No. 18-1641

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EVER BEDOYA, DIEGO GONZALES, and MANUEL DeCASTRO, individually and on behalf of all others similarly situated,

Plaintiff-Appellees,

v.

AMERICAN EAGLE EXPRESS, INC. d/b/a/ AEXGROUP,

Defendant-Appellant.

Interlocutory Appeal from the United States District Court for the District of New Jersey
Civil Action No. 2:14-cv-02811; Honorable Esther Salas, U.S.D.J.

RESPONSE BRIEF OF PLAINTIFF-APPELLEES

Harold L. Lichten
Michael N. Turi
Matthew Thomson, *admission pending*
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
Tel. (617) 994-5800
Fax (617) 994-5801

Peter Winebrake
R. Andrew Santillo
WINEBRAKE & SANTILLO, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
Tel. (215) 884-2491
Fax (215) 884-2492

Attorneys for Plaintiff-Appellees
DATED: August 6, 2018

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STATEMENT OF THE ISSUE

1. Whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") preempts the application of the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq. ("NJWHL"), and New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq. ("NJWPL"), which govern the timely payments of minimum and overtime wages and prohibit certain deductions, to the full-time couriers who brought this case. Joint Appendix (hereinafter simply "A") A10.

STATEMENT OF RELATED CASES OR PROCEEDINGS

There are no related cases pending in this Court.

INTRODUCTION

The Federal Aviation Administration Authorization Act of 1994 ("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] In this case, Plaintiff-Appellees Ever Bedoya, Diego

[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). Notably, however, in enacting the FAAAA Congress added the qualifier "with

Gonzales, and Manuel DeCastro ("Plaintiffs"), courier drivers who deliver medicines and pharmaceutical scripts for Defendant-Appellant American Eagle Express, Inc. ("AEX") within the state of New Jersey using their own cars, seek damages for unpaid overtime wages and unlawful deductions taken from their wages. AEX seeks to evade its obligations as an employer by arguing that Plaintiffs are independent contractors even though they are AEX's employees under New Jersey wage law. In an effort to avoid liability, AEX claims that the test to determine who is an employer under the New Jersey wage laws is preempted by the FAAAA.

However, 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). As set forth below, in enacting the FAAAA, Congress never intended to allow courier companies to escape liability for complying with basic state wage laws such as the NJWPL and NJWHL, which affect transportation companies "one or more steps away from the moment at which the firm offers its customer a service for a particular price." S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc., 697 F.3d 544, 558 (7th Cir. 2012). Indeed, this Court has counseled against finding preemption of a "garden variety employment claim" that is "too

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respect to the transportation of property," thus further limiting the statute's preemptive scope.

remote and too attenuated to fall within the scope of the ADA" or FAAAA. Gary v. Air Group, Inc., 397 F.3d 183, 189 (3d. Cir. 2005). This Court should affirm the District Court's holding that application of these statutes is not preempted by the FAAAA because enforcement of the New Jersey wage laws does not significantly impact AEX's routes, prices, or services, and AEX has failed to show otherwise.

STATEMENT OF THE CASE

I. Nature of the Case

The FAAAA provides that "a State … 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). The District Court held that the application of the NJWPL and NJWHL, which provide for the timely payment of minimum wages, overtime compensation, and prohibit employers from making improper wage deductions, is not preempted by the FAAAA because those statutes do not relate to or have a significant impact on prices, routes or services. AEX appeals that ruling.

II. Relevant Facts

AEX is a regional package delivery company headquartered in Aston, Pennsylvania, with a location in Linden, New Jersey. A39–40 ¶ 14. Its primary function is to provide courier delivery services of medicines and pharmaceutical

scripts to hospitals, drug companies and pharmacies. Id. at ¶ 6. The named Plaintiffs and the class they seek to represent comprise a group of delivery drivers who drive their own cars and who performed delivery services for AEX in New Jersey on a full-time basis. All of the plaintiffs are classified as independent contractors. Id. ¶¶ 3–5, 7. As a precondition to receiving work, AEX required its drivers to sign an agreement drafted by AEX, stipulating that they were "independent contractors." A41 ¶ 16; A50, 55.

Despite being called independent contractors by AEX, the drivers were subject to AEX's full behavioral and financial control. Plaintiffs did not have their own independent businesses, but rather, Plaintiffs worked full-time as delivery drivers for AEX for five days or more per week, and Plaintiffs Bedoya and DeCastro often worked in excess of forty hours per week. A40–41 ¶¶ 11, 14, 17–20. AEX required drivers to report to the AEX warehouse facility in Linden, New Jersey by 6:00 AM each morning, and deliver packages for AEX along a regular route each day. Id. ¶¶ 14, 17. Plaintiffs were required to seek permission from AEX to take a day off. A41 ¶ 18.

AEX exercised significant control over Plaintiffs through both written and unwritten policies and procedures that AEX requires drivers to follow when making deliveries. A42 ¶ 24. For example, AEX required Plaintiffs to use a particular kind of scanner to deliver each package, and this scanner enables AEX

to track its drivers and the packages they deliver. A40 ¶ 13. AEX has the right to constantly monitor drivers' performance, and markets its services to customers by claiming that it can strictly control, micromanage, and monitor the work being performed by its delivery drivers. A42 ¶¶ 24–25. Because drivers work full-time for AEX and require AEX's permission to take time off, they are economically dependent upon AEX for their livelihoods. A39–41 ¶¶ 3–5, 11, 18, 23.

AEX also requires drivers to bear its own expenses. It takes deductions from drivers' pay for such things as "occupational insurance," a mandatory electronic scanner, background checks, and drug testing. A40–41 ¶¶ 13, 17. Additionally, whenever AEX believes that a driver has failed to perform deliveries in the manner prescribed by its procedures, AEX penalizes drivers with deductions for "infractions" such as lateness or poor delivery service. Id. Although Plaintiffs routinely worked more than forty hours per week, AEX does not pay any overtime compensation. A41 ¶ 19; A43 ¶ 37.

Plaintiffs brought this action to recover unpaid wages, including overtime compensation and unlawful deductions, that AEX has taken in violation of the NJWPL and NJWHL. A42–44.

III. Course of Proceedings

The Plaintiffs in this case are drivers who worked full-time jobs making deliveries for AEX, and who allege in their Complaint, A42–43, that they were

misclassified as independent contractors by AEX in violation of the NJWPL and NJWHL. Those statutes use what is called an "ABC" test for determining who qualifies as an "employee":

> The "ABC" test presumes an individual is an employee unless the employer can make certain showings regarding the individual employed, including:
>
> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

Hargrove v. Sleepy's, LLC, 106 A.3d 449, 453, 458 (N.J. 2015). "[T]he failure to satisfy any one of the three criteria results in an 'employment' classification." Id.[2]

[2] Notably, in New Jersey, the "ABC" test is only used to determine employee/independent contractor status for the purpose of the NJWPL, NJWHL, and the Unemployment Compensation Act, N.J.S.A. 43:21-19(i)(6). Id. at 453. It has not been held to apply to determinations of employee status for other purposes, and indeed, employee/independent contractor status is not an all-or-nothing proposition. MacDougall v. Weichert, 677 A.2d 162, 166 (N.J. 1996) ("An individual may be considered an employee for some purposes but an independent contractor for others."). For example, the Supreme Court of New Jersey concluded shortly after the Hargrove decision that New Jersey uses a twelve-factor "hybrid" test, not an ABC test, to distinguish employees and independent contractors for the purpose of the Workers' Compensation Act, N.J.S.A. 34:15. Kotsovska v. Liebman, 116 A.3d 1, 16–17 (N.J. 2015). Therefore, it is possible that employers

The NJWPL generally prohibits employers from taking deductions or withholdings from the wages of employees, except where expressly permitted therein. See N.J. Stat. § 41:11-4.4. The NJWHL requires that employees who work over 40 hours in a workweek shall receive "1 ½ times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week." N.J.S.A. § 34:11-56a4. Based on their status as covered "employees" under those statutes, Plaintiffs seek to recover damages for unlawful deductions and overtime pay. A42–43.

On May 1, 2014, Plaintiffs filed a putative class action in the District Court alleging that, as a result of AEX's misclassification of its delivery drivers as independent contractors, AEX violated the NJWPL by making unlawful deductions from the drivers' wages for items such as insurance, scanners, and background checks, and violated the NJWHL by failing to pay overtime compensation. See A38–44. On August 7, 2015, AEX moved for judgment on the pleadings on Plaintiffs' claims, arguing that the application of the "ABC" test used to determine employee status under the NJWPL and NJWHL was preempted by the FAAAA. See A181–82; District Court ECF No. 69-1. On November 21, 2016, the District Court denied AEX's motion for judgment on the pleadings in an

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such as AEX could utilize workers who are classified as employees under the ABC test for the purpose of the NJWPL and NJWHL, but who are independent contractors for all other purposes under state and federal law.

oral opinion. A519–29. In doing so, the Court held that "[b]ased on the arguments before the Court, it does not appear that the ABC Test significantly affect[s] Defendant's prices, routes, or services," A528–29, and "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 should be covered by one labor statute or another." A524.

In holding that the FAAAA did not preempt application of the ABC test, the District Court looked to the reasoning of other courts that have addressed similar questions, and have almost unanimously agreed that background labor laws like the NJWPL and NJWHL "will [not] have the kind of 'significant impact' on … prices, routes, or services that Congress sought to prevent under the FAAAA." Echavarria, et al. v. Williams Sonoma, Inc., et al., No. 15-6441, 2016 WL 1047225, at *8–9 (D.N.J. Mar. 16, 2016); A524–29. The Court noted that the Circuit Courts of Appeal, with one exception, have unanimously held that state wage laws and misclassification claims are not preempted by the FAAAA. A526; Costello v. BeavEx, Inc., 810 F.3d 1045, 1054 (7th Cir. 2016), cert. denied, 137 S. Ct. 2289 (2017) (holding that an identical ABC test under Illinois law was not preempted); Dilts v. Penske Logistics, LLC, 769 F.3d 637, 646 (9th Cir. 2014), cert. denied, 135 S. Ct. 2049 (2015) (holding that California's meal and rest break

law was not preempted).[3]

On December 22, 2016, AEX moved to certify an interlocutory appeal and stay proceedings, seeking interlocutory review of the order on FAAAA preemption. District Court ECF No. 112. On September 29, 2017, the District Court granted AEX's motion and certified the question for interlocutory appeal. A2–11. On October 10, 2017, AEX filed its petition seeking interlocutory review of the order on FAAAA preemption under 28 U.S.C. § 1292(b). See Case No. 17-8053. On March 12, 2018, this Court granted AEX's petition for interlocutory review.

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[3] As discussed below in Section III-B, infra, the ABC test that the First Circuit held partially preempted in Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429 (1st Cir. 2016), and Massachusetts Delivery Ass'n ("MDA") v. Healey, 821 F.3d 187 (1st Cir. 2016), has been consistently described as "anomalous" for its uniquely structured "prong B," which has an exceptionally broad scope and automatically makes *anyone* who does work within an employer's usual course of business an employee. See Portillo v. Nat'l Freight, Inc., No. 15-7908, 2016 WL 5402215, at *5 (D.N.J. Sep. 26, 2016) (describing Massachusetts prong B as "relatively novel" and "something of an anomaly") (Simandle, J.).

In its opening brief, AEX portrays a legal landscape in which the circuit courts are split on the issue of FAAAA preemption of wage laws, with Costello and Dilts standing on the wrong side of Supreme Court precedent. This could not be a less accurate portrayal of FAAAA law. As set forth infra, *every* District Court and Circuit Court to address this issue has held that the law in question is *not* preempted, with the sole exception of the "anomalous" prong B of the Massachusetts ABC test. The Supreme Court cases cited in AEX's brief are all readily distinguishable because (among other reasons) they concern claims that directly implicated the services offered from a motor or air carrier to its customers. See Section III-D, infra.

SUMMARY OF THE ARGUMENT

Preemption analysis begins "with the assumption that the historic police powers of the States were not to be superseded," Wyeth v. Levine, 555 U.S. 555, 565 (2009), and because "the establishment of labor standards falls within the traditional police power of the State," Forth Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 21 (1987), AEX bears a heavy burden in arguing that the NJWPL and NJWHL are preempted by the FAAAA. In enacting the FAAAA, Congress sought to eliminate a "patchwork of … service-determining [state] laws," such as "entry controls, tariff filing and price regulation," H.R. Conf. Rep. No. 103-677, 87 (1994), but never intended to preempt "[l]aws that merely govern a carrier's relationship with its workforce" because the impact of those laws is too "tenuous, remote, or peripheral to warrant FAAAA preemption." Costello, 810 F.3d at 1054–55.

The Supreme Court has held that FAAAA only preempts state laws that have "a *significant* impact on carrier rates, routes, or services." Rowe, 552 U.S. at 375 (emphasis added); see also Schwann, 813 F.3d at 436 ("a state statute is preempted if it expressly references, or has a significant impact on … prices, routes, or services … [t]here is, of course, a necessary limit to the scope of FAAAA preemption … in a broad sense, everything 'relates to' everything else in some manner"). While AEX argues that there is a circuit split in assessing whether

the FAAAA preempts state misclassification claims, both the First and Seventh Circuits—along with the Ninth Circuit addressing other labor law claims—have dutifully followed the same "significant impact" test. The First and Seventh Circuits arrived at different conclusions in Schwann and Costello only because the statutes at issue were quite different. The misclassification statute at issue in Schwann triggers a wide variety of employee protections, and its "anomalous" prong B makes anyone who works in the "usual course of business" of the motor carrier an employee. 813 F.3d at 438–42; Portillo, No. 15-7908, 2016 WL 5402215, at *5 (D.N.J. Sept. 26, 2016) (Simandle, J.). As a result, prong B of that statute foreclosed the carrier's ability to use independent contractors and was thus preempted. Id. In contrast, the ABC test at issue in Costello—which is essentially identical to the ABC test in this case—is narrower in scope and leaves room for motor carriers to utilize an independent contractor workforce; its impact is therefore "too tenuous, remote, or peripheral" to warrant preemption because it "only indirectly affects prices by raising costs." 810 F.3d at 1055–57.

New Jersey's ABC test clearly falls on the side of the Illinois ABC test from Costello and is not preempted. Like the Illinois test and the ABC tests used by most states, prong B is a disjunctive test that allows a carrier to use independent contractors if they work outside their course of business *or place of business*, thus suggesting the possibility that a motor carrier can satisfy prong B where it could

not otherwise do so in Massachusetts under Schwann (where prong B does not include the "place of business" factor). See Hargrove, 106 A.3d at 458; Carpet Remnant Warehouse, Inc. v. New Jersey Dept. of Labor, 593 A.2d 1177, 1190 (N.J. 1991) (an enterprise's "place of business" under prong B "refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business."). While AEX seeks to distinguish this case from Costello on the ground that it also challenges prongs A (right to control) and C (independently established business), every court to address that question has held that those prongs are not preempted, even in Massachusetts where the Schwann Court eliminated prong B. See, e.g., Portillo, 2016 WL 5402215, at *5; Chambers v. RDI Logistics, Inc., 65 N.E.3d 1, 11 (Mass. 2016); DaSilva v. Border Transfer of MA, Inc., 227 F. Supp. 3d 154, 159 (D. Mass. 2017); Vargas v. Spirit Delivery & Dist. Servs., Inc., 245 F. Supp. 3d. 268, 282 (D. Mass. 2017).

Indeed, the District Court's conclusion that the New Jersey wage laws are not preempted falls squarely within the realm of existing Supreme Court precedent. The four Supreme Court cases that AEX relies upon—Morales, Wolens, Rowe, and Ginsberg—do not command any different result. The preempted claims in those cases are distinguishable because they all *directly targeted* the services that an air or motor carrier could offer to its customers. In contrast, Plaintiffs' claims here concern generally applicable background regulations that only affect AEX

(and every other employer in the State of New Jersey) "in their capacity as members of the public," Rowe, 552 U.S. at 375, do not target routes, prices or services, and AEX cannot show that the impact of those claims would be significant.

Lastly, AEX argues that if the NJWPL and NJWHL are enforced with respect to Plaintiffs, it will be forced to raise prices and change its business model. AEX provides no evidence to support these claims, and, like the motor carrier in Portillo, has "failed to articulate how the [ABC test] would impact their prices, routes or services beyond asserting conclusory statements." 2016 WL 5402215, at *5. To the extent that enforcement of the New Jersey ABC test would indirectly impact AEX's prices, no court has held a labor statute preempted for this reason, even where carriers have put forth a much more detailed showing than AEX. See, e.g., Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1189–90 (9th Cir. 1998) (FAAAA did not preempt application of prevailing wage law where carrier argued that it would be forced to increase its prices by 25%); Amerijet Int'l, Inc. v. Miami-Dade Cty., Fla., 627 Fed. Appx. 744, 751 (11th Cir. 2015) (ADA did not preempt living wage ordinance that mandated wage hikes and imposed administrative duties because "indirect economic influences are insufficient to trigger preemption"). The law is equally clear that motor carriers need not abandon the use of independent contractors if they are

actually *independent*. With regard to New Jersey's prongs A and C, "there is nothing intrinsic to these provisions that prevents motor carriers from using independent contractors," Chambers, 65 N.E.3d at 11, and with regard to prong B, unlike the "anomalous" Massachusetts prong B, AEX may attempt to show that its drivers are contractors if they perform services "outside of all the places of business of the enterprise for which such service is performed." Hargrove, 106 A.3d at 458. Yet even if AEX must classify its drivers as employees under the ABC test, employee/contractor status is not an all-or-nothing proposition; the same workers could be contractors for many other purposes. See, e.g., 26 U.S.C. § 3121(d)(2) (under the federal tax code, an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee"); Kotsovska, 116 A.3d at 16–17 (New Jersey uses twelve-factor "hybrid" test to distinguish employees and independent contractors for the purpose of the Workers' Compensation Act, N.J.S.A. 34:15). AEX has done nothing to suggest that the imposition of minimum wage, overtime, and a prohibition on unlawful deductions would force it to change its business model, beyond simply "choos[ing] whether to absorb [those] costs … or pass them along to its couriers through lower wage or to its customers through higher prices." Costello, 810 F.3d at 1056.

Ultimately, AEX cannot show that the application of the NJWPL and

NJWHL will have a significant impact on its prices, routes, or services. On that basis, this Court must affirm denial of AEX's motion for judgment on the pleadings.

ARGUMENT

I. Standard of Review

This Court reviews a district court's decision on preemption grounds *de novo*, beginning with the "strong presumption against preemption in areas of the law that States have traditionally occupied." Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 687 (3d Cir. 2016); see also Gary, 397 F.3d at 190 ("courts should not lightly infer preemption … particularly … in the employment context which falls squarely within the traditional police powers of the states"). Thus, a proponent of preemption "bears a considerable burden of overcoming the starting presumption that Congress did not intend to supplant state law." De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997) (internal quotation marks omitted). Finally, "when faced with two equally plausible readings of statutory text, [this Court has] a duty to accept the reading that disfavors preemption." Bruesewitz v. Wyeth Inc., 561 F.3d 233, 240 (3d Cir. 2009) (internal quotation marks omitted).

A motion for judgment on the pleadings is reviewed "under the same standards that apply to a Rule 12(b)(6) motion." Zimmerman v. Corbett, 873 F.3d

414, 417 (3d Cir. 2017). On appeal of a motion to dismiss under Rule 12(b)(6), all facts as alleged in the Complaint are "accepted as true," see Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and all reasonable inferences should be drawn in favor of the non-moving party (here, Plaintiffs). Zimmerman, 873 F.3d at 418.

II. The Purpose and History of the FAAAA Demonstrate that the Plaintiffs' Claims Under the NJWPL and NJWHL are Not Preempted.

AEX bears the heavy burden of overcoming the presumption that Congress did not intend to preempt standard and basic state wage laws like the NJWPL and NJWHL when it enacted the FAAAA, without any indication whatsoever that it was intending to preempt all such basic wage protections. "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, 555 U.S. at 565. Because "the establishment of labor standards falls within the traditional police power of the State," the Supreme Court has emphasized that "pre-emption should not be lightly inferred in this area." Coyne, 482 U.S. at 21. "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). 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) (where the federal preemption statute "is not primarily [concerned with] working conditions as such," "it cannot be that the minimum requirements laid down by state authority are all set aside"); see also California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 334 (1997) ("We could not hold pre-empted 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 pre-emption case."). In passing the FAAAA's preemption provision, Congress sought to eliminate a "patchwork of … service-determining laws" that had arisen among the states; "[t]ypical forms of [these] regulation[s] include entry controls, tariff filing and price regulation, and types of commodities carried." H.R. Conf. Rep. No. 103-677, 87 (1994); see Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 264 (2013) (holding that zoning ordinances are not preempted because they "ordinarily are not related to a price, route, or service of any motor carrier"); 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.").[4]

Congress clearly did not intend to preempt laws that merely regulate employment relationships. In Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, the Ninth Circuit found it "revealing" that "Congress

[4] Indeed, 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, but merely to specify some of the matters which are not [regulations of] 'prices, rates, or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84–85.

identified forty-one jurisdictions which regulated intrastate prices, routes and services, 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).[5] In fact, many of the jurisdictions identified by Congress as not having laws regulating prices, routes, or services, also had wage payment statutes in effect when Congress enacted the FAAAA. See, e.g., Arizona Revised Stat. § 23-352 (wage withholding statute first enacted in 1980); 1992 Delaware Laws Ch. 217 (H.B. 353) (establishing when wages are due and payable); 1992 District of Columbia Laws 9-248 (minimum wage law); 1991 Me. Legis. Serv. Ch. 507 (increasing the minimum wage rate for employers in Maine that was first established in 1954).

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[5] In DiFiore v. American Airlines, Inc., 646 F.3d 81, 87 (1st Cir. 2011), the First Circuit accepted the holding in Mendonca as "confirming our view that the Supreme Court would be unlikely … to free airlines from … prevailing wage laws" and other state laws that "must impact airline operations—and so, indirectly may affect fares and services" yet only "regulate the employment relationship…" 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…"); President William J. Clinton, Statement on Signing the Federal Aviation Administration Authorization Act of 1994, 2 Pub. Papers 1494 (Aug. 23, 1994) (predicting that "employment in the trucking services industry will increase substantially" as a result of the FAAAA).

Indeed, as the Costello court determined, "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. 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. See Section III-D, infra. 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." Costello, 810 F.3d 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 must necessarily define the distinction between an employee and an independent contractor. 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.

Lastly, the FAAAA's preemption provision tracks the ADA's with one exception: it only preempts state laws "related to" the routes, prices, and services of a motor carrier "*with respect to the transportation of property*." Ours Garage, 536 U.S. at 449 (Scalia, J., dissenting) (emphasis in original). That added language "massively limits the scope of preemption to include only laws, regulations, and

other provisions that single out for special treatment 'motor carriers of property.'" Id.[6] Thus, states "remain free to enact and enforce … other regulations that do not target motor carriers 'with respect to the transportation of property.'" Id. Needless to say, the background independent contractor test at issue in this case is generally applicable to all employers as members of the public, does not in any way single out motor carriers, and has nothing to do with the transportation of property.

Simply put, Congress never intended to preempt basic wage laws such as the NJWPL and NJWHL's employee-definition test, and this Court should uphold the District Court's holding in this respect. See A524–29.

III. Courts Have Virtually Unanimously Held That the FAAAA Does Not Preempt State Wage Laws or Misclassification Claims Because They are Too Tenuously Connected to Carrier Prices, Routes, and Services.

A. Courts Use the "Significant Impact Test" in This Context to Determine Whether a Law is Preempted.

The Supreme Court has made clear that the FAAAA does not preempt state laws such as the NJWPL and NJWHL that only affect motor carriers in their capacity as an employer or member of the public. Rowe, 552 U.S. at 375; see also Dan's City, 569 U.S. at 264 (zoning regulations fall outside the preemptive scope of the FAAAA because they are ordinarily not related to prices, routes, and

[6] While the language quoted herein comes from Justice Scalia's dissent in Ours Garage, that language was later adopted by a unanimous Supreme Court in Dan's City, which held that "nothing in the Court's opinion in [Ours Garage] is in any way inconsistent with [Justice Scalia's] characterization of § 14501(c)(1) [the FAAAA's preemption provision]." Dan's City, 569 U.S. at 261 n.4.

services). Rather, the FAAAA only preempts state laws "with a *significant* impact on carrier rates, routes, or services." Rowe, 552 U.S. at 375 (emphasis in original); see also Massachusetts Delivery Ass'n v. Coakley, 769 F.3d 11, 17–18 (1st Cir. 2014) ("a state statute is preempted if it expressly references, or has a significant impact on, carriers' prices, routes, or services"); Costello, 810 F.3d at 1055 ("the task before us is to determine whether the [ABC test] will have a significant impact on the prices, routes, and services that [the motor carrier] offers to its customers").

AEX attempts to confuse the standard of review for FAAAA preemption by suggesting that any law with even a marginal, tangential relationship to routes, prices, or services is preempted. See Appellant's Br. pp. 13–17. On the contrary, courts have universally adopted the "significant impact" test from Rowe and Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), excluding from preemption laws that do not substantially and adversely affect a carrier's routes, prices, and services. Rowe, 552 U.S. at 375 (quoting Morales, 504 U.S. at 390). AEX eventually arrives at this point, admitting that it must do more than suggest that enforcement of the NJWPL and NJWHL will have some effect on its business; the impact must be *significant*. Appellant's Br. p. 18.

Indeed, appellate courts across the country have noted that background labor laws cannot have the requisite "significant impact" to warrant preemption. In S.C. Johnson & Son, 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, safety regulations […], zoning laws, laws prohibiting theft and embezzlement, or laws prohibiting bribery or racketeering." 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. Capital is regulated by banking laws, securities rules, and tax laws among others. … 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 … because their effect on price is too 'remote.' Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its customer a service for a particular price.

Id. Numerous other courts have reached the same conclusion. The Ninth Circuit has held that the FAAAA does not preempt state meal and rest break laws, reasoning that:

> [G]enerally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about [their prices, routes, or services].

Dilts v. Penske Logistics, LLC, 769 F.3d at 646; see also Mendonca, 152 F.3d at 1190 (holding that the FAAAA does not preempt a state prevailing wage law); The

People v. PAC Anchor Transp., Inc., 329 P.3d 180, 188–90 (Cal. 2014), cert. denied, 2015 WL 731869 (U.S. Feb. 23, 2015), ("nothing in the congressional record establishes that Congress intended to preempt states' ability to tax motor carriers, to enforce labor and wage standards, or to exempt motor carriers from generally applicable insurance laws.").

The First Circuit has likewise "[drawn] the preemption 'dividing line' between state laws that regulate 'how a service is performed' (preempted) and those that regulate how [a business] behaves as an employer or proprietor (not preempted)." Tobin v. Federal Exp. Corp., 775 F.3d 448, 456 (1st Cir. 2014) (quoting DiFiore v. American Airlines, Inc., 646 F.3d at 87–88 (laws that "merely [regulate] how the [business] behaves as an employer or proprietor" are not preempted)); see also Gennell v. FedEx Ground, Inc., No. 05-145, 2013 WL 4854362, at *6 (D.N.H. Sep. 10, 2013) (The purpose of the FAAAA "is not served when the FAAAA is construed so broadly as to require the preemption of every employee compensation statute…"). Indeed, even in Schwann, where the First Circuit held that the unusual "prong B" of the Massachusetts ABC test was preempted by the FAAAA, the Court was careful to note that "in a broad sense, everything 'relates to' everything else in some manner." 813 F.3d at 435 (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) ("If 'relate to' were taken to extend to the furthest stretch

of its indeterminacy, then for all practical purposes pre-emption would never run its course....")); see also Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1259–60 (11th Cir. 2003) (noting that "[i]t is true that an airline's employment decisions may have an incidental effect on its 'services,'" but holding that the incidental effect of employment-retaliation claims was too remote to warrant preemption).

Simply put, even if the FAAAA could be construed as reaching state wage laws, AEX still must show that application of the NJWPL and NJWHL will have a *significant* impact on its routes, prices, or services, which it cannot do and certainly has not done.

B. There is No Circuit Split on the Application of FAAAA Preemption to Employment Statutes

Virtually every Circuit Court that has addressed the question of whether the FAAAA or ADA preempt state wage laws or misclassification claims has held that they do not. See Costello, 810 F.3d at 1054, cert. denied, 137 S. Ct. 2289 (2017) ("[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."); Amerijet, 627 Fed. Appx. at 751, cert. denied, 136 S. Ct. 2015, 195 L. Ed. 2d 217 (2016) (county living wage ordinance not preempted by the ADA, which uses identical "preemption" language as the FAAAA); Dilts, 769 F.3d at 646, cert. denied, 135 S. Ct. 2049 (2015) ("generally applicable

background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws …, are not preempted….”); S.C. Johnson, 697 F.3d at 558 (“no one thinks that the ADA or the FAAAA preempts” background laws such as minimum wage laws); DiFiore, 646 F.3d at 87 (holding that the ADA does not preempt laws that “simply regulate the employment relationship between the [plaintiffs] and the [defendant]”); Mendonca, 152 F.3d at 1190 (state prevailing wage law does not fall into the “field of laws” regulating prices, routes, or services that are preempted by the FAAAA, even where carrier argued that the law would force it to increase its prices by 25%); Gary, 397 F.3d at 190 (“garden variety employment claim[s]” are not preempted by the ADA). The sole exception is one part of the Massachusetts ABC test—“prong B”—that the First Circuit recognized as an “anomaly,” and is quite distinguishable from the ABC test here. See Schwann, 813 F.3d at 438. Moreover, virtually every federal district court and state court has agreed with the District Court below in this case.[7]

[7] See Hargrove et al. v. Sleepy’s, LLC, No. 10-1138, ECF No. 174 at 11 (D.N.J. Nov. 3, 2016) (New Jersey misclassification claims for unpaid wages not preempted by FAAAA) (Tr. of Opinion attached to Plaintiff-Appellants’ Motion to Expand the Record and Take Judicial Notice as Exhibit 1); Echavarria, 2016 WL 1047225, at *9 (same), recons. denied sub nom. 2016 WL 1670934 (D.N.J. Apr. 27, 2016); Kloppel v. Sears Holdings Corp., No. 17-6296, 2018 WL 1089682, at *5–6 (W.D.N.Y. Feb. 28, 2018) (New York’s ABC test and plaintiffs’ underlying misclassification claim not preempted by FAAAA); Johnson v. Diakon Logistics, No. 16-6776, 2018 WL 1519157, at *4 (N.D. Ill. Mar. 28, 2018) (Illinois misclassification claim for unlawful deductions not preempted by FAAAA); Lupian v. Joseph Cory Holdings, LLC, 240 F. Supp. 3d 309, 314–17 (D.N.J. 2017)

AEX contends that there is a circuit split on this issue, with Dilts and Costello incorrectly applying the law. Appellant's Br. pp. 26–28. The reality could not be further from the truth. The First, Seventh, and Ninth Circuits applied the exact same "significant impact" analysis in the respective cases AEX cites, arriving at different holdings only because the statutes at issue were quite different.

In Schwann v. FedEx Ground Package Sys., Inc., the First Circuit held that

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(same); PAC Anchor, 329 P.3d 180, 190 (Cal. 2014) (California wage claims and the underlying independent contractor misclassification claims were not preempted by the FAAAA); Villalpando v. Exel Direct Inc., No. 12-4137, 2015 WL 5179486, *24–*30 (N.D. Cal. Sept. 3, 2015) (same); Ridgeway v. Wal-Mart Stores, Inc., No. 08-05221, 2016 WL 4529430, at *7 (N.D. Cal. Aug. 30, 2016) (same); Robles v. Comtrak Logistics, Inc., No. 13-161, 2014 WL 7335316, *8 (E.D. Cal. Dec. 19, 2014) (California prevailing wage law not preempted); Godfrey v. Oakland Port Services Corp., 179 Cal. Rptr. 3d 498, 505–10 (Cal. Ct. App. 2014) (meal and rest break laws are not preempted by the FAAAA), cert. denied, 136 S.Ct. 318 (2015); Venegas v. Global Aircraft Serv., Inc., No. 14-249, 2016 WL 5349723, at *10–19 (D. Me. Sept. 23, 2016) (state law claims for independent contractor misclassification and unpaid wages not preempted by the ADA); Delivery Express, Inc. v. Sacks, No. 15-5842, 2016 WL 3198321, at *4 (W.D. Wash. June 9, 2016) (state worker's compensation law not preempted by FAAAA); Gennell, 2013 WL 4854362, at *5–7 (misclassification and wage deductions claims under New Hampshire law not preempted by the FAAAA); W. Ports Transp., Inc. v. Employment Sec. Dep't of State of Wash., 41 P.3d 510, 519 (Wash. App. 2002) ("We decline to infer that Congress, in enacting federal motor carrier law, intended to preempt state unemployment law."); Vargas, 245 F. Supp. 3d at 280–85 ("Almost uniformly, courts… have found that state laws that define employees for purposes of state wage law claims, such as Prongs 1 [control] and 3 [independently established business], are not preempted by the FAAAA"); DaSilva, 227 F. Supp. 3d at 160; Chambers, 65 N.E.3d at 11; Portillo, 2016 WL 5402215, at *4.

The only two cases holding that the Massachusetts wage statute was completely preempted were clearly reversed and overruled by more recent First Circuit opinions. See Remington v. J.B. Hunt Transp., Inc., No. 15-10010, 2015 WL 501884, at *2 (D. Mass. Feb. 5, 2015), rev'd (Feb. 22, 2016) and Sanchez v. Lasership, 937 F. Supp. 2d 730 (E.D. Va. 2013) (overruled by Schwann).

the FAAAA preempted prong B of an "ABC" test, Mass. Gen. Laws § 148B(a), which it described as "relatively novel" and "something of an anomaly." 813 F.3d at 438–42. While prong B of New Jersey's ABC test requires an employer to demonstrate that the individual in question performs work outside the usual course *or usual place of business* of the entity, the Massachusetts prong B refers only to the "usual course of business." Hargrove, 106 A.3d at 458; M.G.L. c. 149, § 148B(a)(2). In contrast, the "ABC" test in New Jersey is less restrictive and permits AEX to demonstrate that its drivers are independent contractors if they performed their services outside its usual course of business *or outside its usual place of business*. See Hargrove, 106 A.3d at 458. Also critical is the exceptionally broad scope of the Massachusetts ABC test. Once a worker is deemed an employee under the test, the employer must "provide certain benefits to its employees, including various days off … parental leave … work-break benefits … a minimum wage … [and] under Plaintiffs' proposed application of the [Statute] … pay for or reimburse all out-of-pocket expenses incurred." Schwann, 813 F.3d at 433. As discussed above, the New Jersey ABC test does not implicate nearly as many protections; it applies only to minimum wage, overtime, deductions, and unemployment insurance.[8]

[8] Importantly, these four benefits at most only implicate financial concerns, in contrast to the Massachusetts ABC test, which would require a carrier to provide certain breaks and other time off to its drivers. As discussed below in Section IV,

In Portillo v. Nat'l Freight, Inc., Judge Simandle of the District of New Jersey recognized that the Schwann holding was based on the fact that prong B of the Massachusetts "ABC" test "'stands as something of an anomaly' among state wage laws because it makes any person who performs a service within the usual course of business an employee." No. 15-7908, 2016 WL 5402215, at *5. The Schwann Court reasoned that because the statute had the effect of making any person who performs a service within the usual course of an enterprise's business an employee, prong B effectively foreclosed FedEx's business model of using independent contractors. Id. at 439. The Court held that for those reasons, prong B would "unquestionably [have] an *impact* on price, route[s], [and] services by in effect proscribing the carrier's preferred business model[.]" Id. at 435 (emphasis added).

The Seventh Circuit employed the exact same "significant impact" test in

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infra, no court has *ever* found a statute to be preempted because it indirectly increases prices by raising costs. Indeed, the Schwann Court was swayed towards finding preemption not because of increased labor costs, but because it believed the variety of labor benefits triggered by Massachusetts prong B—highlighting expense reimbursements and work break and time off requirements in particular—necessarily foreclosed FedEx's preferred business model of using independent contractors to perform first-and-last mile pick-up and delivery services. 813 F.3d at 433, 438–39. No such concerns are implicated here, where New Jersey's prong B leaves room for AEX to utilize independent contractors if they operate outside its usual "places of business" and, at worst, would only be required to absorb increased internal labor transaction costs—which does not result in the *significant impact* on routes, prices, and services necessary to invoke preemption. Costello, 810 F.3d at 1056–57.

Costello v. BeavEx, Inc., yet reached a different holding because the Illinois wage law—the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. 115/2, an ABC test essentially identical to the New Jersey ABC test—had a more limited scope. 810 F.3d at 1055–57; see also Kloppel, 2018 WL 1089682, at *4 ("Although the Seventh Circuit used the same analysis that the First Circuit used in Schwann, the facts of the case and the narrower scope of the state labor law mandated a different result."). The court concluded that the IWPCA would not require motor carriers to change their business model, in contrast to the statute in Schwann, and was a "background labor law" with an impact "too tenuous, remote, or peripheral to warrant FAAAA preemption" because it "only indirectly affects prices by raising costs." Id. at 1055. Like the New Jersey ABC test, the Illinois statute does not implicate a host of work break or time off protections, nor does it require reimbursement for expenses incurred. Rather, the company simply "will have to choose whether to absorb the costs it previously deducted or pass them along to its couriers through lower wage or to its customers through higher prices." Id. at 1056. For those reasons, it would ***not*** have "a significant impact on the prices, routes, and services that [the motor carrier] offers to its customers." Id. at 1055 (emphasis added).[9]

[9] After soliciting briefs from both parties and the United States Solicitor General, the Supreme Court denied BeavEx, Inc.'s petition for certiorari. BeavEx, Inc. v. Costello, 137 S. Ct. 2289 (2017) (No. 15-1305). The Solicitor General's

The Ninth Circuit also employed the "significant impact" test mandated by the U.S. Supreme Court in holding that meal and rest break laws are not preempted. Dilts, 769 F.3d at 645 ("Rowe simply reminds us that, whether the effect is direct or indirect, the state laws whose effect is forbidden under federal law are those with a *significant* impact on carrier rates, routes, or services.") (emphasis in original).[10] The Eleventh Circuit followed suit in Amerijet. 627 Fed. Appx. at 751 ("[W]e conclude that the [living wage] ordinance does not have the

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brief ("DOJ Br.") outlined that there was no evidence that enforcement of the IWPCA would result in a significant impact on BeavEx's business model, prices, routes, or services, and that the IWPCA was not preempted by the FAAAA. Id.; DOJ Br. at 11, 13, 16, attached to Plaintiff-Appellants' Motion to Expand the Record and Take Judicial Notice as Exhibit 2. The Solicitor General wrote that there is no circuit split in the analysis of FAAAA preemption, and that BeavEx could "identif[y] no actual conflict in the decisions of the courts of appeals." Id. at 21. Critical to this conclusion was the difference in scope between the IWPCA and the Massachusetts ABC test. As the Solicitor General wrote, "classification of a worker as an employee under the Massachusetts definition triggered 'far more employment laws' than the IWPCA[] … a delivery company would be forced to alter its routes, provide meal and rest breaks, [and] maintain a fleet of delivery vehicles," among other things. Id. at 9.

[10] Likewise, in Dilts, the Ninth Circuit invited the United States to file an amicus brief on the issue of whether a California law requiring employers to afford employees periodic meal and rest breaks was preempted by the FAAAA. The United States, informed by the expertise of the Department of Transportation and the Federal Motor Carrier Safety Administration, submitted a brief stating that state meal and rest break laws were not preempted by the FAAAA because "[l]aws of general applicability that do not target the [motor carrier] industry but merely increase the labor costs of all employers are not at odds with [the FAAAA's deregulatory] purposes." See A297–334; A321. The views of the DOT and FMCSA on the scope of FAAAA preemption are entitled to substantial deference. Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 883 (2000).

requisite 'significant impact' to bring it within the ambit of the ADA's preemption clause."). Those courts held, in accordance with Costello and every other court not addressing the "anomalous" Massachusetts prong B, that the background labor statute at issue was not preempted by the FAAAA.

The Seventh Circuit and the First Circuit commented on each other's decisions and found that there was no conflict between their respective opinions. See Schwann, 813 F.3d at 440 n.8 (observing that "[i]n reaching our conclusion, we considered the recent Seventh Circuit decision in Costello," and explaining the distinction between the Illinois and Massachusetts statutes at issue); Costello, 810 F.3d at 1055 (observing that the IWPCA was not preempted because it was "more limited" than the Massachusetts statute). While the various circuit courts used different language at times, they were all unquestionably analyzing the effects of those statutes under the same "significant impact" test.[11] Rather, the differences in

[11] AEX's argument that the Seventh Circuit employed the wrong test by discussing the statute's effect on a carrier's workforce (as opposed to its customers), Appellant's Br. p. 27, and that the Ninth Circuit employed an improper "binds to" test, id. p. 21, is plainly incorrect. Rather, these courts at times used different terminology to measure the same thing: the *significance* of the *impact* of the respective statutes on routes, prices, and services of motor carriers. See Costello, 810 F.3d at 1055 ("the task before us is to determine whether the IWPCA will have a significant impact on the prices, routes, and services that BeavEx offers to its customers. We conclude that it does not."); Dilts, 769 F.3d at 650 (agreeing with amicus United States of America that "there is no showing of an actual or likely significant effect on prices, routes, or services, and so the California laws at issue are not preempted"). This analysis is exactly what Rowe commands. 552 U.S. at 375.

holdings were entirely attributable to the fact that Prong B, and only Prong B, of the Massachusetts independent contractor statute had a significant impact on routes, prices, and services (by foreclosing the use of FedEx's entire business model), and the other statutes at issue did not.

Lastly, the plain language of the Supreme Court's holdings in Rowe and Dan's City supports another inference: Schwann was wrongly decided. While the Schwann and MDA courts grounded their holdings in the fact that the respective trucking companies would be required to change their preferred business model, the First Circuit never explained why this would have a significant impact on the routes, prices, and services that the companies could offer to their customers. As discussed above in footnote 2, supra, employee/contractor status is not an all-or-nothing proposition, and the Schwann Court arguably erred in assuming that prong B required FedEx to classify its drivers as employees for all purposes. 813 F.3d at 439. In fact, the Massachusetts Supreme Judicial Court recently confirmed that the ABC test does not define employment status for workers' compensation claims, and listed a number of other areas—unemployment insurance, withholding of taxes on wages, and the department of revenue's classification system—that use considerably different tests to determine employee/contractor status. Ives Camargo's Case, 96 N.E.3d 673, 679–80 (Mass. 2018). Therefore, it is entirely possible that FedEx's drivers could have been employees under the ABC test but

contractors for a host of other purposes, meaning that the Schwann Court may have vastly overstated the practical consequences of prong B on FedEx's routes, prices, and services.

The MDA Court simply explained that "[a]pplication of Prong [B] to [the company] would, as in Schwann, 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. But in neither MDA nor Schwann did the First Circuit discuss exactly how the transition to an employee-driver business model would have a "*significant* impact" in practice on the actual services that would be offered. Rowe, 552 U.S. at 375 (emphasis in original). And nowhere in either decision did the First Circuit explain its decision to part with the Supreme Court in Dan's City, where the Court adopted Justice Scalia's dissenting language from Ours Garage: "the scope of preemption … include[s] only laws, regulations, and other provisions that single out for special treatment 'motor carriers of property.'" Dan's City, 569 U.S. at 261; Ours Garage, 536 U.S. at 449 (Scalia, J., dissenting). Needless to say, the Massachusetts misclassification statute is generally applicable and does not single out "motor carriers of property," and nothing in the MDA or Schwann decisions clearly reconciles this conflict.

In any event, as the District Court determined, the ABC test used to determine employee status under the NJWPL and NJWHL plainly comes down on

the side of the Illinois ABC test and is not preempted. A523–29. Indeed, the ABC tests are virtually identical. Compare 820 Ill. Comp. Stat. 115/2 with N.J.S.A. 43:21–19(i)(6). Enforcement of these generally applicable, background labor laws will not force a motor carrier like AEX to change its business model, and any connection between an increase in labor costs and consumer prices is "simply too tenuous" to warrant preemption. A527.

C. The New Jersey ABC Test is a Common Statute That Has Never Been Held to be Preempted

As discussed above, the New Jersey ABC test is essentially identical to the Illinois ABC test that the Seventh Circuit has already held is not preempted by the FAAAA. Unlike the Massachusetts ABC test, there is nothing "anomalous" about this test; it is very similar, if not virtually identical to, the ABC tests used by many other states for their wage payment and deduction laws, including Connecticut, Illinois, Montana, Nebraska, and Vermont,[12] and even more states use the same

[12] See Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. 115/2; Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1229(1); Vermont Wages and Medium of Payment Law, 21 V.S.A. § 341; see also Tianti, ex rel. Gluck v. William Raveis Real Estate, Inc., 231 Conn. 690, 698, 651 A.2d 1286, 1290 (1995) (Connecticut applies ABC test); Ramsey v. Yellowstone Neurosurgical Assoc., 125 P.3d 1091, 1095 (Mont. 2005) (applying a conjunctive "AB" test for wage purposes that is virtually identical to prongs one and three of Connecticut's ABC test).

ABC test for their workers' compensation and unemployment laws.[13]

However, AEX contends that this case is different—in Costello and Schwann, only prong B was at issue, whereas here, AEX argues that *all three* prongs of the ABC test are preempted by the FAAAA. Appellant's Br. pp. 24–25. While AEX does not articulate anywhere in its brief exactly *how* prongs A (evaluating degree of control) and C (independently established business) would "significantly impact" its routes, prices or services (as opposed to prong B, where AEX relies on the Schwann analysis), case law is nonetheless clear that those prongs cannot be preempted.[14]

In Portillo, evaluating Massachusetts law, Judge Simandle held that while prong B of the Massachusetts "ABC" test was preempted under Schwann, "the Prong [A] 'right to control' test and the Prong [C] economic realities test are very common among other states[,]" and it is "unlikely that Congress intended to eliminate frequently-used state law tests … for determining who is an employee."

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[13] See, e.g., Alaska Stat. § 23.20.525(a) (Alaska Employment Security Act); Arkansas Code Ann. § 11-10-210(e) (Arkansas Unemployment Insurance Act); Conn. Gen. Stat. Ann. § 31-222(a)(1)(B)(ii) (Connecticut Unemployment Compensation Act); Del. Code Ann. tit. 19, § 3302(10)(K) (Delaware Unemployment Compensation law); Md. Code Ann., Lab. and Employ. § 8-205 (Maryland's unemployment insurance law); N.H. Rev. Stat. § 282-A:9, III (New Hampshire Unemployment Compensation Law); N.Y. Labor Code § 862-b ("Presumption of employment in the commercial goods transportation industry").

[14] The Schwann court expressly held that prong B was severable from prongs A and C, and that the drivers' claims could still go forward on those grounds. 813 F.3d at 441.

2016 WL 5402215, at *5 (considerations of control and economic dependence were "simply a type of pre-existing and customary manifestation of the state's police power that we might assume Congress intended to leave untouched."). Massachusetts courts have come to the same conclusion and held that although prong B of the Massachusetts ABC test may be preempted, putative employees may still pursue wage claims under the remaining prongs A and C that are commonly used across the country to determine employee status. See Chambers, 65 N.E.3d at 11; DaSilva, 227 F. Supp. 3d at 159 ("Prongs [A] and [C] still allow a carrier to use an independent contract driver model as long as the carrier does not exert a certain level of control over them or prevent them from engaging in an independently established trade."); Vargas, 245 F. Supp. 3d. at 282 ("The factors for satisfying both Prongs [A] and [C] are typical of the elements used to determine independent contractor status in many states and for purposes of federal law … they are less likely to have an effect on a carrier's pricing, routes and services."); see also Venegas v. Global Aircraft Service, Inc., et al., No. 14-249, 2016 WL 5349723, at *18 (D. Me. Sept. 23, 2016) (applying Schwann and holding that Maine's "right to control" test for employee status was not preempted because it posed no "patchwork" problem given "the number of jurisdictions that use similar multi-factor tests to determine whether a worker is an employee or independent contractor").

Indeed, the Massachusetts Supreme Judicial Court, following the First Circuit's decision in Schwann, expressly rejected AEX's argument that prongs A and C could ever plausibly be preempted by the FAAAA:

> Motor carriers, like any other industry, may structure their business model to use either independent contractors or employees. The first prong requires that an employer prove that a worker is "free from control and direction in connection with the performance of the service," both contractually and factually, in order to establish that a worker is an independent contractor. See G.L. c. 149, § 148B(a)(1). The third prong requires, in turn, that, to be an independent contractor, "the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." G.L. c. 149, § 148B(a)(3). Unlike prong two, there is nothing intrinsic to these provisions that prevents motor carriers from using independent contractors. To the extent that the first and third prongs have an effect on motor carriers, we conclude that such an effect is too "indirect, remote, and tenuous" to trigger the FAAAA's preemption.
> […]
> Finally, without prong two, the statute contains only commonly used State and Federal tests of employment, indicating that it does not fall within the intended scope of the FAAAA's preemption. In enacting the FAAAA, Congress was concerned with State laws that created a "patchwork" of differing State regulations that would interfere with "the competitive marketplace." Rowe, 552 U.S. at 373, 128 S.Ct. 989. State laws that are "more or less nationally uniform" do not pose a "patchwork problem." Schwann, 813 F.3d at 440.

Chambers, 65 N.E.3d at 11–12.

Finally, as discussed above, prong B of the New Jersey ABC test does not have the same prohibitive effect as prong B in Massachusetts. A defendant may also satisfy prong B under New Jersey law by demonstrating that the workers' services were performed outside of its usual *place* of business. Put simply, there is

no basis to conclude that Congress intended to foreclose the application of New Jersey's ABC test, which is a "garden variety employment claim" widely used across the nation both before and after the passage of the FAAAA. Gary, 397 F.3d at 189.

D. Supreme Court Jurisprudence Confirms that the FAAAA Does Not Preempt Plaintiffs' Claims

AEX points to four Supreme Court cases—Morales, Wolens, Rowe, and Ginsberg—as evidence that the District Court erred, and that Costello and Dilts were wrongly decided. Appellant's Br. pp. 14–17, 21, 27–28. Indeed, these important cases unquestionably set forth the proper standard for determining whether the FAAAA or the analogous ADA preempts a state statute. See Morales, 504 U.S. at 388, 390; Rowe, 552 U.S. at 375 (articulating the significant impact test). What AEX's brief does not reveal is that the facts at issue in these four cases—all of which held state laws to be preempted—are quite inapposite to the facts at bar here.

In Morales, the Supreme Court confronted the attempts of several states to prevent allegedly deceptive airline advertisements by way of state consumer fraud statutes. 504 U.S. at 379–380. The Court held that these efforts were preempted by the ADA, because advertising restrictions burdened an airline's ability to offer services and prices to its customers, and would potentially force it to produce

different advertisements for each of a variety of different markets. Id. at 389, 390. Likewise, the Court in Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995), held that the ADA preempted claims based on an Illinois consumer fraud act brought by a class of customers against an airline's frequent flier program, who were displeased by unfavorable modifications to its terms. 513 U.S. at 222, 225. Because the ADA's purpose was to "leave largely to the airlines themselves … the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services," state consumer protection laws could not be used to disrupt modifications of frequent flier programs, a service that the airline offers to its customers. Id. at 228.

Rowe concerned a provision of Maine's Tobacco Delivery Law that required licensed tobacco shippers to utilize delivery services that verified the legal age of anyone purchasing tobacco. 552 U.S. at 368–69. The Supreme Court held this statute preempted by the FAAAA because it expressly proscribed the types of delivery services that licensed tobacco retailers could or could not employ. Id. at 371. Indeed, the law essentially forced the delivery market—thus implicating motor carriers—to offer a set of services in Maine that they otherwise may not wish to. Id. at 372. This unique restraint, by "directly regulat[ing] a significant aspect of the motor carrier's pickup and delivery service," conflicted with Congress' goals in enacting the FAAAA. Id. at 373.

Finally, the Supreme Court in Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422 (2014), held that the ADA preempted a customer's state law claim for breach of the covenant of good faith and fair dealing against Northwest Airlines, in response to their termination of his membership in their frequent flier program. 134 S. Ct. at 1430–33. That claim "directly concerned services provided by the airline—admission to the frequent flyer program and its attendant benefits … [h]ence, the forbidden connection under the [ADA] was obvious: the … requested relief consisted of better services at a lower rate." Chambers, 65 N.E.3d at 13 (distinguishing Ginsberg).

All four of these cases on which AEX relies have one fundamental element in common: the preempted claims *directly targeted* the services that an air or motor carrier could offer to its customers. In Morales, the claims attacked an airline's ability to offer prices and services; in Wolens and Ginsberg, the service of offering frequent flier programs; in Rowe, the method and manner of tobacco delivery services. Here, in stark contrast, as the Massachusetts Supreme Judicial Court held in Chambers:

> What Ginsberg teaches is that State laws are "more likely to be preempted when they operate at the point where carriers provide services to customers at specific prices." Dilts, 769 F.3d at 646. Here, by contrast, the plaintiffs' misclassification claim is not directly related to the defendant's "services," but relates instead to a "generally applicable background regulation[ ] ... several steps removed from prices, routes, or services." Id. This tenuous connection to services does not, without more, fall within the

FAAAA's preemptive scope.

65 N.E.3d at 13.

The state law claims at bar here are generally applicable to all employers and only affect AEX "in their capacity as members of the public," regardless of whether AEX is a motor carrier. Rowe, 552 U.S. at 375. Unlike the claims and statutes in the above-cited cases, they do not explicitly target routes, prices, or services, and as set forth below, AEX cannot show that their impact would be significant. For those reasons, this Court should affirm the District Court's judgment.

IV. Application of the NJWPL and NJWHL Will Not Significantly Impact AEX's Routes, Prices, or Services

In its brief to the Court, AEX contends that if the NJWPL and NJWHL—two universally applicable labor laws that apply to all New Jersey employers—are enforced with respect to Plaintiffs, "AEX's rates, routes or services will be significantly impacted by AEX's departure from [its] preferred business model." Appellant's Br. at 30. But the law requires more. AEX has not provided a scintilla of evidence with which this Court could conclude that application of the law would have *any* effect on its business, let alone a significant one.

AEX essentially puts forth two arguments: (1) that application of the NJWPL and NJWHL, and the corresponding New Jersey ABC test, will indirectly

affect its prices by raising costs; and (2) that the application of those statutes and the ABC test will force it to change its business model by foreclosing the use of independent contractors. Both arguments are without merit.

The first is easily dispensed with. To Plaintiffs' knowledge, no court has *ever* held a labor statute to be preempted because it indirectly affects pricing by raising costs. In Mendonca, the Ninth Circuit held that the FAAAA did not preempt application of California's Prevailing Wage Law to a local motor carrier, even where the carrier had argued that the statute would force it to increase its prices by a staggering 25%.[15] 152 F.3d at 1189–90; see also Dilts, 769 F.3d at 646 ("[M]any … laws that Congress enumerated as expressly not related to prices, routes, or services … are likely to increase a motor carrier's operating costs. But Congress clarified that this fact alone does not make such laws "related to" prices, routes, or services. Nearly every form of state regulation carries some cost."). The Eleventh Circuit held likewise in Amerijet (with respect to the ADA), where an employer argued that enforcement of Miami-Dade County's Living Wage Ordinance, which mandated wage hikes and imposed numerous administrative duties on an air carrier, would significantly impact the prices that it offers to customers.[16] 627 Fed. Appx. at 751 ("indirect economic influences are insufficient

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15 See Cal. Lab. Code §§ 1770–80.

16 See Miami-Dade Code of Ordinances ch. 2, art. I, § 2–8.9(f)(2)(A).

to trigger preemption"). Lastly, the First Circuit agreed in DiFiore, holding that a state statute is not preempted simply "wherever it imposes costs on [carriers] and therefore affects [prices] … [this] would effectively exempt [carriers] from state taxes, state lawsuits of many kinds, and perhaps most other state regulation of any consequence." 646 F.3d at 89.

As set forth in Section II, supra, Congress sought to combat the evils of a patchwork of state-by-state regulations that explicitly targeted carrier rates, such as price controls, *not* generally applicable background labor laws that only affect employers like AEX as "members of the public." Rowe, 552 U.S. at 375. Indeed, AEX has put forth no evidence whatsoever, other than conclusory assertions, of exactly how enforcement of these New Jersey wage laws will have a forbidden significant impact on its prices. As the District Court held, that is not enough to warrant FAAAA preemption. A527–28 ("the Court also rejects Defendant's arguments that incurring additional costs will significantly affect consumer prices. This causal relationship is simply too tenuous."). Thus, AEX cannot succeed on this point.

Second, AEX contends that "the New Jersey ABC test impermissibly dictates to motor carriers that they must utilize a business model of employee-drivers." Appellant's Br. p. 31. This is simply not true. With respect to prong A (control) and C (independently established business), "there is nothing intrinsic to

these provisions that prevents motor carriers from using independent contractors." Chambers, 65 N.E.3d at 11. Indeed, these prongs are "standard elements of an independent contractor test." DaSilva, 227 F. Supp. 3d at 159. AEX need only show that its independent contractors are actually *independent*: that they are free from AEX's control and direction (prong A) and that they are engaged in their own independently established businesses and not solely economically reliant on AEX (prong C).

Nor does New Jersey's prong B foreclose the use of independent contractors. As discussed above in Section III-B, supra, only the First Circuit has found prong B of an ABC test to be preempted, because the "anomalous" Massachusetts prong B "makes any person who performs a service within the usual course of the enterprise's business an employee." Portillo, 2016 WL 5402215 (quoting Schwann, 813 F.3d at 437). Here, in contrast, AEX may also show that its drivers are independent contractors because they perform services "outside of all the places of business of the enterprise for which such service is performed." Hargrove, 106 A.3d at 458. This disjunctive "course *or* place of business" test in New Jersey's prong B reads identically to the Illinois statute held not preempted in Costello. The uniquely oppressive Massachusetts prong B provides no such option to employers.

Importantly, in Carpet Remnant Warehouse, Inc. v. New Jersey Dept. of

Labor, the Supreme Court of New Jersey held that an enterprise's "place of business" under prong B "refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business." 593 A.2d at 1190. For that reason, the Court held that the residences of a carpet-installing company's clients were not among its "places of business." Id. Whether the delivery routes and sites used by a courier company's workers are properly viewed as "places of business" is an open question under New Jersey law. What is clear, however, is that nothing inherent to the New Jersey ABC test prevents delivery companies like AEX from utilizing independent contractors.[17] As such, the New Jersey ABC test

[17] A common independent contractor workforce business model involves a competitive bidding system in which routes and contracts are awarded to couriers based on preference and bidding price. See, e.g., MDA, 821 F.3d at 189; Com., Uninsured Employers' Fund v. Ritchie, No. 2012-SC-000746-WC, 2014 WL 1118201, at *1 (Ky. Mar. 20, 2014); Infanti v. Castle, No. 05-92-00061, 1993 WL 493673, at *1 (Tx. Ct. App. Oct. 28, 1993); Scott v. NOW Courier, Inc., No. 10-cv-971, 2012 WL 1072751, at *3 (S.D. Ind. Mar. 29, 2012). While this model may not survive the Massachusetts prong B, because it makes everyone who operates within an employer's usual course of business an employee, MDA, 821 F.3d at 193, it could fare well under the New Jersey ABC test which allows employers to satisfy prong B by showing that the worker operates outside of its usual *place* of business.

While AEX could have chosen a legitimate independent contractor business model, as described above, that is not what AEX did here with respect to Plaintiffs. Plaintiffs were not bidding on routes or operating their own independent businesses of which AEX was simply one client. Rather, AEX exerted full behavioral and financial control over Plaintiffs, by requiring them to report to the AEX warehouse each morning and deliver along a regular route each day, A40–41 ¶¶ 14, 17, and follow specific procedures for delivering packages, A40 ¶ 13; A42 ¶¶ 24–25, among other things. See supra pp. 3–5.

does not require motor carriers to utilize an employee-only workforce.[18]

Finally, the record contains no specific evidence whatsoever of exactly *how* application of the ABC test would have a significant impact on AEX's routes, prices, or services. AEX seeks to excuse itself from providing an iota of concrete evidence on the impact of the New Jersey wage laws by citing the First Circuit's holding that empirical evidence is not necessary to find preemption, and that courts should instead look to the "logical effects" of the state law. Appellant's Br. pp. 18–19, 23, 30. However, as Judge Simandle commented in Portillo, "while empirical evidence is not mandatory to conclude that the prongs are preempted, Defendants have failed to articulate how the leftover prongs would impact their prices, routes or services beyond asserting conclusory statements." 2016 WL 5402215, at *5. AEX puts forth a number of unsubstantiated suggestions that it would be forced to acquire its own vehicles, provide insurance coverage, and incur a number of other new costs. See Appellant's Br. p. 9. But as the Costello court observed, "[c]onspicuously absent from BeavEx's parade of horrors is any citation of authority showing that it would be required to comply with this slew of federal

[18] AEX's assertion that "regional competitors would realize a significant competitive advantage through their use of" an independent contractor business model, Appellant's Br. p. 30, is therefore incorrect. Even so, New Jersey's wage laws apply to *any* employer who does business in New Jersey and whose employees do work in New Jersey—regardless of whether the employer maintains its principal place of business in another jurisdiction. Mulford v. Computer Leasing, Inc., 759 A.2d 887, 891 (N.J. Super. Ct. Law Div. 1999).

and state laws. We do not accept BeavEx's bare assertion that its couriers will need to be classified as employees for all purposes." 810 F.3d at 1056.[19] Because AEX can still make use of independent contractors if it so chooses, AEX cannot show that the ABC test would have a significant impact on its routes, prices, or

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[19] Even if AEX was required to utilize an employee-only workforce, which it is not, its list of supposed compliance costs is largely either incorrect or deeply misleading. See Appellant's Br. p. 9. AEX suggests that it would have to "absorb the cost of recruiting and hiring the drivers," but it cannot show that this requires any changes from the procedure it uses now to acquire "contractors." AEX contends that it must then create a department of human resources, but the Costello court summarily rejected this argument where the courier company in that case, BeavEx, said it would lead to an additional $185,000 a year in expenses. 810 F.3d at 1056 ("BeavEx has offered no frame of reference upon which we could conclude that this $185,000 would significantly impact BeavEx's prices."). AEX has offered nothing more than a conclusory allegation on this point.

AEX further declares that it would "need to acquire and maintain a fleet of delivery vehicles," but this is plainly false, as New Jersey does not have an expense reimbursement statute, and AEX could thus continue to require its workers to use their own vehicles. AEX states that it "would be required to administer, plan and dictate the delivery routes for each driver [and] be forced to control the time and sequence of deliveries," yet this circular reasoning makes no sense. While exerting that sort of control would suggest that AEX's drivers are employees, the opposite is not true; if the drivers are held to be employees, AEX is under no legal obligation to then exert certain levels of control over them.

Finally, AEX suggests that it would be obligated to pay employment taxes, liability and occupational insurance, health insurance, and other fringe benefits, which is all patently untrue. As discussed in footnote 2, supra, employee/contractor status is not an all-or-nothing proposition. The state and federal governments use different tests to determine entitlement to different benefits, and AEX's drivers could very well be employees under the limited ambit of the ABC test, and contractors for all other purposes. See, e.g., 26 U.S.C. § 3121(d)(2) (under the federal tax code, an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee"); Kotsovska, 116 A.3d at 16–17 (New Jersey uses twelve-factor "hybrid" test to distinguish employees and independent contractors for the purpose of the Workers' Compensation Act, N.J.S.A. 34:15).

services. The NJWPL and NJWHL are thus not preempted by the FAAAA.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the District's Court decision on AEX's motion for judgment on the pleadings, holding that enforcement of the NJWPL and NJWHL is not preempted by the FAAAA.

Dated: August 6, 2018

Respectfully Submitted,
EVER BEDOYA, DIEGO GONZALES, and MANUEL DeCASTRO, individually and on behalf of all others similarly situated,

By their attorneys,

/s/ Harold L. Lichten

Harold L. Lichten
Michael N. Turi
Matthew Thomson, *admission pending*
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
Tel. (617) 994 5800
Fax (617) 994-5801

Peter Winebrake
R. Andrew Santillo
WINEBRAKE & SANTILLO, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
Tel. (215) 884-2491
Fax (215) 884-2492

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2018, a copy of this pleading was served on all counsel of record for Defendant-Appellant via the Court's ECF system.

/s/ Harold L. Lichten
Harold L. Lichten
Attorney for Plaintiff-Appellees

LOCAL RULE 46.1 CERTIFICATION

I, Harold L. Lichten, am one of the attorneys representing the Plaintiffs-Appellees, and all others similarly situated, in this matter. I hereby certify that I am a member of the bar of this Court.

Dated: August 6, 2018

/s/ Harold L. Lichten
HAROLD L. LICHTEN

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,049 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of

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I also certify that this brief complies with the electronic filing requirements of Local Rule 32.1(c) because the text of this electronic brief is identical to the text of the paper copies, it has been natively converted to a searchable PDF document using Adobe Acrobat, and a virus scan has been run on the file using Symantec Endpoint Protection NIS-22.9.3.13 and no virus has been detected.

Dated: August 6, 2018 *_/s/ Harold L. Lichten_*

HAROLD L. LICHTEN