APPENDIX

APPENDIX A

Court of Appeal, Second Appellate District, Division Four - No. B304240

S266217

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Petitioner

v.

SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;

CAL CARTAGE TRANSPORTATION EXPRESS, LLC, et al., Real Parties in Interest.

The petition for review is denied.

[Filed February 24, 2021]

CANTIL-SAKAUYE
Chief Justice

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FILED NOV. 19, 2020

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent

CAL CARTAGE TRANSPORTATION EXPRESS LLC, et al.,

Real Parties in Interest.

B304240

(Los Angeles County Super. Ct. Nos. BC689320, BC689321, BC689322)

ORIGINAL PROCEEDINGS; petition for writ of mandate. William F. Highberger, Judge. Petition granted.

Office of the Los Angeles City Attorney, Michael N. Feuer, Kathleen A. Kenealy, Michael J. Bostrom,

Danielle L. Goldstein, and Christopher S. Munsey for Petitioner.

Gibson, Dunn & Crutcher, Joshua S. Lipshutz, Christopher D. Dusseault, Michele L. Maryott, Dhananjay S. Manthripragada for Cal Cartage Transportation Express, LLC, K&R Transportation California, LLC, and CMI Transportation, LLC.

Scopelitis, Garvin, Light, Hanson & Feary, Christopher C. McNatt, Jr. for CCX2931, LLC, CM2931, LLC, and KRT2931, LLC.

Altshuler Berzon, Stacey Leyton and Andrew Kushner for International Brotherhood of Teamsters as Amicus Curiae on behalf of Petitioner.

Xavier Becerra, Attorney General, Thomas S. Patterson Senior Assistant Attorney General, Tamar Pachter, and Jose A. Zelidon-Zepeda, Deputy Attorneys General for the Attorney General of California as Amicus Curiae on behalf of Petitioner.

Barbara J. Parker, Oakland City Attorney, Maria Bee, Erin Bernstein, Malia McPherson, and Nicholas DeFiesta for City of Oakland as Amicus Curiae on behalf of Petitioner.

Dennis J. Herrera, San Francisco City Attorney, Yvonne Meré, and Molly Alarcon for City and County of San Francisco as Amicus Curiae on behalf of Petitioner.

Horvitz & Levy, Jeremy B. Rosen for The Chamber of Commerce of the United States of America as Amicus Curiae on behalf of Real Parties in Interest.

Ellison, Whalen & Blackburn, Patrick J. Whalen for Western States Trucking Association as Amicus Curiae on behalf of Real Parties in Interest.

Littler Mendelson, Richard H. Rahm for American Trucking Associations, Inc. and California Trucking Association as Amicus Curiae on behalf of Real Parties in Interest.

INTRODUCTION

Does the Federal Aviation Administration Authorization Act of 1994 (FAAAA) preempt application of California's "ABC" test, originally set forth in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*) and eventually codified by Assembly Bill 2257 (AB 2257), to determine whether a federally licensed interstate motor carrier has correctly classified its truck drivers as independent contractors? The FAAAA preempts state laws "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).) After surveying the FAAAA's legislative history and relevant federal caselaw, our Supreme Court held the FAAAA does not preempt generally applicable worker-classification laws that do not prohibit the use of independent contractors. (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 785-87 (*Pac Anchor*).) We hold the ABC test, as codified by AB 2257, is such a law, and therefore is not preempted by the FAAAA.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Defendants[2] are federally licensed motor carriers that operate or have operated "'trucking and drayage compan[ies] . . . in and around the Ports of Los Angeles and Long Beach.'" Defendants utilize the services of independent owner-operator truck drivers — independent truckers who lease their vehicles and services to a licensed motor carrier to move freight under the motor carrier's operating authority — to perform drayage (defined in the complaints as "the short distance transportation of cargo by truck to and from the ports").

In 2018, in connection with Senate Bill No. 1402,[3] the California Legislature found "California's port drayage drivers are the last American sharecroppers, held in debt servitude and working dangerously long hours for little pay." (Senate Bill No. 1402 (2017-2018 Reg. Sess.) § 1(b).) It cited an investigative report finding "'port trucking companies in Southern California have spent the past decade forcing drivers to finance their own trucks by taking on debt they could not afford.' The investigation found instances where

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[1] The factual statements in this section are largely taken from the allegations in the People's complaints and the trial court's January 8, 2020 order.

[2] Defendants are Cal Cartage Transportation Express, LLC, CMI Transportation, LLC, K&R Transportation California, LLC, CCX2931, LLC, CM2931, LLC, and KRT2931, LLC.

[3] Senate Bill No. 1402 amended the California Labor Code to, among other things, require the Division of Labor Standards Enforcement to publicly post the identities of drayage companies with unsatisfied misclassification judgments against them. (Senate Bill No. 1402 (2017-2018 Reg. Sess.) § 2.)

drivers 'end up owing money to their employers – essentially working for free.'" (*Id.*, § 1(c).) The Legislature further found "[d]rayage drivers at California ports are routinely misclassified as independent contractors when they in fact work as employees under California and federal labor laws. A recent report finds that two-thirds of California port drayage drivers fall under this category, and rampant misclassification of drivers contributes to wage theft and leaves drivers in a cycle of poverty." (*Id.*, § 1(f).)

On January 8, 2018, the Los Angeles City Attorney, acting on behalf of the People of the State of California, filed complaints against the defendants in three related cases,[4] alleging two causes of action under the Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, et seq. The first cause of action is predicated on defendants' alleged misclassification of truck drivers as independent contractors, and the second on defendants' alleged violations of the federal Truth-in-Leasing Regulations, 49 C.F.R. § 376.1, et seq. The complaints allege defendants misclassified truck drivers as independent contractors and therefore engaged in unfair competition by failing to: (1) pay unemployment insurance taxes (Unemp. Ins. Code, § 976); (2) pay employment training fund taxes (*id.*, § 976.6); (3) withhold state disability insurance taxes (*id.*, § 984); (4) withhold state income taxes (*id.*, § 13020); (5) provide workers' compensation (Lab. Code, § 3700); (6) provide employees with itemized written wage statements (*id.*, § 226) and to maintain

[4] The three related cases are: *People v. Cal Cartage Transportation Express LLC, et al*. (Case No. BC689320); *People v. CMI Transportation LLC, et al*. (Case No. BC689321); and *People v. K&R Transportation California LLC, et al*. (Case No. BC689322).

and provide employees with records in violation California's Industrial Welfare Commission wage order No. 9-2001, section 7 (Industrial Welfare Commission Wage Order No. 9); (7) reimburse employees for business expenses and losses (Lab. Code, § 2802); and (8) ensure payment of the minimum wage at all times (Lab. Code, § 1194, Industrial Welfare Commission Wage Order No. 9, § 4). Specifically, the People allege defendants deduct from drivers' pay, or fail to reimburse for, work-related expenses including fuel, truck insurance, parking, and routine maintenance costs, amounting to tens of thousands of dollars per year.

When the People filed their complaints, the test for worker classification in California was governed by *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*).[5] In April 2018, our Supreme Court decided *Dynamex*, replacing the *Borello* standard with the "ABC" test for claims brought under California's Wage Orders. The ABC test requires a worker be classified as an employee unless: (A) "the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact[;]" (B) "the worker performs work that is outside the usual course of the hiring entity's business[;] and" (C) "the worker is customarily engaged in an independently established trade, occupation, or business[.]" (*Dynamex*, *supra*, 4 Cal.5th at p. 964.)

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[5] The *Borello* standard is a multi-factor test, not to be ". . . 'applied mechanically as separate tests[,]'" to determine whether a worker is an employee or an independent contractor. (*Borello, supra*, 48 Cal.3d at p. 351.)

In 2019, the Legislature passed and the Governor signed into law Assembly Bill 5 (AB 5). Effective January 1, 2020, AB 5 codified (as Labor Code section 2750.3) the ABC test and expanded its reach to apply to all claims under the Labor Code and the Unemployment Insurance Code. (Stats. 2019, ch. 296, § 2.) AB 5 also included exemptions that were not part of the *Dynamex* test, including an exemption for "business-to-business contracting relationship[s]."

On September 4, 2020, however, after the petition in these related cases was filed, the Legislature passed and the Governor signed AB 2257, which repealed and replaced the statutory changes enacted by AB 5. (Stats. 2020, ch. 38, § 2.) AB 2257 revised certain exemptions to the ABC test, including the business-to-business exemption, and created additional exemptions. (Lab. Code § 2775, et seq.) Under Labor Code section 2775, subdivision (a)(3), "[i]f a court of law rules that the [ABC] test . . . cannot be applied to a particular context . . . then the determination of employee or independent contractor status in that context shall instead be governed by [*Borello*]."[6] Because the parties disagreed whether the ABC test or the *Borello* standard applies to the People's misclassification-based UCL claims, the trial court permitted defendants to submit a motion in limine, before substantial discovery or filing of dispositive motions, addressing (1) whether *Dynamex* is preempted by federal law;

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[6] On September 16, 2020, we requested supplemental briefing from the parties to address the significance, if any, of the revisions to the statutes put in place by AB 2257. We reviewed the supplemental briefs, and, in this opinion, address whether the relevant statutes, as modified by AB 2257, are preempted by the FAAAA.

and (2) whether *Dynamex* can be applied retroactively.[7] Following two rounds of briefing and two hearings, the trial court directed both parties to lodge proposed orders. After argument at the second hearing, the trial judge noted he was "tending away from finding preemption[,]" but that his indecision "would tend to indicate why it's a very suitable matter for appeal." Ultimately, the court adopted defendants' proposed order without significant modification, granting in part defendants' motion in limine. It held "[b]ecause Prong B of the ABC Test under both *Dynamex* and AB 5 prohibits motor carriers from using independent contractors to provide transportation services, the ABC Test has an impermissible effect on motor carriers' 'price[s], route[s], [and] service[s]' and is preempted by the FAAAA." It certified its ruling for writ review pursuant to Code of Civil Procedure section 166.1.

The People petitioned this court for a writ of mandate directing respondent court to vacate its order or, at a minimum, to issue an alternative writ or order to show cause directing the real parties in interest to show cause why the writ should not issue. We summarily denied the petition. The California Supreme Court granted the People's petition for review and transferred the matter back to this court with directions to vacate our order denying mandate and to issue an order directing respondent superior court to

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[7] Although used most often to resolve questions of admissibility of evidence, use of a motion in limine to secure an early ruling on a potentially dispositive legal issue can be a useful tool in the management of complex litigation. Trial courts have inherent powers to employ motions in limine to dispose of claims in appropriate circumstances. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1595; *Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 375-376.)

show cause why the relief sought in the petition should not be granted. We complied, issuing an order to show cause on July 10, 2020. Real parties in interest filed a return, and the People filed a reply. We also granted the applications of the International Brotherhood of Teamsters, the California Attorney General, the City of Oakland, and the City and County of San Francisco to file amicus briefs in support of the People, and The Chamber of Commerce of the United States of America, American Trucking Associations, Inc. and California Trucking Association, and Western States Trucking Association to file amicus briefs in support of defendants.

DISCUSSION

A. Standard of Review and Federal Preemption Principles

We review de novo a trial court's decisions regarding preemption and statutory construction. (See, e.g., *Roberts v. United Healthcare Services, Inc.* (2016) 2 Cal.App.5th 132, 142 ["Where, as here, preemption turns on questions of law such as the meaning of a preemption clause or the ascertainment of congressional intent, our review is de novo. [Citations.]"]; *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10 ["federal preemption presents a pure question of law. [Citation.]"].) Also, "[w]hen a motion in limine 'results in the entire elimination of a cause of action or a defense, we treat it as a demurrer to the evidence and review the motion de novo . . . .' [Citation.]" (*Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1411)

"The United States Supreme Court has identified 'two cornerstones' of federal preemption analysis. [Ci-

tation.] First, the question of preemption "'fundamentally is a question of congressional intent.'" [Citations.] If a statute 'contains an express pre-emption clause, our "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" [Citations.] "'Also relevant, however, is the 'structure and purpose of the statute as a whole,' [citation] as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" [Citations.]" (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1059-1060.)

B. The FAAAA

Our Supreme Court explained the history and purpose of the FAAAA in *Pac Anchor*, *supra*, 59 Cal.4th at p. 779-782. "'In 1978, Congress "determine[d] that 'maximum reliance on competitive market forces'" would favor lower airline fares and better airline service, and it enacted the [Airline Deregulation Act (ADA)].' [Citation.] 'In order to ensure that the States would not undo federal deregulation with regulation of their own," that Act "included a pre-emption provision" that said "no State . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier.'" [Citation.]" (*Id*. at p. 779.)

In 1980, Congress deregulated trucking with the adoption of the Motor Carrier Act of 1980 (Pub. L. No. 96-296 (July 1, 1980) 94 Stat. 793.) "'In 1994, Congress similarly sought to pre-empt state trucking regulation[]' [citation]" with the adoption of the FAAAA. (*Pac Anchor*, *supra*, 59 Cal.4th at p. 779.) In doing so, it borrowed language from the ADA and included the

following express preemption clause: "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 . . . with respect to the transportation of property." (49 U.S.C. § 14501(c)(1).) "Specifically, the FAAAA was intended to prevent state regulatory practices including 'entry controls, tariff filing and price regulation, and [regulation of] types of commodities carried.' (H.R. Rep. No. 103-677, 2d Sess., p. 86 (1994), reprinted in 1994 U.S. Code Cong. & Admin. News, p. 1758)." (*Pac Anchor*, *supra*, 59 Cal.4th at pp. 779-780.) "The phrase 'related to," [in the FAAAA's preemption clause] . . . embraces state laws 'having a connection with or reference to' carrier "'rates, routes, or services,'" whether directly or indirectly. [Citations.]" (*Dan's City Used Cars, Inc. v. Pelkey* (2013) 569 U.S. 251, 260 [133 S.Ct. 179, 185 L.Ed. 2d 909] (*Dan City*).) The FAAAA, however, does not "preempt state laws affecting carrier prices, routes, or services 'in only a "tenuous, remote, or peripheral . . . manner."' [Citations.] (*Id*. at p. 261 (alteration in original).)

The defendants offered no evidence, and the trial court made no factual findings, concerning the impact, if any, of application of the ABC test on motor carriers' prices, routes, and services.[8] To the extent they had a

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[8] The trial court made only one factual finding, stating that in circumstances where defendants "contracted with licensed motor-carriers to transport loads, the cost of such transport was nearly triple the cost of using independent owner-operators for the same route." But that finding is irrelevant to our inquiry. There is no evidence in the record of the pricing impact, if any, of

burden to prove more than a tenuous or peripheral impact, rather than simply make arguments, the defendants did not carry it. If we were writing on a clean slate, that would end our inquiry and we would conclude defendants failed to demonstrate that application of the ABC test actually would impact prices, routes, or services. But we are not. Instead, courts have taken to deciding similar issues on their own, based on something other than facts or expert opinion. For example, in *Pac Anchor* our Supreme Court decided whether an action under California's Unfair Competition Law was preempted by the FAAAA without a developed factual record (the defendants presented the issue in the context of a motion for judgment on the pleadings). (*Pac Anchor*, *supra*, 59 Cal.4th at pp. 775-777.)[9] And so, we turn to the central issue: does the FAAAA preempt application of the ABC test?[10]

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defendants using employees rather than independent contractors, nor of contracting with businesses other than a licensed motor carrier to transport loads.

[9] See also *Schwann v. FedEx Ground Package Sys.* (1st Cir. 2016) 813 F.3d 429, 437, quoting *Mass. Delivery Ass'n v. Coakley* (1st Cir. 2014) 769 F.3d 11, 21 (*Schwann*) ("'[A] statute's "potential" impact on carriers' prices, routes, and services' need not be proven by empirical evidence; rather, courts may 'look[ ] to the logical effect that a particular scheme has on the delivery of services.' [Citations.]")

[10] The same issue is pending in the Ninth Circuit in *California Trucking Ass'n, et al. v. Becerra, et al*., case Nos. 20-55106 and 20-55107. The case was argued and, as of the date of this opinion, is under submission. The First Circuit held prong B of Massachusetts' ABC test (which contains the same language as California's ABC test) is preempted by the FAAAA. (*Schwann*, *supra*, 813 F.3d at p. 440.) The federal district courts are split on the issue. (See, e.g., *Henry v. Cent. Freight Lines, Inc.* (E.D. Cal. June 13, 2019) 2019 U.S. Dist. LEXIS 99594, at p. 19 [holding

C. The FAAAA Does Not Preempt the ABC Test

Defendants contend prong B of the ABC test makes it impossible for a motor carrier to contract with an owner-operator as an independent contractor, and thus the ABC test is preempted by the FAAAA under the clear terms of *Pac Anchor*. The People counter the ABC test is not preempted because it is a generally applicable employment law that does not prohibit the use of independent contractors, and therefore does not have an impermissible effect on prices, routes, or services. We agree with the People. Our conclusion is compelled by the California Supreme Court's decision in *Pac Anchor*, and the FAAAA's legislative history, as discussed below.

In *Pac Anchor*, the California Supreme Court held the FAAAA did not preempt a claim under the UCL premised on truck drivers being misclassified as independent contractors.[11] The defendants argued the

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the FAAAA does not preempt application of the ABC test because the "ABC test is a general classification test that does not apply to motor carriers specifically and does not, by its terms, compel a carrier to use an employee or an independent contractor"]; *Western States Trucking Ass'n v. Schoorl* (E.D. Cal. 2019) 377 F.Supp.3d 1056, 1072-1073 [same]; *Alvarez v. XPO Logistics Cartage LLC* (C.D. Cal. Nov. 15, 2018) 2018 U.S. Dist. LEXIS 208110, at p. 15 [finding the FAAAA preempts the ABC test]; *Valdez v. CSX Intermodal Terminals, Inc*. (N.D. Cal. Mar. 15, 2019) 2019 U.S. Dist. LEXIS 77258, at pp. 24-28 [finding the FAAAA preempts part B of the ABC test].)

[11] The People's UCL claim here is essentially identical to that in *Pac Anchor*. Both are premised on an alleged misclassification of truck drivers as independent contractors rather than employees. (See *Pac Anchor, supra*, 59 Cal.4th at p. 776.) At the second hearing in the trial court, the People's counsel noted he used the complaint in *Pac Anchor* "as a model" when drafting one of the complaints in this action.

"People's UCL claim will significantly affect motor carrier prices, routes, and services because its application will prevent their using independent contractors, potentially affecting their prices and services." (*Pac Anchor*, *supra*, 59 Cal.4th at p. 785.) They also contended "if the People's UCL action is successful, they will have to reclassify their drivers as employees, driving up their cost of doing business and thereby affecting market forces." (*Ibid.*) After analyzing the legislative history of the FAAAA and relevant United States Supreme Court, Ninth Circuit, and other precedent, the *Pac Anchor* court rejected the defendants' arguments. (*Id*. at pp. 782-784.) The court reasoned that a "UCL action that is based on an alleged general violation of labor and employment laws does not implicate [Congress's] concerns" about "regulation of motor carriers with respect to the transportation of property[.]" (*Id*. at p. 783.) It further explained: "Defendants' assertion that the People may not prevent them from using independent contractors is correct, but its characterization of the People's UCL claim is not. Nothing in the People's UCL action would prevent defendants from using independent contractors. The People merely contend that if defendants pay individuals to drive their trucks, they must classify these drivers appropriately and comply with generally applicable labor and employment laws." (*Id*. at p. 785) The court also rejected defendants' argument that enforcement of California's general employment laws was contrary to the FAAAA's "deregulatory purpose." (*Id*. at p. 786.) The court explained that while "Congress passed the FAAAA in order to end a patchwork of state regulations[,] . . . nothing in the congressional record establishes that Congress intended to preempt states' ability to tax motor carriers, to enforce labor and wage standards, or to exempt motor carriers from

generally applicable insurance laws. [Citations.]" (*Ibid.*)

Pac Anchor is dispositive. Like the labor laws examined in that case, the ABC test is a law of general application.[12] The ABC test does not mandate the use of employees for any business or hiring entity. Instead, the ABC test is a worker-classification test that states a general and rebuttable presumption that a worker is an employee unless the hiring entity demonstrates certain conditions. That independent owner-operator truck drivers, as defendants currently use them, may be incorrectly classified, does not mean the ABC test prohibits motor carriers from using independent contractors. The ABC test, therefore, is not the type of law Congress intended to preempt. (See *Pac Anchor*, *supra*, 59 Cal.4th at p. 787 [noting the congressional record showed "Congress disapproved of a California law that denied advantageous regulatory exemptions to motor carriers who used a large proportion of independent contractors[,]" but unlike that law, "the People's UCL action does not encourage employers to use employee drivers rather than independ-

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[12] We reject defendants' contention that the ABC test, as codified in AB 2257, is not a law of general application because the law includes exemptions for several occupations and industries. (See, e.g., *Godfrey v. Oakland Port Services Corp*. (2014) 230 Cal.App.4th 1267, 1280 [finding California's meal and rest break laws to be generally applicable – and not preempted by the FAAAA – despite those laws' legislative exemptions].) But we recognize, as did our Supreme Court in *Pac Anchor*, that even laws of general applicability can be preempted if they have a direct effect on carriers' prices, routes, or services. (*Pac Anchor, supra,* 59 Cal.4th at pp. 784-785; *see also Morales v. TWA* (1992) 504 U.S. 374, 386 [112 S.Ct. 2031, 119 L.Ed.2d 157].)

ent contractors. Defendants are free to use independent contractors as long as they are properly classified[.]"].)

Pac Anchor also relied on the Ninth Circuit's discussion in *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184 (*Mendonca*) of indirect evidence of Congress's intent when it enacted the FAAAA. In *Mendonca*, the court held California's generally applicable prevailing wage laws were not preempted by the FAAAA in part because several states Congress identified as not having laws regulating interstate trucking had prevailing wage laws in place at the time the FAAAA was enacted. (*Pac Anchor*, *supra*, 59 Cal.4th at p. 786.) *Pac Anchor* noted "[s]imilarly, eight out of the 10 jurisdictions identified in *Mendonca* had generally applicable laws governing when a worker is an independent contractor (or the equivalent) and when a worker is an employee. [Citations.] Thus, even though the People's UCL action may have some indirect effect on defendants' prices or services, that effect is "'too tenuous, remote [and] peripheral . . . to have pre-emptive effect.'" [Citation.]" (*Ibid.*) Notably, one of the statutes *Pac Anchor* identified, Wis. Stat. § 102.07, contains similar language to prong B of California's ABC test. (Compare Wis. Stat. § 102.07, subd. (8)(a) (1994) ["Except as provided in par. (b) and (bm), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury"] and Lab. Code, § 2775, subd. (b)(1)(B) [a worker is an employee unless the hiring entity can demonstrate "[t]he person performs work that is outside the usual course of the hiring entity's business."].) As noted in *Pac Anchor*, this

legislative history suggests Congress did not intend to preempt worker-classification laws like the ABC test.

Moreover, that the statutory scheme codified by AB 2257 is not one that prohibits motor carriers from using independent contractors (and therefore, does not have an impermissible effect on prices, routes, or services) is further supported by the business-to-business exemption in Labor Code section 2776. Under that exemption, the ABC test does not apply to a business-to-business contracting relationship, including contracts between licensed motor carriers and independent owner-operators who may operate as sole proprietorships, LLC's, or other business entities, if the hiring entity demonstrates a list of criteria is satisfied. (Lab. Code, § 2776, subd. (a).) If an individual or entity qualifies for the exemption, "the determination of employee or independent contractor status [of the individual doing the work] shall [ ] be governed by [the *Borello* standard]."[13] (*Ibid.*) Defendants argue

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[13] The full text of the business-to-business exemption states: "Section 2775 and the holding in Dynamex do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions: [¶] (a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ('business service provider') contracts to provide services to another such business or to a public agency or quasi-public corporation ('contracting business'), the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied: [¶] (1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. [¶] (2) The business service provider is providing services directly to the contracting business

rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses. [¶] (3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services. [¶] (4) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration. [¶] (5) The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business. [¶] (6) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed. [¶] (7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity. [¶] (8) The business service provider advertises and holds itself out to the public as available to provide the same or similar services. [¶] (9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract. [¶] (10) The business service provider can negotiate its own rates. [¶] (11) Consistent with the nature of the work, the business service provider can set its own hours and location of work. [¶] (12) The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code. [¶] (b) When two bona fide businesses are contracting with one another under the conditions set forth in subdivision (a), the determination of whether an individual worker who is not acting as a sole proprietor or formed as a business entity, is an employee or independent contractor of the business service provider or contracting business is governed by Section 2775. [¶] (c) This section does not

independent owner-operators can never meet several of the requirements in the business-to-business exemption, and thus, the exemption does not save the statutes codified by AB 2257 from preemption. We are unpersuaded.

First, defendants argue the licensing requirement of the exemption makes it impossible for independent owner-operators to qualify for the exemption: "If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration." (Lab. Code, § 2776, subd. (a)(4).) Defendants claim this provision requires truck drivers to have a federal motor carrier operating license, but "[i]ndependent owner-operator truck drivers, by definition *lack* motor carrier licenses and thus cannot meet this requirement." We agree with the People, however, that the more natural construction of a "business license" is that the phrase refers to the licenses issued by local governments ("jurisdictions" within the State of California) for health and safety regulation and tax purposes. Indeed, other subdivisions of AB 2257 distinguish between "business license[s]" and other permits and licenses. (See, e.g., Lab. Code, § 2781, subds. (c) & (h)(1)(C) [for the construction industry exemption, the contractor must demonstrate, among other requirements, that the "subcontractor has the required business license or business tax registration" and the "subcontractor utilizes its own employees to perform the construction trucking services, unless the subcontractor is a sole proprietor who operates their own truck to perform

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alter or supersede any existing rights under Section 2810.3." (Lab. Code, § 2776.)

the entire subcontract and holds a valid motor carrier permit issued by the Department of Motor Vehicles."].)

Second, the business-to-business exemption applies only if the owner-operator is "providing services directly to the [motor carrier] rather than to customers of the [motor carrier]." (Lab. Code, § 2776, subd. (a)(2).) Defendants contend this condition is impossible for an owner-operator to meet because an owner-operator contracting with a motor carrier necessarily is providing services to the motor carrier's customers by moving the customer's goods at the customer's direction. But defendants provide no support for their strained reading of this provision. Motor carriers — not the motor carriers' customers — could contract with owner-operators (or other business entities meeting the requirements of the business-to-business exemption), direct their actions, and pay them. Services would be provided by the owner-operators directly to the motor carriers, notwithstanding that those services would include moving freight belonging to the motor carrier's customers.

Moreover, defendants offered no evidence demonstrating it would be impossible to meet the requirements of the business-to-business exemption. Indeed, the only evidence submitted in the trial court (attached to the People's counsel's declaration in support of their opposition to defendants' motion in limine) indicates at least one defendant does not operate any of its own trucks, and instead contracts not only with independent truckers, but also with trucking companies. Those trucking companies, referred to as "outside carriers" or "outside brokers," are legally organized business entities and appear to be among the

kinds of businesses contemplated by the business-to-business exemption.

We therefore conclude defendants have not demonstrated, as they must under *Pac Anchor*, that application of the ABC test prohibits motor carriers from using independent contractors or otherwise directly affects motor carriers' prices, routes, or services. Nothing in *Pac Anchor* nor the FAAAA's legislative history suggests Congress intended to preempt a worker-classification test applicable to all employers in the state.

DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its January 8, 2020 order granting in part defendants' motion in limine, and enter a new order denying that motion because the statutory amendments implemented by AB 2257 are not preempted by the FAAAA. We express no view on the two alternative arguments raised in defendants' motion in limine, which respondent court denied without prejudice, *i.e.*, whether the ABC test violates the Dormant Commerce Clause or that it may not be applied retroactively. The People are awarded their costs in this original proceeding.

CERTIFIED FOR PUBLICATION

CURREY, J.

We concur:

MANELLA, P.J.

COLLINS, J.

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Patent Owner.

CAL CARTAGE TRANSPORTATION EXPRESS LLC et al.,
Real Parties in Interest.

B304240

(Los Angeles County Super. Ct. No. BC689320, BC689321, BC689322) (William F. Highberger, Judge)

ORDER TO SHOW CAUSE; ORDER VACATING MARCH 26, 2020 DENIAL ORDER

TO THE SUPERIOR COURT OF LOS ANGELES COUNTY:

On June 17, 2020, the California Supreme Court issued an order (S261764), directing this court to vacate its March 26, 2020 order summarily denying the

petition for writ of mandate and to issue an order to show cause directing the superior court to show cause why the relief sought should not be granted.

Based on that order, you are hereby required to SHOW CAUSE before this court in its courtroom at 300 South Spring Street, Los Angeles, California, on October 16, 2020, at 9:00 a.m.

The written return to this Order to Show Cause shall be filed and served on or before August 7, 2020.

Petitioner may file and serve a reply on or before September 4, 2020.

MANELLA, P.J. COLLINS, J. CURREY, J.

APPENDIX D

Court of Appeal, Second Appellate District, Division Four - No. B30424

S261764

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent,

CAL CARTAGE TRANSPORTATION EXPRESS LLC et al., Real Parties in Interest.

The petition for review is granted. The matter is transferred to the Court of Appeal, Second Appellate District, Division Four, with directions to vacate its order denying mandate and to issue an order directing respondent superior court to show cause why the relief sought in the petition should not be granted.

Cantil-Sakauye
Chief Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

Cuellar
Associate Justice

Kruger
Associate Justice

Groban
Associate Justice

APPENDIX E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

CAL CARTAGE TRANSPORTATION EXPRESS LLC et al.,
Real Parties in Interest.

B304240

(Los Angeles County Super. Ct. No. BC689320, BC689321, BC689322) (William F. Highberger, Judge)

ORDER

THE COURT: *

The petition for writ of mandate filed on February 18, 2020, along with the preliminary opposition and reply have been read and considered. The petition is denied. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273.)

[Filed March 26, 2020]

***MANELLA, P.J. COLLINS, J. CURREY, J.**

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

CAL CARTAGE TRANSPORTATION EXPRESS LLC, CCX2931, LLC and DOES 1-50, inclusive,
Defendants.

CASE NO. BC689320

Related Cases: BC689321, BC689322, 19STCV19291, 19STCV0377

ORDER GRANTING IN PART DEFENDANTS' MOTION IN LIMINE RE PREEMPTION AND NON-RETROACTIVITY OF ABC WORKER CLASSIFICATION TEST

Assigned for all purposes to:
Hon. William F. Highberger
Dept.: SSC-10

Action Filed: January 8, 2018
Trial Date: None Set.

ORDER GRANTING IN PART DEFENDANTS' MOTION IN LIMINE

I. Executive Summary

After careful consideration, the Court agrees with Defendants that the currently operative legal requirements for determination of employee versus independent contractor status are preempted as to certain motor carriers and their drivers by an act of Congress. A preemption determination is not a relative weighing of the desirability of a given state's legal regime as opposed to the rules which Congress seeks to impose. Rather, it is simply a determination that Congress has exercised its overriding powers under the Supremacy and Commerce clauses of the United States Constitution to require a uniform rule to apply in all 50 states. Here the requirements of the "ABC Test" set forth in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903 ("*Dynamex*") and the recently enacted Assembly Bill 5 ("AB 5") clearly run afoul of Congress's 1994 determination in the Federal Aviation Administration Authorization Act (the "FAAAA"), 49 U.S.C. § 14501(c)(1) that a uniform rule endorsing use of non-employee independent contactors (commonly known in the trucking industry as "owner-operators") should apply in all 50 states to increase competition and reduce the cost of trucking services. This conclusion is supported both by the detailed analysis which follows and by the recent ruling of the United States District Court for the Southern District of California in Case No. 3:18-cv-02458 *California Trucking Ass'n v. Becerra* on Dec. 31, 2019, granting a Temporary Restraining Order against the State's representatives prohibiting enforcement of AB 5.

The legislative history of the FAAAA makes plain there was a desire to preempt a specific California

statute which limited use of owner-operators by freight companies, such as Roadway Express, which were in competition with Federal Express, then solely regulated as an air carrier. Although this case does not specifically involve competitors in the over-night cargo business, the Court is strongly persuaded by the House Report's reference to this statute as objectionable, which demonstrates Congress's intent to protect the owner-operator business model in the trucking industry and preclude its replacement by an "employee-operator" regime. The Court is also highly persuaded by the rulings of the First Circuit and the Supreme Judicial Court of Massachusetts holding that the FAAAA does preempt the ABC Test in the formulation used in both Massachusetts and California. *(Schwann v. FedEx Ground Package System, Inc.* (1st Cir. 2016) 813 F.3d 429; *Chambers v. RDI Logistics, Inc.* (2016) 476 Mass. 95; *see also Bedoya v. American Eagle Express Inc.* (3d Cir. 2019) 914 F.3d 812 (finding no FAAAA preemption of New Jersey's ABC test because it does not apply to workers who perform services "outside of all the places of business of the enterprise for which such service is performed").)

Defendants[1] placed this question before the Court by moving in limine for an order determining that the claims set forth in this case should be adjudicated with reference to the worker classification test set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 ("*Borello*"), rather than the "ABC Test" set forth in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903 ("*Dynamex*") and the recently enacted Assembly Bill 5

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[1] Defendants are Cal Cartage Transportation Express, LLC, CMI Transportation, LLC, K&R Transportation California, LLC, CCX2931, LLC, CM2931, LLC, and KRT2931, LLC.

("AB 5"). This is so, Defendants argue, because (1) Prong B of the ABC Test as applied to motor carriers is preempted by the FAAAA, 49 U.S.C. § 14501(c)(1); (2) the ABC Test as applied to motor carriers violates the Dormant Commerce Clause of the U.S. Constitution; and (3) the ABC Test cannot be applied retroactively. For the reasons set forth below, the Court **GRANTS** Defendants' motion and finds that the ABC Test as applied to motor carriers is preempted by the FAAAA, and thus that the *Borello* test will apply to the claims in this case. Because the Court need not address Defendants' alternative arguments that the ABC Test violates the Dormant Commerce Clause or that it may not be applied retroactively, the Court **DENIES** Defendants' motion without prejudice as to those two issues.

II. Relevant Background

Defendants are motor carriers that operate or have operated "trucking and drayage compan[ies] . . . in and around the Ports of Los Angeles and Long Beach." (Compl. ¶ 2.) Defendants utilize the services of independent owner-operator truck drivers to perform drayage— "the short distance transportation of cargo by truck to and from the ports." (*Id.*)

On January 8, 2018, Plaintiff filed the Complaints at issue in these three related cases,[2] each alleging two causes of action under the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.:

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[2] The Court's Order applies to the three related cases filed on January 8, 2018 by the City Attorney of Los Angeles: *People v. Cal Cartage Transportation Express LLC, et al.* (BC689320); *People v. CMI Transportation LLC', et al.* (BC689321); and *People v. K&R Transportation California LLC, et al.* (BC689322).

a first cause of action predicated on Defendants' alleged misclassification of truck drivers as independent contractors, and a second cause of action predicated on Defendants' alleged violations of the federal Truth-in-Leasing Regulations, 49 C.F.R. § 376.1, et seq. (1979). At the time Plaintiff filed the lawsuits, the test for worker classification in California was governed by *Borello*.

In April 2018, the California Supreme Court decided *Dynamex*, in which the Court replaced the *Borello* test for claims brought under California's Wage Orders. Through *Dynamex*, the California Supreme Court adopted an "ABC Test," which renders workers presumptive employees unless the putative employer demonstrates each of the following:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact,
>
> (B) that the worker performs work that is outside the usual course of the hiring entity's business, and
>
> (C) that the worker is customarily engaged in an independently established trade, occupation, or business.

(*Dynamex*, *supra*, 4 Cal.5th at p. 964.)

On September 18, 2019, California Governor Gavin Newsom signed AB 5 into law. AB 5 codified the ABC Test and, when it takes effect on January 1, 2020, will expand the reach of the ABC Test to apply to all claims under the Labor Code and the Unemployment Insurance Code. The three prongs of the ABC

Test codified by AB 5 are identical to the prongs of *Dynamex*. (AB 5, § 2(a)(1).) AB 5 also includes certain exceptions that were not part of the *Dynamex* test, including an exception for "business-to-business contracting relationship[s]" (*id.*, § 2(e)), which is discussed in more detail below. Under the terms of AB 5, "[i]f a court of law rules that the three-part [ABC] test ... cannot be applied to a particular context" due, for example, to federal preemption, "then the determination of employee or independent contractor status in that context shall instead by governed by [*Borello*]." (*Id.*, § 2(a)(3).)

The Parties disagree whether the ABC Test or the *Borello* test applies to Plaintiffs misclassification-based UCL claims. Thus, the Court permitted Defendants to submit a motion in limine addressing the threshold legal issues of (a) whether *Dynamex* is preempted by federal law; and (b) whether *Dynamex* can be applied retroactively. Following several rounds of briefing and two hearings on November 6 and November 25, Defendants' motion is now ripe for determination.

III. FAAAA Preemption

Independent contractor owner-operators—independent truckers who lease their vehicles and services to a licensed motor carrier in order to move freight under the motor carrier's operating authority—have long been a feature of the U.S. trucking industry. (*Am. Trucking Assns. v. United States* (1953) 344 U.S. 298, 303 ["Carriers . . . have increasingly turned to owner-operator truckers . . . . By a variety of arrangements, the authorized carriers hire them to conduct operations under the former's permit."]; *Central Forwarding, Inc. v. ICC* (5th Cir. 1983) 698 F.2d 1266,

1267 ["Owner-operators are the 'independent truckers' of song and legend. They are persons owning one or a few trucks who lack [motor carrier] operating authority. Since they cannot transport regulated commodities in interstate commerce in their own right, . . . they lease their services and equipment to a carrier in order to utilize the carrier's operating authority."].)

The relationship between motor carriers and independent truckers has been the subject of extensive federal regulation. In 1978, Congress determined that "[t]he independent owner-operator is undoubtedly regarded as one of the most efficient movers of goods and accounts for approximately 40 percent of all intercity truck traffic in the United States." (H.R. Rep. No. 1812, 95th Cong., 2d Sess. 5 (1978) ("H.R. Rep. No. 1812").) In 1979, the federal government enacted the Truth-in-Leasing Regulations, 49 C.F.R. § 376.1, et seq., to provide a uniform set of rules and guidelines for independent contractor owner-operators nationwide. (44 Fed.Reg. 4680 (1979) [noting that the Truth-in-Leasing Regulations govern the relationship "between the carrier and owner-operator" in order to "promote the stability and economic welfare of the independent trucker"].) The following year, Congress passed the Motor Carrier Act of 1980, 49 U.S.C. § 10101, et seq., to eliminate the barriers to entry that states had imposed on truckers seeking to enter the motor carrier industry.

In 1994, Congress enacted the FAAAA's preemption provision, which prohibits states from "enact[ing] or enforc[ing] 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).) Congress's stated goal was eliminating

the patchwork of state and local regulations that had bogged down the motor carrier industry and increased costs for motor carriers and consumers. (See H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. 87 (1994) ["The sheer diversity of these [state] regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business."]; *id*. [disparate state treatment of motor carriers "causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets"].) Congress explained that "[l]ifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers. Service options will be dictated by the marketplace; and not by an artificial regulatory structure." (*Id*. at pp. 87-88.) As one example of a state law that Congress intended to preempt, Congress pointed to a California law disfavoring motor carriers "using a large proportion of owner-operators instead of company employees." (*Id*. at p. 87.)

In enacting the FAAAA preemption provision, Congress intentionally duplicated the language of the Airline Deregulation Act ("ADA"), thereby replicating the "broad preemption interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.*" (*Id*. at p. 83, citing *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374)[3] In

[3] Conversely, the preemption provision's enumerated exceptions are to be construed narrowly: "There has been concern raised that States . . . may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. The conferees do not intend for States to attempt to de

Morales, the Supreme Court held that Congress "express[ed] a broad pre-emptive purpose" because the phrase "related to" is "deliberately expansive" and "conspicuous for its breadth." (*Morales*, *supra*, at pp. 383-384.) Thus, the FAAAA preempts any state law that affects motor carrier prices, routes, and services in anything other than a "tenuous, remote, or peripheral [] manner." (*Id*. at p. 390.) A law or regulation is "related to" prices, routes, or services for purposes of FAAAA preemption if it has a "direct or indirect" effect on them. (*Dilts v. Penske Logistics, LLC* (9th Cir. 2014) 769 F.3d 637, 644-645; see also *Rowe v. New Hampshire Motor Transport Assn.* (2008) 552 U.S. 364, 375; *Morales*, *supra*, 504 U.S. at p. 386.) FAAAA preemption "occurs at least where state laws have a significant impact related to Congress' deregulatory and pre-emption-related objectives," which include ensuring that motor carriers' rates "reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality." (*Rowe*, *supra*, 552 U.S. at p. 371.) Thus, the FAAAA prevents "a State's direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." (*Id*. at p. 372)[4]

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facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." (H.R. Conf. Rep. No. 103-677, *supra*, at p. 83.)

[4] The California Supreme Court has held that the typical presumption against federal preemption does not apply to the FAAAA: "[N]either *Rowe,* nor *Morales,* nor *Wolens* 'adopted [the] position . . . that we should presume strongly against preempting in areas historically occupied by state' law." (*People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 778-779.) The

The sole difference between the ADA's preemption provision and the FAAAA's preemption provision is a qualifying phrase in the FAAAA provision limiting preemption to those laws having an effect "with respect to the transportation of property." (49 U.S.C. § 14501(c)(1).) As the Supreme Court has explained, this limits the preemptive scope of the FAAAA to those laws that have "a direct [or] an indirect connection to any transportation services a motor carrier offers its customers." (*Dan's City Used Cars, Inc. v. Pelkey* (2013) 569 U.S. 251, 252-253.)

IV. Analysis

Several state and federal courts in California and Massachusetts (which uses the same ABC Test) have held that the ABC Test is preempted by the FAAAA in the motor carrier context because Prong B of the test effectively prohibits motor carriers from utilizing independent owner-operator truck drivers. (See *Mass. Delivery Assn. v. Healey* (1st Cir. 2016) 821 F.3d 187; *Schwann v. FedEx Ground Package Sys., Inc.* (1st Cir. 2016) 813 F.3d 429; *Valadez v. CSX Intermodal Terminals, Inc.*(N.D.Cal. Mar. 15, 2019) 2019 WL 1975460; *Alvarez v. XPO Logistics Cartage LLC* (C.D.Cal. Nov. 15, 2018) 2018 WL 6271965; *Chambers v. RDI Logistics, Inc.* (2016) 476 Mass. 95.) For the reasons set forth below, this Court agrees.

Court therefore does not employ a presumption against preemption, and instead conducts an "analysis of the underlying state regulations," legislation, and decisional authority at issue. (*Id*. at p. 780, citing *Morales*, *supra*, 504 U.S. at p. 388.)

A. *Pac Anchor* Does Not Dictate The Outcome Of Defendants Motion

As an initial matter, Plaintiff argues that the California Supreme Court's decision in *People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal 4th 772 forecloses FAAAA preemption of the ABC Test. If Plaintiff is correct, then this Court is bound to apply *Pac Anchor* and deny Defendants' motion. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1213; *Auto Equity Sales, Inc. v. Sup. Ct.* (1962) 57 Cal.2d 450, 454 [lower courts must follow appellate courts' unambiguous holdings on "precise question[s]" that have been "considered and passed upon"].)

In *Pac Anchor*, the California Supreme Court addressed the question "whether an action under the unfair competition law . . . based on a trucking company's alleged violation of state labor and insurance laws" is preempted by the FAAAA, answering in the negative. (*Pac Anchor*, *supra*, 59 Cal.4th at p. 775.) That is a different question than the one presented here in two respects. First, the defendants in *Pac Anchor* sought preemption of the UCL action itself—*Pac Anchor* arose in the context of a motion for judgment on the pleadings, which, if granted, would have barred the plaintiff's UCL action in its entirety. (*Id*. at p. 777.) Unlike in *Pac Anchor*, the Defendants in this case are not arguing that the Plaintiff's UCL action is preempted and cannot proceed; they agree with *Pac Anchor's* conclusion that the action can proceed under the *Borello* standard. Second, *Pac Anchor* was decided several years before *Dynamex* or AB 5 came into being, so the state labor and insurance laws at issue were at the time evaluated under the *Borello* standard, not the ABC Test. Thus, the Supreme Court did

not have occasion in *Pac Anchor* to consider the precise question of whether the ABC Test is preempted under the FAAAA. (*In re Marriage of Conejo* (1996) 13 Cal.4th 381, 388 ["It is axiomatic that cases are not authority for propositions not considered."].)[5]

Nevertheless, Plaintiff argues that *Pac Anchor* stands for a broader proposition: that there can be no FAAAA preemption of California's generally applicable labor and employment laws, including in particular laws that set forth the generally applicable test for distinguishing between employees and independent contractors. To be sure, certain language in the Supreme Court's decision could be read to support such a broad proposition. For example, in the portion of the opinion addressing the defendants' *facial* challenge to the UCL, the Court upheld the law in part because "defendants have conceded, as they must, that the FAAAA does not preempt generally applicable employment laws that affect prices, routes, and services." (*Pac Anchor*, *supra*, 59 Cal.4th at p. 783.) Later, in the portion of the opinion addressing the defendants' *as-applied* challenge to the UCL, the Court upheld the law in part because the UCL is one of many "generally applicable labor and employment laws," and because other jurisdictions have similar "generally applicable

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[5] See also *Fairbanks v. Sup. Ct.* (2009) 46 Cal.4th 56, 64 ["[A] judicial decision is not authority for a point that was not actually raised and resolved."]; *People v. Knoller* (2007) 41 Cal.4th 139, 169 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered. An appellate decision is not authority for everything said in the court's opinion but only for the points actually involved and actually decided."]; *Mercury Ins. Grp. v. Sup. Ct.* (1998) 19 Cal.4th 332, 348 ["A decision, of course, is not authority for what it does not consider."].

laws governing when a worker is an independent contractor (or the equivalent) and when a worker is an employee." (*Id*. at pp. 785-786.)

Other portions of the opinion, however, suggest that the rule has limitations. In particular, the California Supreme Court explained that FAAAA preemption "calls for an analysis of the underlying state regulations to see if they relate to motor carrier prices, routes, or services when enforced through the UCL." (*Id*. at pp. 784-785.) And the Court found it significant that the People were *not* seeking to prohibit the motor carriers' use of independent contractors: "The defendants' assertion that the People *may not prevent* them from using independent contractors *is correct*, but its characterization of the People's UCL claim is not. Nothing in the People's UCL action would prevent defendants from using independent contractors." (*Id*. at p. 785, emphasis added.)

In rejecting the preemption argument advanced in Pac Anchor, the California Supreme Court characterized the People's position as follows: "if defendants pay individuals to drive their trucks, they must classify the[se] drivers appropriately." (*Id*.) This Court reads that language to mean that a labor law distinguishing employees from independent contractors can, in appropriate circumstances, be applied to motor carriers as it could to other businesses, and motor carriers can face consequences if they misclassify their drivers. Defendants in this case have never contended otherwise, and whether they correctly classified drivers would be the central issue in this case were it to proceed under the *Borello* standard should the Court find preemption. But what makes the present case different from *Pac Anchor* is that, according to Defendants, the ABC Test (which was not at issue in *Pac*

Anchor) would not just *distinguish* employees from independent contractors, but would *prohibit* the use of independent contractors altogether. If Defendants are correct and the ABC Test does prohibit motor carriers from using independent owner-operator truck drivers, then *Pac Anchor* in fact points to a finding of preemption, because a state law "may not . . . prevent defendants from using independent contractors." (*Id*.)

Importantly, Plaintiff agrees with that conclusion, conceding that *Pac Anchor* leads to a finding of preemption in a case in which a state law prohibits motor carriers from using independent owner-operators: "[T]he People have never contended that *Pac Anchor* held that an employment law of general applicability can never be preempted. The People's position is simply that *Pac Anchor* means what it says, and such laws are preempted only where they 'prevent' the use of independent contractors." (The People's Supp. Br. at p. 4, fn. 3; see also *id.* at p. 2 ["Under the FAAAA, a generally applicable law that defines the standard for employment status is only preempted where it forces motor carriers to use employee drivers, rather than independent contractors."].)

Moreover, in a decision post-dating *Pac Anchor*, the Ninth Circuit agreed with the proposition that laws prohibiting motor carriers from using independent owner-operators would likely be preempted by the FAAAA. (*Cal. Trucking Assn. v. Su* (9th Cir. 2018) 903 F.3d 953, 964 [discussing the "obvious proposition that an 'all or nothing' rule requiring services be performed by certain types of employee drivers . . . [is] likely preempted"].) Indeed, the Ninth Circuit noted in dicta that the very ABC Test at issue here is likely preempted: "[T]he 'ABC' test may effectively compel a motor carrier to use employees for certain services

because, under the 'ABC' test, a worker providing a service within an employer's usual course of business will never be considered an independent contractor." (*Id*.)

U.S. Supreme Court decisions both before and after *Pac Anchor* confirm that laws of general applicability are not immune from federal preemption. In the ADA context (the law that Congress used as a model for the FAAAA preemption provision), the Supreme Court was clear on this point:

> [P]etitioner advances the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of ***general applicability***. Besides creating an ***utterly irrational loophole*** (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "relating to" language. We have consistently rejected this precise argument in our ERISA cases: "[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect."

(*Morales*, *supra*, 504 U.S. at p. 386, quoting *Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 139, emphasis added.) More recently, two years after *Pac Anchor*, the U.S. Supreme Court held again (this time in the ERISA context, another statutory model for ADA and FAAAA preemption) that laws of general applicability can be preempted. As the Court explained, a state regulation with forbidden effects on "a central matter of [ERISA] plan administration" was not saved

from preemption merely because it had "nothing to do with the financial solvency of plans or the prudent behavior of fiduciaries"—the principal objectives animating ERISA' s preemption provision. (*Gobeille v. Liberty Mut. Ins. Co.* (2016) 136 S. Ct. 936, 946.) To the contrary, "[a]ny difference in purpose does not transform" a statute or regulation "into an innocuous and peripheral set of additional rules." (*Id*.)

The Ninth Circuit and California Court of Appeal also have both reaffirmed, in decisions post-dating *Pac Anchor*, the principle that laws of general applicability can be preempted under the FAAAA and ADA. (*Su*, *supra*, 903 F.3d at p. 966 ["What matters is not solely that the law is generally applicable, but where in the chain of a motor carrier's business it is acting to compel a certain result . . . and what result it is compelling."]; *People ex rel. Harris v. Delta Air Lines, Inc.* (2016) 247 Cal.App.4th 884, 902 ["We additionally find no merit to the Attorney General's assertions that [] the OPPA is a law of general applicability," and therefore exempt from ADA preemption, because "the high court has disposed of these arguments in *Morales* and *Wolens*."].)

In sum, the better reading of *Pac Anchor* is not that laws of general applicability are always immune from FAAAA preemption. Rather, *Pac Anchor* left open the possibility that state laws prohibiting motor carriers from using independent owner-operator truck drivers might be preempted—and even suggested that they would. The Court simply decided that the *Borello* standard does *not* constitute such a prohibition. The critical question in this case is whether the ABC Test does.

B. The ABS Test Is Preempted As Applied To Motor Carriers

1. Prong B Prohibits Motor Carriers From Using Independent Contractors

Given Plaintiff's concession that the ABC Test would be preempted, even under *Pac Anchor*, if it precludes motor carriers from using independent contractors, the Court turns to that issue first. Prong B of the ABC Test requires that a worker be classified as an employee unless, the employer establishes that the worker "performs work that is outside the usual course of the hiring entity's business." (*Dynamex*, *supra*, 4 Cal.5th at p. 964; AB 5, § 2(a)(1)(B).) Under this test, it is plain that a motor carrier's core transportation-related services cannot be performed by independent contractors. Neither party argues otherwise. Thus, absent some applicable exception, the ABC Test prohibits motor carriers from using independent owner-operator truck drivers.

Plaintiff points to two exceptions that it says allow motor carriers to continue using independent contractors as truck drivers: (1) AB 5's "business-to-business" exception (AB 5, § 2(e)); and (2) the joint employment context. These exceptions, however, do not save AB 5.

1. Business-to-Business Exception. Under AB 5, the ABC Test "do[es] not apply to a bona fide business-to-business contracting relationship," where certain enumerated criteria are met. (AB 5, § 2(e).) For several reasons, however, this exception does not aid Plaintiff because it does not permit motor carriers to utilize *independent owner-operator truck drivers*, as that term has been used in the trucking industry, by Congress, and by the U.S. Supreme Court for many decades.

First, the exception "does not apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business." (*Id.*, § 2(e)(2).) And in order to be a qualifying business entity, the "business service provider" must "ha[ve] the required business license." (*Id.*, § 2(e)(1)(D).) For truck drivers wishing to transport cargo in the United States, that means, at a minimum, having a federal motor carrier operating license. (See, e.g., 49 C.F.R. § 365.101.) Both Congress and the U.S. Supreme Court, however, have explained that the *absence* of a motor carrier license is a core attribute of an independent contractor in the trucking industry. (See H.R. Rep. No. 1812, *supra*, at p. 5 [defining independent owner-operators as "a person who owns and operates one, or a few, trucks for hire without holding ICC operating authority"]; *Am Trucking Assns.*, *supra*, 344 U.S. at p. 303 ["Carriers . . . have increasingly turned to owner-operator truckers . . . to conduct operations under the former's permit."].)[6] Indeed, the premise of the federal Truth-in-Leasing Regulations—which establish a uniform set of rules for independent-contractor truckers nationwide—is that independent owner-operators "lease" their services and trucks to motor carriers because the contractors

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[6] See also Grawe, *Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators Over Time* (2008) 35 Transp. L.J. 115, 116, fn. 1 ["The independent owner-operator is an independent trucker who lacks federal operating authority."]; Hardman, *The Employment Classification Issue in the Motor Carrier Industry* (2010) 37 Transp. L.J. 27, 28 ['Independent contractors' include an individual who. . . leases [her] vehicle to a motor carrier with driver service to be used in moving freight . . . indicating the lessor of the equipment as the motor carrier of the freight transported."].

lack independent operating authority. (See 49 C.F.R. §§ 376.1, 376.2.)

Second, in addition to requiring licensure, the business-to-business exception establishes a host of other barriers to entry for independent truckers: they must, for example, "maintain[] a business location that is separate from the business or work location of the contracting business" (AB 5, § 2(e)(1)(E)), "actually contract[] with other businesses to provide the same or similar services and maintain[] a clientele" of their own (*id.*, § 2(e)(1)(G)), and "advertise[] . . . to the public" (*id.*, § 2(e)(1)(H)). These barriers to entry contradict the rationale for enacting the FAAAA preemption provision in the first place, which sought the "[l]ifting of these antiquated controls" to allow "transportation companies to freely compete more efficiently," so that "[s]ervice options will be dictated by the marketplace, and not by an artificial regulatory structure." (H.R. Conf. Rep. No. 103-677, *supra*, at pp. 87-88); see also Statement by President William J. Clinton Upon Signing H.R. 2739, 1994 U.S.C.C.A.N. 1762-1 (Aug. 23, 1994) ["State regulation preempted under this provision takes the form of controls on who can enter the trucking industry within a State . . . ."].) The Ports of Los Angeles and Long Beach have explained the importance of independent owner-operators to the U.S. drayage industry, noting that the "[flack of barriers to entry" for independent owner-operators "has created a very competitive port drayage sector." (John E. Husing et al., San Pedro Bay Ports Clean Air Action Plan (Sept. 7, 2007), p. 15, available at https://bit.ly/2CYUaZT.)

Third, the business-to-business exception is inapplicable unless the business services provider "can negotiate its own rates" with the motor carrier. (AB 5,

§ 2(e)(1)(J).) Again, however, this is inconsistent with the federal regulations governing independent owner-operator truck drivers, which require the motor carrier to *provide* "clearly stated" rates to independent owner-operators. (49 C.F.R. § 376.12(d).)

Fourth, under the business-to-business exception, the determination of "whether an individual working for a business service provider is an employee or independent contractor" is still governed by the ABC Test. (AB 5, § 2(e)(3).) Thus, under Prong B, any truck drivers who work for the independent trucking company that contracts with the motor carrier would be considered employees of that company, not independent contractors.

In short, the relationship contemplated by the business-to-business exception is nothing like the independent contractor relationship that has been a staple of the trucking industry through nearly 70 years of congressional proceedings and court decisions.

2. Joint employment. Plaintiff argues that the joint employment context also provides a means for motor carriers to continue utilizing independent contractors because the Court of Appeal has determined that the ABC Test does not apply in the joint employment context. (See *Henderson v. Equilon Enters.* (2019) 40 Cal.App.5th 1111, 1128.) This argument suffers from a similar deficiency, however, because truck drivers affected by the joint employment rule are, by definition, employees of at least one company, not independent contractors. (*Id.* ["In a joint employer claim, the worker is an admitted employee of a primary employer . . . . The distinct question posed in such claims is whether 'another business or entity that has some relationship with the primary employer should properly be considered a joint employer of the

worker and therefore also responsible, along with the primary employer, for the obligations imposed by the wage order.'"], quoting *Dynamex*, *supra*, 4 Cal.5th at p. 915.) Thus, the joint employment context does not permit independent owner-operator truck drivers.

2. The ABC Test Has A Substantial Effect On Motor Carriers' Prices, Routes, And Services

Having concluded that the ABC Test, as codified by AB 5, prohibits motor carriers from using independent contractors as truck drivers, the question remains whether such a prohibition has sufficient direct or indirect effects on motor carrier prices, routes, and services, and is therefore preempted by the FAAAA. This Court, like many others before it, concludes that it does.[7]

In *Schwann v. FedEx Ground Package Sys., Inc.* (1st Cir. 2016) 813 F.3d 429, 439, the First Circuit held that Prong B of Massachusetts' ABC Test (which contains the same language as California's ABC Test) is preempted by the FAAAA because it "mandate[s] that any services deemed 'usual' to" a motor carrier's "course of business be performed by an employee. Such an application of state law poses a serious potential impediment to the achievement of the FAAAA's

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[7] "[A] statute's 'potential' impact on carriers' prices, routes, and services' need not be proven by empirical evidence; rather, courts may `look[ ] to the logical effect that a particular scheme has on the delivery of services.' [Citation.] This logical effect . . . can be sufficient even if indirect' so that motor carriers can be immunized 'from state regulations that threaten to unravel Congress's purposeful deregulation in this area.'" (*Schwann v. FedEx Ground Package Sys., Inc.* (1st Cir. 2016) 813 F.3d 429, 437, quoting *Mass. Delivery Assn. v. Coakley* (1st Cir. 2014) 769 F.3d 11, 21.)

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*. at p. 438.) The First Circuit explained that the implications of Prong B's mandated employee relationship would necessarily affect the motor carrier's prices, routes, and services, thus triggering FAAAA preemption:

> [B]ecause Prong 2 would mandate that FedEx classify these individual contractors as employees, FedEx would be required to reimburse them for business-related expenses. The logical effect of this requirement would thus preclude FedEx from providing for first-and-last mile pick-up and delivery services through an independent person who bears the economic risk associated with any inefficiencies in performance. This regulatory prohibition would also logically be expected to have a significant impact on the actual routes followed for the pick-up and delivery of packages. . . . It is reasonable to conclude that employees would have a different array of incentives that could render their selection of routes less efficient, undercutting one of Congress's express goals in crafting an express preemption proviso.

(*Id*. at p. 439, emphases added; see also *Mass. Delivery Assn. v. Healey* (1st. Cir. 2016) 821 F.3d 187, 193 [following *Schwann* in holding that application of Massachusetts' Prong, B would necessarily "deprive [the motor carrier] of its choice of method of providing for delivery services and incentivizing the persons providing those services"].)

The Massachusetts Supreme Court has similarly held that the ABC Test is preempted by the FAAAA:

> Prong two [], in essence, requires that motor carriers providing delivery services . . . use employees rather than independent contractors to deliver those services. As a result, motor carriers are compelled to adopt a different manner of providing services from what they otherwise might choose because prong two dictates the type of worker that will provide the services. This likely also would have a significant, if indirect, impact on motor carriers' services by raising the costs of providing those services.

(*Chambers v. RDI Logistics, Inc.* (2016) 476 Mass. 95, 102-103.)

Federal courts in California have reached the same result with respect to the ABC Test. In *Alvarez v. XPO Logistics Cartage LLC*, the Central District of California found that applying Prong B "would require a court to look at a motor carrier's service, determine that the service is outside the carrier's usual course of business, and then bar the carrier from using workers as independent contractors to perform that service," which "posed a serious potential impediment to the FAAAA's objectives." (*Alvarez v. XPO Logistics Cartage LLC* (C.D.Cal. Nov. 15, 2018) 2018 WL 6271965, at *4, quotations and citation omitted.) Likewise, the Northern District of California held that the ABC Test is preempted because "application of Part B would require carriers to classify all workers who performed trucking work as employees, rather than independent contractors," which "is impermissible" under the FAAAA. (*Valadez v. CSX Intermodal*

Terminals, Inc. (N.D.Cal. Mar. 15, 2019) 2019 WL 1975460, at *8.)

The Ninth Circuit has also suggested that the ABC Test is likely preempted by the FAAAA—in a decision holding that the *Borello* test is *not* preempted. The court focused on the important differences between the two tests. (*Su*, *supra*, 903 F.3d at p. 964 [noting that, unlike *Borello*, "the 'ABC' test may effectively compel a motor carrier to use employees for certain services because, under the 'ABC' test, a worker providing a service within [a motor carrier's] usual course of business will never be considered an independent contractor"]; *id*. [unlike the ABC Test, the *Borello* test provides flexibility for motor carriers, because "[w]hether the work fits within the usual course of an employer's business is one factor among many — and not even the most important one"].)[8]

In contrast, the Third Circuit held that New Jersey's version of the ABC Test is *not* preempted by the FAAAA, but that holding reinforces the conclusion that the California ABC Test *is* preempted. (*Bedoya v. Am. Eagle Express Inc.* (3d Cir. 2019) 914 F.3d 812, 824.) Specifically, Prong B of the New Jersey ABC provides that a worker is an employee unless she performs work "outside the [employer's] usual course of

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[8] The Eastern District of California has twice come to the opposite conclusion, finding California's ABC Test not preempted by the FAAAA. (*Henry v. Cent. Freight Lines, Inc.* (E.D.Cal. Jun. 13, 2019) 2019 WL 2465330, at *7; *W. States Trucking Ass 'n v. Schoorl* (E.D.Cal. Mar. 29, 2019) 377 F.Supp.3d 1056, 1070-1072.) But both of those cases relied solely on precedent finding the *Borello* test not preempted because it does not prevent the use of independent contractors and failed to evaluate whether the substantively different ABC Test *does* prevent motor carriers from using independent contractors to drive trucks. Thus, the Court finds *Henry* and *Schoorl* unpersuasive.

business . . . *or [performs such service] outside of all the places of business of [the employer].*" (*Id*. at p. 824, quoting N.J. Stat. Ann. § 43:21-19(i)(6)(B), emphasis added, alterations in original.) The "or" clause is pivotal because, as the Third Circuit explained, it provides motor carriers a viable "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.' (*Ibid.*)

The record before the Court in this case confirms the common-sense conclusion that AB 5 would have a substantial impact on trucking prices, routes, and services, as motor carriers in California revamp their business models either to utilize only employee drivers or attempt to satisfy the business-to-business exception. As the evidence shows, in those circumstances where Defendants have contracted with licensed motor-carriers to transport loads, the cost of such transport was nearly triple the cost of using independent owner-operators for the same route. (The People's Opp. Br. at pp. 10-11 [demonstrating that contracted licensed motor-carriers earned $160 for a route from "Sears c/o Cal Cartage" to "Yusen Terminals Inc" whereas owner-operators earned $65 for the same route].) That is precisely the sort of inefficiency Congress sought to preempt.

Finally, this Court points out that a finding of FAAAA preemption does not mean these cases will cease. To the contrary, the UCL claims in this case will proceed under the *Borello* standard, just as AB 5 contemplates. (AB 5, § 2(a)(3).) That is the same result the California Supreme Court reached in *Pac An-*

chor and the same standard Plaintiff intended to apply when it filed its Complaint in January 2018, which Plaintiff says it modeled off the *Pac Anchor* complaint.

V. Conclusion

Because Prong B of the ABC Test under both *Dynamex* and AB 5 prohibits motor carriers from using independent contractors to provide transportation services, the ABC Test has an impermissible effect on motor carriers' "price[s], route[s], [and] service[s]" and is preempted by the FAAAA. (49 U.S.C. § 14501(c)(1).) Defendants' motion is **GRANTED** on that basis, and **DENIED** without prejudice as to Defendants' other arguments.

Furthermore, and pursuant to Code of Civil Procedure § 166.1, the Court finds that the question of whether the FAAAA preempts the ABC Test as implemented by *Dynamex* and AB 5 is "controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation."

DATED: January 8, 2020

By: _____
Hon. William F. Highberger

APPENDIX G

Statutory Provisions Involved

49 U.S.C. § 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.

California Labor Code § 2275

(a) As used in this article:

(1) "Dynamex" means Dynamex Operations W. Inc. v. Superior Court (2018) 4 Cal.5th 903.

(2) "Borello" means the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341.

(b)

(1) For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(2) Notwithstanding paragraph (1), any exceptions to the terms "employee," "employer," "em-

ploy," or "independent contractor," and any extensions of employer status or liability, that are expressly made by a provision of this code, the Unemployment Insurance Code, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of "employee" in subdivision 2(E) of Wage Order No. 2, shall remain in effect for the purposes set forth therein.

(3) If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello).

California Labor Code § 2276

Section 2775 and the holding in Dynamex do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions:

(a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ("business service provider") contracts to provide services to another such business or to a public agency or quasi-public corporation ("contracting business"), the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied:

(1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.

(3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for

services to be performed, as well as the due date of payment for such services.

(4) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.

(5) The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business.

(6) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.

(8) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

(9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.

(10) The business service provider can negotiate its own rates.

(11) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

(12) The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

(b) When two bona fide businesses are contracting with one another under the conditions set forth in subdivision (a), the determination of whether an individual worker who is not acting as a sole proprietor or formed as a business entity, is an employee or independent contractor of the business service provider or contracting business is governed by Section 2775.

(c) This section does not alter or supersede any existing rights under Section 2810.3.

Mass. Gen. Laws ch. 49, § 148B

(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters 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 nature as that involved in the service performed.

(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section.

(c) An individual's exercise of the option to secure workers' compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section.

(d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. Who-

ever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section.

(e) Nothing in this section shall limit the availability of other remedies at law or in equity.

820 Ill. Comp. Stat. § 115-2

For all employees, other than separated employees, "wages" shall be defined as any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties, whether the amount is determined on a time, task, piece, or any other basis of calculation. Payments to separated employees shall be termed "final compensation" and shall be defined as wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the 2 parties. Where an employer is legally committed through a collective bargaining agreement or otherwise to make contributions to an employee benefit, trust or fund on the basis of a certain amount per hour, day, week or other period of time, the amount due from the employer to such employee benefit, trust, or fund shall be defined as "wage supplements", subject to the wage collection provisions of this Act.

As used in this Act, the term "employer" shall include any individual, partnership, association, corporation, limited liability company, business trust, employment and labor placement agencies where wage payments are made directly or indirectly by the agency or business for work undertaken by employees under hire to a third party pursuant to a contract between the business or agency with the third party, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is gainfully employed.

As used in this Act, the term "employee" shall include any individual permitted to work by an employer in an occupation, but shall not include any individual:

(1) who has been and will continue to be free from control and direction over the performance of his work, both under his contract of service with his employer and in fact; and

(2) who performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees; and

(3) who is in an independently established trade, occupation, profession or business.

The following terms apply to an employer's use of payroll cards to pay wages to an employee under the requirements of this Act:

"Payroll card" means a card provided to an employee by an employer or other payroll card issuer as a means of accessing the employee's payroll card account.

"Payroll card account" means an account that is directly or indirectly established through an employer and to which deposits of a participating employee's wages are made.

"Payroll card issuer" means a bank, financial institution, or other entity that issues a payroll card to an employee under an employer payroll card program.

N.J. Stat. Ann. § 43-21-19

Definitions. As used in this chapter (R.S.43:21-1 et seq.), unless the context clearly requires otherwise:

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(i) (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.