No. 23-_____

In the Supreme Court of the United States

SIERRA NEVADA TRANSPORTATION, INC.,
Petitioner,

v.

NEVADA TRANSPORTATION AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federally-licensed limousine company state a valid claim for relief under 42 U.S.C. §§ 1983 and 1985 against state regulators for violating the dormant Commerce Clause, where the company attempts to provide ground transportation to airline passengers in the stream of commerce as one leg of a passenger's continuous, pre-arranged interstate trip and state regulators prevent the federally-licensed company from providing its passenger services because it does not possess a state-issued certificate of public necessity and convenience.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Sierra Nevada Transportation, Inc.

Respondent and Defendant-Appellee below

- Nevada Transportation Authority ("NTA")

CORPORATE DISCLOSURE STATEMENT

Petitioner Sierra Nevada Transportation, Inc. submits this Corporate Disclosure Statement pursuant to Supreme Court Rule 29.6.

Petitioner is a corporation organized under the laws of Nevada. Sierra Nevada Transportation, Inc. does not have corporate parents.

No publicly-held corporation owns 10% or more of the stock of Sierra Nevada Transportation, Inc.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

No. 22-15823

Sierra Nevada Transportation Inc., *Plaintiff-Appellant,* v. Nevada Transportation Authority, Division of the Nevada Department of Business and Industry, *Defendant-Appellee.*

Date of Final Opinion: October 18, 2023

U.S. District Court for the District of Nevada

No. 3:21-cv-00358-LRH-CLB

Sierra Nevada Transportation Inc., *Plaintiff,* v. Nevada Transportation Authority, Division of the Nevada Department of Business and Industry, *Defendant.*

Date of Final Order: May 18, 2022

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Sierra Nev. Transp., Inc. v. Nev. Transp. Auth.*, No. 22-15823, 2023 U.S. App. LEXIS 27677, 2023 WL 6871575 (9th Cir Oct. 18, 2023).

The order of the district court is reported at *Sierra Nev. Transp., Inc. v. Nev. Transp. Auth.*, No. 3:21-cv-00358-LRH-CLB, 2022 U.S. Dist. LEXIS 89309, 2022 WL 1569191 (D. Nev. May 18, 2022).

JURISDICTION

The opinion of the court of appeals was entered on October 18, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and implementation of Article I, Section 8, Clause 3 of the United States Constitution:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. ("Commerce Clause").

The case also involves application of 42 U.S.C. §§ 1983 and 1988, which remedy violations of rights secured by the Constitution and laws of the United States by persons acting under the color of state law. (App.29a).

STATEMENT OF THE CASE

Petitioner is a federally-licensed motor carrier operating an airport limousine service providing ground transportation to and from Reno Tahoe International Airport, Sacramento International Airport, San Francisco International Airport and various private jet centers in both Nevada and California. App.34a.

Petitioner's clients are third party booking companies who book ground transport for flight crews and airline passengers as the beginning or ending leg of a pre-arranged, continuous interstate trip. Because Petitioner operates almost exclusively through third-party pre-booking only, to and from airports only, Petitioner does not advertise or operate as a taxi service for the public, and does not pick up random fares for trips to points around town. App.34a.

In the case of Reno Tahoe International Airport, Petitioner's business consists of three types of bookings:

(a) airline crews scheduled through a company in New York;

(b) out-of-state business and vacation travelers booked by travel agents or other third party companies;

(c) and on very rare occasions, trips prearranged and paid for in advance directly by the passenger.

Id.

Virtually all of Petitioner's business is ground transport of airline crews and business or vacation travelers booked through third party travel agencies or companies. Rarely does any passenger directly book and pre-pay for a trip. App.36a.

In the case of airline crews, Petitioner's pick-ups are scheduled by a company in New York that contracts directly with the airlines. Petitioner typically picks up the airline crew at Reno airport as scheduled and transports the crew to a hotel in Reno, returning as scheduled to transport the crew back to the airport. The New York company takes all reservations and sends Petitioner a schedule two weeks in advance for the following month. For example, Petitioner receives the schedule for the entire month of February on January 15th. The New York company bills the airlines and pays Petitioner about 30 to 45 days after the month is complete. App.34a.

In the case of prearranged trips booked by travel agencies or other third parties for out-of-state business and vacation travelers, these trips are booked through national and international third-party ground transportation companies, travel agents, casinos, medical transportation providers and others. The travel is arranged and paid for by the third-party companies. The third-party company sends Petitioner a schedule for transporting the client to and from the airport in Reno. On occasion the schedule will consist of a pick-up at Reno airport and travel to a hotel, then at a later

time in the same day or next day, a pick-up from the hotel for a meeting, and from the meeting back to the airport. Occasionally, when conventions are in town, a charter is pre-arranged, weeks to a few days in advance, as directed, for a 6-to-12 hour block each day for several days and then back to the airport. In the case of Harrah's Casino at Lake Tahoe, for example, Harrah's prearranges a package which includes a pick-up at Reno airport to the hotel and then the return trip to the airport. All travel for these customers is billed to the third-party companies and Petitioner is paid 30-45 days after the end of the month in which the trips occur. App. 35a.

In a few isolated instances, Petitioner has been called directly by passenger who is traveling from out-of-state who wishes to prearrange ground transportation from the airport to a hotel or resort, or the passenger is already in the Reno area and wishes to prearrange transportation to the airport to fly out-of-state. In most cases such arrangements are made weeks or months in advance, though they are sometimes arranged a day or two in advance. Nevertheless, the pick-up is prearranged and paid for in advance as one leg of a continuous interstate trip. App.36a.

Reno is close to Lake Tahoe, on the border of California and Nevada. Petitioner may transport a particular passenger from the Reno airport to a destination that is either on the California or Nevada side of Lake Tahoe. If the prearranged ground transportation is from the Reno airport to the Nevada side of the lake, Petitioner's ground transport leg may be entirely within a single state, but for the passenger, the ground transportation is the conclusion of a continuous, interstate journey, prearranged and paid for through

a third-party booking company, that began in another state and ended in Lake Tahoe, Nevada. The ground transport therefore is but a segment of a single trip in interstate commerce. App.36a.

The Nevada Transportation Authority ("NTA") is a Nevada state agency responsible, *inter alia*, for issuing a "Certificate of Public Necessity and Convenience" to motor carriers involved in *intra*state commerce. Per Nevada statute, it is unlawful for any fully regulated motor carrier to operate intrastate without the NTA certificate. App.41a.

As the name implies, "Certificate of Public Necessity and Convenience" is more than a mere license. It is a crime in Nevada to operate without one of these certificates while conducting intrastate transportation. *Intra*state means any point-to-point transportation within Nevada, *i.e.*, not crossing a state line (see discussion below, regarding the Gravel memo).

Three political appointees who serve at the pleasure of the Nevada governor decide who gets the Certificate of Public Necessity and Convenience. NRS 706.1511(7). Before granting a certificate, they hold a hearing at which the applicant must prove the following:

> (a) The applicant is financially and operationally fit, willing and able to perform the services of a common motor carrier and that the operation of, and the provision of such services by, the applicant as a common motor carrier will foster sound economic conditions within the applicable industry (emphasis added);

(b) The proposed operation or the proposed modification will be consistent with the legislative policies set forth in NRS 706.151 (one of the five legislative policies is (emphasis added):

> To discourage any practices which would tend to increase or create competition that may be detrimental to the traveling and shipping public or the motor carrier business within this State.

(c) The granting of the certificate or modification will not unreasonably and adversely affect other carriers operating in the territory for which the certificate or modification is sought (emphasis added);

(d) The proposed operation or the proposed modification will benefit and protect the safety and convenience of the traveling and shipping public and the motor carrier business in this State;

(e) The proposed operation, or service under the proposed modification, will be provided on a continuous basis;

(f) The market identified by the applicant as the market which the applicant intends to serve will support the proposed operation or proposed modification (emphasis added); and

(g) The applicant has paid all fees and costs related to the application.

See NRS 706.391.

The applicant bears the burden to satisfy each of these findings. NRS 706.391(5)(b). Thus, to obtain a certificate, Petitioner and federally-licensed carriers like Petitioner must prove to the NTA board that their provision of ground transport services will contribute to "sound economic conditions," will be supported by the market, will not create "detrimental" competition and will not harm anyone else already in the market.

The statutory scheme plainly is intended to protect the chosen few who already have received the blessing of a certificate from the NTA, and to allow board members wide discretion to bestow their largesse on certain newcomers with whom they find favor.

A reasonable and objective person could fairly conclude that the latitude afforded to the NTA board by the statutory scheme in Nevada opens the door to personal bias and favoritism. Be that as it may, Petitioner's principal, Priscilla Wilson, has not been one of the chosen ones to receive a certificate. Petitioner's First Amended Complaint points out that through her predecessor company, Ms. Wilson attempted without success over a period of years to obtain a Certificate of Public Convenience Necessity and Convenience. App.41a.

The First Amended Complaint alleges the obstacles posed by the statutory procedure for obtaining a Certificate of Public Necessity and Convenience, the difficulty in trying to gain the favor of the NTA, and the consequent significant burden on interstate commerce that results. App.41a.

Petitioner and other federally-licensed carriers operating in Nevada in the same manner as Petitioner who cannot obtain a Certificate of Public Necessity

and Convenience from the NTA face the constant threat that vehicles will be impounded, drivers detained, and companies fined for allegedly being engaged in *intra*state commerce without the permission of the NTA. App.46a. These are not mere threats; Petitioner and others similarly situated have had passenger trips interrupted, vehicles impounded, and impound fees and fines imposed. *Id.* (*see also* discussion, infra).

The First Amended Complaint alleges that generally, the federal regulatory scheme for motor carriers promotes competition in interstate commerce, encourages free market entry and requires less ongoing regulatory compliance, in comparison to the highly restrictive regulatory scheme adopted by the state of Nevada and administered and enforced by the NTA. App.40a. "Trying to get a permit to operate from the NTA is only one of many daunting obstacles under a system that values protectionism over competition." App.41a. For example, Ms. Wilson was able to obtain and to maintain a federal license but not a state Certificate of Public Necessity and Convenience. *Id.*

The First Amended Complaint alleges that under the Nevada regulatory framework, the NTA oversees a system that considers competition as potentially "detrimental to the . . . motor carrier business" in the state (NRS 706.151(e)). Hence, while obtaining federal licensing is relatively simple, the state imposes difficult, costly, and time-consuming hurdles to obtaining a certificate of public necessity and convenience or a permit to operate as a contract carrier. App.41a.

The NTA's enforcement policy prevents Petitioner from taking advantage of the benefits to be expected as a federally licensed motor carrier, set forth in the National Transportation Policy at 49 U.S.C. § 13101,

such as the opportunity to make the most productive use of its equipment resources, the opportunity to earn adequate profits, and the opportunity to be a part of a sound, safe, and competitive privately owned motor carrier system. App.48a.

Petitioner is subject to ongoing harm to its business due to its inability to solicit customers for additional contracts for the transportation of passengers which involve ground transport between the airport and a point in Nevada. (First Amended Complaint, ¶ 37, App.48a).

A notable aspect of this particular case is that historically, the NTA did not attempt to enforce its regulatory powers against interstate motor carriers such as Petitioner. This policy changed dramatically on July 15, 2019. App.42a. On that date, Dave Gravel, a supervisory investigator for the NTA, sent out an email which stated in relevant part:

> I'm sending you a quick email to let you know that our agency has had much discussion about interstate versus intrastate transportation – especially when it involves the airport.
>
> We have had some lengthy internal discussions, and what we have decided will be our enforcement direction moving forward is this:
>
> ANY land transportation which begins in Nevada (even if it is at the Airport) and terminates at another location in Nevada (even if THAT is at the airport) will be considered INTRAstate transportation (Point to point within Nevada) – subject to citation and the impoundment of the vehicle used for

> any non-certificated carrier. I believe that you were previously given an opinion that if the pickup or drop off was at the Airport for an out-of-state traveler, and that land transportation was pre-arranged to go to or arrive from a hotel in Nevada, that would be considered interstate transportation. This opinion will not be the [sic] our enforcement stance moving forward.
>
> Please understand that after much discussion, that is not going to be the view of our agency moving forward, and we will immediately begin enforcing the Nevada Statutes in the manner described – which is ANY point to point trips within Nevada require certification from the Nevada Transportation Authority. Although you may feel differently, I feel it is important for you to understand how our enforcement will be handled moving forward.

Id.

Petitioner's predecessor entity was Lakeshore Enterprises, Inc. ("Lakeshore"). App.43a. In response to the Gravel email, Lakeshore petitioned the board of commissioners of the NTA, challenging the constitutionality of the new policy on the basis that Lakeshore was engaged in interstate, rather than *intra*state, commerce, and citing the relevant Commerce Clause case authorities. Lakeshore requested a declaratory order or advisory opinion from the NTA Board of Commissioners. *Id.*

At the hearing on Lakeshore's request before the 3-member board on July 22, 2020, the board voted to deny Lakeshore's request for a declaratory order or

advisory opinion. App.44a. At the conclusion of the hearing, the board chairman told Lakeshore's counsel:

> As I said at the beginning of this discussion, we do not have jurisdiction to interpret federal law that may be subject to more than one interpretation. So why don't you go to District Court, ask for a dec relief action, that will exhaust your administrative remedies, then you take that up to the federal court. I mean, I'm not going to tell you how to practice law but that's what I would do.

On July 12, 2020, Petitioner had picked up a flight crew at Reno airport according to Petitioner's standard prearranged contract with the New York company that books ground transportation to the crew's hotel. For this trip, the NTA issued Petitioner a citation for not having a certificate of public convenience and necessity. At the ensuing hearing, proof was shown that the passengers were pilots, though they were deadheading and thus not wearing uniforms. The board's rationale for issuing the fine was that the flight crew was not in uniform and thus there was no way for the NTA to know whether the passengers were actually pilots. But at the hearing, the board imposed a $1,000 fine against Petitioner, with full knowledge that the passengers were a flight crew.

On July 6, 2021, NTA investigators observed a vehicle owned and operated by Sunset Limousine ("Sunset") at Reno airport. Sunset operates in interstate commerce by providing limousine service for passengers with prearranged payment through third parties for completing interstate trips, in essentially the same manner as Petitioner. In his report, the NTA investigator stated that Sunset's owner "has been advised

several times that he is not to provide intrastate passenger transportation services to include point to point transportation from the Reno Tahoe International Airport to another location within the state of Nevada." After detaining the vehicle, two NTA investigators confronted the female passenger, who advised them that she had made arrangements through a travel agency for transportation from Reno airport to Edgewood Resort at Lake Tahoe, Nevada. Her statement was confirmed by paperwork in the vehicle. The two investigators impounded the vehicle and issued a citation for operating without a certificate of public necessity from the NTA.

Also on July 6, 2021, on a round trip pre-arranged and paid for by Harrah's Casino, Petitioner picked up an NBC employee at Reno airport who had flown in from Portland for the celebrity golf tournament at Lake Tahoe, Nevada. Petitioner provided the ground transportation for the NBC official up to Lake Tahoe. On the return trip on July 12, 2021 for his flight back to Portland, the NTA detained Petitioner's driver and impounded the vehicle at the airport while issuing a citation fine for allegedly engaging in intrastate transportation without having a certificate of public convenience and necessity from the NTA.

On August 13, 2021, Petitioner filed a complaint for declaratory relief and injunction in U.S. District Court for the District of Nevada. The District Court had jurisdiction of this action under 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States, specifically, the United States Constitution, Article I, Section 8, Clause 3 ("Commerce Clause") and 42 U.S.C. §§ 1983 and 1988, which remedy violations of rights secured by the Con-

stitution and laws of the United States by persons acting under the color of state law.

The District Court granted the NTA's motion to dismiss Petitioner's First Amended Complaint, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The court's decision distinguished between airline employees and airline passengers. It reasoned that flight crews are employees of the airline. Contracting for flight crews' ground transport "directly involve[s] interstate travel" and thus cannot be regulated by the NTA, the court held. In contrast, ground transport of passengers who travel on the same plane as the flight crew does not involve "a contract with an interstate transportation provider to accommodate its employees" and is *intra*state commerce that the NTA can regulate. The court also found that because the NTA asserted in the litigation that it does not enforce its laws against transporting flight crews, Petitioner could not state a claim for relief against the NTA as to the flight crews. The District Court then entered its judgment dismissing the entire action.

On appeal to the Ninth Circuit Court of Appeals, the appeals court affirmed by a 2-1 vote.

The Ninth Circuit majority held that Petitioner lacked standing to appeal the district court's ruling as to the airline crews, because even though trips involving flight crews involve interstate commerce, the NTA had asserted in the litigation that the NTA would not enforce state laws where a flight crew was being transported. The dissenting judge pointed out that notwithstanding the NTA's litigation position, the NTA's policy as stated in the Gravel email made no exception for flight crews. The dissenter further observed that Petitioner's pleading showed that the

NTA had in fact issued a $1,000 fine against Petitioner following a hearing in which the board acknowledged that the passengers being transported were a flight crew.

As to passengers, the court unanimously said it would "assume, without deciding" that Petitioner's "prearranged transportation of out-of-state passengers from the Reno airport to destinations in Nevada and back constitutes interstate commerce." Even so, the court ruled, Petitioner's First Amended Complaint did not state a claim under the Commerce Clause because the State of Nevada has concurrent power with the federal government to regulate commerce, so long as the state's regulations do not discriminate against interstate commerce and do not impose undue burdens on interstate commerce. The court held that neither discrimination nor an undue burden were present here, and that the NTA's regulation of Petitioner effectuated a legitimate local interest (public safety) with effects on interstate commerce that were only "incidental".

REASONS FOR GRANTING THE PETITION

This petition for writ of certiorari should be allowed because the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and with the decisions of other circuit courts involving the same important matter.

When this action was filed in 2021, Petitioner justifiably thought that it had well-established prece-

dent to follow in pursuing a declaratory and injunctive relief claim against the NTA under 42 U.S.C. §§ 1983 and 1985 for violation of the Commerce Clause. There is no question that rights under the Commerce Clause may be enforced under § 1983. *Dennis v. Higgins*, 498 U.S. 439, 442, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). Respectfully, despite the decision of the 9th Circuit almost 90 days ago, Petitioner still believes that its First Amended Complaint states a valid claim for relief against the NTA.

The chief precedent that guided Petitioner in pursuing this case—this Court's decision in *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed 2010 (1947) – was followed in decisions of the 3rd, 4th, 5th, 11th and D.C. Circuit Courts of Appeal and federal district courts. Each court of appeal and district court decision involved fact patterns so similar to Petitioner's circumstances that it seemed inevitable that the reasoning from *Yellow Cab* would be applied in this case to reach the conclusion that the NTA violated the Commerce Clause by prosecuting Petitioner for lawfully engaging in interstate commerce as a federally-licensed motor carrier at Reno Tahoe International Airport. At the very least, Petitioner did not anticipate a court sustaining a challenge to Petitioner's pleading for failure to state a claim on the facts of this case.

Yellow Cab was decided by this Court in 1947. At that time, many different railway companies had stations in Chicago. Passengers arriving at one station would take a taxi to another railway station to continue their travels. The oft-quoted portion of this Court's opinion states:

> The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. (Emphasis added).

Yellow Cab, at 228-229, 67 S.Ct. at 1566, 91 L.Ed. at 2019. *Yellow Cab* established the principle that the interstate nature of ground transport as part of a passenger's interstate rail journey is to be considered from the perspective of the passenger and in relation to the entire journey of that passenger. *Yellow Cab* endorsed a view of interstate commerce that is "an intensely practical concept drawn from the normal and accepted course of business." *Id.* at 231, 67 S.Ct. 1567, 91 L.Ed. 2020. This practical view was to be from the perspective of the passenger, not from the perspective of the employees of the train or taxi carrying the passenger. This basic principle from *Yellow Cab* has been lost by the NTA as its policy draws an unwarranted distinction between employees of the interstate carrier and its passengers (*see* discussion below).

Following the lead of *Yellow Cab,* the Fourth Circuit in *Airline Transportation Inc. v. Tobin*, 198 F.2d 249

(4th Cir. 1952) held that a company that contracted with three airlines, which made 26 interstate flights per day into and out of the Raleigh-Durham Airport, to provide airline passengers with limousine transport between North Carolina cities and the airport was operating in interstate commerce and thus subject to the Fair Labor Standards Act. The Third Circuit in *Southerland v. St. Croix Taxicab Association*, 315 F.2d 364 (3rd Cir. 1963) held that transporting passengers between the airport and their hotels in St. Croix pursuant to prearranged contracts with third parties, including travel agents and others, was the continuation of an interstate trip and that the attempt to restrict transportation from the airport solely to a local taxi company registered with the territorial government violated the Commerce Clause of the United States Constitution. The Fifth Circuit in *Charter Limousine, Inc. v. Dade County Board of County Commissioners*, 678 F.2d 586 (5th Cir. 1982) held that a limousine service operating through a nationwide system that scheduled pickups of passengers arriving on interstate flights whose ground transportation was prepaid as part of a tour package or other prearrangement was operating within the stream of interstate commerce and Dade County's attempt to allow only a local taxi company to operate at the airport violated the Commerce Clause. The D.C. Circuit held in *Pennsylvania Public Utility Commission v. ICC*, 812 F.2d 8 (D.C. Cir. 1987) that a limousine company that provided ground transportation pursuant to a contract with United Airlines to take flight crews from the airport to overnight accommodations in the same state was interstate commerce and exempt from the state's ability to regulate. The Eleventh Circuit in *Walters v. Am. Coach Lines of Miami, Inc.*, 575 F.3d 1221, 1224-

25 (11th Cir. 2009) held that a private motor carrier holding all necessary authorizations from the Federal Motor Carrier Safety Administration and providing single-state transportation between the cruise ship and hotels and airports pursuant to written contracts with the cruise lines was operating in interstate commerce because the ground transportation was but one segment in a continuous interstate or international move.

In an on-point district court decision which incorporates the reasoning of *Yellow Cab* and its progeny, the court in *East West Resort Transportation v. Binz*, 494 F.Supp.2d 1197 (D. Colo. 2007) observed that the federally-licensed motor carrier of passengers operating exclusively in Colorado, who provided transportation to and from Denver International Airport and Eagle Airport to and from various Colorado ski resorts was operating in interstate commerce. The state attempted an enforcement action against the carrier for charging and advertising rates different than those approved and on file with the state. The carrier sued for declaratory relief pursuant to 42 U.S.C. § 1983 and sought attorney's fees pursuant to 42 U.S.C. § 1988 for violation of its rights under the Commerce Clause on the basis that the state lacked jurisdiction because its authority was pre-empted by federal law. The court granted the declaratory relief sought by the carrier, noting that "[t]here is no genuine dispute here that passengers traveling from outside of Colorado to a ski resort do not end their journey at the airport, they end their interstate journey at the resort . . . This kind of prearranged system, like that in *Charter Limousines*, is sufficiently linked to the overall interstate journey to qualify as interstate."

When Petitioner filed the instant case and cited the foregoing authorities, the NTA responded with a peculiar stance. The NTA argued that Petitioner's transporting of flight crews between the Reno Airport and points in Nevada was interstate commerce, while transporting passengers who traveled on the same interstate flight was not. The distinction the NTA drew between flight crews and airline passengers was, and is, legally without precedent. Creating this dichotomy spawned a host of irreconcilable problems that have infected this case ever since (see discussion, below). The district court's and Ninth Circuit's failures to reject the NTA's stance outright is a paramount and compelling reason for the intervention of this Court to state the law and reconcile the Ninth Circuit with the rest of the circuit courts of appeal.

Rather than directly address the obvious conflict between the NTA's stance and the federal precedents including *Yellow Cab* and its progeny, the district court's decision simply avoided mentioning the federal precedents. Petitioner then argued on appeal to the Ninth Circuit that the district court's adoption of the NTA's strange line-drawing between flight crews and passengers was contrary to the *Yellow Cab* and the circuit courts of appeals decisions that follow *Yellow Cab*.

The Ninth Circuit had a clear opportunity to follow *Yellow Cab* and adopt the position of all the other circuits by holding that since the NTA acknowledged that pre-booked ground transport of flight crews constitutes interstate commerce, then so does pre-booked ground transport of the interstate passengers.

The Ninth Circuit majority passed. Rather than directly address the NTA's legally baseless distinction between flight crews (interstate) and passengers (intrastate), the Ninth Circuit tried to circumvent the problem entirely by holding that that Petitioner lacked standing to raise any issue about flight crews, since the NTA's litigation posture was that the NTA would never prosecute Petitioner for transporting a flight crew anyway. The majority's tactic sparked a strong and excellent dissent on the standing issue. The dissenting judge pointed out that Petitioner clearly had standing to sue for violation of the Commerce Clause respecting the flight crews. The dissent properly noted that the NTA's written policy of prosecuting "ANY" "intrastate" trips does not contain any exception for flight crews. She cited to the First Amended Complaint in which Petitioner had plausibly pleaded as a matter of fact that the NTA had fined Petitioner $1,000 for transporting a flight crew after the NTA's policy was announced. By basing its decision on assumed facts that were contradictory to the plausibly-pleaded First Amended Complaint, the majority had violated cardinal rules of pleading that this Court promulgated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009). The dissenter was of course outvoted, but her analysis on the standing ruling is correct beyond reproach.

The problem that permeates the Ninth Circuit's position, and which compels its review by this Court, is that the Ninth Circuit majority's decision, in contrast to every other circuit, adopts the inherently illogical distinction between ground transport of flight crews versus passengers. The absurdity of this distinction is

exposed by the NTA's and the Ninth Circuits "public safety" argument.

Initially, lest it be overlooked, the First Amended Complaint alleges that Petitioner is licensed by the Federal Motor Carrier Safety Administration. The pleading further alleges that the FMCSA has safety rules, some which are found in 49 CFR Parts 350-399, while commercial regulations for for-hire transportation of passengers are found in 49 CFR Part 365, among other places. So "public safety" is covered by the FMCSA regulations.

Next, the Ninth Circuit decision accepts the NTA's position on the one hand that Petitioner has a Constitutional right under the Commerce Clause to transport flight crews to and from the airport. On the other hand, the Ninth Circuit in this case holds that Petitioner supposedly has no Commerce Clause right to transport the passengers under its federal motor carrier license, and must submit to state regulation, because the state has the right to enforce its "public safety" regulations concurrent with federal regulations. But the flight crews are traveling in the same vehicles, with the same drivers, headed to the same or similar destinations as the passengers. To be genuine and sincere, the state's interest in "public safety" must be the same for the pilots as the passengers. If the federally-licensed Petitioner can safely transport the flight crews without having a Certificate of Public Necessity and Convenience, then it can safely transport the passengers.

Further, the Ninth Circuit's decision engrafts a "public safety" justification for state regulation of Petitioner which, respectfully, cannot be justified by the facts of this case. The decision cites case law holding that "the Commerce Clause generally does not

preempt state licensing requirements related to public safety." (App.6a). The Ninth Circuit decision then states "The NTA's licensing requirement is 'state legislation in the field of safety where the propriety of local regulation has long been recognized." *Id.*

The Ninth Circuit's description of the state's interest in requiring Petitioner to obtain a Certificate of Public Necessity and Convenience as being "licensing requirements related to public safety" clearly is inapt. The facts of this case are that the NTA is barring Petitioner from transporting passengers to and from Reno Airport without a state-issued Certificate of Public Necessity and Convenience. As explained above, the Certificate of Public Necessity and Convenience is a protectionist piece of state legislation in favor of existing holders of certificates. An applicant motor carrier has to prove its entry into the market will not harm (be overly competitive with) other motor carriers, that there is space for the new business in the market and that "sound economic conditions with the applicable industry" support issuance of the certificate. Yes, amongst the standards, the NTA board is to consider whether issuance of the certificate would "benefit and protect the safety and convenience of the traveling and shipping public and the motor carrier business in this State," but the statute's purpose is to protect existing players already in the market from new competition, not to provide for enforcement of any "public safety" standards. It is called a "Certificate of Public Necessity and Convenience" because the NTA board issues the certificate when it decides that a new entrant into the market has carried its burden to show that the new business is a public necessity and that

the new entrant will make transportation more convenient for the public.

Understandably, the Ninth Circuit's decision in this case did not adopt the NTA's and district court's incorrect positions that transporting interstate passengers between the airport and a point in Nevada is "intrastate" commerce. The court said it would "assume, without deciding" that transportation of the passengers was interstate in nature. Of course, other circuits following *Yellow Cab* have all uniformly decided it is interstate commerce. However, in the instant case the Ninth Circuit still held that Petitioner failed to state a claim for relief because the Ninth Circuit has held that "the Commerce Clause generally does not preempt state licensing requirements related to public safety." *Kleenwell Biohazard Waste & General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 191, 392, 398 (9th Cir. 1995). Even if *Kleenwell* accurately stated the law, it would be inapplicable here. A Certificate of Public Necessity and Convenience is not a state licensing requirement related to public safety, it is a bottleneck created by the state of Nevada which allows the state to prevent Petitioner, Sunset Limousine, and others similarly situated from providing their services to the interstate traveling public. As such, it is a perfect example of a significant and impermissible burden on interstate commerce. *South Dakota v. Wayfair*, 138 S.Ct. 2080, 2090-91 (2018).

The Ninth Circuit opinion in *Kleenwell* is out of step with the other circuits. In *Southerland,* the court held:

> To force an individual engaged in an interstate journey which includes transportation by plaintiff's vehicle to abandon that transpor-

> tation for which he has paid and which will provide him with the type of vehicle and insurance protection which he desires and employ a local taxicab operator who may well not provide him with either is clearly to impose an unwarranted burden on the interstate commerce involved.

Southerland, at 369. The Third Circuit thus holds that the act of violating the Constitutional rights of the traveling public itself is an unwarranted burden on interstate commerce.

Similarly, in *Charter Limousine,* the motor carrier argued that Dade County's total prohibition of its right of access to the airport constituted an unreasonable burden on interstate commerce:

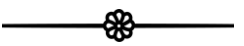
> Charter's operations are similar to those set forth in *Southerland*. *See also, Toye Bros., Yellow Cab Company v. Irby*, 437 F.2d 806 (5th Cir. 1971). It is the conclusion of this Court that Charter's prearrangements place their operations within the stream of interstate commerce, even though they take place wholly within a single state. The Court concludes, as did the district court, that the restrictions placed upon Charter by the Dade County Commission constitute an unreasonable burden upon interstate commerce.

Charter Limousine, at 589. The Fifth Circuit thus interprets the dormant Commerce Clause consistently with the Third Circuit, and differently than the Ninth Circuit does in this case.

Even prior Ninth Circuit precedent undercuts the Ninth Circuit's holding in this case that there is no

significant burden on interstate commerce caused by the NTA's enforcement policy and the requirement of obtaining a Certificate of Public Necessity and Convenience. In *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021), the court noted that the Ninth Circuit cases hold that only state regulation of activities that are inherently national or require a uniform system of regulation violates the dormant Commerce Clause. *Id.* at 1031. "The 'small number' of cases dealing with 'activities that are inherently national or require a uniform system of regulation' generally concern taxation or interstate transportation." *Id.* (emphasis added). This case fits that description.

At its most basic level, the Ninth Circuit has dismissed Petitioner's First Amended Complaint, with prejudice, for failure to state a claim. A claim for relief satisfies federal pleadings standards when the plaintiff pleads "enough facts to state a claim to relief that is plausible on its face." *Twombly*, at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, at 678. The First Amended Complaint satisfies these standards. The Ninth Circuit decision in this case conflicts with prior decisions of this Court and with the precedents of all the other circuits by holding otherwise.



CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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