to alter, determine or affect in any way … whether any carrier is or should be covered by one labor statute or another…").

The Supreme Court's major preemption decisions confirm this conclusion, because they all concerned legal claims that *directly targeted* the prices and services offered by carriers to consumers. In contrast, "[l]aws that merely govern a carrier's relationship with its workforce, however, are often too tenuously connected to the carrier's relationship *with its consumers* to warrant preemption." Id. at 1054 (emphasis in original). As discussed above, virtually all states had generally applicable wage laws at the time the FAAAA was enacted, and those statutes all must necessarily define the distinction between an employee and an independent contractor for purposes of delimiting the statutes' coverage in the workplace generally--not just as to motor carriers.[5] Because those background definitions are so far removed from the point at which a carrier offers prices, routes, and services to its customers, they do not fall within the ambit of FAAAA preemption. The ABC test to determine independent contractor status at issue in this case is generally applicable to all employers as members of the public, is an exercise of California's traditional police powers, and does not in any way single out motor carriers. Simply put, Congress never intended to preempt generally applicable laws

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[5] For example, some states use an "ABC test," other states use an "economic realities" test similar to the FLSA, while others apply a "right to control" test similar to California's former Borello standard. It is absurd to suggest that Congress somehow intended to preempt some states' employee definitions, but not others, when it passed the FAAAA.

like the ABC test which determines the applicability of state employment laws.

b. The Ninth Circuit and Numerous Other Courts to Address the Issue Have Held that the FAAAA Does Not Preempt Generally Applicable Labor and Employment Laws Unless They Have a "Significant Impact" on Rates, Routes, or Services.

This Court has recognized that under the Supreme Court's decisions, the FAAAA only preempts generally applicable laws if they specifically target motor carriers or have a "significant impact" on carriers' routes, prices, and services. Rowe, 552 U.S. at 375 (quoting Morales, 504 U.S. at 390). The Ninth Circuit has held that California's generally applicable employment laws do not have a "significant impact" unless they "bind" carriers to a "particular" rate, route, or service. See Dilts, 769 F.3d at 646; see also Air Transport Ass'n, 266 F.3d at 1072.

This Circuit has held that the FAAAA does not preempt generally applicable employment laws including California's prevailing wage law, Mendonca, 152 F.3d 1184; meal and rest break laws, Dilts, 769 F.3d at 637; the earlier Borello test to determine whether a worker is an employee or an independent contractor, Su, 903 F.3d 953; or laws governing minimum wages for layovers, Ridgeway, 946 F.3d 1066. In Dilts, this Court wrote that a state's "generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted" by the FAAAA. 769 F.3d at 646.

This Court's jurisprudence is also consistent with the California Supreme Court's decision in People ex rel Harris v. Pac Anchor Transportation, Inc., 59 Cal. 4th 772. There the California Supreme Court addressed a trucking company's claim that the FAAAA preempts California's unfair competition law (UCL), which mandates compliance with state labor and insurance laws, including worker classification laws. Id. at 75-76. The Court confirmed that the "the FAAAA does not preempt generally applicable employment laws that affect prices, routes, and services" such as the UCL. Id. at 783 (citing Mendonca, 152 F.3d at 1190). The UCL and generally applicable laws that it references are merely "laws that regulate employer practices *in all fields* and simply require motor carriers to comply with labor laws that apply to the classification of their employees." Id. at 785. This Court has indicated that its own decisions are in accord with the California Supreme Court. See Su, 903 F.3d at 967.

The Seventh Circuit and Third Circuit agree that the FAAAA was not intended to preempt workplace laws that protect workers generally and are not specifically targeted on motor carriers. In S.C. Johnson & Son v. Transport Corp of America, Inc., 697 F. 3d 544, 558 (7th Cir. 2012), the Seventh Circuit recognized that "state laws of general application that provide the backdrop for private ordering" are not preempted by the FAAAA where they affect motor carriers "only in their capacity as members of the public," including, for example, "minimum

wage laws . . .” 697 F.3d at 558. This is because virtually *every* state law can be linked in some remote way to a motor carrier’s prices, routes, or services:

> For example, labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, antidiscrimination laws, and pension regulations. . . . Changes to these background laws will ultimately affect the costs of these inputs, and thus, in turn, the ‘price . . . or service’ of the outputs. Yet no one thinks that the ADA or the FAAAA preempts these and many comparable state laws . . . .

Id. at 558.

Similarly, in Bedoya, the Third Circuit held that the FAAAA does not preempt New Jersey’s ABC classification test. 914 F.3d at 824. First, “The test does not mention carrier prices, routes, or services, nor does it single out carriers.” Id. at 824. Second, the test “does not have a significant effect on prices, routes, or services either.” Id. The defendant argued that “applying the New Jersey law may require it to shift its model away from using independent contractors, which will increase its costs, and in turn, its prices.” Id. at 825. The Third Circuit rejected the argument that “negative financial and other consequences for an employer” equate to “a significant impact on Congress’ goal of deregulation” Id. at 826. Rather, “Congress sought to ensure market forces determined prices, routes, and services. Nothing in that goal, however, meant to exempt workers from receiving proper wages, even if the wage laws had an incidental impact on carrier prices, routes, or services.” Id.

Thus, the principle is firmly settled among this Circuit and others that the FAAAA does not preempt generally applicable state labor and employment laws such as the ABC test unless they bind motor carriers to *particular* prices, routes, or services.

c. The District Court Failed to Explain How AB-5 "Binds" Motor Carriers to a "Particular" Rate, Route, or Service.

CTA bears "the burden of proof in establishing the affirmative defense of preemption" by more than "very general information." See Dilts, 769 F.3d at 649. The District Court in this case emphasized that Prong B of the ABC test "categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees." Cal. Trucking Ass'n v. Becerra, 2020 WL 248993, at *7 (S.D. Cal. Jan. 16, 2020). However, even assuming that this is accurate, neither CTA nor the District Court have specified *how* an inability to hire independent contractors has an impermissible impact on prices, routes, and services. Indeed, the District Court and CTA would have been unable to explain had they tried, because examining each category in turn shows there is no evidence an employee framework has anything more than an "indirect, remote and tenuous" effect on carrier routes, rates, and services. Mendonca, 152 F.3d at 1189.

i. AB-5 will have no significant impact on rates.

The law of this Circuit holds that even when the cost of doing business

increases **markedly** as a result of a generally applicable wage law, that increase does not necessarily impact rates and is thus insufficient to trigger FAAAA preemption. Mendonca, 152 F.3d at 1189. In Mendonca, the appellant challenged the California Prevailing Wage Law (CPWL), contending that the CPWL would lead motor carriers, to "increase . . . prices by 25%" to offset the increase in wages. Id. Despite these claims, this Court did not "believe that CPWL frustrates the purpose of deregulation by acutely interfering with the forces of competition." Id. In contrast, in the instant case, neither the District Court nor CTA identified any specific percentage increase in prices that would result from hiring employees—let alone a momentous increase like 25% that this Court *found acceptable* in Mendonca. In most instances, carriers would not even have to pay overtime to employees, as drivers of vehicles with a gross vehicle weight rating of 10,001 pounds or more are exempt from overtime. See Alexander v. FedEx Ground Package Sys., Inc., 2016 WL 1427358, at *4 (N.D. Cal. Apr. 12, 2016).

Similarly, in Dilts, the Court concluded that the FAAAA does not preempt California's meal and rest break laws. 769 F.3d at 649. This Court recognized that the laws could indirectly impact rates, by leading motor carriers to "hire additional drivers or reallocate resources in order to maintain a particular service level . . ." Id. at 648. The Court nevertheless held that, even if such laws "raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment,"

they are not preempted." Id. at 646.

In Air Transport Ass'n of America, 266 F.3d 1064, this Court addressed whether the ADA preempted an anti-discrimination ordinance that mandated provision of employment benefits to employees' domestic partners. The air carrier claimed in part that the ordinance "dictat[es] the Airlines' ability to set prices and access to flights . . ." Id. at 1072. The Court rejected this argument. Although the ordinance essentially added "a contractual requirement" that increased the cost of doing business, this impact did not amount to binding the air carrier to a particular rate. Id. at 1074.

Finally, in Cal. Trucking Ass'n v. Su, 903 F.3d 953 (9th Cir. 2019), the Court specifically addressed whether the FAAAA preempts the previous common law Borello test for determining whether a worker is an employee or an independent contractor. There, CTA argued that the FAAAA preempts the Borello test because if an owner-operator is found to be an employee, "this could result in obligations under the California Labor Code . . . ." Id. at 959. Yet, the Su court found no preemption because "[a]t most, carriers will face modest increases in business costs, or will have to take the Borello standard and its impact on labor laws into account when arranging operations." Id. The same is true in this case—even if the ABC test requires motor carriers to hire employees and in turn modestly increases costs, this impact does *compel* the motor carrier to a particular rate.

Indeed, many motor carriers--including major players, such as Prime Inc., UPS, Deliv, Homer, and FedEx Express--have adopted an employee model with seemingly little impact on their ability to offer competitive services and rates. See Alison Griswold, *What Happens When Delivery Startups Use Employees Instead of Contractors*, QUARTZ, Sept. 19, 2019, https://qz.com/1707924/what-happens-when-delivery-startups-use-employees-instead-of-contractors/ (hereafter *What Happens*); Lisa Baertlein, *FedEx to Hire 700 Flexible Rural and Residential Drivers*, REUTERS, June 6, 2019, https://www.reuters.com/article/us-fedex-lastmile-exclusive/exclusive-fedex-to-hire-700-flexible-rural-and-residential-drivers-idUSKCN1T728S; *Company Truck Driving Jobs*, https://driveforprime.com/drive/company-driver-careers/. Notably, on an industry publication's "Top 100 For-Hire Carriers in the United States," UPS and FedEx Corp., which both use employee drivers, are ranked as the top two. See Transport Topics, 2019, https://www.ttnews.com/top100/for-hire/2019. Such companies advocate that hiring employee drivers leads to more efficiency due to better training and increased retention. See Carolyn Said, *Deliv Switching California Couriers to Employees—'Start of a Wave'*, June 22, 2019, https://www.sfchronicle.com/business/article/Deliv-switching-California-couriers-to-employees-14029663.php. Moreover, in contrast to CTA's claim in the lower court that an employee model would require carriers to "acquire enough trucks and

drivers to meet *maximum* demand," see ER 247, it is actually an independent contractor model that requires "a big labor pool to draw from because, as contractors, workers are free to turn down jobs." See Griswold, *What Happens*. Thus, neither the law of this Circuit nor the evidence supports the contention that an employee framework would bind motor carriers to certain rates—let alone prohibitive ones.

An employee model for motor carriers may very well not cause any increase in price at all. For example, in an independent contractor model, a delivery company is likely requiring the worker to pay for fuel and vehicle maintenance. It reasons that this worker classified as an "independent contractor" is paid more in order to cover these expenses than if he or she were converted to an "employee." After converting to an employee model, the costs of the inputs such as fuel and vehicle maintenance may shift to the employer, but the price of the inputs remains the same, so there is no reason to suspect that the end price paid by the consumer of the delivery services would increase. The only change is whether the employer or driver pays for fuel and vehicle maintenance up front.

ii. AB-5 will have no significant impact on routes.

The District Court also conducted none of the required analysis of how an employee framework would "so restrict the set of routes available as to indirectly bind . . . motor carriers . . . to a limited set of routes" or "make the provision or use

of specific routes necessary for compliance with the law." Dilts, 769 F.3d at 649.

In Su, the Court also addressed the claim that the Borello test for independent contractor status had an impermissible impact on motor carrier routes. The court found no compelling "allegation that if a current driver is found to be an employee, CTA's members will no longer be able to provide the service it was once providing through that driver, or that the route or price of that service will be compelled to change." Id. The Court noted that motor carriers "will have to take the Borello standard and its impact on labor laws into account when arranging operations," but emphasized that this did not amount to binding motor carriers to any particular route. Id.

In Dilts, the Court also addressed the motor carrier's contention that "the requirement that drivers pull over and stop for each break period necessarily dictates that they alter their route" or "limit motor carriers to a smaller set of possible routes . . ." Id. 769 F.3d at 649. The Court rejected these arguments, finding that "[t]he requirement that a driver briefly pull on and off the road during the course of travel does not meaningfully interfere with a motor carrier's ability to select its starting points, destinations, and routes." Id. The Court thus determined that defendant had not met its burden to show that the FAAAA preempted California's break laws. Id. Here, the case is much the same. Neither CTA, nor the District Court, has specifically indicated how an employee framework would

impact a motor carrier's ability to select starting points, destinations, and routes. Indeed, there is no clear reason why this would be the case—employees can cover the exact same routes as independent contractors currently do.

iii. AB-5 will have no significant impact on services.

Finally, the District Court did not indicate how an employee framework would bind motor carrier to particular services.

In Dilts, the defendant motor carrier made three arguments claiming that California's break laws would impact service, and the Court rejected all three. First, the carrier argued that "break laws impermissibly mandate that no motor carrier service be provided during certain times because the laws require a cessation of work during the break period." 769 F.3d at 648. The Court quickly rejected this contention, noting that the defendant remains "at liberty to schedule service whenever they choose" but must "simply must hire a sufficient number of drivers and stagger their breaks." Id. at 648. Notably, the Dilts Court sanctions a law that leads carriers to hire more drivers in order to comply—the exact result of the ABC test that CTA claims would contravene the FAAAA. See ER 247.

The carrier in Dilts also argued that "mandatory breaks mean that drivers take longer to drive the same distance, providing less service overall" and that break laws would necessitate altering frequency and scheduling of carrier services. Id. The Court again responded that "[m]otor carriers may have to hire additional

drivers or reallocate resources in order to maintain a particular service level, but they remain free to provide as many (or as few) services as they wish" and "schedule transportation as frequently or as infrequently as they choose, at the times that they choose . . . ." Id. The Court noted that the effect of the meal and rest break laws is simply that carriers must take drivers' break times into account—just as they must take into account speed limits or weight restrictions, which are not preempted by the FAAAA. Id. Thus, this Court has made extremely clear that, even if motor carriers must shape their services around legal requirements, this does not equate to dictating the exact services that carriers can provide.

Similarly, in Air Transp. Ass'n of America, the Court recognized that the fact that air carriers have to consider compliance with the Ordinance did not amount to impermissibly binding air carriers to certain services. The Court also noted that:

> some of the plaintiffs have actually begun extending employment benefits to their employees' domestic partners on a nationwide basis during the pendency of this appeal, even though they were not obligated to do so…. This further evidences that the costs of providing these benefits are not enough to compel the Airlines to change their routes and services.

266 F.3d at 1075.

The same goes in the instant case. For example, Hub Group, Inc, a for-hire carrier company that currently ranks No. 12 on Transport Topics Top 100 list of for-hire carriers in the United States, "decided to voluntarily make drayage drivers

in California into employees" after previously using independent contractors. See *Hub Group Switches Drivers to Employee Status*, TRANSPORT TOPICS, Sept. 10, 2014, https://www.ttnews.com/articles/hub-group-switches-drivers-employee-status; *Top 100 For-Hire*. Evidently, that a top carrier successfully switched to an employee framework evidences that this switch does not fatally limit or inhibit the services that a carrier provides. See Air Transp. Ass'n of Am., 266 F.3d at 1075.

Looking at all three components together, it is clear that CTA's claims are unavailing to the extent that CTA argues that the FAAAA preempts the ABC test because classifying drivers as employees may lead to modestly increased rates or cause motor carriers to adjust their routes or services to comply with the law. Indeed, even if AB-5 compelled carriers to hire drivers as employees, many of the attendant rights and benefits of employee status have already been held by this Court to **not** have a significant impact on rates, routes, or services. Thus, the District Court erred in finding that the ABC test is preempted where it merely governs the applicability of other general labor and employment laws that this Court has *already found* to have no significant impact on carrier rates, routes, or services.

d. The District Court Erred in Relying on Inapplicable Dicta from Su.

The District Court erred in relying on *dicta* from Su for the proposition that the FAAAA preempts the California ABC test. See Cal. Trucking Ass'n v. Becerra,

2020 WL 248993, at *6 (S.D. Cal. Jan. 16, 2020). First, the Su court went to great lengths to explain that its decision would have no effect on whether an ABC test was preempted by the FAAAA. See 903 F.3d at 964 n.9 ("we need not and do not decide whether the FAAAA would preempt using the 'ABC' test to enforce labor protections under California law.") Second, precedent in this Circuit indicates that the determinative question is *not* whether the law binds motor carriers to labelling their workers as employees, but whether the law binds motor carriers to particular rates, routes, or services—a question which, for the reasons discussed above, must be answered in the negative here.

Even if the operative question *were* whether the ABC test binds motor carriers to label drivers as employees rather than independent contractors, the AB-5 importantly differs from the Massachusetts statute in this regard. While the Massachusetts independent contractor statute "may effectively compel a motor carrier to use employees for certain services," Su, 903 F.3d at 964, AB-5 includes a "business-to-business" exception that is available to "sole proprietorship[s]" which can include independent owner-operators. See §2750.3(e)(1)-(2). The District Court erred in putting the onus on Defendant-Appellant to show how the applicability of the business-to-business exception to owner-operators "is possible," Becerra, 2020 WL 248993, at *10, when the burden of proving preemption falls on Plaintiff-Appellee. See Dilts, 769 F.3d at 649.

Moreover, the Independent Service Provider (ISP) model recently adopted by both FedEx Ground and Amazon provides examples of how a motor carrier might satisfy the business-to-business exception. Through the ISP model, Amazon and FedEx contract with independent service providers, which are large companies with responsibility over multiple routes and drivers, under which employee drivers work. See Spencer Soper & Thomas Black, *Forget Drones. Amazon's Jeff Bezos Needs Lots of Delivery Humans*, Dec. 17, 2018, https://www.bloomberg.com/news/articles/2018-12-17/forget-drones-amazon-s-jeff-bezos-needs-lots-of-delivery-guys. Through an ISP model, motor carriers can still obtain the services of drivers, but they do not hire the employee drivers directly, and the employees are paid by the separate ISP entity. The District Court also erred in concluding that motor carriers could not engage the business-to-business exception to continue to obtain the services of delivery drivers.

e. The District Court erred in relying on Schwann.

The District Court further erred in relying on Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429 (1st Cir. 2016), as persuasive authority, which held that the FAAAA preempts Prong B of the Massachusetts independent contractor test, which is identical to Prong B of the AB-5 ABC test. See Becerra, 2020 WL 248993, at *6. The District Court's reliance on Schwann is misguided for two reasons. First, the First Circuit jurisprudence on FAAAA preemption has

diverged considerably from this Circuit, as well as from the Third and Seventh Circuits. Second, and relatedly, given the Supreme Court's mandate that the law at issue have a "significant impact" on carrier routes, rates, or services, Rowe, 552 U.S. at 375, *Amicus* respectfully submits that Schwann was wrongly decided because it gave short shrift to this analysis. However, to the extent that this Court does rely on Schwann, this Court should hold that, at most, only Prong B is preempted.

i. Schwann is premised on First Circuit precedent that conflicts with Ninth Circuit precedent and gives short shrift to the "significant impact" analysis mandated by the Supreme Court.

First, the District Court erred in relying on inapplicable First Circuit precedent. The First Circuit has rejected "a categorical rule that the FAAAA does not preempt generally applicable state employment laws." DaSilva v. Border Transfer of MA, Inc., 227 F. Supp. 3d 154, 158 (D. Mass. 2017). In contrast, this Circuit's precedent, discussed above in Section 1(c)(ii), supra, clearly conveys that if a generally applicable labor and employment law coincidentally leads to a price increase or modest change in service, that effect does not constitute "significant impact" triggering FAAAA preemption. See Ridgeway, 946 F.3d at 1066; Air Transport Ass'n of America, 266 F.3d at 1070-75; Dilts, 769 F.3d at 637; Mendonca, 152 F.3d at 1184. For this reason, several District Courts in this Circuit have rejected Schwann as being "contrary to the Ninth Circuit's FAAAA

preemption decisions in Dilts and Mendonca." See Western States Trucking Ass'n, 377 F. Supp. 3d 1056, 1072 n.5 (E.D. Cal. Mar. 29, 2019); see also Phillips v. Roadrunner Intermodal Serv., 2016 WL 9185401, at *7 (C.D. Cal. Aug. 16, 2016).

The Schwann decision relied heavily on DiFiore v. American Airlines, Inc., 646 F.3d 81 (1st Cir. 2011), which is inapposite in the Ninth Circuit context. In DiFiore, the First Circuit concluded that the ADA preempted the Massachusetts statute governing employees' tips because the statute required airlines to allow skycaps to keep the full proceeds of a $2.00 curbside check-in service charge. 646 F.3d 81 (1st Cir. 2011). The court noted that the tips statute required airlines to change the way the service was rendered in order to lawfully continue the practice of not remitting the full $2.00 to the skycaps, or alternatively, to raise the ticket fare to account for paying skycaps the proceeds of the $2.00 charge. Id. at 88-89. Thus, the court concluded, the state tips statute impermissibly "related to a price, route, or service." Id. at 87. The court did not conduct any analysis of why these outcomes constituted "significant impact" on airline rates, routes, or services, or how the tips statute bound carriers to a particular rate, route or service—the analysis required in the Ninth Circuit. Dilts, 769 F.3d at 646.

Schwann also relied heavily on the First Circuit decision in Massachusetts Delivery Ass'n v. Coakley, 769 F.3d 11 (1st Cir. 2014), which also addressed whether the FAAAA preempts the Massachusetts ABC test. The Coakley Court

simply explained that "[a]pplication of Prong [B] to [the company] would deprive [the company] of its choice of method of providing for delivery services and incentivizing the persons providing those services." 821 F.3d at 193. Yet Coakley never explained why this would have a "significant impact" on the routes, prices, and services that the carriers could offer, as required under the plain language of the Supreme Court's holdings in Rowe and Dan's City.

For these reasons, the District Court erred in relying on Schwann in finding that the CTA demonstrated a likelihood of success on its preemption claim.

ii. If this Court follows Schwann, this Court should hold that only Prong B of the ABC test is preempted.

If this Court nevertheless decides to follow Schwann, this Court should, like the Schwann court, find that only Prong B is preempted. 813 F.3d at 442. Schwann held that as a matter of state law, Prongs A and C of the Massachusetts Independent Contractor Statute were severable from Prong B and thus remain enforceable. Id. at 440.

Cal Lab Code § 2750.3(a)(3) provides that the Borello classification framework governs if "the three-part test . . . cannot be applied to a particular context . . ." The statute does not indicate whether Borello governs only if *all three* prongs of the three-part are inapplicable—and no court has addressed this issue. However, in line with California law on severability, this court should construe § 2750.3(a)(3) to mean that Borello applies only if all three parts are inapplicable

and that, if only one part is inapplicable, the others are severable.

Under California law, the first question to determine severability is whether "the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words." Santa Barbara Sch. Dist. v. Superior Court, 13 Cal. 3d 315, 330 (Cal. 1975). Here, like the ABC test in Schwann, 813 F.3d at 441, Prongs A and C are grammatically separate clauses from Prong B and are thus mechanically severable.

California law also asks whether the provision is "functionally" severable, meaning the sections are "capable of independent application." People v. Library One, Inc., 229 Cal. App. 3d 973, 989 (Cal. Ct. App. 1991); People's Advocate, Inc. v. Superior Court 181 Cal. App. 3d 316, 332 (Cal. 1986). Prongs A and C can be enforced independently of Prong B, because an employer's failure to prove any one prong is *independently* sufficient to determine that a worker is an employee.

The last test is whether the provisions are "volitionally" severable and "would have been adopted without the invalidated portion." Barlow, 72 Cal. App. 4th at 1265; Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 840 (Cal. 1989). The ABC test begins with a presumption that workers are employees, and alleged employers may then rebut this presumption by proving all three factors of the ABC test. See § 2750.3(a)(1). Requiring employers to prove prongs A and C still

provides more protection to employees than the multi-factor Borello test. Prongs A and C are volitionally severable because they fulfill the Legislature's goal in establishing a presumption of employee status and "restor[ing] . . . important protections" to misclassified employees. 2018 Cal AB 5 § 1(e).

CONCLUSION

For the foregoing reasons, in addition to reasons set forth by Defendants-Appellants, *Amicus* urges this Court to reverse the District Court's order granting Plaintiff-Appellee's motion for a preliminary injunction. In the alternative, *Amicus* urges this Court to enjoin at most enforcement of only Prong B of the ABC test.

Respectfully submitted,

For *Amicus Curiae*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), and 29(a)(4)(G), I hereby certify that this brief contains 6991 words as established by the word count of the computer program used for preparation of this brief. This brief complies with the length requirements set forth in Rule 29(a)(5).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point size Times New Roman font.

Dated: April 8, 2020

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CERTIFICATE OF SERVICE

I, Shannon Liss-Riordan, hereby certify that a copy of the foregoing document was filed electronically with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit and served upon all counsel of record via the Court's CM/ECF system on April 8, 2020.

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