No. _____

IN THE

Supreme Court of the United States

AMERICAN EAGLE EXPRESS INC., d/b/a AEX Group,

Petitioner,

v.

EVER BEDOYA, DIEGO GONZALES, MANUEL DECASTRO, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (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 transportation of property." 49 U.S.C. § 14501(c)(1).

The questions presented are:

(1) Whether the Third Circuit erred by holding that New Jersey's statutory test for determining employment classification is not preempted under the FAAAA, applying a novel preemption test that conflicts with the decisions of this Court and deepens the already-existing circuit split.

(2) Whether the presumption against preemption applies in the context of a statutory express preemption clause where the claims at issue involve areas historically regulated by the States.

RULE 14.1(b) STATEMENT

Petitioner is American Eagle Express Inc., d/b/a AEX Group, defendant-appellant below.

Respondents are Ever Bedoya, Diego Gonzales, and Manuel Decastro, class representatives and plaintiffs-appellees below.

RULE 29.6 STATEMENT

Petitioner American Eagle Express, Inc., d/b/a AEX Group is a privately held corporation and has no parent corporations, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Eagle Express Inc., d/b/a AEX Group ("AEX") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, issued on January 29, 2019, is reported at 914 F.3d 812 (3d Cir. 2019) and is reproduced at Pet. App. 3a-28a; the judgment of the court of appeals is unreported and reproduced at Pet. App. 1a-2a. The transcript of the oral opinion of the district court denying AEX's motion for judgment on the pleadings is unreported and is reproduced at Pet. App. 29a-36a. The order of the district court denying AEX's motion for judgment on the pleadings is unreported but available at No. 14-2811, 2017 U.S. Dist. LEXIS 163875 (D.N.J. Sept. 29, 2017), and is reproduced at Pet. App. 37a-38a. The opinion and order of the district court granting AEX's 1292(b) motion to certify the order for interlocutory appeal under 28 U.S.C. § 1292(b) is unreported and reproduced at Pet. App. 39a-51a. The order of the

court of appeals granting AEX's petition for permission to appeal under 28 U.S.C. 1292(b) is unreported and available at Pet. App. 52a-53a.

JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(d). The United States Court of Appeals for the Third Circuit had appellate jurisdiction of the interlocutory appeal of the District Court's decision denying AEX's motion for judgment on the pleadings pursuant to 28 U.S.C. § 1292(b). The Third Circuit issued its opinion on January 29, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution (art. VI, cl. 2) provides in part that "the laws of the United States . . . shall be the supreme law of the land." Relevant provisions of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501, are reproduced at Pet. App. 54a-61a and N.J. STAT. ANN. § 43:21-19(i) at Pet. App. 62a-84a.

STATEMENT OF THE CASE

This case raises the issue of the scope of preemption under the Federal Aviation Administration Authorization Act ("FAAAA"). This issue has repeatedly made its way to the Court due to differences in interpretation by the courts of appeals. *See, e.g., California Trucking v. Su*, No. 18-887; *J.B. Hunt Transport, Inc. v. Ortega*, No. 17-1111; *Beavex v. Costello*, No. 15-1305; *Penske Logistics, LLC v. Dilts*, No. 14-801; *American Trucking Assocs., Inc. v. City of Los Angeles*, No. 11-798. Percolation has not resulted in resolution; the differences persist. The decision below deepens the circuit split and contravenes both this Court's precedents and Congress's intent to promote efficiency through broad deregulation. Certiorari is warranted.

I. The FAAAA

In 1978, Congress enacted the Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 ("ADA"), intending to further "efficiency, innovation, and low prices" in the airline industry via "maximum reliance on competitive market forces and on actual and potential competition." *Northwest, Inc. v.*

Ginsberg, 572 U.S. 273, 280 (2014). In enacting the ADA, Congress intended to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 378 (1992). In 1980, the focus turned to trucking deregulation with the Motor Carrier Reform Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. *See S.C. Johnson & Son, Inc. v. Transport Corp. of Am., Inc.*, 697 F.3d 544, 548 (7th Cir. 2012).

In 1994, Congress enacted the FAAAA "upon finding that state governance of intrastate transportation of property had become 'unreasonably burden[some]' to 'free trade, interstate commerce, and American consumers.'" *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 256 (2013) (citation omitted). Congress intended the FAAAA to do away with state regulations that had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets." H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759; *see also* H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760 (stating that the purpose was to deregulate motor carriers so that "[s]ervice options

will be dictated by the marketplace[,] and not by an artificial regulatory structure.").

The FAAAA provides that a State or political subdivision "may not enact or enforce a law, regulation, or other provisions 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) (emphasis added), Pet. App. 56a. Congress intended to "create a completely level playing field" between motor carriers and air carriers by adopting this provision, which is identical in relevant part to the ADA's preemption provision. H.R. REP. NO. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757. Accordingly, courts construe the two provisions *in pari materia*. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008).

II. New Jersey's ABC Test

Under New Jersey law, individuals classified as employees subject their employers to various obligations, including minimum and overtime wage requirements, N.J. STAT. ANN. § 34:11-56a4; conditions regarding the time and manner of pay, N.J. STAT. ANN. § 34:11-4.2, 4.2a; and restrictions on

pay deductions, N.J. STAT. ANN. § 34:11-4.4. When an individual is classified as an independent contractor, the company is exempt from those requirements.

New Jersey's test for determining employment classification for purposes of the New Jersey Wage and Hour Law ("NJWHL"), N.J. STAT. ANN §§ 34:11-56a to -56a3, and the New Jersey Wage Payment Law ("NJWPL"), N.J. STAT. ANN. §§ 34:11-4.1 to -4.14, provides that workers performing services for a company in exchange for pay are deemed employees unless the company can show:

> 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 estab-

> lished trade, occupation, profession, or business.

N.J. STAT. ANN. §§ 43:21-19(i)(6)(A)-(C) ("ABC test"), Pet. App. 73a.

A worker qualifies as an independent contractor under the NJWHL and NJWPL when a company demonstrates all of these elements. *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 458 (N.J. 2015).

III. This Litigation

AEX is a logistics coordinator, operating as a same-day package delivery company in the mid-Atlantic region from Virginia to New York. A39 ¶6; A40 ¶9.[1] It is a "motor carrier" within the meaning of the FAAAA. Independent couriers in New Jersey contract with AEX to make deliveries for AEX's shipper-customers. A40 ¶10.

Respondents delivery drivers Ever Bedoya, Diego Gonzalez, and Manuel Decastro (the "Drivers") are members of LLCs

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[1] For ease of reference, Petitioner cites to the Appendix filed with the Third Circuit as "A."

that have entered into such contracts with AEX. A46, ¶¶ 7-9, A50-A103. Under this arrangement, the Drivers provide their own vehicles and pay their own occupational insurance, among other expenses. A50-A103; A116-A169.

IV. Proceedings Before the District Court

The Drivers filed a putative class action against AEX, alleging that AEX misclassified them as independent contractors instead of employees under the NJWHL and the NJWPL. Pet. App. 4a. AEX moved for judgment on the pleadings, arguing that the Drivers' claims are preempted by the FAAAA. Pet. App. 4a. The district court denied the motion and certified the order for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 4a, 29a-38a.

Concluding that AEX had satisfied the second prong under Section 1292(b), the district court noted that "Plaintiffs concede there is a circuit split on this issue . . . ." Pet. App. 44a. The district court granted AEX's motion to certify the order for interlocutory review by the Third Circuit pursuant to Section 1292(b). Pet. App. 48a.

V. Proceedings Before the Third Circuit

The Third Circuit granted the AEX's petition for permission to appeal under 28 U.S.C. § 1292(b). Pet. App. 50a. Upon review, however, the Third Circuit affirmed the district court's denial of AEX's motion for judgment on the pleadings.

The decision below began by holding that the presumption against preemption applied to the case. Pet. App. 8a-9a. It described the presumption as preventing federal legislation from superseding "historic police powers of the States" unless "that was the clear and manifest purpose of Congress." Pet. App. 8a (citing *Wyeth v. Levine*, 555 U.S. 555, 687 (2009)). Presuming that claims based on laws "embodying state police powers" were not preempted, the court held that employment regulations, like wage laws, "fall within New Jersey's police power" and the presumption against preemption applied. Pet. App. 9a (citations omitted).

The Third Circuit was persuaded by those Courts of Appeals that have held that the FAAAA and ADA do not preempt state employment laws. Pet. App. 15a. It articulated two multi-factored tests. First, in as-

sessing "the *directness* of a law's effect on prices, routes, or services, courts should examine whether the law: (1) mentions a carrier's prices, routes, or services; (2) specifically targets carriers as opposed to all businesses; and (3) addresses the carrier-customer relationship rather than non-customer-carrier relationships (e.g., carrier-employee)." Pet. App. 21a (emphasis added). If the court finds that the law has a "direct impact on carriers' prices, routes, or services with respect to the transportation of property," then it is preempted unless it falls within one of the statutory exceptions. *Id.*

The second test applies when a court must assess whether a law has a "*significant effect* on a carrier's prices, routes, or services." Pet. App. 21a (emphasis added). The Third Circuit held that courts considering that question should assess whether "(1) the law binds a carrier to provide or not provide a particular price, route, or service; (2) the carrier has various avenues to comply with the law; (3) the law creates a patchwork of regulation that erects barriers to entry, imposes tariffs, or restricts the goods a carrier is permitted to transport; and (4) the law existed in one of the jurisdictions Congress determined lacked laws that regulate intrastate prices,

routes, or services and thus, by implication, is a law Congress found not to interfere with the FAAAA's deregulatory goal." Pet. App. 21a. The Third Circuit added that "[o]ther factors may also lead a court to decide that a state law has a significant effect where the law undermines Congress' goal of having competitive market forces dictate prices, routes, or services of motor carriers." Pet. App. 21a.

After examining these factors, the Third Circuit concluded that the FAAAA does not preempt New Jersey's ABC test. Pet. App. 22a. The court characterized the effect of the ABC test on prices, routes or services as "tenuous," stating that it does not mention carrier prices, routes, services, or carriers. Pet. App. 22a. It asserted that the ABC test applies to all businesses as part of the "'backdrop' they face in conducting their affairs and that it only concerns employer-worker relationships." Pet. App. 22a (internal quotation marks omitted). The Third Circuit concluded the ABC test is "'steps removed' from regulating customer-carrier interactions through prices, routes, or services." Pet. App. 23a (citing *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1048 (7th Cir. 2016); *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir 2014)).

The Third Circuit also held that the ABC test does not have a significant effect on prices, routes, or services. Pet. App. 23a. It rejected AEX's argument that applying New Jersey law may require it to alter its business model such that it no longer uses independent contractors, which will increase its costs and therefore its prices. Pet. App. 23a-25a. The court stated that although disruption of a labor model "could have negative financial and other consequences for an employer, this impact on the employer does not equate to a significant impact on Congress' goal of deregulation." Pet. App. 26a (citation and internal quotation marks omitted). Accordingly, the Third Circuit affirmed the district court's order denying the motion for judgment on the pleadings.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The decision below contravenes this Court's precedents and deepens the circuit splits on two important and recurring issues: (1) the scope of the FAAAA's preemption clause and (2) the applicability of the pre-

sumption against preemption in the context of an express preemption clause where the claims at issue involve areas historically regulated by the States. Both issues warrant this Court's review.

First, the circuit conflict over the scope of "related to" language in the FAAAA preemption clause has persisted even after this Court's decision in *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) and *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 383-84 (1992), both of which repeatedly emphasized the broad preemptive scope of the FAAAA and the ADA. The decision below ignored these precedents, instead following those Courts of Appeals that have embraced the project of redrawing and narrowing the scope of FAAAA preemption. Those decisions directly oppose those of the First Circuit, which has remained faithful to *Rowe* and *Morales*. The scope of the FAAAA preemption clause is an issue that has been presented to this Court several times; the circuit split is intractable and can only be resolved by this Court.

Second, the decision below held that the presumption against preemption applied to this case in contravention of this Court's de-

cision in *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016). In *Puerto Rico*, this Court held that the presumption does not apply where, as here, the statute at issue contains an express preemption clause. *Id.* at 1946. Subsequent to that decision, the circuits have split over whether this Court's holding applies to cases involving areas historically regulated by the states. A court's decision to apply (or not) the presumption against preemption can be outcome-determinative or, at a minimum, have a significant effect on a court's ultimate decision. Moreover, the Court's holding in this regard will affect multiple areas of the law inasmuch as express preemption clauses can be found in many different statutes.

This Court should grant AEX's petition for a writ of certiorari and reverse the judgment of the Third Circuit.

I. The Third Circuit's FAAAA Preemption Test Conflicts with the Decisions of this Court and Other Circuits.

The Third Circuit's decision contravenes this Court's precedents, providing reason enough to grant certiorari. In addition, the decision deepens the circuit split regard-

ing the scope of FAAAA preemption, warranting this Court's review.

A. The Third Circuit's Decision Conflicts with this Court's Precedents.

The decision below was the latest in a series of decisions by several Courts of Appeals attempting to narrow the scope of FAAAA preemption. The novel multi-factor tests designed by the Third Circuit significantly depart from this Court's prior precedents.

This Court has consistently held that the scope of the key phrase "related to" in the ADA, applicable to the FAAAA, expresses a "broad pre-emptive purpose," and that "related to" means "*a connection with, or reference to*, carrier rates, routes, or services," even if the law's effect "is only indirect." *Rowe*, 552 U.S. at 370 (internal quotation marks omitted) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992)); *see also Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 280-81 (2014).

In *Rowe*, this Court described the holding in *Morales*:

> (1) that "[s]tate enforcement actions *having a connection with, or reference to"* carrier "rates, routes, or services" are preempted; (2) that such pre-emption may occur *even if* a state law's effect on rates, routes, or services "is *only indirect*"; (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation; and (4) that pre-emption occurs *at least where* state laws have a "significant impact" related to Congress' deregulatory and pre-emption-related objectives.

552 U.S. at 370-71 (emphasis added) (internal citations omitted).

Indeed, the Court in *Rowe* held that the law at issue, which regulated the delivery of tobacco products to avoid sales to minors, was preempted despite the fact that the law was "less 'direct' than it might be, for it tells *shippers* what to choose rather than *carriers* what to do." *Id.* at 372 (emphasis in original). It was enough that "the *effect* of the regulation is that carriers will have to *offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate*." *Id.* (emphasis

added). The Court noted that preemption would not apply to laws that affect those regulated "only in their capacity as members of the public," such as "a prohibition on smoking in certain public places," or to laws that affect rates, routes, or services "in 'too tenuous, remote or peripheral a manner.'" *Id.* at 375.

In *Morales*, the Court explicitly rejected the argument that FAAAA's preemption clause only pre-empted the States from "actually prescribing rates, routes, or services," because that would "simply read[] the words 'relating to' out of the statute." 504 U.S. at 385; *cf. Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1761 (2018) ("Lamar's preferred statutory construction . . . must be rejected, for it reads 'respecting' out of the statute.") (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("[A] statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.")). Indeed, the *Morales* Court continued, if Congress had designed the statute to pre-empt state law "in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes, and services.'" 504 U.S. at 385 (emphasis in original).

The Court also took the dissent to task, noting a rejected Senate bill evinced the preference of the full Congress for the broad phrase "relating to" rates, routes, or services rather than the prior language, which was "[n]o State shall enact any law . . . *determining* routes, schedules, or rates, fares, or charges in tariffs of . . . ." *Id.* at 385 n.2 (emphasis in original) (quoting S. 2493, § 423(a)(1), *reprinted in* S. REP. NO. 95-631, p. 39 (1978)). The Court also noted that whether state and federal law are inconsistent is "beside the point" because "[n]othing in the language of [the preemption provision] suggests that its 'relating to' pre-emption is limited to *inconsistent* state regulation . . . ." 504 U.S. at 386-87 (emphasis in original).

The Court's decision in *Dan's City Used Cars, Inc. v. Pelkey* is not to the contrary. 569 U.S. 251 (2013). After recounting the decisions discussing the broad nature of the phrase "related to," the Court cautioned that does not mean "the sky is the limit." *Id.* at 260. State laws that preempt carrier prices, routes, and services in "only a 'tenuous, remote, or peripheral . . . manner'" are not preempted. *Id.* at 261.

In *Dan's City*, the Court considered whether a New Hampshire law regulating the disposal of abandoned vehicles by a "storage company" was preempted by the FAAAA. The Court held it was not because it was not sufficiently connected to a "motor carrier's service *with respect to the transportation of property*." *Id.* at 255 (emphasis in original). The Court held that the claims were neither "related to" the "transportation of property" nor the "service" of a motor carrier as required by the plain text of the FAAAA's preemption provision. *Id.* at 261. The New Hampshire law at issue had nothing to do with such a service—it addressed "storage company[ies]" and "garage owner[s] or keeper[s]" rather than transportation activities. *Id.* at 263 (citation omitted).

This Court's very recent cases continue to construe the term "related to" broadly. *See, e.g., Lamar,* 138 S. Ct. at 1759-60 ("[W]hen asked to interpret statutory language including the phrase "relating to," which is one of the meanings of "respecting," this Court has typically read the relevant text expansively.") (citing *Morales*); *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017) ("We have 'repeatedly recognized' that the phrase 'relate to' in a

preemption clause 'express[es] a broad preemptive purpose.' Congress characteristically employs the phrase to reach any subject that has 'a connection with or reference to,' the topics the statute enumerates. The phrase therefore weighs against Nevils' effort to narrow the term 'payments' . . . . Given language notably 'expansive [in] sweep, Nevils' argument that Congress intended to preempt only state coverage requirements . . . also miscarries.") (citations omitted) (citing *Morales*).

In sum, state laws that have a "significant impact" on carrier prices, routes, or services or a "'significant impact' related to Congress' deregulatory and pre-emption-related objectives" are preempted. *Rowe*, 552 U.S. at 370-71, 375 (quoting *Morales*, 504 U.S. at 388, 390)). If, however, the impact is only "tenuous, remote, or peripheral," the law is not expressly preempted. *Morales*, 504 U.S. at 390.

The Third Circuit's multi-factored tests attempt to measure whether a law's effect on a carrier's prices, routes, or services is "direct" or "significant." The Third Circuit held that courts should determine directness by assessing the following factors: whether the

law "(1) *mentions* a carrier's prices, routes, or services; (2) *specifically targets* carriers as opposed to all businesses; and (3) *addresses the carrier-customer relationship rather than non-customer-carrier relationships* (e.g., carrier employee)." Pet. App. 21a.

It would be hard to design a more narrow test than one requiring explicit mention of carriers, routes, and services—and one in contravention of *Morales*. 504 U.S. at 385 (rejecting argument that the statute 'only pre-empts the States from actually prescribing rates, routes, or services'"). Requiring explicit targeting of carriers is also in contravention of *Morales*. *Id.* at 386 (rejecting argument that only state laws specifically addressed to the industry at issue are preempted and noting the statute "imposes no constraint on laws of general applicability"). And the requirement that the law address the "carrier-customer relationship rather than non-customer-carrier relationships" appears to have been the Third Circuit's own invention. Pet. App. 21a. It has appeared nowhere in the precedents of this Court.

As noted, the decision below held that the FAAAA did not preempt the New Jersey ABC test for determining employment classi-

fication for purposes of New Jersey's wage and labor law. Although the Third Circuit began by reciting this Court's precedents accurately, Pet. App. 12a, its first misstep was the sentence: "where a law's impact on carrier prices, routes, or services is so *indirect* that the law affects them 'in only a tenuous, remote or peripheral . . . manner,' the law is not preempted." Pet. App. 13a (emphasis added). In support, the court cited *Dan's City*, 569 U.S. at 261; *Rowe*, 552 U.S. at 371; and *Morales*, 504 U.S. at 390.

But those cases did not use the word "indirect," which was the focus of the Third Circuit's initial multi-factored test to assess "directness." Rather, those cases discussed the "tenuous, remote, or peripheral" language in assessing how the law at issue affected carrier prices, routes, and services, and with respect to the language "relate to" and whether a "connection" existed. *Dan's City*, 450 U.S. at 261; *Rowe*, 552 U.S. at 370-71; *Morales*, 504 U.S. at 390.

Indeed, this Court has gone to some lengths to avoid a direct/indirect dichotomy. *See, e.g., Rowe*, 552 U.S. at 370 ("such preemption may occur even if a state law's effect on rates, routes, or services, is only indirect")

(internal quotation marks omitted); *Morales*, 504 U.S. at 386 ("[A] state law may . . . be preempted, even if . . . the effect [of the law] is only indirect."). The entire multi-factored test to assess "directness" is thus ill-founded.

The Third Circuit's test designed to determine whether a law has a "significant impact" instructs courts considering that question to assess whether "(1) the law binds a carrier to provide or not provide a particular price, route, or service; (2) the carrier has various avenues to comply with the law; (3) the law creates a patchwork of regulation that erects barriers to entry, imposes tariffs, or restricts the goods a carrier is permitted to transport; and (4) the law existed in one of the jurisdictions Congress determined lacked laws that regulate intrastate prices, routes, or services and thus, by implication, is a law Congress found not to interfere with the FAAAA's deregulatory goal." Pet. App. 21a. The Third Circuit added that "[o]ther factors may also lead a court to decide that a state law has a significant effect where the law undermines Congress' goal of having competitive market forces dictate prices, routes, or services of motor carriers." Pet. App. 21a.

The "binds to" portion of the test follows the Ninth Circuit's approach, which is just another way to state the "regulates" or "prescribes" test rejected in *Morales*. 504 U.S. at 385, 388. Rather than apply a laundry list of complicated factors, this Court has taken the approach that preemption is based on the practical impact of laws on rates, routes, or services. *Northwest*, 572 U.S. at 284 (law preempted because mileage credits would "either eliminate[] or reduce[]" the rate paid by a customer); *Rowe*, 552 U.S. at 372 (law preempted because effect was that carriers would have to offer significantly different delivery services from those that the market would dictate absent regulation).

There is no basis in this Court's precedents for a lower court to create any kind of heightened standard for laws of general applicability. *Morales*, 504 U.S. at 386 (noting the statute "imposes no constraint on laws of general applicability"); *see also Northwest*, 572 U.S. at 289-90 (holding the ADA preempted a claim for breach of the implied covenant of good faith and fair dealing); *Morales*, 504 U.S. at 385 (holding the ADA preempted the enforcement of consumer-protection laws against airlines because they had a connection with fares—regardless of

whether they "actually prescrib[ed]" rates, routes, or services).

The Third Circuit's decision artificially limits the scope of the FAAAA and conflicts with this Court's consistent holding that, in the context of the FAAAA and the ADA, the phrase "relates to" must be construed broadly. Certiorari is warranted.

B. The Third Circuit's Decision Deepens the Circuit Split Regarding the Scope of FAAAA.

Because the circuits are in disarray as to the scope of the FAAAA's preemption clause, the issue has has made its way up to this Court several times. *See, e.g., California Trucking v. Su*, No. 18-887; *J.B. Hunt Transport, Inc. v. Ortega*, No. 17-1111; *Beavex v. Costello*, No. 15-1305; *Penske Logistics, LLC v. Dilts*, No. 14-801; *American Trucking Assocs., Inc. v. City of Los Angeles*, No. 11-798. Indeed, even in 2000, prior to this Court's decision in *Rowe*, Justice O'Connor's dissent in *Northwest Airlines v. Duncan* recognized that the Ninth and Third Circuits defined "services" narrowly for the purposes of preemption. 531 U.S. at 1058 (O'Connor, J., dissenting) (citing *Taj Mahal*

Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 193 (3d Cir. 1998)). This Court's decision in *Rowe* resolved the scope of the term "service," but the Ninth Circuit still clings to its narrow construction of the ADA's and FAAAA's preemption clauses. Several circuits have now followed suit. However, the First Circuit has remained faithful to this Court's precedents. The circuit split has ripened and matured, and this Court's review is warranted.

The Third Circuit appears to have been influenced to some degree by the Ninth Circuit's decision in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014) which held that California's meal and rest-break laws are not preempted by the FAAAA. *Id.* at 640. The Ninth Circuit applied its own rule that, for generally applicable "background" state laws, "the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route, or service." *Id.* at 646 (emphasis added). The "binds" concept appears as a factor in the Third Circuit's test for assessing "significant impact." Pet. App. 19a. The "binds" test, in and of itself, contravenes this Court's precedents instructing that laws of general applicability should not be treated differently. *See supra* pp. 21, 24.

And yet other courts of appeals have followed *Dilts*. *See, e.g., Amerijet Int'l, Inc. v. Miami-Dade County*, 627 F. App'x 744, 751 (11th Cir. 2015) (applying the "binds" test and holding a Florida wage law was not preempted by the ADA although it would raise the prices of an air carrier's services).

In *Costello v. BeavEx, Inc.*, the Seventh Circuit took a slightly different tack. 810 F.3d 1045 (7th Cir. 2016). It held that an Illinois wage law was not preempted by the FAAAA because "the effect of a labor law, which regulates the motor carrier *as an employer*, is often too 'remote' to warrant FAAAA preemption." *Id.* at 1054 (emphasis in original). The Seventh Circuit based its analysis on the distinction it drew 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." *Id.*

Despite this Court's warnings that laws of general applicability should not be treated differently, *see supra* pp. 21, 24, the Seventh Circuit persisted in its categorical approach. The Third Circuit appears to have been influenced by *Costello* as well, given the inclusion in its test of "addresses the carrier-customer

relationship rather than non-customer carrier relationships (e.g., carrier employee)." Pet. App. 19a; *see also Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 136-37 (3d Cir. 2018) ("We are persuaded by the decisions of two of our sister Courts of Appeals": *Costello* and *Dilts*).

All of these cases stand in direct conflict with the position taken by the First Circuit. In *Massachusetts Delivery Association v. Coakley*, the First Circuit analyzed whether the FAAAA preempted one prong of the Massachusetts Independent Contractor Statute, MASS. GEN. LAWS ch. 149 § 148B(a)(2), a generally applicable law.[2] 769 F.3d 11 (1st Cir.

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[2] Section 148B(a) provides that "an individual performing any service . . . shall be considered to be an employee" unless:

> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> (2) the service is performed outside the usual course of the business of the employer; and
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same na-

2014) ("MDA"). MDA was a non-profit trade organization representing same-day delivery companies in Massachusetts. *Id.* at 14.

MDA argued that the second requirement of the Independent Contractor Statute, which it called prong "B," was preempted by the FAAAA. *Id.* The government argued that the court should adopt the rule adopted by the Ninth Circuit for "background" labor laws. *Id.* at 18-19; *see also Dilts*, 769 F.3d at 646 ("generally applicable background regulations that are several steps removed from prices, routes, or services . . . are not preempted."). As noted, the Third Circuit's decision below was persuaded by *Dilts*: "Laws governing how an employer pays its workers do not 'directly regulate[] how [a carrier's] service is performed[;] they merely dictate how a carrier 'behaves as an employer.' As a result, the test is 'steps removed' from regulating customer-carrier interactions through prices, routes, or services." Pet. App. 23a.

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ture as that involved in the service performed.

MASS. GEN. LAWS ch. 149 § 148B(a) (2004).

But the First Circuit rejected that approach, holding that taking a special approach for laws of general applicability "runs counter to Supreme Court precedent broadly interpreting the 'related to' language in FAAAA." 769 F.3d at 19 (discussing *Morales*, 504 U.S. at 385-86; *Northwest*, 572 U.S. at 548-49). Thus, it "refuse[d] the . . . invitation to adopt . . . a categorical rule exempting from preemption all generally applicable state labor laws. . . . The court must engage with the *real and logical* effects of the state statute, rather than simply assigning it a label." *MDA*, 769 F.3d at 20 (emphasis added); *see also Mass. Delivery Ass'n v. Healy*, 821 F.3d 187, 191-92 (1st Cir. 2016) (MDA II) (on appeal after remand) ("Significant impact may be proven by 'empirical evidence' or 'the logical effect that a particular scheme has on the delivery of services,' or some combination of each.").

The First Circuit held that if the "B" prong of the Massachusetts ABC test had a potentially significant impact on the prices, routes, or services of the motor carriers, then FAAAA preemption must be the result, because the Massachusetts ABC test "governs the classification of the couriers for delivery services. It potentially impacts the services

the delivery company provides, the prices charged for the delivery of property, and the routes taken during this delivery. The law clearly concerns a motor carrier's 'transportation of property.'" *MDA*, 769 F.3d at 23.

The First Circuit addressed the issue again in *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016). Once again, prong "2" of the Massachusetts ABC test was at issue.[3] The court reiterated that the Massachusetts ABC test is a "generally applicable law regulating the relationships between *businesses and persons who perform services* for those businesses." *Id.* at 437 (emphasis added). The First Circuit also reaffirmed that if prong "2," standing alone, would prevent a motor carrier from using independent couriers to perform the delivery service, the prong would then "relate to" the "service of a motor carrier . . . with respect to the transportation of property." *Id.* at 438.

Eschewing a categorical approach, the First Circuit followed the statutory language, first looking to the "'service' performed by

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[3] In *Schwann*, the court referred to prong "B" as prong "2." *Id.* at 438.

Plaintiffs on behalf of FedEx," and then determining whether that service was "outside the usual course of the business of [FedEx]." *Id.* at 437. The court held that analysis would require a "judicial determination of the extent and types of motor carrier services that FedEx provides," and that applying the text of prong "2" in that way "expressly references" FedEx's motor carrier services. *Id.* at 437-48.

Indeed, the court recognized that the "decision whether to provide a service directly, with one's own employee, or to procure the services of an independent contractor is a significant decision in designing and running a business," not peripheral. *Id.* at 438. The First Circuit explained, "It requires a court to define the degree of integration that a company may employ by mandating that any services deemed 'usual' to its course of business be performed by an employee." *Id.* The court held that "[s]uch an application of state law poses a serious potential impediment to the achievement of the FAAAA's objectives because a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them." *Id.* Therefore, the court concluded that Prong "2," applied as

plaintiffs proposed, sufficiently "relate[s] to" Fed Ex's service and routes and was therefore preempted by the FAAAA. *Id.* at 440.[4]

Respondents have argued that the Massachusetts "B" prong is different from the New Jersey "B" prong because the Massachusetts test arguably forecloses any possibility for a same-day courier company to lawfully classify a driver as an independent contractor. But their efforts are unavailing. In *Schwann*, the First Circuit expressly analyzed what would logically result from a same-day courier reclassifying its independent couriers as employees under the state-

[4] Although *Schwann* addressed only prong "2" of the Massachusetts ABC test, while in the proceedings below, AEX argued the entire New Jersey ABC test was preempted, this is a distinction without a difference. The analysis and the result are the same. The district court in *Schwann* concluded that all three prongs of the Massachusetts ABC test were preempted, but on appeal the First Circuit noted that FedEx had "expressly disavowed" moving as to prongs "A" and "C". *Id.* at 441. Accordingly, it concluded, "We therefore hold FedEx to its decision not to argue to us that prongs A and C are preempted, and *for that reason alone* vacate and reverse the district court's ruling that prongs A and C are preempted." *Id.* (emphasis in original).

law ABC test, *id.* at 438—exactly the issue presented in this appeal.

Multiple circuits have now analyzed the scope of FAAAA preemption and have reached different conclusions. Interstate carriers like AEX are faced with conflicting approaches depending on what state the drivers happen to be in that day. The decision below was influenced by those courts that reached a result at odds with the analytical framework set forth by this Court and faithfully followed by the First Circuit. The First Circuit has clearly stated that it will not reconsider its position until this Court acts. *MDA II*, 621 F.3d at 192 ("The Attorney General asks us to reconsider *Schwann*, saying it was wrongly decided. But under the law of the circuit doctrine, we are bound by a prior panel decision, absent any intervening authority. The Attorney General points to no such intervening authority. The decisions from other circuits that the Attorney General argues are inconsistent with *Schwann*—*Costello*[], *Amerijet*[], and *Dilts*[]—were already considered by this court in *Schwann*. Those decisions were also raised in the petition for rehearing and the petition for rehearing en banc in *Schwann*, which were both denied.") (citations and internal quotation marks omitted). Only this

Court's review will resolve the conflict. The petition should be granted.

II. The Third Circuit's Refusal To Apply the Presumption Against Preemption in the Context of an Express Preemption Clause Conflicts with this Court's Precedent and Deepens a Circuit Split.

The decision below began by holding that the presumption against preemption applied to the case. Pet. App. 8a-9a. It stated that "[u]nder this presumption, 'the historic police powers of the States'" are "not to be superseded by [a] [f]ederal [a]ct unless that was the clear and manifest purpose of Congress." Pet. App. 8a (citing *Wyeth v. Levine*, 555 U.S. 555, 687 (2009)). Accordingly, the court continued, "we 'presume claims based on laws embodying state police powers are not preempted.'" Pet. App. 9a. The court held that because employment regulations, like wage laws, protect workers—"seek[ing] to ensure workers receive fair pay"—they "fall within New Jersey's police power." Pet. App. 9a. The Third Circuit concluded that the presumption against preemption by federal law therefore applies. Pet. App. 9a.

At first glance, this seems uncontroversial, because for years, this Court followed the rule that:

> In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [a court] start[s] with the assumption that the historic police powers of the State 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 (alterations and quotation marks omitted).

However, in 2016, this Court decided *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016), holding that application of the presumption against preemption was inappropriate when the statute at issue "contain[ed] an express pre-emption clause." *Id.* at 1946. The Court refused to "invoke any presumption against pre-emption" due to the presence of an express preemption clause, "instead 'focus[ing] on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Id.* (quoting *Chamber of Commerce v.*

Whiting, 563 U.S. 582, 594 (2011)) (citing *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016)).

Since that decision, the courts of appeals have differed as to whether the presumption against preemption applies in the context of an express preemption clause. *See Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 761 & n.1 (4th Cir. 2018) ("The Supreme Court has made somewhat varying pronouncements on presumptions in express preemption cases. . . . The circuits also may not be in full accord. . . . [I]n all events, we need not enter the great preemption presumption wars here because the text of the preemption provision . . . governs the disposition of this case."). *Compare, e.g., Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017) (ADA case) ("In determining the meaning of an express pre-emption provision, we apply no presumption against preemption . . . .") (citing *Puerto Rico*, 136 S. Ct. at 1946); *Eaglemed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017) (same); *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) (same) *with Lupian v. Joseph Cory Holdings, LLC*, 905 F.3d 127, 131 n.5 (3d Cir. Sept. 2018) (FAAAA decision); *Shuker v. Smith &*

Nephew, PLC, 885 F.3d 760, 771 & n.9 (3d Cir. 2017).

In *Shuker*, the Third Circuit took an opposing position to that of the Eighth, Ninth, and Tenth Circuits. The Third Circuit wrote:

> We disagree with [the] assertion that '[a]ny presumption against express preemption no longer exists.' . . . [*Puerto Rico*], 136 S. Ct. 1938, 1945-46 . . . did not address preemption of claims invoking 'historic . . . state regulation of matters of health and safety,' such as the products liability claims at issue here. As that case does not 'directly control[]' here, we 'leav[e] to [the Supreme Court] the prerogative of overruling its own decisions,' and continue to apply the presumption against preemption to claims . . . that invoke 'the historic police powers of the States.'"

Shuker, 885 F.3d at 771 & n.9 (citations omitted).

And in *Lupian*, the Third Circuit reiterated its position, holding that the presumption against preemption applies to express

preemption claims that invoke the States' historic police powers. It distinguished this Court's decision in *Puerto Rico* as "dealing with a Bankruptcy Code provision [and] not address[ing] claims involving areas historically regulated by states." 905 F.3d at 131 n.5.

Now, for the third time, the Third Circuit has reiterated its position in the decision below, which conflicts with the position taken by the Eighth, Ninth, and Tenth Circuits. This Court should grant certiorari to resolve the differing positions taken by the circuits on an issue that will have a widespread impact across multiple areas of the law.

III. The Decision Below Is Wrong.

The Third Circuit wrongly answered both of the questions presented. With respect to the first question regarding the scope of the FAAAA's preemption clause, the court joined those circuits that have contravened Congress's intent to enact a broad preemption clause, *see supra* pp. 26-28, and this Court's broad interpretation of the key phrase "related to" in the ADA and FAAAA. *See, e.g., Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 280-81 (2014); *Rowe v. New Hamp-*

shire Motor Transp. Ass'n, 552 U.S. 364, 370 (2008); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992).

Instead of following the guidance of this Court, the Third Circuit took it upon itself to fashion two multi-factored tests that have no grounding in the statutory language of the FAAAA or Congressional intent. Pet. App. 21a. Application of these judge-made tests led the court to conclude that the FAAAA does not preempt New Jersey's ABC test. The court called the ABC test's effect on prices, routes, services, or carriers tenuous, noting that it does not mention carrier prices, routes, services, or carriers—a requirement which is nowhere mentioned in the statutory language and which has been rejected by this Court because it would "simply read[] the words 'relating to' out of the statute." *Morales*, 504 U.S. at 385; *see also Rowe*, 552 U.S. at 370-71.

As additional support for its opinion, the Third Circuit stated that the ABC test "only concerns employer-worker relationships" and thus was "steps removed from regulating customer-carrier interactions through prices, routes, or services." Pet. App. 22a-23a. As noted, this categorical approach

is drawn from the *Dilts* and *Costello* opinions rather than the precedents of this Court or any statutory language. *See* Pet. App. 15a; *see supra* pp. 26-28. The Court continued to follow *Dilts*, using its test regarding "whether the law binds the carrier to provide a particular price, route, or service." Pet. App. 18a. Again, this heightened scrutiny is not in accord with the broad "relating to" statutory language, this Court's decisions in *Rowe* and *Morello*, or legislative intent.

The Third Circuit should have followed the First Circuit's decisions in *MDA*, 769 F.3d 11 (1st Cir. 2014) and *Schwann*, 813 F.3d 429 (1st Cir. 2016). In *MDA*, the First Circuit explicitly rejected the argument made by the Attorney General that "background" laws are not subject to FAAAA preemption. 769 F.3d at 19-20; *see supra* pp. 28-31. The First Circuit held that if enforcement of prong "B" of the Massachusetts ABC test had a potentially significant impact on the prices, routes, or services of motor carriers, FAAAA preemption must result. *Id.* at 19-20; *see supra* pp. 28-31. In so holding, it remained faithful to this Court's precedent.

The First Circuit addressed this issue a second time in *Schwann* where, once again, it

concluded that prong "2" of the Massachusetts ABC test "sufficiently 'relates to' FedEx's services and routes and is thus preempted by" the FAAAA. *Id.* at 440; *see supra* pp. 31-33.

Instead of following these decisions, which are in accord with the statutory language, this Court's precedents, and Congressional intent, the Third Circuit used its own judge-made tests to conclude, against common sense, that the ABC test had no significant effect on prices, routes, or services. The test is infirm for all the reasons discussed, *see supra* pp. 14-35, but even on a practical level, the conclusion that the ABC test has no significant effect strains credulity. The decision below, if left to stand, will force AEX to drastically alter its business model, inevitably causing a significant impact on the rates, routes, or services offered by AEX to its shipper-customers. *See MDA II*, 821 F.3d at 191-92.

Recruiting and hiring employees is substantially more expensive and complicated than engaging independent contractors. Hiring multiple employees would necessitate the creation of a human resources department to develop and implement employment policies

and procedures as well as the acquisition, operation, and maintenance of a fleet of vehicles. AEX would need to plan, administer, and dictate the employee-drivers' delivery routes, provide liability insurance, occupational hazard insurance, fringe benefits, and pay overtime wages and employment taxes.

Costs and prices are inextricably intertwined, and therefore all of these significantly increased costs will result in an increase in prices. Because New Jersey's ABC test impermissibly dictates to motor carriers that they must utilize a business model of employee-drivers, destroying AEX's preferred and well established business model of utilizing independent couriers, it necessarily will disrupt the rates, routes, and services offered. *See MDA II*, 821 F.3d at 191-92. AEX is an *interstate* motor carrier, and its *intrastate* competitors would realize a significant competitive advantage through their use of the preferred business model centered on the utilization of independent couriers. This uneven playing field caused by differing state laws is exactly what Congress intended the FAAAA preemption provision to prevent.

With respect to the second question presented, the Third Circuit held that the

presumption against preemption applied because employment regulations are "within New Jersey's police power." Pet. App. 9a. The court took no notice of this Court's decision in *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016), which held that the presumption against preemption is inapplicable in the context of an express preemption clause. *Id.* at 1946. In *Puerto Rico*, this Court instructed that when confronted with such a clause, courts are to "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Id.*; *see supra* pp. 36-37. By ignoring this holding and applying the presumption, the decision below viewed the case through the wrong lens from the very start, an analytical misstep that ineluctably led it to the wrong conclusion. Certiorari is warranted.

IV. The Questions Presented Are Exceptionally Important and Recurring and Warrant this Court's Review.

The Court is no stranger to either of the questions presented. The first question regarding the scope of the FAAAA's preemption clause has come before the Court several times in the last few years and will continue

to recur until the Court grants certiorari and decides it. Only if the Court does so and reverses the decision below will Congress's intention to have "[s]ervice options . . . dictated by the marketplace[,] and not by an artificial regulatory structure" be realized. *See* H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760. This issue is of exceptional importance to motor carriers across the country, particularly interstate carriers like Petitioner, who currently face not only a patchwork of state regulation but also circuit court decisions in conflict.

The Court's answer to the second question presented is also exceptionally important and will affect applicability of the presumption against preemption in every case involving an express preemption clause. The lower courts' confusion is evident. The presumption against preemption is analogous to the standard of review; it affects the starting point of a court's analysis. It is critically important to get that starting point right. The Court's answer will have far-reaching implications across many areas of law and warrants this Court's review.

This Court alone can correctly resolve the split of authority with respect to both

questions. *See MDA II*, 821 F.3d at 192. This case presents the perfect opportunity to do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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Dated: April 29, 2019

APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JANUARY 29, 2019

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1641

EVER BEDOYA; DIEGO GONZALES; MANUEL DECASTRO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

v.

AMERICAN EAGLE EXPRESS INC,
D/B/A ALEX GROUP,

v.

KV SERVICE, LLC; M&J EXPRESS, LLC;
A&D DELIVERY EXPRESS, LLC,

AMERICAN EAGLE EXPRESS, INC.

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. No. 2-14-cv-02811)
District Judge: Hon. Esther Salas

Argued November 14, 2018

Appendix A

Before: GREENAWAY, JR., SHWARTZ, and BIBAS,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was argued on November 14, 2018. On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the order of the District Court entered on November 22, 2016, is AFFIRMED. Costs taxed against Appellant. All of the above in accordance with the Opinion of this Court.

ATTEST:
/s/ Patricia S. Dodszuweit
Clerk

Dated: January 29, 2019

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JANUARY 29, 2019

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1641

EVER BEDOYA; DIEGO GONZALES; MANUEL DECASTRO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

AMERICAN EAGLE EXPRESS INC,
d/b/a AEX GROUP

v.

KV SERVICE, LLC; M&J EXPRESS, LLC;
A&D DELIVERY EXPRESS, LLC

AMERICAN EAGLE EXPRESS, INC.,

Appellant.

November 14, 2018, Argued;
January 29, 2019, Opinion Filed

Appendix B

Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-14-cv-02811)
District Judge: Hon. Esther Salas.

Before: GREENAWAY, JR., SHWARTZ, and BIBAS,
Circuit Judges.

OPINION

SHWARTZ, *Circuit Judge.*

Plaintiff delivery drivers Ever Bedoya, Diego Gonzalez, and Manuel Decastro (collectively, "the Drivers") filed a putative class action against Defendant American Eagle Express, Inc., ("AEX"), alleging that AEX misclassified them as independent contractors when they are actually employees under the New Jersey Wage and Hour Law ("NJWHL"), N.J. Stat. Ann. §§ 34:11-56a to -56a3, and the New Jersey Wage Payment Law ("NJWPL"), N.J. Stat. Ann. §§ 34:11-4.1 to 4:14. AEX moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), arguing that the Drivers' claims are preempted by the Federal Aviation Authorization Administration Act of 1994 ("FAAAA"), 49 U.S.C. §§ 14501-06. The District Court denied AEX's motion and certified the order for interlocutory appeal. Because the FAAAA does not preempt the New Jersey law for determining employment status for the purposes of NJWHL and NJWPL, we will affirm the order and remand for further proceedings.

Appendix B

I

AEX is a logistics company that provides delivery services to various medical organizations. The Drivers are New Jersey residents who make deliveries for AEX. The Drivers filed this putative class action against AEX seeking, among other things, a judgment declaring that they are employees of AEX, rather than independent contractors, which entitles them to compensation under the NJWHL and NJWPL.[1] AEX moved for judgment on the pleadings, arguing that the FAAAA preempts the Drivers' claims.

The District Court denied AEX's motion, *Bedoya v. Am. Eagle Express*, Civ. No. 14-2811, 2017 U.S. Dist. LEXIS 163875, 2017 WL 4330351 , at *1 (D.N.J. Sept. 29, 2017), reasoning that "[t]here is no clear indication" that Congress intended for the FAAAA to preempt state wage laws, Dkt. 109 at 6, 10, and that the connection between regulation of AEX's workforce and the "prices, routes, and services" provided to its consumers is too attenuated to justify preempting claims under the NJWHL and NJWPL, *id.* at 8-9. We now consider AEX's interlocutory appeal of the order denying the motion pursuant to 28 U.S.C. § 1292(b). *Bedoya*, 2017 U.S. Dist. LEXIS 163875, 2017 WL 4330351, at *1-4.

1. The District Court has jurisdiction pursuant to 28 U.S.C. § 1332(d).

Appendix B

II[2]

A

The question before us is whether the FAAAA preempts New Jersey's test for determining employment classification for purposes of the NJWHL and NJWPL. Under this test, workers performing services for a given company in exchange for pay are deemed employees unless the company can demonstrate each of the following:

> 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

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2. We review an order granting or denying a motion for judgment on the pleadings de novo. *Zimmerman v. Corbett*, 873 F.3d 414, 417 (3d Cir. 2017) (citing *Allah v. Al-Hafeez*, 226 F.3d 247, 249 (3d Cir. 2007)). Judgment will not be granted unless the movant "clearly establishes there are no material issues of fact, and he is entitled to judgment as a matter of law." *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005) (citation omitted). In considering a motion for judgment on the pleadings, we must accept as true all facts presented in the complaint and answer and draw all reasonable inferences in favor of the non-moving party—here, the Drivers. *Id.* at 417-18. While AEX implores us to look beyond the pleadings, we may not.

> C. Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

N.J. Stat. Ann. §§ 43:21-19(i)(6)(A)-(C) ("New Jersey ABC classification test"). Where a company successfully demonstrates all three elements with respect to a worker, that worker qualifies as an independent contractor under the NJWHL and NJWPL. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 106 A.3d 449, 458 (N.J. 2015). The company, in turn, is exempt from requirements under those statutes with respect to the worker. *Id.* For individuals classified as employees, however, the employing company is subject to each statute's obligations, including minimum and overtime wage requirements, N.J. Stat. Ann. § 34:11-56a4, conditions regarding the time and mode of pay, N.J. Stat. Ann. § 34:11-4.2, 4.2a, and restrictions on pay deductions, N.J. Stat. Ann. § 34:11-4.4. AEX contends that the New Jersey ABC classification test is preempted by the FAAAA.

B

The preemption doctrine stems from the Supremacy Clause, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, "Congress . . . has the power to preempt state law." *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 83 (3d Cir. 2017) (citing *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)), *cert*

denied sub nom., Alban v. Nippon Yusen Kabushiki Kaisha, 138 S. Ct. 114, 199 L. Ed. 2d 31 (2017). There are three categories of preemption: field preemption, conflict preemption, and express preemption. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 334 (3d Cir. 2009) (citing *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)).

Because preemption is an affirmative defense, we examine the specific preemption defense asserted. *In re Vehicle*, 846 F.3d at 84 (citing *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 191 L. Ed. 2d 511 (2015)). AEX argues that New Jersey's ABC classification test is subject to express preemption under 49 U.S.C. § 14501(c)(1). "Express preemption requires a[n] analysis of whether '[s]tate action may be foreclosed by express language in a congressional enactment.'" *Lupian v. Joseph Cory Holdings, LLC*, 905 F.3d 127, 131 (3d Cir. 2018) (alteration in original) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)).

In evaluating AEX's argument, we first decide whether the presumption against preemption applies. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 438, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002) (applying the presumption against preemption in the FAAAA context). Under this presumption, "the historic police powers of the States" are "not to be superseded by [a] [f]ederal [a]ct unless that was the clear and manifest purpose of Congress." *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 687 (3d Cir. 2016) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed.

2d 51 (2009)). Thus, we "presume claims based on laws embodying state police powers are not preempted." *In re Vehicle*, 846 F.3d at 84; *see also Farina v. Nokia Inc.*, 625 F.3d 97, 116 (3d Cir. 2010).

Many employment regulations, such as the wage laws at issue here, seek to ensure workers receive fair pay. Because they protect workers, they are within New Jersey's police power, and the presumption against preemption by federal law applies. *See, e.g., Lupian*, 905 F.3d at 131 (stating wage laws that protect workers represent an exercise of "police power"); *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987) (applying the presumption against preemption to a state labor law regarding severance pay "since the establishment of labor standards falls within the traditional police power of the State").

The presumption is rebutted where Congress had a "clear and manifest purpose" to preempt state laws. *Sikkelee*, 822 F.3d at 687 (citation omitted); *see also Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (directing courts to examine congressional intent, the "ultimate touchstone" in discerning the preemptive scope of a statute (internal quotation marks and citation omitted)). To determine Congress' purpose, we look to the plain language of the statute and, if necessary, to the statutory framework as a whole. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (citation omitted). Thus, we next examine Congress' purpose in enacting the FAAAA and the Airline Deregulation Act of 1978 ("ADA"),

49 U.S.C. §§ 40101-130, an earlier statute with a similar preemption provision.

C

In 1978, following a long period of heightened regulation, Congress enacted the ADA, which sought to deregulate the air-travel industry to "maxim[ize] reliance on competitive market forces." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) (quoting 49 U.S.C. App. § 1302(a)(4)). To ensure that this objective would not be frustrated by state regulation, Congress included a preemption provision providing that "no State . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier." *Id.* at 420 (Stevens, J., dissenting) (quoting 49 U.S.C. App. § 1305(a)).

Congress enacted similar laws focused on deregulating interstate trucking, culminating with the passage of the FAAAA in 1994. *Lupian*, 905 F.3d at 132-33. Via the FAAAA, Congress sought to "level the playing field" between air carriers and motor carriers so that both could benefit from federal deregulation. H.R. Conf. Rep. No. 103-677, at 88 (1994); *see also Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187-88 (9th Cir. 1998) (detailing FAAAA legislative history). The FAAAA contains a preemption provision modeled after the ADA's, providing, with limited exceptions, 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). Because of the parallels between the ADA and FAAAA, ADA cases are instructive regarding the scope of FAAAA preemption. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008) (analyzing FAAAA preemption using ADA cases as guidance). As with the ADA, the FAAAA preemption provision's central objective is to avoid frustrating the statute's deregulatory purpose by preventing states from imposing "a patchwork of state service-determining laws." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 264, 133 S. Ct. 1769, 185 L. Ed. 2d 909 (2013) (quoting *Rowe*, 552 U.S. at 373). The FAAAA, however, has a qualifier that is absent from the ADA: the preempted state law must relate to prices, routes, or services "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The Supreme Court has recognized that this language "massively limits the scope of preemption ordered by the FAAAA." *Dan's City*, 569 U.S. at 261 (internal citation and quotation marks omitted).

Further insight into the limits of FAAAA preemption comes from the subjects Congress considered when enacting that statute. "Congress identified ten jurisdictions (nine states and the District of Columbia . . .) that did not regulate intrastate prices, routes, and services." *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 967 (9th Cir. 2018) (citing *Mendonca*, 152 F.3d at 1187). By implication, Congress determined that the laws then in existence in

those jurisdictions did not contravene its deregulatory goals and thus were not preempted. *Id.*

The Supreme Court has also articulated several principles that inform us about the breadth of FAAAA preemption. First, the "related to" language from the FAAAA preemption clause gives it a broad scope, encompassing any state actions that have "a connection with, or [make] reference to . . . rates, routes, or services" of a motor carrier. *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 280-81, 134 S. Ct. 1422, 188 L. Ed. 2d 538 (2014) (internal quotation marks and citation omitted) (interpreting the ADA). While this language covers any state law that has a connection with or refers to "price[s], route[s], [or] service[s,]" *id.* at 280, "the breadth of the words 'related to' does not mean the sky is the limit," *Dan's City*, 569 U.S. at 260. Drawing from case law examining similar wording in the preemption provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), *see, e.g., Morales*, 504 U.S. at 383-84, the Supreme Court has observed that reading the phrase "related to" with "uncritical literalism" would render preemption an endless exercise, *Dan's City*, 569 U.S. at 260-61 (citation omitted), because "everything [is] relat[ed] to everything else in some manner[,]" *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 436 (1st Cir. 2016) (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1955)).

Second, FAAAA preemption reaches laws that affect prices, routes, or services even if the effect "is only indirect." *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S.

at 386). However, where a law's impact on carrier prices, routes, or services is so indirect that the law affects them "in only a tenuous, remote, or peripheral . . . manner," the law is not preempted. *Dan's City*, 569 U.S. at 261 (quoting *Rowe*, 552 U.S. at 371); *Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)).

Finally, preemption occurs where a state law has "a 'significant impact' on carrier rates, routes, or services."[3] *Rowe*, 552 U.S. at 375 (emphasis omitted) (quoting *Morales*, 504 U.S. at 390).

Mindful of these principles, we next review the case law for guidance concerning whether a law has a direct or indirect effect and whether it has a significant or insignificant effect. From our review, we identify factors courts examine and set forth those factors that may shed light on a law's directness and those that may reflect the significance of the law's effect on the regulated entities at issue.

D

Neither the Supreme Court nor our Court has recited precise standards for evaluating directness or significance, but cases addressing the issue provide some guidance. For example, the Supreme Court has held that

3. The Supreme Court also noted that "it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulation." *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 386-87).

consumer protection and fraud laws used to regulate frequent-flyer programs could directly and significantly affect prices and services and are thus preempted. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995); *Morales*, 504 U.S. at 388-89. Similarly, the Court determined that a Maine law requiring a specific procedure to verify the recipient of tobacco deliveries was preempted by the FAAAA because it dictated a service that tobacco motor carriers were required to provide for property they transported. *Rowe*, 552 U.S. at 372. In addition, we recently observed that the FAAAA's "preemption clause undoubtedly applies, for example, to state laws directly restricting types of goods that can be carried by trucks, tariffs, and barriers to entry." *Lupian*, 905 F.3d at 135; H.R. Conf. Rep. No. 103-677, at 86 (1994).

On the other hand, the FAAAA itself, the Supreme Court, and the courts of appeals have identified laws that are too "tenuous, remote, or peripheral" from carrier prices, routes, and services to trigger preemption. *See, e.g.*, *Rowe*, 552 U.S. at 371; *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014). The FAAAA explicitly exempts from preemption laws governing motor vehicle safety, local route controls based on vehicle size and weight, and driver insurance requirements.[4] 49 U.S.C. § 14501(c)(2)(A). The Supreme Court has stated that the

4. The House of Representatives Conference Report specifies that the list provided in 49 U.S.C. § 14501(c)(2) and (3) is "not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 83.

FAAAA does not preempt laws prohibiting prostitution, gambling, and "obscene depictions," *Morales*, 504 U.S. at 390, or those addressing zoning, *Dan's City*, 569 U.S. at 264. We have observed that "garden variety employment claim[s]" evade ADA and FAAAA preemption because they are "too remote and too attenuated" from carrier prices, services, or routes. *Lupian*, 905 F.3d at 134 (quoting *Gary v. Air Grp., Inc.*, 397 F.3d 183, 189 (3d Cir. 2005)). As relevant to this case, we recently held that wage claims under the Illinois Wage Payment and Collection Act ("IWPCA"), 820 Ill. Comp. Stat. 115/1-115/15, are not preempted under the FAAAA because they are "too far removed from the statute's purpose to warrant preemption." *Lupian*, 905 F.3d at 136. Many of our sister circuits have similarly held that the FAAAA and ADA do not preempt state employment laws. *See, e.g., Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1068 (9th Cir. 2018) (holding California prevailing wage law for workers on public projects not preempted); *Su*, 903 F.3d at 957 (holding California common law test for employee versus independent contractor status not preempted); *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1048 (7th Cir. 2016) (holding Illinois wage law not preempted), *cert. denied*, 137 S. Ct. 2289, 198 L. Ed. 2d 723 (2017); *Amerijet Int'l, Inc. v. Miami-Dade County, Fla.*, 627 F. App'x 744, 751 (11th Cir. 2015) (holding Miami-Dade County living wage ordinance as applied to air carriers not preempted); *Dilts*, 769 F.3d at 647 (holding California meal and rest-break laws not preempted); *Mendonca*, 152 F.3d at 1189 (holding California wage law not preempted).

From the language of the FAAAA preemption provision and these cases, we can distill several factors

courts should consider when deciding whether a particular state law is FAAAA-preempted. First, courts should examine whether the state law at issue applies to all businesses or whether it focuses on motor carriers. Laws that are directed at "members of the general public" and that are not targeted at motor carriers are usually viewed as not having a direct effect on motor carriers. *Rowe*, 552 U.S. at 375.

Even targeted laws, however, are not necessarily preempted. We know from the FAAAA itself that state laws that may target motor carrier safety and insurance, or restrict local routes based on vehicle size and weight, are not preempted. 49 U.S.C. § 14501(c)(2). Conversely, laws of general applicability may nonetheless be preempted where they have a significant impact on the services a carrier provides. *See, e.g., DiFiore v. Am. Airlines Inc.*, 646 F.3d 81, 88-89 (1st Cir. 2011) (holding generally applicable state tip law as applied to airlines preempted under the ADA because it "directly regulate[d] how an airline service is performed and how its price is displayed to customers"). Thus, whether a law is applicable to every business or targets carriers is a helpful but nondispositive factor for determining whether a law has a direct effect on motor carriers' prices, routes, or services. *Morales*, 504 U.S. at 386.

Second, courts should consider whether the law addresses the carrier-employee relationship as opposed to the carrier-customer relationship. "[G]enerally applicable state laws that affect the carrier's relationship with its customers [differ from] those that affect the carrier's

relationship with its workforce." *Costello*, 810 F.3d at 1054; *see also Su*, 903 F.3d at 961-63 (noting same dichotomy); *DiFiore*, 646 F.3d at 88 (preempting a Massachusetts law prohibiting employer from collecting fee advertised as "service charge" because the law regulates how a company performs services for its customers and "not merely how the airline behaves as an employer or proprietor").

The Court of Appeals for the Seventh Circuit provides a useful analysis explaining why laws governing an employer's relationship with its employees have too remote an impact to be preempted. *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012) (citing *Mendonca*, 152 F.3d at 1189). The court examines whether the challenged state law regulates matters needed to operate the business, which it calls resource inputs, as opposed to laws governing the goods or services the business puts out, which it calls product outputs. *Id.* The product outputs of the motor carrier industry are the services it provides—transportation of property from origin to destination. *Id.* The FAAAA's focus on prices, routes, and services shows that the statute is concerned with the industry's production outputs, and seeks to protect them from state regulation.

Resource inputs, on the other hand, are the resources necessary for a business to create product outputs, including "labor, capital, and technology," which may be regulated by various laws. *Id.* "For example, labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations. Capital

is regulated by banking laws, securities rules, and tax laws, among others. Technology is heavily influenced by intellectual property laws." *Id.* Although laws that regulate inputs may impact costs and may in turn affect prices charged and services provided to customers, "no one thinks that the ADA or the FAAAA preempts these [regulations] and the many comparable state laws[.]" *Id.* That is because, notwithstanding the state laws' indirect effects, they "operate one or more steps away from the moment at which the firm offers its customer[s] a service for a particular price" and therefore have too "remote" an effect on prices, routes, and services to be the intended target of preemption. *Id.* (internal citations omitted); *see also Su*, 903 F.3d at 966 (stating that courts should examine "where in the chain of a motor carrier's business [the state law] is acting to compel a certain result *(e.g.*, consumer or work force), and what result it is compelling *(e.g.*, certain wage, non-discrimination, a specific system of delivery, a specific person to perform the delivery)"); *Costello*, 810 F.3d at 1055 (embracing *S.C. Johnson*, 697 F.3d at 558). In short, laws regulating labor inputs, such as wage laws, have too remote an effect on the price the company charges, the routes it uses, and service outputs it provides and are less likely to be preempted by the FAAAA.

Third, courts should consider whether the law binds the carrier to provide a particular price, route, or service. As discussed above, the Supreme Court held that Maine's identification requirements for tobacco deliveries required a motor carrier transporting tobacco to provide a particular service. *Rowe*, 552 U.S. at 372. Similarly,

the Court of Appeals for the First Circuit determined that Massachusetts' ABC test for classifying employees in effect bound the carrier to provide its services using employees rather than independent contractors. *Schwann*, 813 F.3d at 437. Under Massachusetts' independent contractor statute, only workers who perform a service that is outside the employer's usual course of business may be classified as independent contractors. *Id.* (quoting Mass. Gen. Laws ch. 149, § 148B(a)(2)). Thus, application of Massachusetts' test "in substance, bar[red] [the carrier at issue] from using any individuals as full-fledged independent contractors." *Id.* In other words, the Massachusetts test essentially foreclosed the independent contractor classification of any of the carrier's workers performing delivery services because such services were within the carrier's usual course of business. *Id.* As a result, the Massachusetts statute bound the carrier to provide its services using employees and not independent contractors.

The same was not true with laws that do not dictate a price, route, or service. For example, the Court of Appeals for the Ninth Circuit analyzed whether the FAAAA preempted a California law that requires employers to provide meal and rest breaks, reviewing, among other factors, whether the law bound the carrier to specific prices, routes, or services. *Dilts*, 769 F.3d at 649-50. The court held that the FAAAA did not preempt California's meal and rest-break laws. *Id.* The court relied partially on the fact that the California laws did not "set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly

or indirectly." *Id.* at 647. Put simply, the law at issue did "not 'bind' motor carriers to specific prices, routes, or services."[5] *Id.* (citation omitted).

Finally, courts examining a preemption challenge to a state law should be mindful of Congress' goal of avoiding a "patchwork" of differing state "service-determining laws," which could undermine its "major legislative effort to leave [decisions regarding the provision of services] to the competitive marketplace." *Rowe*, 552 U.S. at 373 (citing H.R. Conf. Rep. No. 103-677, at 87 (1994)). This goal does not constitute a categorical imperative to free motor carriers of all state regulation. Rather, the plain language of the FAAAA, and its preemption of only laws "relat[ing] to" carrier "price[s], route[s], or service[s]," 49 U.S.C. § 14501(c)(1), demonstrates that Congress was concerned only with a limited set of state laws. *Dilts*, 769 F.3d at 646-47. Thus, "[t]he fact that laws may differ from state to state is not, on its own, cause for FAAAA preemption." *Id.* at 647. Laws that are "more or less nationally uniform," *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 65 N.E.3d 1, 11-12 (Mass. 2016), are less likely to pose the kind of state law interference FAAAA preemption seeks to avoid.

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5. AEX characterizes *Dilts* as impermissibly relying on this "binds to" test to conclude that the FAAAA did not preempt California's meal and rest break laws, arguing that such a test construes the scope of FAAAA preemption too narrowly. While relying solely on such a "binds to" test may narrow FAAAA preemption to an unacceptable degree, *Dilts* merely recognized that the "binds to" test provides one of several possible avenues to demonstrate that a state law has a significant effect on carrier prices, routes, or services. *Dilts*, 769 F.3d at 649.

In sum, to assess the directness of a law's effect on prices, routes, or services, courts should examine whether the law: (1) mentions a carrier's prices, routes, or services; (2) specifically targets carriers as opposed to all businesses; and (3) addresses the carrier-customer relationship rather than non-customer-carrier relationships (e.g., carrier-employee). If a law has a direct impact on carriers' prices, routes, or services with respect to the transportation of property, then it is preempted unless it falls within one of the statutory exceptions. Though we can draw no firm line between laws whose effects on rates, routes, or services are indirect and laws whose effects are "tenuous, remote, or peripheral," these factors, and perhaps other considerations, will guide courts in the inquiry.

To assess whether a law has a significant effect on a carrier's prices, routes, or services, courts should consider whether: (1) the law binds a carrier to provide or not provide a particular price, route, or service; (2) the carrier has various avenues to comply with the law; (3) the law creates a patchwork of regulation that erects barriers to entry, imposes tariffs, or restricts the goods a carrier is permitted to transport; and (4) the law existed in one of the jurisdictions Congress determined lacked laws that regulate intrastate prices, routes, or services and thus, by implication, is a law Congress found not to interfere with the FAAAA's deregulatory goal. Other factors may also lead a court to decide that a state law has a significant effect where the law undermines Congress' goal of having competitive market forces dictate prices, routes, or services of motor carriers.[6]

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6. Before the Supreme Court's rulings in *Rowe* and *Dan's City*, our Court once framed the inquiry—albeit in the context of whether

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We have examined each of these considerations and conclude that New Jersey's ABC classification test is not preempted as it has neither a direct, nor an indirect, nor a significant effect on carrier prices, routes, or services.

Any effect New Jersey's ABC classification test has on prices, routes, or services is tenuous. The test does not mention carrier prices, routes, or services, nor does it single out carriers. Indeed, the test applies to all businesses as part of the "backdrop" they "face in conducting their affairs." *Lupian*, 905 F.3d at 136; *see also Dilts*, 769 F.3d at 646 (describing a state employment law as a "background regulation[]"). The test also does not regulate carrier-customer interactions or other product outputs. Rather, it only concerns employer-worker

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a defamation claim was preempted under the ADA (a question we answered in the negative, holding that the defamation claim was not preempted)—as whether the law or claim in question would "frustrate[] deregulation by interfering with competition through public utility-style regulation." *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998) (citation omitted). Elaborating on regulation in a "public utility sense" in the context of airline services, our Court said that regulations of "the frequency and scheduling of transportation" and "the selection of markets" are public-utility styled regulations (which would thus be preempted under the ADA), whereas "provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities" are not services in a "public utility sense," and thus could be regulated, for instance through state implementation of a duty to exercise reasonable care, the violation of which could give rise to ordinary tort claims. *Id.* at 193 (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261, 1265-66 (9th Cir. 1998) (en banc)).

relationships. Laws governing how an employer pays its workers do not "directly regulate[] how [a carrier's] service is performed[;]" they merely dictate how a carrier "behaves as an employer[.]" *DiFiore*, 646 F.3d at 88. As a result, the test is "steps removed" from regulating customer-carrier interactions through prices, routes, or services. *Costello*, 810 F.3d 1045 (quoting *Dilts*, 769 F.3d at 646).

The New Jersey ABC classification test does not have a significant effect on prices, routes, or services either. The test does not bind AEX to a particular method of providing services and thus it is unlike the preempted Massachusetts law at issue in *Schwann*, 813 F.3d 429. The Massachusetts statute does not include New Jersey's alternative method for reaching independent contractor status—that is, by demonstrating that the worker provides services outside of the putative employer's "places of business." N.J. Stat. Ann. § 43:21-19(i)(6)(B). Thus, if the other prongs of the New Jersey classification test are met, the test allows an employer to classify a worker as an independent contractor if it shows that the worker either provides a service that is "outside the [employer's] usual course of business . . . or [performs such service] outside of all the places of business of [the employer]." *Id.*[7] No part

7. AEX focuses its argument on the B prong of the New Jersey test, but also asserts that the A and C prongs of the test are preempted. AEX cites no case holding that prong A or C is preempted under either the FAAAA or the ADA. This is not surprising given the legion of cases holding that the A and C prongs are not FAAAA-preempted. *See, e.g., Vargas v. Spirit Delivery & Distrib. Servs., Inc.*, 245 F. Supp. 3d 268, 281-84 (D. Mass. 2017); *DaSilva v. Border*

of the New Jersey test categorically prevents carriers from using independent contractors. As a result, the state law at issue here does not mandate a particular course of action—e.g., requiring carriers to use employees rather than independent contractors—and it offers carriers various options to comply with New Jersey employment law.[8]

Transfer of Mass., Inc., 227 F. Supp. 3d 154, 159-60 (D. Mass. 2017); *Portillo v. Nat'l Freight, Inc.*, Civ. No. 15-7908, 2016 U.S. Dist. LEXIS 132180, 2016 WL 5402215, at *5-6 (D.N.J. Sept. 26, 2016); *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 65 N.E.3d 1, 11-12 (Mass. 2016). AEX also provides no reason why these prongs are preempted and in fact does not individually analyze them. Thus, AEX has failed to carry its burden to demonstrate that the affirmative defense of FAAAA preemption applies to these prongs.

8. AEX makes much of the fact that the *Costello* and *Lupian* courts observed that certain aspects of the IWPCA classification provision could be contracted around (i.e., employees could enter into contracts with carriers to allow certain paycheck deductions), *Lupian*, 905 F.3d at 135 n.12, whereas neither the New Jersey test nor the Massachusetts test allows the same contractual avoidance. Contrary to AEX's argument, this does not make the current case more analogous to *Schwann* than to *Costello* and *Lupian*. Though *Costello* and *Lupian* correctly took the IWPCA contractual loophole into account, neither court relied on it. *See Lupian*, 905 F.3d at 136 n.12 (observing that the *Costello* court "noted" the contractual allowance in the IWPCA); *Costello*, 810 F.3d at 1057 (noting in a single sentence that the IWPCA's prohibition on deductions from wages can be contracted around, ultimately holding that the IWPCA is not "related to a price, route, or service of any motor carrier"). Moreover, while a contractual circumvention option may provide another route for compliance, weighing against FAAAA preemption, it is not the only way a state statute can afford carriers some flexibility. Here, the New Jersey ABC classification test gives carriers options; it does not need to provide a contractual workaround to avoid preemption.

AEX argues that applying the New Jersey law may require it to shift its model away from using independent contractors, which will increase its costs, and in turn, its prices. Specifically, AEX asserts that if it can no longer use independent contractors to perform its delivery services, then it will be forced to recruit employees, bring on a human resources department to manage them, acquire and maintain a fleet of vehicles and pay expense reimbursements, provide fringe benefits, plan and dictate delivery routes and timing, and pay overtime wages and employment taxes. Our Court and our sister circuits have rejected similar lists of conclusory impacts. *Lupian*, 905 F.3d at 135-36; *Costello*, 810 F.3d at 1056; *Mendonca*, 152 F.3d at 1189. Though AEX correctly states that it need not proffer empirical evidence to support its assertions of significant impact at the pleading stage, *see, e.g.*, *Costello*, 810 F.3d at 1055 (citing *Rowe*, 552 U.S. at 373-74), it does not provide even a logical connection between the application of New Jersey's ABC classification test and the list of new costs it would purportedly incur.[9]

AEX's argument that it may be subject to other legal requirements arising from reclassification, citing only the Affordable Care Act,[10] is equally unavailing. In the words of the *Costello* court, "[c]onspicuously absent from [the company's] parade of horrors is any citation of

9. For instance, we cannot see, nor has AEX explained, how reclassification of employees would necessarily require AEX to acquire a new fleet of vehicles or create a human resources department.

10. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010).

authority showing that it would be required to comply with [other] federal and state laws." *Id.* at 1056. Instead, AEX "rel[ies] on conclusory allegations that compliance with the [NJWHL and NJWPL] will require [AEX] to switch its entire business model . . . [but w]e see no basis for concluding that [New Jersey law] would require that change given that the federal employment laws and other state labor laws [may] have different tests" for determining whether someone is an employee under a specific statute. *Id.* (citations omitted).

Furthermore, while "[w]e have no doubt that the disruption of a labor model—especially after services have been performed—could have negative financial and other consequences for an employer," *Lupian*, 905 F.3d at 136, this impact on the employer does not equate to a significant impact on Congress' goal of deregulation. Congress sought to ensure market forces determined prices, routes, and services. Nothing in that goal, however, meant to exempt workers from receiving proper wages, even if the wage laws had an incidental impact on carrier prices, routes, or services.[11]

Finally, the fact that New Jersey's ABC classification

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11. Indeed, Congress evinced its intent for the FAAAA not to preempt general state wage laws when it included New Jersey—where, at the time the FAAAA was enacted, the NJWHL and NJWPL were already in effect, N.J. Stat. Ann. §§ 34:11-56a7 & 34:11-4.1 (indicating initial enactment in 1966 and 1965, respectively)—in its list of jurisdictions with laws that did not run afoul of the FAAAA. H.R. Conf. Rep. No. 103-677, at 86 (1994); *see also Mendonca*, 152 F.3d at 1187 88 & n.3.

test differs from the federal test used in the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19, will not result in a "'patchwork' of unique state legislation, which [AEX contends] regulates differently from state to state how motor carriers are required to perform their delivery services." Reply Br. at 14. Most notably, New Jersey's test is similar to that used in many other states. *See, e.g.*, *RDI Logistics*, 65 N.E.3d at 11-12 (holding that prongs A and C of the Massachusetts test, which are identical to those in the New Jersey test, were not FAAAA-preempted because they did not present a "patchwork problem" as they were "more or less nationally uniform," unlike the Massachusetts B prong, which was preempted in *Schwann* because it was anomalous (quoting *Schwann*, 813 F.3d at 440)).

Thus, AEX has not shown that New Jersey's ABC classification test has a "significant impact" on Congress' deregulatory efforts with respect to motor carrier businesses, nor are the NJWHL and NJWPL—typical state wage and hour laws—the kinds of preexisting state regulations with which Congress was concerned when it passed the FAAAA.[12] *See Lupian*, 905 F.3d at 135-36; *Schwann*, 813 F.3d at 438; *Costello*, 810 F.3d at 1050-51; *Amerijet*, 627 F. App'x at 751; *Dilts*, 769 F.3d at 647-48; *Gary*, 397 F.3d at 189-90; *Mendonca*, 152 F.3d at 1187-89. Notably, eight of the ten jurisdictions that Congress

12. As the *Schwann* court observed, while Congress sought "to avoid 'a patchwork of state service-determining laws,'" we can assume that "Congress intended to leave untouched" "pre-existing and customary manifestation[s] of the state's police power." 813 F.3d at 438 (quoting *Rowe*, 552 U.S. at 373).

identified as not regulating intrastate prices, routes, and services "had laws for differentiating between an employee and an independent contractor," *Su*, 903 F.3d at 967, and at least three codified ABC tests similar to that of New Jersey, *see* Alaska Stat. § 23.20.525(a)(10) (1992); Del. Code Ann. tit. 19, § 3302(9)(k) (1992); Vt. Stat. Ann. tit. 21, § 1301(6)(B) (1992). Therefore, AEX's patchwork argument fails.

Accordingly, any effect the New Jersey ABC classification test has on prices, routes, or services with respect to the transportation of property is tenuous and insignificant. *See Lupian*, 905 F.3d at 136. As a result, the test is not preempted.

III

For the foregoing reasons, we will affirm the District Court's order denying AEX's motion for judgment on the pleadings and remand for further proceedings.

APPENDIX C — TRANSCRIPT OF ORAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED NOVEMBER 21, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL 14-2811 ES

EVER BEDOYA,

v.

EAGLE EXPRESS, *et al.*,

Defendants.

TRANSCRIPT OF PROCEEDINGS

ORAL OPINION

NEWARK, New Jersey
NOVEMBER 21, 2016

BEFORE: HONORABLE ESTHER SALAS,
UNITED STATES DISTRICT JUDGE

THE COURT: Pending before the Court is Plaintiffs' motion to dismiss Defendant's counterclaim and third-party complaint for indemnification under Section 10 of the Transportation Brokerage Agreements. Although the parties concede that Pennsylvania law governs these claims, the Court will engage in a choice of law analysis.

Appendix C

District courts must apply the choice of law rules of the forum state in diversity actions. The first step is to determine if an actual conflict exists between the substantive laws of each state. If an actual conflict exists, district courts next turn to the forum state's choice-of-law rules. New Jersey uses the approach of the Restatement Second of Conflict of Laws in resolving choice of law issues. Under the Second Restatement, when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice so long as that choice does not violate New Jersey's public policy.

Defendant's claims turn on the interpretation of the indemnification or hold harmless provision under Section 10 of the TBAs. No conflict exists between Pennsylvania law and New Jersey law with regards to the applicable rules of contract interpretation. Thus, because no actual conflict exists, Pennsylvania law will govern as the parties' chosen state law.

Under Pennsylvania law, the Court concludes that Defendant can sustain first party indemnification against Plaintiffs and their LLCs. Plaintiffs rely on outdated case law to support the proposition that Pennsylvania does not recognize first-party indemnification -- mainly *Exelon Generation Co. v. Tugboat Doris Hamlin*, No. 06-0244, 2008 WL 2188333, at *2-3 (E.D. Pa. May 27, 2008). Following *Exelon*, however, Pennsylvania courts have held that similarly worded hold-harmless provisions are unambiguous and evidence of the parties' intention for first-party indemnification. *See Waynesborough Country*

Club v. Diedrich Niles Bolton Architects, Inc., No. 07-155, 2008 WL 4916029, at *3-4 (E.D. Pa. Nov. 12, 2008). Absent any evidence or public policy to the contrary, this Court will construe Section 10 of the TBAs just as the *Waynesborough* court didas broadly and unambiguously allowing for recovery through first-party indemnification.

Likewise, the Court concludes that Plaintiffs' claims are covered under the broad language of the indemnification or hold harmless provision under Section 10 of the TBAs. Similar to the contractual analysis in *Spellman v. American Eagle Express, Inc.*, 680 F. Supp. 2d 188 (D.D.C. 2010), the Court finds that Plaintiffs' claims relate to their obligations under the TBAs. Accordingly, much like in *Spellman*, Defendant has a basis to assert that Plaintiffs' claims fall within the terms of the indemnification provisions. Plaintiffs are challenging their obligations to accept fees as independent contractors under the TBAs. As such, Plaintiffs claims have a connection with their obligations under the TBAs.

For the same reasons, Plaintiffs' motion to dismiss Defendant's third party complaint against the LLCs is denied because the LLCs are separate signatories to the TBAs.

Likewise, the Court finds Plaintiffs' retaliation argument to be misplaced. Plaintiffs fail to present a reason why this can serve as a basis for dismissing Defendant's indemnification claims. Rather, Plaintiffs' argument is better served as an affirmative claim asserted against Defendant. Despite this ruling today,

the Court is cognizant of Plaintiffs' argument that first-party indemnification is inconsistent with the purpose of New Jersey wage laws. Although this may be true, New Jersey's wage laws are only applicable if Plaintiffs are employees -- determination that the Court cannot make at the motion to dismiss stage. Thus, Plaintiffs' argument is premature.

Accordingly, the Court denies Plaintiffs' motion to dismiss, docket entry 54, without prejudice.

Also pending before the Court is Defendant's motion for judgment on the pleadings as to all counts in Plaintiffs' Complaint, which includes Plaintiffs' claims for violations to the New Jersey wage laws and unjust enrichment. Defendant argues that all claims must be dismissed because the Federal Aviation Administration Authorization Act ("FAAAA") preempts New Jersey's definition of an employee under the New Jersey ABC Test.

The Third Circuit has cautioned that "courts should not lightly infer preemption," particularly in the "employment context which falls squarely within the traditional police powers of the states." *Gary v. Air Group, Inc.*, 397 F.3d 183, 190 (3d Cir. 2005). Indeed, federal laws are presumed not to preempt a state's police powers unless that was the clear and manifest purpose of Congress.

Both parties agree that the FAAAA preempts state laws that have a connection with or relate to carrier rates, routes, or services. The connection may be indirect. However, preemption is limited in that it does not preempt

laws that only have a tenuous, remote, or peripheral effect on a carrier's prices, routes, or services. *See Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008).

Here, the Court concludes that the FAAAA does not preempt New Jersey's ABC test. First, the Court struggles to find enough evidence that Congress intended the FAAAA to preempt state employment laws and classifications. Rather, the legislative history shows that Congress intended to eliminate the patchwork of state regulations, which included intrastate price controls by forty-one different states. Succinctly put, 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.

Second, it is unclear how the ABC Test relates to prices, routes, or services. While the Third Circuit has not spoken directly on this issue, the decision issued by Judge Thompson in *Echavarria, et al. v. Williams Sonoma, Inc., et al.*, No. 15-6441, 2016 WL 1047225 (D.N.J. Mar. 16, 2016), has addressed this very issue. Much like in the instant case, the plaintiffs in *Echavarria* were delivery drivers and helpers who alleged that they were misclassified as independent contractors and not paid proper overtime wages in violation of the NJWHL. Exactly like Defendant in the instant case, one of the defendants in *Echavarria* attempted to argue that the FAAAA preempted a particular plaintiff's NJWHL claim in light of New Jersey's ABC Test. Judge Thompson disagreed.

Indeed, Judge Thompson noted that the defendant's argument was a matter of first impression in the Third Circuit. However, Her Honor relied on Ninth Circuit and Seventh Circuit decisions in declining to infer preemption. Importantly, Judge Thompson noted a distinction between laws that affect a carrier's contracts with consumers versus laws that affect a carrier's relationship with its employees. Laws that affect carrier's contracts with consumers -- i.e. prices, routes, and services -- are preempted by the FAAAA, whereas laws that merely govern a carrier's relationship with employees are not preempted because they are often too tenuously connected to the carrier's relationship with its consumers. *See Echavarria*, 2016 WL 1047225, at *8 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992); *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1054 (7th Cir. 2016)). According to Judge Thompson, it is not apparent how the application of the NJWHL would affect the defendant's prices, routes, or services any more than other general regulations.

This Court agrees with Judge Thompson's analysis. Here, Defendant argues that the FAAAA preempts the application of the NJWHL and the ABC Test. However, much like in *Echavarria*, the Seventh Circuit's decision in *Costello*, and the Ninth Circuit's decision in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), it is unclear how the ABC Test Effects Defendant's prices, routes, or services. Rather, the ABC Test and the NJWHL govern Defendant's relationship with its workforce; the connection to Defendant's relationship with its consumers is too tenuous.

Defendant cannot show that the New Jersey wage laws significantly affect Defendant's prices, routes, or services. Defendant lists a litany of *potential* costs that it *may* incur if all of its independent contractors were reclassified as employees, particularly application of various federal and state employment laws. However, the Court concludes that Defendant has failed to demonstrate how these potential impacts would significantly affect Defendant's prices, routes, or services. Indeed, Defendant overlooks the fact that many of these federal and state laws use a much more restrictive definition of employee than the ABC Test. The New Jersey Supreme Court in *Hargrove v. Sleepy's, L.L.C.* expressly limited the use of the ABC Test to the New Jersey Wage Payment Law and New Jersey Wage and Hour Law. 220 N.J. 289, 316 (2015). As such, the use of New Jersey's ABC Test may have no effect at all on Defendant's obligation to expend costs under certain federal and state laws. Indeed, it remains to be seen whether Plaintiffs qualify as employees under the ABC test. Should they ultimately qualify, that does not lead to the automatic conclusion that they are automatically entitled to certain benefits that would drive Defendant's prices up.

For the same reasons, the Court also rejects Defendant's arguments that incurring additional costs will significantly affect consumer prices. This causal relationship is simply too tenuous. The Court also finds that Defendant's needing to assign multiple delivery routes to one employee to avoid increased consumer costs is too far removed. For similar reasons, the Court concludes that New Jersey's ABC Test has no significant impact on Defendant's services.

The Court is cognizant of the First Circuit's position on this issue. Indeed, as Judge Thompson noted, the First Circuit has held that the FAAAA preempted the application of Massachusetts' ABC Test. See *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 440 (1st Cir. 2016). However, the Court finds Judge Thompson's *Echavarria* decision to be highly persuasive, and agrees that the First Circuit's conclusions stand in tension with the Ninth and Seventh Circuit decisions.

For the same reasons, the Court concludes that Plaintiffs' unjust enrichment claim is not preempted by the FAAAA. Indeed, Defendant has failed to adequately demonstrate how Plaintiffs' classification as employees relates to prices, routes, or services, much less how unjust enrichment affects its relationships with its consumers.

There is no clear indication from Congress that it intended to preempt state wage laws by enacting the FAAAA. Based on the arguments before the Court, it does not appear that the ABC Test significantly affect Defendant's prices, routes, or services.

Accordingly, the Court denies Defendant's motion for judgment on the pleadings, docket entry 69.

(Adjourned)

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED NOVEMBER 21, 2016

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 14-2811 (ES)

EVER BEDOYA, *et al.*,

Plaintiffs,

v.

AMERICAN EAGLE EXPRESS,

Defendant.

ORDER

SALAS, DISTRICT JUDGE

Pending before the Court is Plaintiff's motion to dismiss Defendant's counterclaim and third-party complaint. (D.E. No. 54). Also pending before the Court is Defendant's motion for judgment on the pleadings. (D.E. No. 69). For the reasons stated in the Court's Opinion, which was read into the record;

IT IS on this 21st day of November 2016;

ORDERED that Plaintiff's motion to dismiss is DENIED without prejudice; and it is further

ORDERED that Defendant's motion for judgment on the pleadings is DENIED.

SO ORDERED.

/s/ Esther Salas
Esther Salas, U.S.D.J.

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED SEPTEMBER 29, 2017

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 14-2811 (ES) (JAD)

EVER BEDOYA, *et al.*,

Plaintiffs,

v.

AMERICAN EAGLE EXPRESS,

Defendant.

September 29, 2017, Decided
September 29, 2017, Filed

MEMORANDUM OPINION

Salas, District Judge

I. Introduction

The parties are familiar with the facts and procedural posture of this case, so the Court will be brief. Plaintiffs are delivery drivers. Defendant is a logistics company that coordinates delivery services throughout several states

(including New Jersey). Defendant employs Plaintiffs as independent contractors. Plaintiffs brought this putative class action to challenge their status as independent contractors; they contend that, under New Jersey law, they are employees.

On August 7, 2015, Defendant moved under Federal Rule of Procedure 12(c) for judgment on the pleadings. (D.E. No. 69 ("12(c) motion")). Defendant's 12(c) motion advanced a single, potentially case-dispositive argument: that Plaintiffs' Complaint is preempted by the Federal Aviation Authorization Administration Act of 1994 ("FAAAA"). (*See generally id.*). In a November 21, 2016 Order (the "Order"), this Court denied Defendant's 12(c) motion. (D.E. No. 110).

Defendant now moves (i) to certify the Order for interlocutory appeal under 28 U.S.C. § 1292(b); and (ii) to stay this action pending appeal. (D.E. No. 112 ("Motion")). Plaintiffs oppose Defendant's Motion. (D.E. No. 113 ("Pl. Opp. Br.")). For the following reasons, the Court will GRANT Defendant's request to certify the Order for interlocutory appeal, but DENY *without prejudice* Defendant's request to stay this action at this time. If the Third Circuit agrees to hear Defendant's appeal, Defendant may move for reconsideration of its stay request.

II. Discussion

A. Certification for Interlocutory Appeal

28 U.S.C. § 1292(b) provides, in relevant part, that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he[1] shall so state in writing in such order.

Thus, "[t]he statute imposes three criteria for the district court's exercise of discretion to grant a § 1292(b) certificate. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974). Specifically, the order must (i) involve a "controlling question of law"; (ii) offer "substantial ground for difference of opinion" as to its correctness; and (iii) if appealed immediately, "materially advance the ultimate termination of the litigation." *Id.* (quoting § 1292(b)). "The burden is on the movant to demonstrate that all three requirements are met." *F.T.C. v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 633 (D.N.J. 2014) (citations omitted), *aff'd*, 799 F.3d 236 (3d Cir. 2015).

"Certification, however, should only rarely be allowed as it deviates from the strong policy against piecemeal

1. Or she.

litigation." *Huber v. Howmedica Osteonics Corp.*, No. 07-2400, 2009 U.S. Dist. LEXIS 91526, 2009 WL 2998160, at *1 (D.N.J. Mar. 10, 2009). Accordingly, a district court should certify issues for interlocutory appeal only "sparingly" and in "exceptional circumstances." *Cardona v. General Motors Corp.*, 939 F. Supp. 351, 353 (D.N.J. 1996). So, "even if all three criteria under Section 1292(b) are met, the district court may still deny certification, as the decision is entirely within the district court's discretion." *Morgan v. Ford Motor Co.*, No. 06-1080, 2007 U.S. Dist. LEXIS 5455, 2007 WL 269806, at *2 (D.N.J. Jan. 25, 2007).

1. The Order involves a controlling question of law.

The parties agree that the Order involves a controlling question of law. (D.E. No. 112-1 ("Def. Mov. Br.") at 7-8; Pl. Opp. Br. at 3 n.3). The Court also agrees that the Order involves a controlling question of law. Defendant has therefore satisfied the first prong under § 1292(b).

2. The Order offers substantial ground for difference of opinion.

A "substantial ground for difference of opinion" must "arise out of genuine doubt as to the correct legal standard." *Kapossy v. McGraw-Hill, Inc.*, 942 F. Supp. 996, 1001 (D.N.J. 1996); *see also P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 161 F. Supp. 2d 355, 360 (D.N.J. 2001) (same). "[M]ere disagreement with the district court's ruling" is not enough. *Kapossy*, 942 F. Supp. at 1001.

Defendant argues that the Order offers a "substantial ground for a difference of opinion" because (i) there is no controlling authority in the Third Circuit; (ii) there is a circuit split between the First Circuit and the Seventh and Ninth Circuits; (iii) the Order involves a novel and complex issue of statutory interpretation; and (iv) the Supreme Court, when considering a writ of certiorari from the Seventh Circuit's decision in *Costello*,[2] invited the Solicitor General to weigh in on this issue. (Def. Mov. Br. 8-11).

Plaintiffs counter that Defendant's "mere disagreement with the district court's ruling" is not enough to satisfy this factor; rather, Defendant must demonstrate "genuine doubt as to the correct legal standard" that the Court applied. (Pl. Opp. Br. at 6) (quoting *Eisai Inc. v. Zurich Am. Ins. Co.*, No. 12-7208, 2015 U.S. Dist. LEXIS 1747, 2015 WL 113372, at *6 (D.N.J. Jan. 8, 2015)). Plaintiffs explain that when the Court heard oral argument on Defendant's 12(c) motion, "[n]o other federal or state court had addressed the affect [sic], if any, that the FAAAA had on New Jersey's ABC test for employment status." (*Id.* at 6-7). Since then, however, "this Court and two other District of New Jersey judges have addressed this issue and held that the ABC test is not preempted by the FAAAA." (*Id.* at 7) (citing *Hargrove v. Sleepy's LLC*, No. 10-1138, 2016 U.S. Dist. LEXIS 156697, 2016 WL 8258865 (D.N.J. Oct. 25, 2016);[3] *Echavarria v. Williams Sonoma,*

2. *Costello v. Beavex, Inc.*, 810 F.3d 1045 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 267, 196 L. Ed. 2d 16 (Oct. 3, 2016).

3. Judge Sheridan's Oral Opinion can be found at D.E. No. 174 in Civil Action No. 10-1138.

Inc., No. 15-6441, 2016 U.S. Dist. LEXIS 33980, 2016 WL 1047225 (D.N.J. Mar. 16, 2016)). Plaintiffs argue that this "unanimous authority on the FAAAA issue eliminates any 'difference of opinion' that would require the Third Circuit to resolve." (*Id.*). Plaintiffs add that the "mere existence of conflicting circuit authority . . . does not mean that this § 1292(b) factor is satisfied. (*Id.*).

The Court finds that the Order offers substantial ground for a difference of opinion. As an initial matter, Plaintiffs agree that there is no controlling authority on this issue. (*See* Pl. Opp. Br. at 6-7). And although Plaintiffs contend there is "unanimous" district-wide authority on this issue that "eliminates any 'difference of opinion,'" Plaintiffs do not cite law for that proposition. Defendant, however, correctly observes that "[s]ubstantial ground for a difference of opinion exists 'when the matter involves one or more difficult and pivotal questions of law *not settled by controlling authority*.'" (Def. Mov. Br. at 8) (citing *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 599 (E.D. Pa. 2008) (emphasis added)). Defendant also persuasively argues that *Echavarria* and *Sleepy's* are factually and procedurally different from this case. (D.E. No. 114 ("Def. Reply Br.") at 4-5).

Plaintiffs concede there is a circuit split on this issue, but argue that's not enough to establish the second criteria under § 1292(b). In support, Plaintiffs cite *Hensley v. First Student Mgmt., LLC* for the proposition that "the presence of a circuit split 'does not tip the scale in favor of interlocutory review.'" (Pl. Opp. Br. at 7-8) (quoting No. 15-3811, 2016 U.S. Dist. LEXIS 169036, 2016 WL 7130908,

at *1 n.1 (D.N.J. Dec. 7, 2016)). But Plaintiffs take that dicta out of context. The court in *Hensley* found that the circuit split did "not tip the scale in favor of interlocutory appeal" because the Third Circuit previously weighed in on the issue. *See Hensley*, 2016 U.S. Dist. LEXIS 169036, 2016 WL 7130908, at *1 n.1 ("[T]he significance of a split is diminished by the Third Circuit's endorsement of the reasoning employed in this Court's March 31, 2016 Opinion."). Plaintiffs also ignore Defendant's point about the Supreme Court's invitation to the Solicitor General, as well as Defendant's argument that the Order involves a novel and complex issue of statutory interpretation. *See State v. Fuld*, No. 09-1629, 2009 U.S. Dist. LEXIS 81084, at *5 (D.N.J. Aug. 31, 2009) ("[W]hen there are not conflicting precedents that control, substantial grounds for a difference of opinion may exist when the court is faced with issues of statutory interpretation that are somewhat novel and complex.").

Accordingly, the Court concludes that Defendant has satisfied the second prong under § 1292(b).

3. The Order may materially advance the ultimate termination of the litigation.

A § 1292(b) certification "materially advances the ultimate termination of the litigation where the interlocutory appeal eliminates: (1) the need for trial; (2) complex issues that would complicate trial; or (3) issues that would make discovery more costly or burdensome. *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, No. 11-0011, 2013 U.S. Dist. LEXIS 23973, 2013

WL 663301, at *4 (D.N.J. Feb. 21, 2013); *Orson, Inc. v. Miramax Film Corp.*, 867 F. Supp. 319, 322 (E.D. Pa. 1994) (same). "Certification is more likely to materially advance the litigation where the appeal occurs early in the litigation, before extensive discovery has taken place and a trial date has been set." *N.J. Protection & Advocacy, Inc. v. N.J. Dep't of Educ.*, No. 07-2978, 2008 U.S. Dist. LEXIS 80080, 2008 WL 4692345, at *3 (D.N.J. Oct. 8, 2008).

Defendant maintains that a successful appeal will likely end this case. (Def. Mov. Br. at 12). According to Defendant, "if the Third Circuit agrees with the interpretation of the FAAAA preemption provision as expressed by the First Circuit, the Third Circuit likely would conclude that the FAAAA preempts application of the New Jersey ABC test to the Plaintiffs' claims." (*Id.*). But if the Court denies Defendant's request for certification, "the parties may be required to engage in substantial, expensive and lengthy class-wide discovery, and potentially a trial" before the Third Circuit addresses this issue. (*Id.*).

Plaintiffs contend that immediate appellate review will not affect their unjust enrichment claims, so it will not materially advance the ultimate termination of the litigation. (Pl. Opp. Br. at 4). To that end, Plaintiffs state that "Defendant has never suggested that Plaintiffs' unjust enrichment claims are preempted or otherwise affected by the [FAAAA]." (*Id.*). Plaintiffs also argue that, even if the Third Circuit were to adopt the First Circuit's analysis, the FAAAA would only preempt one of the three prongs in the New Jersey ABC test. (*Id.* at 5). Therefore,

"even under Defendant's base-case-scenario, the parties would still need to litigate the remaining two prongs." (*Id.*).

Defendant responds that its 12(c) motion "expressly argued . . . that the Unjust Enrichment claims *are* preempted by the FAAAA." (Def. Reply Br. at 8) (emphasis in original). Further, Defendant points out that it would be illogical for Plaintiffs' unjust enrichment claims "to survive disposition of the misclassification claim" because the unjust enrichment claims depend on a finding that Plaintiffs are wrongly classified as independent contractors. (*Id.* at 8-9). Defendant also distinguishes the First Circuit cases (where the plaintiffs, for standing purposes, challenged only one of the prongs of the Massachusetts ABC test) from this case (where Defendant is challenging all three prongs of the New Jersey ABC test). (*Id.* at 10-11).

The Court finds that the Order, if appealed, will materially advance the ultimate termination of the litigation. First, the Court rejects Plaintiffs' argument that Defendant's 12(c) motion did not seek dismissal of Plaintiffs' unjust enrichment claims. Defendant's 12(c) motion did so expressly. (*See generally* D.E. No. 69-1 at 32-34; *id.* at 34 ("Plaintiffs' unjust enrichment claims also cannot withstand the FAAAA preemption analysis."); *id.* at 34 ("[Defendant] submits that the [P]laintiffs' entire Complaint is preempted.")). Second, the Court agrees with Defendant that its 12(c) motion challenged all three prongs under the New Jersey ABC test, whereas the plaintiffs before the First Circuit challenged only the second prong of the Massachusetts ABC test. Finally, Defendant

has shown that its appeal involves a potentially case-dispositive issue: whether Plaintiffs' entire Complaint is preempted by the FAAAA. Based on the foregoing, Defendant has satisfied the third prong under § 1292(b).

B. Stay of Proceedings Pending Appeal

The Court denies Defendant's request to stay this action at this time. But, in the event the Third Circuit agrees to hear Defendant's appeal, Defendant may move before this Court for reconsideration of its stay request. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936) ("The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

III. Conclusion

For the foregoing reasons, the Court will GRANT Defendant's motion to certify the Order, but DENY *without prejudice* Defendant's request to stay proceedings at this time.

/s/ Esther Salas
Esther Salas, U.S.D.J.

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED SEPTEMBER 29, 2017

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 14-2811 (ES) (JAD)

EVER BEDOYA, *et al.*,

Plaintiffs,

AMERICAN EAGLE EXPRESS,

Defendant.

ORDER

Salas, District Judge

Pending before the Court is Defendant's motion (i) to certify the Court's November 22, 2016 Order for interlocutory appeal under 28 U.S.C. § 1292(b) and (ii) to stay this action pending appeal (D.E. No. 112 ("Motion")); and Plaintiffs having opposed Defendant's Motion (D.E. No. 113); and the Court having considered the parties' submissions in support of and in opposition to Defendant's Motion; and for the reasons in the Court's accompanying Memorandum Opinion;

Appendix F

IT IS on this 29th day of September 2017;

ORDERED that Defendant's request to certify the Court's November 22, 2016 Order (D.E. No. 110) for interlocutory appeal is GRANTED; and it is further

ORDERED that, pursuant to 28 U.S.C. § 1292(b), the Court hereby grants certification of the following issue for immediate interlocutory review by the U.S. Court of Appeals for the Third Circuit:

> Whether the FAAAA preempts application of the New Jersey ABC test to the state law claims brought by the Plaintiffs in this action;

and it is further

ORDERED that Defendant's petition for leave to file an interlocutory appeal shall be filed with the U.S. Court of Appeals for the Third Circuit within 10 days of the service of this Order; and it is further

ORDERED that Defendant's request to stay this action pending appeal is DENIED *without prejudice* so that, in the event the Third Circuit agrees to hear Defendant's appeal, Defendant may move before this Court for reconsideration of its stay request; and it is further

ORDERED that the Clerk of Court shall terminate docket entry 112.

/s/ Esther Salas
Esther Salas, U.S.D.J.

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MARCH 12, 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-8053

EVER BEDOYA; DIEGO GONZALES; MANUEL DECASTRO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

v.

AMERICAN EAGLE EXPRESS, INC., D/B/A AEX GROUP

v.

KV SERVICE LLC; M&J EXPRESS LLC; A&D DELIVERY EXPRESS LLC,

AMERICAN EAGLE EXPRESS, INC.,

Petitioner.

(D.N.J. No. 14-cv-02811)

Present: AMBRO, RESTREPO and NYGAARD,
Circuit Judges

Appendix G

1. Petition for Permission to Appeal under 28 U.S.C. Section 1292(b) from the order entered November 22, 2016;

2. Addendum to Petition filed by Petitioner;

3. Response in opposition filed by Respondents Ever Bedoya, Manuel DeCastro and Diego Gonzales;

4. Letter Memorandum by Petitioner in Reply to Respondent's Response.

Respectfully,
Clerk/tyw

O R D E R

The foregoing Petition for permission to appeal is granted.

By the Court,
s/ Thomas L. Ambro, Circuit Judge

Dated: March 12, 2018

APPENDIX H — STATUTES AND REGULATIONS

49 U.S.C. § 14501

§ 14501. Federal authority over intrastate transportation

(a) Motor carriers of passengers.

(1) Limitation on State law. No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to--

(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route;

(B) the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required; or

(C) the authority to provide intrastate or interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus

transportation of any nature in the State of Hawaii.

(2) Matters not covered. Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

(b) Freight forwarders and brokers.

(1) General rule. Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) Continuation of Hawaii's authority. Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) Motor carriers of property.

(1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more 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 (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or

enforce a law, regulation, or other provision relating to the regulation of tow truck operations performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices.

(A) Continuation. Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to--

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907,

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements. A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if--

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election. Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii. This subsection shall not apply with respect to the State of Hawaii.

(5) Limitation on statutory construction. Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle,

the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

(d) Pre-arranged ground transportation.

(1) In general. No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law requiring a license or fee on account of the fact that a motor vehicle is providing pre-arranged ground transportation service if the motor carrier providing such service--

(A) meets all applicable registration requirements under chapter 139 for the interstate transportation of passengers;

(B) meets all applicable vehicle and intrastate passenger licensing requirements of the State or States in which the motor carrier is domiciled or registered to do business; and

(C) is providing such service pursuant to a contract for--

(i) transportation by the motor carrier from one State, including intermediate stops, to a destination in another State; or

(ii) transportation by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State.

(2) Intermediate stop defined. In this section, the term "intermediate stop", with respect to transportation by a motor carrier, means a pause in the transportation in order for one or more passengers to engage in personal or business activity, but only if the driver providing the transportation to such passenger or passengers does not, before resuming the transportation of such passenger (or at least 1 of such passengers), provide transportation to any other person not included among the passengers being transported when the pause began.

(3) Matters not covered. Nothing in this subsection shall be construed--

(A) as subjecting taxicab service to regulation under chapter 135 or section 31138;

(B) as prohibiting or restricting an airport, train, or bus terminal operator from contracting to provide preferential access or facilities to one or more providers of pre-arranged ground transportation service; and

(C) as restricting the right of any State or political subdivision of a State to require, in a nondiscriminatory manner, that any individual operating a vehicle providing prearranged ground transportation service originating in the State or political subdivision have submitted to pre-licensing drug testing or a criminal background investigation of the records of the State in which the operator is domiciled, by the State or political subdivision by which the operator is licensed to provide such service, or by the motor carrier providing such service, as a condition of providing such service.

Appendix H

N.J. STAT. ANN. § 43:21-19(i)

***

(i)

(1) "Employment" means:

(A) Any service performed prior to January 1, 1972, which was employment as defined in the "unemployment compensation law" (R.S.43:21-1 et seq.) prior to such date, and, subject to the other provisions of this subsection, service performed on or after January 1, 1972, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

(B)

(i) Service performed after December 31, 1971 by an individual in the employ of this State or any of its instrumentalities or in the employ of this State and one or more other states or their instrumentalities for a hospital or institution of higher education located in this State, if such service is not excluded from "employment" under paragraph (D) below.

(ii) Service performed after December 31, 1977, in the employ of this State

or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of the foregoing and one or more other states or political subdivisions, if such service is not excluded from "employment" under paragraph (D) below.

(C) Service performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational, or other organization, which is excluded from "employment" as defined in the Federal Unemployment Tax Act, solely by reason of section 3306 (c)(8) of that act, if such service is not excluded from "employment" under paragraph (D) below.

(D) For the purposes of paragraphs (B) and (C), the term "employment" does not apply to services performed

(i) In the employ of (I) a church or convention or association of churches, or (II) an organization, or school which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(ii) By a duly ordained, commissioned, or

licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(iii) Prior to January 1, 1978, in the employ of a school which is not an institution of higher education, and after December 31, 1977, in the employ of a governmental entity referred to in R.S.43:21-19 (i) (1) (B), if such service is performed by an individual in the exercise of duties

(aa) as an elected official;

(bb) as a member of a legislative body, or a member of the judiciary, of a state or political subdivision;

(cc) as a member of the State National Guard or Air National Guard;

(dd) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;

(ee) in a position which, under or pursuant to the laws of this State, is designated as a major nontenured policy making or advisory position, or a policy making or advisory position, the performance of the duties of which

ordinarily does not require more than eight hours per week; or

(iv) By an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of rehabilitation of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market;

(v) By an individual receiving work-relief or work-training as part of an unemployment work-relief or work-training program assisted in whole or in part by any federal agency or an agency of a state or political subdivision thereof; or

(vi) Prior to January 1, 1978, for a hospital in a State prison or other State correctional institution by an inmate of the prison or correctional institution and after December 31, 1977, by an inmate of a custodial or penal institution.

(E) The term "employment" shall include the services of an individual who is a citizen of the United States, performed outside the United States after December 31, 1971 (except in

Canada and in the case of the Virgin Islands, after December 31, 1971) and prior to January 1 of the year following the year in which the U.S. Secretary of Labor approves the unemployment compensation law of the Virgin Islands, under section 3304 (a) of the Internal Revenue Code of 1986 (26 U.S.C. § 3304 (a)) in the employ of an American employer (other than the service which is deemed employment under the provisions of R.S.43:21-19 (i) (2) or (5) or the parallel provisions of another state's unemployment compensation law), if

(i) The American employer's principal place of business in the United States is located in this State; or

(ii) The American employer has no place of business in the United States, but (I) the American employer is an individual who is a resident of this State; or (II) the American employer is a corporation which is organized under the laws of this State; or (III) the American employer is a partnership or trust and the number of partners or trustees who are residents of this State is greater than the number who are residents of another state; or

(iii) None of the criteria of divisions (i) and (ii) of this subparagraph (E) is met but the American employer has

elected to become an employer subject to the "unemployment compensation law" (R.S.43:21-1 et seq.) in this State, or the American employer having failed to elect to become an employer in any state, the individual has filed a claim for benefits, based on such service, under the law of this State;

(iv) An "American employer," for the purposes of this subparagraph (E), means (I) an individual who is a resident of the United States; or (II) a partnership, if two-thirds or more of the partners are residents of the United States; or (III) a trust, if all the trustees are residents of the United States; or (IV) a corporation organized under the laws of the United States or of any state.

(F) Notwithstanding R.S.43:21-19 (i) (2), all service performed after January 1, 1972 by an officer or member of the crew of an American vessel or American aircraft on or in connection with such vessel or aircraft, if the operating office from which the operations of such vessel or aircraft operating within, or within and without, the United States are ordinarily and regularly supervised, managed, directed, and controlled, is within this State.

(G) Notwithstanding any other provision of this subsection, service in this State with respect to which the taxes required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under the "unemployment compensation law" (R.S.43:21-1 et seq.).

(H) The term "United States" when used in a geographical sense in subsection R.S.43:21-19 (i) includes the states, the District of Columbia, the Commonwealth of Puerto Rico and, effective on the day after the day on which the U.S. Secretary of Labor approves for the first time under section 3304 (a) of the Internal Revenue Code of 1986 (26 U.S.C. § 3304 (a)) an unemployment compensation law submitted to the Secretary by the Virgin Islands for such approval, the Virgin Islands.

(I)

(i) Service performed after December 31, 1977 in agricultural labor in a calendar year for an entity which is an employer as defined in the "unemployment compensation law," (R.S.43:21-1 et seq.) as of January 1 of such year; or for an employing unit which

(aa) during any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000.00 or more for individuals employed in agricultural labor, or

(bb) for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor 10 or more individuals, regardless of whether they were employed at the same moment in time.

(ii) for the purposes of this subsection any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other entity shall be treated as an employee of such crew leader

(aa) if such crew leader holds a certification of registration under the Migrant and Seasonal Agricultural Worker Protection Act, Pub.L.97-470 (29 U.S.C. § 1801 et seq.), or P.L.1971, c.192 (C.34:8A-7 et seq.); or substantially all the members of such crew operate or maintain tractors, mechanized harvesting

or cropdusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(bb) if such individual is not an employee of such other person for whom services were performed.

(iii) For the purposes of subparagraph (I) (i) in the case of any individual who is furnished by a crew leader to perform service in agricultural labor or any other entity and who is not treated as an employee of such crew leader under (I) (ii)

(aa) such other entity and not the crew leader shall be treated as the employer of such individual; and

(bb) such other entity shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on his own behalf or on behalf of such other entity) for the service in agricultural labor performed for such other entity.

(iv) For the purpose of subparagraph (I) (ii), the term "crew leader" means an individual who

(aa) furnishes individuals to perform service in agricultural labor for any other entity;

(bb) pays (either on his own behalf or on behalf of such other entity) the individuals so furnished by him for the service in agricultural labor performed by them; and

(cc) has not entered into a written agreement with such other entity under which such individual is designated as an employee of such other entity.

(J) Domestic service after December 31, 1977 performed in the private home of an employing unit which paid cash remuneration of $1,000.00 or more to one or more individuals for such domestic service in any calendar quarter in the current or preceding calendar year.

(2) The term "employment" shall include an individual's entire service performed within or both within and without this State if:

(A) The service is localized in this State; or

(B) The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from

which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(3) Services performed within this State but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government.

(4) Services not covered under paragraph (2) of this subsection and performed entirely without this State, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) if the individual performing such services is a resident of this State and the employing unit for whom such services are performed files with the division an election that the entire service of such individual shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.).

(5) Service shall be deemed to be localized within a state if:

(A) The service is performed entirely within such state; or

(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.

(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that:

(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.

(7) Provided that such services are also exempt under the Federal Unemployment Tax Act, as amended, or that contributions with respect to such services are not required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by the Federal Unemployment Tax Act, as amended, the term "employment" shall not include:

(A) Agricultural labor performed prior to January 1, 1978; and after December 31, 1977, only if performed in a calendar year for an entity which is not an employer as defined in the "unemployment compensation law," (R.S.43:21-1 et seq.) as of January 1 of such calendar year; or unless performed for an employing unit which

(i) during a calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000.00 or more to individuals employed in agricultural labor, or

(ii) for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor 10 or more individuals, regardless of whether they were employed at the same moment in time;

(B) Domestic service in a private home performed prior to January 1, 1978; and after December 31, 1977, unless performed in the private home of an employing unit which paid cash remuneration of $1,000.00 or more to one or more individuals for such domestic service in any calendar quarter in the current or preceding calendar year;

(C) Service performed by an individual in the employ of his son, daughter or spouse, and service performed by a child under the age of 18 in the employ of his father or mother;

(D) Service performed prior to January 1, 1978, in the employ of this State or of any political subdivision thereof or of any instrumentality of this State or its political subdivisions, except as provided in R.S.43:21-19 (i) (1) (B) above, and service in the employ of the South Jersey Port Corporation or its successors;

(E) Service performed in the employ of any other state or its political subdivisions or of an instrumentality of any other state or states or their political subdivisions to the extent that such instrumentality is with respect to such service exempt under the Constitution of the United States from the tax imposed under the Federal Unemployment Tax Act, as amended, except as provided in R.S.43:21-19 (i) (1) (B) above;

(F) Service performed in the employ of the United States Government or of any instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by the "unemployment compensation law," except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this act shall be applicable to such instrumentalities, and to service performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this State shall not be certified for any year by the Secretary of Labor of the United States under section 3304 of the federal Internal Revenue Code of 1986 (26 U.S.C. § 3304), the payments required of such instrumentalities with respect to such year shall be refunded by the division from the fund in the same manner and within the same period as is provided in R.S.43:21-14 (f) with respect to contributions erroneously paid to or collected by the division;

(G) Services performed in the employ of fraternal beneficiary societies, orders, or associations operating under the lodge system or for

the exclusive benefit of the members of a fraternity itself operating under the lodge system and providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association, or their dependents;

(H) Services performed as a member of the board of directors, a board of trustees, a board of managers, or a committee of any bank, building and loan, or savings and loan association, incorporated or organized under the laws of this State or of the United States, where such services do not constitute the principal employment of the individual;

(I) Service with respect to which unemployment insurance is payable under an unemployment insurance program established by an Act of Congress;

(J) Service performed by agents of mutual fund brokers or dealers in the sale of mutual funds or other securities, by agents of insurance companies, exclusive of industrial insurance agents or by agents of investment companies, if the compensation to such agents for such services is wholly on a commission basis;

(K) Services performed by real estate salesmen or brokers who are compensated wholly on a commission basis;

(L) Services performed in the employ of any veterans' organization chartered by Act of Congress or of any auxiliary thereof, no part of the net earnings of which organization, or auxiliary thereof, inures to the benefit of any private shareholder or individual;

(M) Service performed for or in behalf of the owner or operator of any theater, ballroom, amusement hall or other place of entertainment, not in excess of 10 weeks in any calendar year for the same owner or operator, by any leader or musician of a band or orchestra, commonly called a "name band," entertainer, vaudeville artist, actor, actress, singer or other entertainer;

(N) Services performed after January 1, 1973 by an individual for a labor union organization, known and recognized as a union local, as a member of a committee or committees reimbursed by the union local for time lost from regular employment, or as a part-time officer of a union local and the remuneration for such services is less than $1,000.00 in a calendar year;

(O) Services performed in the sale or distribution of merchandise by home-to-home salespersons or in-the-home demonstrators whose remuneration consists wholly of commissions or commissions and bonuses;

(P) Service performed in the employ of a foreign government, including service as a consular, nondiplomatic representative, or other officer or employee;

(Q) Service performed in the employ of an instrumentality wholly owned by a foreign government if (i) the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof, and (ii) the division finds that the United States Secretary of State has certified to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar services performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(R) Service in the employ of an international organization entitled to enjoy the privileges, exemptions and immunities under the International Organizations Immunities Act (22 U.S.C. § 288 et seq.);

(S) Service covered by an election duly approved by an agency charged with the administration of any other state or federal unemployment compensation or employment security law, in accordance with an arrangement pursuant to

R.S.43:21-21 during the effective period of such election;

(T) Service performed in the employ of a school, college, or university if such service is performed (i) by a student enrolled at such school, college, or university on a full-time basis in an educational program or completing such educational program leading to a degree at any of the severally recognized levels, or (ii) by the spouse of such a student, if such spouse is advised at the time such spouse commences to perform such service that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance;

(U) Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall

not apply to service performed in a program established for or on behalf of an employer or group of employers;

(V) Service performed in the employ of a hospital, if such service is performed by a patient of the hospital; service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and regularly attending classes in a nurses' training school approved under the laws of this State;

(W) Services performed after the effective date of this amendatory act by agents of mutual benefit associations if the compensation to such agents for such services is wholly on a commission basis;

(X) Services performed by operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and used for the highway movement of motor freight, who own their equipment or who lease or finance the purchase of their equipment through an entity which is not owned or controlled directly or indirectly by the entity for which the services were performed and who were compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move;

(Y) (Deleted by amendment, P.L.2009, c.211.)

(Z) Services performed, using facilities provided by a travel agent, by a person, commonly known as an outside travel agent, who acts as an independent contractor, is paid on a commission basis, sets his own work schedule and receives no benefits, sick leave, vacation or other leave from the travel agent owning the facilities.

(8) If one-half or more of the services in any pay period performed by an individual for an employing unit constitutes employment, all the services of such individual shall be deemed to be employment; but if more than one-half of the service in any pay period performed by an individual for an employing unit does not constitute employment, then none of the service of such individual shall be deemed to be employment. As used in this paragraph, the term "pay period" means a period of not more than 31 consecutive days for which a payment for service is ordinarily made by an employing unit to individuals in its employ.

(9) Services performed by the owner of a limousine franchise (franchisee) shall not be deemed to be employment subject to the "unemployment compensation law," R.S.43:21-1 et seq., with regard to the franchisor if:

(A) The limousine franchisee is incorporated;

(B) The franchisee is subject to regulation by the Interstate Commerce Commission;

(C) The limousine franchise exists pursuant to a written franchise arrangement between the franchisee and the franchisor as defined by section 3 of P.L.1971, c.356 (C.56:10-3); and

(D) The franchisee registers with the Department of Labor and Workforce Development and receives an employer registration number.

(10) Services performed by a legal transcriber, or certified court reporter certified pursuant to P.L.1940, c.175 (C.45:15B-1 et seq.), shall not be deemed to be employment subject to the "unemployment compensation law," R.S.43:21-1 et seq., if those services are provided to a third party by the transcriber or reporter who is referred to the third party pursuant to an agreement with another legal transcriber or legal transcription service, or certified court reporter or court reporting service, on a freelance basis, compensation for which is based upon a fee per transcript page, flat attendance fee, or other flat minimum fee, or combination thereof, set forth in the agreement.

For purposes of this paragraph (10): "legal transcription service" and "legal transcribing" mean making use, by audio, video or voice recording, of a verbatim record of court proceedings,

depositions, other judicial proceedings, meetings of boards, agencies, corporations, or other bodies or groups, and causing that record to be printed in readable form or produced on a computer screen in readable form; and "legal transcriber" means a person who engages in "legal transcribing."

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