No. 18-1641

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EVER BEDOYA, DIEGO GONZALES, and MANUEL DeCASTRO, on behalf of themselves and all others similarly situated,
Plaintiffs-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
Case No. 2:14-cv-02811
Honorable Esther Salas, U.S. District Judge

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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August 13, 2018

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CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. Public Citizen has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer-advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts, and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer and worker interests in litigation, including as amicus curiae in cases in the United States Supreme Court and the federal appellate courts.

Public Citizen has a longstanding interest in fighting exaggerated claims of federal preemption of state laws that protect consumers and workers. Public Citizen submits this amicus curiae brief because the argument of the trucking industry in this case and similar cases—that federal law displaces basic state labor laws—reflects an overly broad reading of the preemptive scope of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, § 601(c), 108 Stat. 1569. This brief seeks to provide an understanding of the language,

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

purposes, and goals of the FAAAA and its express preemption clause. As explained below, the FAAAA does not displace a generally applicable state labor law merely because the law gives workers employment rights that motor carriers would prefer they not have, or merely because there are costs to complying with the law.

BACKGROUND AND SUMMARY OF ARGUMENT

The Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, eliminated federal economic regulation of the airline industry, including controls over market entry, fares, and routes. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), the ADA included a preemption provision prohibiting states from enacting or enforcing laws related to a price, route, or service of an air carrier. 49 U.S.C. § 41713(b)(1).

In 1980, Congress similarly deregulated the trucking industry, *see* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, but did not preempt state trucking regulation. By 1994, many states regulated "intrastate prices, routes and services of motor carriers." H.R. Conf. Rep. No. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715.

Concerned that state controls were anti-competitive and advantaged airlines over motor carriers, Congress "sought to pre-empt state trucking regulation," *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008), by enacting an amendment to Title 49 entitled "Preemption of State Economic Regulation of Motor Carriers," Pub. L. No. 103-305, § 601(c). "Borrowing from the ADA's preemption clause, but adding a new qualification," *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 256 (2013), that amendment, which was included in the FAAAA, provides that 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).

The conference report accompanying the FAAAA described the kinds of state laws that Congress sought to address in the amendment. "Typical forms of regulation include[d] entry controls, tariff filing and price regulation, and types of commodities carried." H.R. Conf. Rep. No. 103-677, at 86; *see also* Statement by President William J. Clinton upon Signing the FAAAA, 30 Weekly Comp. Pres. Doc. 1703 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1762-1 ("State regulation preempted under this

provision 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.").

Based on its concerns, "Congress resolved to displace '*certain* aspects of the State regulatory process.'" *Dan's City*, 569 U.S. at 263 (quoting FAAAA § 601(a); emphasis in *Dan's City*). Those aspects include state laws with respect to the transportation of property that "hav[e] a connection with, or reference to" motor carrier prices, routes, or services. *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 384; emphasis omitted). But preemption does not extend to "state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Id.* at 375 (quoting *Morales*, 504 U.S. at 390). As the Supreme Court has explained, although the term "related to" is broad, "the breadth of the words … does not mean the sky is the limit." *Dan's City*, 569 U.S. at 260.

In this case, delivery drivers sued American Eagle Express, Inc. (AEX), a delivery company, alleging that the company improperly classified them as independent contractors rather than employees for purposes of the New Jersey Wage and Hour Law (NJWHL) and New

Jersey Wage Payment Law (NJWPL), and therefore deprived them of various wage rights they were due as employees under those laws. *See* Appendix (App.) A38-A44. Specifically, the drivers allege that AEX violated the NJWHL by failing to pay them overtime for hours they worked in excess of forty hours in a work week, App. A43 (citing N.J. Stat. § 34:11-56a4), violated the NJWPL by failing to pay them all of their wages due and by subjecting them to wage deductions and withholdings that are not permitted by the law, App. A42 (citing N.J. Stat. §§ 34:11-4.2 & 34:11-4.4), and was unjustly enriched by retaining illegal deductions, App. A43.

AEX argues that the FAAAA preempts the drivers' claims. According to AEX, properly classifying its drivers under the test the NJWHL and NJWPL use for determining whether a worker is an employee (the "ABC test") would require it to "change its business model from one that utilizes independent carriers to a substantially different model that requires [it] to recruit and hire its own employee-drivers," which would "substantially increase [its] costs of doing business" and thereby "impact [its] rates, routes, or services." AEX Br. 9. But properly classifying its drivers under the ABC test would *not* require AEX to

"drastically alter its business model." *Id.* at 28. AEX would only be required to treat its drivers as employees for certain limited state law purposes. And regardless, the only effects that are relevant in determining whether the FAAAA preempts claims that a motor carrier violated state laws are the effects of enforcing *those* laws—here, the NJWHL and NJWPL—and AEX has not demonstrated that enforcement of those laws would have a significant forbidden effect on its prices, routes, or services.

Moreover, the FAAAA does not preempt a state law simply because it is cheaper for a motor carrier to violate the state law than to comply with it. Any effect the cost of complying with generally applicable state labor laws has on motor carriers' decisions about their prices, routes, and services is too attenuated from those prices, routes, and services for the laws to be preempted. Because any relationship the NJWHL and NJWPL have to motor carrier prices, routes, and services is tenuous, remote, and peripheral, the FAAAA does not preempt the drivers' claims.

ARGUMENT

The FAAAA preempts a state law only if it is "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). State laws "relate to" prices, routes, or services if they have "a connection with or reference to" them. *Morales*, 504 U.S. at 384. "The requisite connection exists either where the law expressly references the [motor] carrier's prices, routes or services, or has a forbidden significant effect upon the same." *Gary v. Air Grp., Inc.*, 397 F.3d 183, 186 (3d Cir. 2005) (internal quotation marks and citation omitted).

The "service of [a] motor carrier" to which a state law must relate to be preempted is the "transportation service[] a motor carrier offers its customers." *Dan's City*, 569 U.S. at 263. Likewise, the "price … of [a] motor carrier" is the price the motor carrier charges its customers for its transportation services, and the "route … of [a] motor carrier" is the route the motor carrier uses in providing transportation services to its customers. Thus, to fall within the scope of the FAAAA's preemption provision, a state law must "expressly reference[] … or ha[ve] a forbidden significant effect," *Gary*, 397 F.3d at 186, on the transportation service a motor carrier provides its customers, the route it uses in providing that service, or the price it charges its customers for that service. Because the

NJWHL and NJWPL do not have the requisite connection to motor carrier prices, routes, or services, the drivers' claims are not preempted.

I. Classifying drivers as employees under the state laws at issue would not require AEX to change its business model.

Proper classification of AEX's drivers under the ABC test would not require AEX to "change its business model" from one that uses independent carriers to one that recruits and hires "employee-drivers." AEX Br. 9. The terms "employee" and "independent contractor" are simply labels that indicate whether certain laws apply. The only effect of determining that a driver is an "employee" under the ABC test is that New Jersey labor laws that use *that test* apply to the driver. The test does not determine whether the driver is an employee for other purposes, including for purposes of other federal or state laws, many of which, as the district court explained, "use a much more restrictive definition of employee." App. A527; *see*, *e.g.*, *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 295, 310-11, 106 A.3d 449, 453, 461-62 (2015) (adopting the ABC test for the NJWHL and NJWPL, but recognizing that other laws use other tests to define employee). Accordingly, properly classifying its drivers as employees under the ABC test would not require AEX to "change its

entire business model." AEX Br. 7. *See Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1056 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2289 (2017) (finding "no basis for concluding" that classifying drivers as employees under Illinois's wage payment law would require a courier company to "switch its entire business model from independent-contractor-based to employee-based" because "federal employment laws and other state labor laws have different tests for employment status").

Moreover, even if a larger set of laws used the ABC test, only the effect of the NJWHL and NJWPL would be relevant in determining whether the drivers' claims are preempted. The ABC test is just a means of defining "employee." Because preemption depends in part on effect, *see*, *e.g.*, *Gary*, 397 F.3d at 186, if two laws use the same definition of employee but have different effects, the FAAAA might preempt one but not the other. The question in determining whether the FAAAA preempts claims under the NJWHL is whether enforcement of the NJWHL has a "forbidden significant effect" on motor carrier prices, routes, and services. *Id*. (citation omitted). Likewise, the question in determining whether the FAAAA preempts claims under the NJWPL is whether enforcement of the NJWPL has such a forbidden significant effect. The effect of other

laws is irrelevant to these determinations, regardless of how those laws define employee.

Here, enforcement of the NJWHL and NJWPL would not have the requisite forbidden significant effect on motor carrier prices, routes, or services. The NJWHL "establishes a minimum wage for employees and the overtime rate for each hour of work in excess of forty hours in any week." *Hargrove*, 106 A.3d at 463. The NJWPL "governs the time and mode of payment of wages to employees," *id.* at 457, and forbids withholding or diverting wages, except as expressly permitted, N.J. Stat. § 34:11-4.4. AEX can continue to provide its customers with the same delivery services, using the same routes, regardless of whether it pays its drivers overtime, refrains from taking certain deductions from their wages, or complies with any of the laws' other provisions. And although requiring the company to pay overtime and prohibiting it from taking certain deductions may increase its costs, which may in turn influence the prices it decides to charge, AEX has offered no evidence that any increased cost "will have a *significant* impact on the prices" it charges. *Costello*, 810 F.3d at 1056. Indeed, apart from arguing that *any* increase in its costs will cause it to increase its prices, AEX provides no argument

or evidence about how enforcement of the two state laws at issue will affect its prices, routes, or services. Because AEX has not demonstrated that enforcement of the NJWHL and NJWPL would have a forbidden significant effect on the prices, routes, or services it provides its customers, the FAAAA does not preempt the drivers' claims.

II. Any connection between the state laws at issue and motor carrier prices, routes, and services is too attenuated and remote for the laws to be preempted.

Even apart from their limited scope, any effect the NJWHL and NJWPL might have on prices, routes, or services would be too "remote" to trigger preemption under the FAAAA. *Morales*, 504 U.S. at 390 (citation omitted). As the Supreme Court has explained, "the breadth of the words 'related to'" in the FAAAA "does not mean the sky is the limit." *Dan's City*, 569 U.S. at 260. The FAAAA "does not preempt state laws affecting carrier prices, routes, and services 'in only a 'tenuous, remote, or peripheral ... manner.'" *Id.* at 261 (quoting *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390)).

Thus, in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, this Court held that defamation claims against an airline were not preempted, although the statements at issue arguably referred to an air carrier

service, because the claims were "simply 'too tenuous, remote, or peripheral' to be subject to preemption." 164 F.3d 186, 195 (3d Cir. 1998). And in *Gary*, this Court held that a claim under a state whistleblower statute by a pilot who had expressed concerns that another pilot was unqualified and either had violated or would violate federal regulations was not preempted because the connection between the claim and the air carrier's service was "simply too remote and too attenuated to fall within the scope of the ADA." 397 F.3d at 189. "Instead," the Court stated, the plaintiff's "actions are more properly viewed as comparable to a garden variety employment claim." *Id.*

Here, the NJWHL and NJWPL are two among numerous labor laws, zoning laws, tax laws, and criminal laws that operate "one or more steps away from the moment at which the firm offers its customer a service for a particular price"—that is, one or more steps away from the motor carrier's prices, routes, or services. *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012). To the extent that these laws have any effect on prices, routes, or services, it is only because it may be more expensive for a motor carrier to comply with them than it is for the motor carrier to violate them, and motor carriers

may decide to raise their prices or change their services in response to the costs of compliance. This second-hand effect, however, is too attenuated for the law to fall within the scope of the FAAAA's preemption provision. Many generally applicable state laws affect the costs of doing business, and may therefore affect motor carriers' decisions about their prices and services, yet that consequence does not render those laws preempted. For example, a rise in a state tax rate might impact a motor carrier's decision about what services to offer, but such an effect would not immunize motor carriers from paying generally applicable taxes. Similarly, state and local zoning regulations dictate where motor carriers may locate their operations and, in that way, may affect the cost of operating in a specific area. But it "is hardly doubtful that state or local regulation of the physical location of motor-carrier operations falls outside the preemptive sweep" of the FAAAA. *Dan's City*, 569 U.S. at 264. *See also Watson v. Air Methods Corp.*, 870 F.3d 812, 818–19 (8th Cir. 2017) (en banc) (noting that laws "regulating minimum wages, worker safety, and discrimination based on race, sex, or age may affect a carrier's costs," but indicating that such "background employment laws" generally operate too far from the moment a carrier offers its customer a service at

a price to be preempted); *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014) (explaining that "[n]early every form of state regulation carries some cost" but that "Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability"); *S.C. Johnson*, 697 F.3d at 558 (noting that numerous state laws, including labor laws, intellectual property laws, banking laws, securities rules, and tax laws, among others, "ultimately affect the costs" of doing business, and thus may affect the price a company charges, but that "no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws ... because their effect on price is too 'remote'" (quoting *Morales*, 504 U.S. at 390)).

As the Seventh Circuit has explained, laws such as generally applicable labor laws, zoning laws, and criminal laws do not attempt "to change the bargain" between carriers and their customers. *S.C. Johnson*, 697 F.3d at 558. Instead, such laws "provide the backdrop for private ordering," *id.*, keeping parties from having to "lard a contract with clause after clause promising not to violate such laws, whether those laws are the anti-gambling laws to which the Supreme Court referred in *Morales* or they are minimum wage laws, safety regulations …, zoning laws, laws

prohibiting theft and embezzlement, or laws prohibiting bribery or racketeering," *id.* Here, rather than seeking to override "competitive forces of the market" for transportation services, *Taj Mahal*, 164 F.3d at 194, the NJWHL and NJWPL provide the background against which those market forces act. These laws are "far removed from Congress' driving concern," in enacting the FAAAA, *Dan's City*, 569 U.S. at 263, and their connection to motor carrier prices, routes, and services is "simply too remote and too attenuated to fall within" the FAAAA's preemptive scope, *Gary*, 397 F.3d at 189.

CONCLUSION

The Court should affirm the district court and hold that the FAAAA does not preempt the drivers' claims.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP, WORD COUNT, IDENTICAL COMPLIANCE OF BRIEFS, AND VIRUS CHECK

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2. I certify that the foregoing brief was prepared in a proportionally-spaced, 14-point type and contains 3,069 words.

3. I certify that the text in the electronic version is identical to the text in the paper copies.

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/s/ Adina H. Rosenbaum
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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2018, this brief was served on counsel of record for all parties through the Court's ECF system.

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