NO. _____

In the Supreme Court of the United States

CALIFORNIA TRUCKING ASSOCIATION,
Petitioner,

v.

JULIE SU, IN HER CAPACITY AS LABOR COMMISSIONER OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAAA) completed Congress' deregulation of the transportation industry. To ensure that States would not undo federal deregulation through their own laws, the FAAAA provides that a state "may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to transportation of property." 49 U.S.C. § 14501(c)(1).

Despite this Congressional edict, the California Labor Commissioner uses California policy judgments to determine employment status of truck owners contracting with motor carriers. Contracts between these truck owners—referred to as "owner-operators" in the trucking industry—and motor carriers reflect the service and price terms on which the parties agree to transport property.

The California Labor Commissioner's employment determination disrupts these voluntarily undertaken contractual arrangements. California Trucking Association filed this case to enjoin the Labor Commissioner from interfering with these free market transportation agreements.

The Ninth Circuit concluded the FAAAA did not preempt the Labor Commissioner's actions because Congress only intended to deregulate the transportation industry's interactions with *consumers* and her actions do not "bind" motor carriers to a particular service or price.

Did the Ninth Circuit err by holding the FAAAA does not preempt California's interference with contractual agreements between motor carriers and owner-operators based on its creation of a "workforce exclusion" to preemption?

RULE 29.6 STATEMENT

California Trucking Association ("CTA"), a California nonprofit corporation, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, California Trucking Association (CTA), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 903 F.3d 953 (9th Cir. 2018) (App. 1a-28a), the opinion of the district court is published at 2017 WL 6049242 (S.D. Cal. Jan. 6, 2017) (App. 32a-43a), the opinion of the district court denying reconsideration is published at 2017 WL 6049243 (S.D. Cal. Feb. 2, 2017) (App. 29a-31a)

JURISDICTION

The Ninth Circuit entered its judgment on September 10, 2018. On November 26, 2018, Justice Kagan granted CTA's timely request for an extension of time to file a petition for certiorari to January 9, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution (Art. VI, cl. 2) provides in part that "the laws of the United States . . . shall be the supreme law of the land." Relevant provisions of the FAAAA, 49 U.S.C. § 14501(c)(1), are reproduced at App. 44a-51a. California Labor Code § 2802 is reproduced at App. 52a-53a.

STATEMENT OF THE CASE

In 1980, save for safety, licensure, and the federal leasing regulations (governing the content of leases between motor carriers and owner-operators), Congress ended federal regulation of the transportation industry. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980). Fourteen years later, Congress passed the FAAAA and finished deregulating the transportation industry. (H.R. Res. 2739, 103d Cong. (1994) (enacted)). In doing so, Congress included an express preemption provision precluding States from "enact[ing] or enforce[ing] a law … related to a price, route, or service of any motor carrier . . . with respect to transportation of property." 49 U.S.C. § 14501(c)(1) (App. 46a).

Reasonable minds can disagree about the wisdom of deregulation. There is no debate, however, about what it is—deregulation is the deliberate extrication of government from the affairs of private market participants. So the theory goes, unconstrained by governmental policies, demand for services and the willingness to provide those services will determine what services will be offered and at what price.

The FAAAA reflects Congress' decision to embrace the benefits of a free-market transportation marketplace and its corresponding "overarching goal [to] help[] ensure transportation rates, routes, and services [] reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality." *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (internal quotations omitted). The "free market," much like Adam Smith's

"invisible hand," is not a "place" or a "thing." Rather, the free market manifests itself through terms of contracts entered into between willing market participants.

Deregulation depends on more than just eliminating governmental restrictions on the formation of contracts. "The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 230 (1995) (internal quotation omitted).

This Court has explained that the FAAAA's preemption provision should be interpreted to mean that "States may not seek to impose their own public policies or theories of competition or regulation on the *operations of* [a motor] carrier." *Id.* at 229 n.5 (emphasis added). It is for this reason that the Court has differentiated between state law claims based on the voluntary undertakings of the parties (not preempted) from those based on "state-imposed" obligations (preempted). *Id.* at 224; *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 285 (2014).

The Labor Commissioner's actions fall decidedly on the preemption side of this line. "The decision whether to provide a service directly, with one's own employee, or to procure the services of an independent contractor is a significant decision in designing and running a business." *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 438 (1st Cir. 2016). [1]

[1] Courts have long recognized the benefits of motor carriers contracting with owner-operators to efficiently provide transportation service in response to motor carriers' customers'

Allowing State law to interfere with that decision "poses a serious potential impediment to the achievement of the FAAAA's objectives because a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them." *Id.*

The Commissioner unapologetically declares that her actions in assessing agreements between owner-operators and motor carriers is aimed at defeating rather than implementing, those contractual agreements. Her stated goal derives directly from the California Supreme Court's instruction that California's "employment determination" has nothing to do with the intent of the parties or the validity of their contract. Rather, it is guided solely by "focusing on the intended scope and purposes" of the California Labor Code. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d. 1, 19 (Cal. 2018).

Of course, Congressional deregulation does not give motor carriers free reign to run roughshod over owner-operators. The FAAAA does not preempt any claims under federal law, including under the Fair Labor Standards Act, 29 U.S.C. §§201-19.

More importantly, however, deregulation is premised on the assumption that market participants will act in their interest and gravitate to the business partner that provides the most favorable terms. Deregulation does not empower motor carriers to force owner-operators to contract with them. A contract

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fluctuating demand. *Am. Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 3030 (1953); *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975).

formed under duress or fraud is not a contract and is not a product of the free market. Even "the staunchest defenders of private institutions and limited government believe that public bodies must enforce rules against force and fraud." *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000).

The Labor Commissioner's actions are not efforts to relieve a party of their obligations to perform under a fraudulently induced agreement. To the contrary, the Labor Commissioner uses California law to determine whether the parties' agreement should be enforced *after* the parties have performed under the terms of their agreements, in some instances for *years*. Using state law to re-write the terms on which motor carriers transport property cannot be squared with Congress' deregulatory objectives.

Congressional Deregulation

This Court has addressed the preemptive scope of the FAAAA and its predecessor the Airline Deregulation Act (ADA), Pub. L. No. 95-504, 92 Stat. 1705 (1978), on several occasions—each time emphasizing the broad preemptive scope of their provisions. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992); *Wolens*, 513 U.S. at 222-24; *Rowe*, 552 U.S. at 370-71; *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 569 U.S. 641, 648-49 (2013); *Ginsberg*, 572 U.S. at 281–83. This case is yet another in a series of cases in which the Ninth Circuit has contravened this Court's precedents and the intent of Congress.

Congress enacted the ADA in 1978 with the purpose of furthering "efficiency, innovation, and low

prices" in the airline industry through "maximum reliance on competitive market forces." 49 U.S.C. §§ 40101(a)(6), (12)(A). The Act included a preemption provision enacted "[i]n order to 'ensure that the States would not undo federal deregulation with regulation of their own.'" *Rowe*, 552 U.S. at 368 (quoting *Morales*, 504 U.S. at 378). The ADA preemption provision provides that "'no State … shall enact or enforce any law … relating to rates, routes, or services of any air carrier.'" Airline Deregulation Act (ADA), Pub. L. No. 95-504, 92 Stat. 1705, 1708 (1978).

In 1980, Congress deregulated trucking. *See Rowe*, 552 U.S. at 368 (citing Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980)). Then, in 1994, Congress borrowed the preemption language from the ADA to preempt state trucking regulation. *Id.* (citing FAAAA, H.R. Res. 2739, 103d Cong. (1994) (enacted). The FAAAA preemption provision states: "A State … may not enact or enforce a 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). Consistent with its text and history, the Court has instructed that, in interpreting the preemption language of the FAAAA, courts should follow decisions interpreting the similar language in the ADA. *See*, *e.g.*, *Rowe*, 552 U.S. at 371.

This Court has consistently emphasized the broad preemptive scope of the FAAAA and ADA. Among other things, the Court has held that Congress' use of the phrase "relating to" indicates the "broad preemptive purpose" of the ADA's preemption clause. *Morales*, 504 U.S. at 386. In *Rowe*, this Court confirmed that the FAAAA has the same broad

preemptive scope and identified two triggers of preemption.

First, the Court held that "[s]tate enforcement actions having a connection with, or reference to" carrier "'rates, routes, or services' are pre-empted." *Rowe*, 552 U.S. at 370 (citations omitted). With respect to this trigger, the Court noted that it is irrelevant whether the claim at issue is "consistent" with federal regulation, and that Congress even intended to preempt state law claims that have only an indirect effect on prices, routes, or services. *Id.* Separately, the Court re-affirmed its holding in *Morales* that Congress *also* intended to preempt claims that "have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Id.* at 371.

Neither trigger requires a separate showing that the claim will be successful or the quantitative impact of the state law claim. For example, with respect to the first trigger, this Court had no trouble finding Rabbi Ginsberg's individual state law claim for breach of the duty of good faith and fair dealing preempted based solely on its "connection with" and "reference to" Northwest's prices and services. *Ginsberg*, 572 U.S. at 281. The Court never analyzed the merits of that claim or mentioned the undeniable fact that readmitting him to Northwest's frequent flier program would have *no* impact on the airline's prices or services.

Similarly, with respect to Congress' deregulatory objectives, this Court has made it clear that the free market can only operate if contracts are enforced according to their terms. "The stability and efficiency

of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time." *Wolens*, 513 U.S. at 230 (internal quotation omitted). The enforcement of contracts is binary; State law claims that impede their enforcement do violence to Congress' deregulatory objectives.

Driving home the breadth of Congress' deregulatory intent, this Court has offered state laws relating to "gambling" or "prostitution" as the type that would be too "tenuous, remote, or peripheral" to fall within the FAAAA's preemptive scope. *Morales*, 504 U.S. at 390.

The CTA

CTA is an association devoted to advancing the interests of its motor-carrier members that provide transportation services in California. Some of CTA's motor carrier members elect to provide delivery services by contracting with independent contractors who own their own trucks. These individuals are known in the transportation industry as "owner-operators." The federal government has long recognized that motor carriers enter into such arrangements with owner-operators and has expressly regulated certain disclosures that must be made in those contracts. *See* 49 C.F.R. pt. 376.

Under the terms of federally-regulated contracts, these independent contractors lease their trucks, along with a qualified driver to operate those trucks, to the motor carrier to provide delivery services. CTA's motor-carrier members also elect to provide delivery

services by hiring employee drivers to operate trucks that the motor carrier owns.

CTA's members make these elections based on the nature of the delivery services they provide in response to the fluctuating demands of the market and in the most efficient manner compelled by the circumstances.

The California Labor Commissioner

The Labor Commissioner is tasked with enforcement of California's labor laws. *See, e.g.,* Cal. Lab. Code §§ 90.3, 90.5, 95, 96.7. California's labor laws apply only to employer/employee relationships; they do not apply to non-employment relationships, including independent-contractor relationships. *See, e.g.*, *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067, 1074 (N.D. Cal. 2015) (finding independent contractors do not receive protections under California labor laws "because they generally are in a far more advantageous position" than employees). Some of California's labor laws impose obligations that, if applied to independent-contractor relationships in the transportation industry, would be inconsistent with the contractual arrangements between motor carriers and owner-operators.

For example, California Labor Code Section 2802 requires employers to indemnify their employees for necessary expenditures incurred in performing their duties for the employer. Cal. Lab. Code § 2802 (App. 52a). Under this provision, motor carriers are responsible for paying the expenses employee drivers incur in connection with operating the trucks the motor carriers own. On the other hand, because

owner-operators, not the motor carriers, own the trucks they lease to motor carriers, they contractually acknowledge that they, not the motor carrier, are responsible for the expenses associated with operating their trucks. (App. 8a, App. 15a, App. 21a)

While carrying out her responsibilities, the Labor Commissioner has used California's common law employment test to determine whether agreements between owner-operators and CTA's members will be enforced as written or whether they will be disregarded because California has made a public policy judgment that the owner-operators should be considered employees. If the Labor Commissioner determines that California considers the owner-operator to be an employee, she "replaces efficiency driven terms" "with external ones found in California's labor laws." (App. 15a, App. 21a) The Labor Commissioner's actions have the effect of re-writing terms under which owner-operators agreed to provide delivery services after the parties have performed under their contracts.

The Labor Commissioner's actions impermissibly impose California's "public policies or theories of competition or regulation on the *operations of* [a motor] carrier." *Wolens*, 513 U.S. at 229 n.5 (emphasis added). Indeed, in 2009, the Ninth Circuit concluded that the FAAAA would preempt a California policy judgment that motor carriers must use employee drivers instead of owner-operators. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). The court reasoned that California's attempt to do so was "a rather blatant attempt to decide who can use whom for [delivery] services" and

was therefore "a palpable interference with prices and services." *Id.* at 1056.

The Labor Commissioner's actions also directly interfere with the outcomes obtained in the free market. "The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time." *Wolens*, 513 U.S. at 230. Congress' deregulatory goals depend on the enforcement of free-market contracts, without which "the competitive market forces sought by Congress cannot operate." *Hickcox-Huffman v. U.S. Airways, Inc.,* 855 F.3d 1057, 1065 (9th Cir. 2017).

The District Court Proceedings

CTA sought a declaration that the FAAAA preempts the Labor Commissioner's use of California state law, embodied in the employment test from *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 769 P.2d 399 (Cal. 1989), to re-write the terms of privately-ordered agreements between motor carriers and owner-operators. CTA also sought an injunction to preclude the Labor Commissioner from continuing to use California's policy judgment regarding who should be considered an employee to defeat the enforcement of those agreements.

The Labor Commissioner filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, principally relying on two Ninth Circuit cases rejecting FAAAA preemption of certain California Labor Code provisions applied to *actual* employees of the motor carrier. *See Dilts v. Penske Logistics*, *LLC,* 769 F.3d 637 (9th Cir. 2014) (finding that the FAAAA did not

preempt California's meal and rest break laws); *Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184 (9th Cir. 1998) (rejecting claim that the FAAAA preempted application of prevailing wage statute).

The district granted the motion. In doing so, the district court disregarded its obligation to accept the facts in the Complaint as true. Instead of assessing whether the FAAAA preempted claims that would disrupt the terms of legitimate contracts governing the transportation of property, the district court characterized CTA's suit as an argument that "its members should be able to avoid California's labor laws (which include meal and rest break requirements) under the *guise* of labeling truck drivers as independent contractors." (App. 37a) (emphasis added). The district court concluded, without analysis, that "if the labor laws themselves are not preempted because they do not relate to rates, routes or services, California's determination as to which truck drivers are protected by such laws necessarily does not relate to rates, routes, or services either." (App. 37a-38a).

The court went on to find that the FAAAA did not preempt the application of the *Borello* factors because "they are generally applicable to all workers and do not concern the transportation of property." (App. 38a). The district court found this Court's holding in *Ginsberg* did not compel preemption because the Commissioner's application of the *Borello* factors "is not a 'common law claim' and does not "enlarge the contractual obligations that the parties voluntarily adopted." (App. 39a-40a). (internal quotations omitted). The district court distinguished the Ninth

Circuit's holding in *ATA* because, while the Commissioner requires motor carriers to satisfy California's definition of independent contractors, she is not mandating the use of employee drivers. (App. 40a-41a).

The Appeal

CTA appealed the district court's order and the Ninth Circuit Court of Appeals affirmed.

To reach this result, the Ninth Circuit ignored this Court's instruction that when a statute has an express preemption clause courts should "not invoke any presumption against pre-emption," but instead look to the actual language of the statute. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). The Ninth Circuit ignored the FAAAA's "general rule" of preemption and instead held that the "presumption against preemption" reflects that "Congress did not intend to preempt laws that implement California's traditional labor protection powers." (App. 12a).

The court acknowledged this Court's holding in *Wolens* that the preemption line is drawn "between what the State dictates and what the [carrier] itself undertakes." (App. 15a) (internal quotations omitted). Without any anchor in the text of the FAAAA or this Court's precedent, the Ninth Circuit nevertheless held that "that line does not control when the contractual relationship is between a carrier and its *workforce*." (App. 16a) (emphasis in original).

The Ninth Circuit also ignored this Court's instruction that "[s]tate enforcement actions having a connection with, or reference to," carrier "'rates,

routes, or services' are pre-empted." *Rowe*, 552 U.S. at 370 (internal quotations omitted). Instead, the court concluded that the FAAAA does not preempt the Labor Commissioner's actions because California's test for employment does not "bind" motor carriers "to a particular price, route or service." (App. 19a) (internal quotations omitted). The Ninth Circuit's "bind to" test is unmoored from this Court's jurisprudence and the language of the FAAAA.

The Ninth Circuit's holding cannot be squared with Congress' preemptive direction, as reflected in the text of the statute, and this Court's teachings regarding the FAAAA's broad preemptive scope.

REASONS FOR GRANTING THE WRIT

This case has all the hallmarks of a case warranting this Court's review (*see* S. Ct. Rule 10). The Ninth Circuit's FAAAA and ADA preemption jurisprudence has long been—and remains—hopelessly out of step with this Court's precedents. This Court has repeatedly emphasized the broad preemptive scope of the FAAAA and ADA, including recently in *Ginsberg*—a case out of the Ninth Circuit. But the Ninth Circuit has repeatedly ignored this Court's decisions and applied a preemption analysis that has no basis in the statutes' text, conflicts with this Court's precedents, and severely curtails the Acts' intended preemptive scope. The problem will not go away until the Ninth Circuit's mistaken preemption analysis is addressed. This Court's intervention is needed again.

I. The Ninth Circuit's Decision Conflicts with This Court's Precedent

The Ninth Circuit's decision requires that laws of general applicability must affirmatively regulate—and "bind" carriers to—prices, routes, and services before they can be preempted. This is an impermissibly demanding standard. The Ninth Circuit exacerbated the ramifications of applying this standard by concluding that common-law misclassification claims impacting a carrier's "workforce" cannot come within the FAAAA's preemptive scope. (App. 25a).

Four Courts of Appeal—the Ninth, First, Third, and Seventh—have addressed whether the FAAAA preempts State misclassification claims that interfere with contractual arrangements between motor carriers and owner-operators. *See Lupian v. Joseph Cory Holdings*, *LLC,* 905 F.3d 127 (3d Cir. 2018); *Cal. Trucking Ass'n v. Su*, 903 F.3d 953 (9th Cir. 2018); *Costello v. Beavex, Inc.,* 810 F.3d 1045 (7th Cir. 2016); *Schwann,* 813 F.3d 429. As discussed below, only the First Circuit—the circuit that this Court affirmed in *Rowe*—found that the FAAAA preempted these claims because the claim had a "reference to" the carrier's services. *Schwann*, 813 F.3d at 438.

The Third Circuit recited this Court's precedents regarding the FAAAA's preemption triggers but declined to find preemption on an interlocutory basis. *Lupian,* 905 F.3d at 136. In reaching its conclusion, the court improperly applied the "presumption against preemption." *Id.* at 131. The court acknowledged the significant implications of the misclassification claim's disruption of the carrier's

labor model "especially after services have been performed" but concluded that the carrier was obligated to quantify the *amount* of that disruption to trigger FAAAA preemption. *Id.* at 136. The court found the reasoning in the Seventh Circuit's *Costello* decision—that misclassification claims likely fall outside the FAAAA's preemptive reach because they do not "regulate affairs" between carriers and customers—persuasive. *Id.*

The Seventh Circuit found that the FAAAA did not preempt using a state law to alter the bargain between a motor carrier and an owner-operator because laws "that merely govern a carrier's relationship with its workforce [] are *often* too tenuously connected to the carrier's relationship *with its consumers* to warrant preemption." *Costello,* 810 F.3d at 1054 (emphasis in original).

The Ninth Circuit's decision below took *Costello* one step further by creating a categorical "workforce" exclusion from FAAAA preemption. (App. 16a, 25a). Specifically, the court held that even "if *Wolens* and *Ginsberg* draw a line between the permissible enforcement of contractual terms and the preempted enforcement of normative policies, that line does not control when the contractual relationship is between a carrier and its *workforce,* and the impact is on the *protections* afforded to that workforce." (App. 16a) (emphasis in original).

The decision below effectively ignores *all* of this Court's ADA and FAAAA precedent. The Ninth Circuit's adherence to its "binds to" test for laws of "general applicability" effectively eliminates the FAAAA's first preemption trigger—whether the claim

has a "connection with" or "reference to" a carrier's "prices, routes, or services." *Rowe*, 552 U.S. at 370. It is logically impossible for a law that is not directly aimed at a motor carrier to "bind" the motor carrier to a particular price, route, or service.

Similarly, the Ninth Circuit has staked its ground and cleared a path for lower courts to disregard the second FAAAA preemption trigger in a field rampant with litigation. Since *Morales*, this Court has held that state claims that "have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives" are preempted. *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390). In *Wolens*, the Court explained that the "stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made." 513 U.S. at 230. With a single sentence, the Ninth Circuit has wiped away this instruction for contracts impacting a carrier's "workforce." In doing so, it has given States free reign to impose their "own public policies or theories of competition or regulation on the *operations of* [a motor] carrier." *Id.* at 229 n.5.

The fact that four courts of appeal have considered the issue in the last two years demonstrates its nationwide importance. The fact that those courts have reached different conclusions regarding the FAAAA's preemptive scope while employing different analyses to do so, demonstrates the need for this Court's intervention.

II. The Circuits Are Split on the Scope of FAAAA Preemption

As discussed above, the Ninth Circuit below found that the FAAAA did not preempt the Labor

Commissioner's application of the *Borello* standard. The court's holding was predicated on its determination that the standard did not "bind" motor carriers "to a particular price, route, or service." (App. 19a). The court expanded the scope of its holding, finding that, in the misclassification context, courts need not even consider the scope of the FAAAA or its exceptions to preemption because "there is no clear intent to usurp the well-established test for triggering a State's traditional labor protection powers." (App. 25a). Without analysis, the court concluded that "the *Borello* standard is more comparable to a state regulation that *Rowe* described as not preempted." *Id.*

Through this analytical side-step, the Ninth Circuit disregarded this Court's pronouncements regarding Congress' preemptive intent. The court ignored the fact that the Labor Commissioner's assessment of the *Borello* standard had a "connection with" and "reference to" motor carrier services. As well as the fact that the Labor Commissioner's actions had the effect of replacing "efficiency-driven" contractual terms with "external ones found in California's labor laws." (App. 15a). Having created its own tautological preemption construct, the court concluded that this Court's holdings in *Ginsberg* and *Wolens* had no application "when the contractual relationship is between a carrier and its *workforce*." (App. 16a).

In stark contrast, the First Circuit in *Schwann,* adhered to this Court's precedents when analyzing whether the FAAAA preempted misclassification claims under the Massachusetts Wage Act, a law of general applicability. The court began by noting that its analysis—examining the "manner" in which the Massachusetts law would impact the motor carrier's

operations—was analogous to this Court's inquiry in *Gingsberg. Schwann,* 813 F.3d at 437.

The court found that applying the "B Prong" of the Massachusetts Wage Act—the only aspect of the law the motor carrier challenged—"requires a judicial determination of the extent and types of motor carrier services that FedEx provides." *Id.* at 437-8. The court recognized that the "decision whether to provide a service directly, with one's own employee, or to procure the services of an independent contractor is a significant decision in designing and running a business." *Id.* 813 F.3d at 438.

The court noted that state laws that interfered with a carrier's chosen business model was inconsistent with Congress' deregulatory goals and would "substantially restrain the free-market pursuit of perceived efficiencies." *Id.* Ultimately, the court concluded that the FAAAA preempted the application of the Wage Act's "B Prong," finding that it "poses a serious potential impediment to the FAAAA's objectives because a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them." *Id.*

After finding preemption, the court acknowledged the circuit split between its analysis the analysis the Seventh Circuit employed in *Costello.* Specifically, the court noted that the Seventh Circuit in *Costello* "did not consider the significance of the statute's requirement that the court define the carrier's scope of business, or the potential effects on routes of any binding change on incentive structures."

In *Costello,* the Seventh Circuit was called upon to decide whether the FAAAA preempted application of the Illinois Wage Payment and Collection Act. 810 F.3d at 1050. Like the carrier in *Schwann,* the courier company in *Costello* only challenged the application of the statute's "B Prong." *Id.* at 1055.

Relying solely on the fact that this Court has only had the occasion to address FAAAA preemption claims involving consumer transactions, the Seventh Circuit found that Congress only intended to deregulate motor carriers' transactions with consumers. *Id.* at 1055. In so doing, as the First Circuit observed, the Seventh Circuit completely disregarded the state law's "connection with" the courier's services and its impact on Congress' deregulatory goals.

Four courts of appeal have analyzed whether the FAAAA preempts State misclassification claims that interfere with contractual arrangements between motor carriers and owner-operators and come to different conclusions. Three of the four reached a result based on analyses totally at odds with the analytical framework this Court set forth in its FAAAA and ADA precedent. Each of these courts did so predicated on limitations on the preemptive scope of the FAAAA that find no home in the statute or this Court's precedent.

This Court has consistently embraced Congress' broad preemptive purpose in enacting the FAAAA and ADA. There is no support in either statute or this Court's precedent that would support limiting that intent to transactions with consumers. If this Court does not rectify the Ninth Circuit's error below, there

is little doubt that its "workforce" exclusion will take root in other circuits.

III. The FAAAA Preempts the Labor Commissioner's Application of California's Policy Judgment Regarding Who Should Be Considered An Employee

A. The FAAAA is not subject to the "presumption against preemption," and it has no exception to cover the Labor Commissioner's actions

When a statute has an express preemption clause courts should "not invoke any presumption against pre-emption," but instead look to the actual language of the statute to ascertain Congress' preemptive intent. *Puerto Rico, v. Franklin Cal. Tax-Free Tr.,* 136 S. Ct. 1938, 1946 (2016). On this score, Congress could not have been clearer: the FAAAA sets preemption as its "General Rule."

Congress expressly delineated the only categories of state laws that would escape preemption. Specifically, Congress excepted from preemption "highway route controls . . . based on the size or weight of the motor vehicle or the hazardous nature of the cargo" as well as safety regulations "with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A).

In *Rowe*, this Court rejected the notion that Congress intended to allow courts interpreting the FAAAA to expand the exceptions Congress enumerated. Rather, the Court examined the narrow list of state laws Congress expressly saved from preemption in 49 U.S.C. §§ 14501(c)(2) to (c)(3), and dismissed Maine's attempt to expand that list. *Rowe*,

552 U.S. at 374. The FAAAA contains no "workforce" exception to preemption.

B. The FAAAA preempts the Labor Commissioner's application of California's common law employment test

The Labor Commissioner's application of the *Borello* standard hits both FAAAA triggers. As discussed above, this Court has long held that "[s]tate enforcement actions having a connection with, or reference to," carrier "'rates, routes, or services' are pre-empted." *Rowe*, 552 U.S. at 370 (citations omitted). There is no question that the Labor Commissioner's application of the *Borello* standard has a "connection with" and "reference to" motor carrier services. The *sole purpose* of the Labor Commissioner's exercise is to determine whether the circumstances surrounding the manner in which owner-operators provided transportation services rendered them misclassified "employees" under California law. (App. 5a). The terms on which the parties agreed to provide transportation services constitute the *entirety* of their relationship. The Labor Commissioner's enforcement actions are a nullity without assessing motor carrier services.

The Ninth Circuit also confirms the Labor Commissioner's actions implicate the second FAAAA trigger. Specifically, the court acknowledged the "fact that the [Labor Commissioner's application of] the *Borello* standard could replace efficiency-driven terms in its members' contracts with external ones found in California's labor laws (*e.g.*, *sua sponte* reallocating responsibility for truck maintenance costs from

owner-operators to carriers)." (App. 15a). The Labor Commissioner's actions in this regard are diametrically opposed to Congress' deregulatory objectives. As this Court held, the "stability and efficiency of the market depends fundamentally on the enforcement of agreements freely made based on the needs by the contracting parties at the time." *Wolens*, 513 U.S. at 230.

If motor carriers do not have assurance that their contracts with owner-operators will be enforced, carriers will be chilled from entering into those agreements. And the transportation market will not "reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality." *Rowe*, 552 U.S. at 371 (internal quotations omitted).

CONCLUSION

Deregulation, like it or loathe it, is premised on the belief that, unrestrained by government, the market delivers the most efficient and productive outcomes. Through the FAAAA, Congress expressed its intent to eliminate state interference with market outcomes in an effort to "ensure transportation rates, routes, and services [] reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality." *Rowe*, 552 U.S at 371.

The Labor Commissioner's actions are aimed at defeating agreements freely entered into by market participants and run afoul of this Court's instruction that the FAAAA "is most sensibly read . . . to mean States may not seek to impose its own public policies

or theories of competition or regulation on the *operations of* [a motor] carrier." *Wolens*, 513 U.S. at 229 n.5 (emphasis added).

The Ninth Circuit had to ignore *all* of this Court's FAAAA and ADA precedent to achieve the result they reached. In doing so, it side-stepped the preemption analysis completely and created a categorical "workforce" exemption from preemption.

The courts of appeals were already split before the decision below. The Ninth Circuit's decision has created a massive limitation on Congress' deregulatory and preemptive goals in an area rampant with litigation. The circuit split—which spans from Massachusetts to California—demonstrates the nationwide importance of this issue and the need for this Court's intervention.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. No. 17-55133

CALIFORNIA TRUCKING ASSOCIATION,
Plaintiff-Appellant,
v.
JULIE SUE,
Defendant-Appellee.

OPINION

Appeal from the United States District Court for the
Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted March 7, 2018
Pasadena, California

Filed September 10, 2018

Before: A. Wallace Tashima, Richard A. Paez,* and
Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Tashima

*Following the death of Judge Reinhardt, who originally was a member of this panel, Judge Paez was randomly drawn to replace him. He has read the briefs, reviewed the record, and listened to a recording of oral argument.

SUMMARY**

Labor Law

The panel affirmed the district court's dismissal of an action seeking declaratory and injunctive relief regarding the Labor Commissioner of the State of California Department of Industrial Relations' use of a common law test, often referred to as the *Borello* standard, to determine whether a motor carrier has properly classified its drivers as independent contractors.

Classifications pursuant to the *Borello* standard impact what benefits workers are entitled to under the State's labor laws and the corresponding burdens placed on the entities that hire them. California Trucking Association, an association of licensed motor carriers, alleged that its "owner-operator" drivers were independent contractors, rather than employees. CTA alleged that the Commissioner's application of the *Borello* standard disrupted the contractual arrangements between owner-operators and motor carriers, which introduced inefficiencies into the transportation services market and was inconsistent with Congress's deregulatory goals under the Federal Aviation Administration Authorization Act.

The panel held that the *Borello* standard, a generally applicable test used in a traditional area of state regulation, is not "related to" prices, routes, or services, and therefore is not preempted by the FAAAA.

**This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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Miles E. Locker (argued), Department of Industrial Relations, California Division of Labor Standards Enforcement, San Francisco, California, for Defendant-Appellee.

OPINION

TASHIMA, Circuit Judge:

The issue in this case is whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") preempts the California Labor Commissioner's use of a common law test, often referred to as the *Borello* standard,[1] to determine whether a motor carrier has properly classified its drivers as independent contractors. Classifications pursuant to the *Borello* standard impact what benefits workers are entitled to under the State's labor laws and the corresponding burdens placed on the entities that hire them. We hold that the *Borello* standard, a generally applicable test used in a traditional area of state regulation, is not "related to" prices, routes, or services, and therefore is not preempted. By the FAAAA Accordingly, we affirm the district court.

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[1] See generally S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 403–07 (Cal. 1989).

FACTUAL AND PROCEDURAL BACKGROUND[2]

Plaintiff-Appellant California Trucking Association ("CTA") is an association devoted to advancing the interests of its motor carrier members.[3] CTA members are licensed motor carrier companies that manage, coordinate, and schedule the movement of property throughout California in interstate commerce. Based on factors such as efficiency and market demand, CTA members use either "company drivers" or "owner-operators" to haul freight. As expected, "company drivers" haul freight using trucks that are owned by the motor carrier; "owner-operators" use their own trucks. When CTA members use owner-operators, the parties enter into contracts providing, generally, that the owner-operators: (1) must provide the truck and a qualified driver to haul the freight; (2) must be responsible for operating expenses like truck

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[2] We accept the factual allegations in CTA's Complaint as true and construe them in the light most favorable to CTA. Soo Park v. Thompson, 851 F.3d 910, 918 (9th Cir. 2017). We reject CTA's contention that the district court failed to do the same. The district court was not required to accept the truth of any legal conclusions, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and the district court's summary of CTA's legal arguments does not, in any way, demonstrate that it applied an incorrect standard of review.

[3] "A 'motor carrier' is an individual, a partnership, or a corporation engaged in the transportation of goods; those engaged in interstate commerce are subject to, inter alia: Department of Transportation regulations; the Motor Carrier Acts; and the Motor Carrier Safety Acts." Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1049 n.4 (9th Cir. 2009) ("American Trucking") (citations omitted).

maintenance, repair, and refueling; (3) will, in turn, have control over whether and how to perform a haul; and (4) will then be paid at an agreed-upon rate. CTA alleges that owner- operators are independent contractors.

CTA filed suit against Defendant-Appellee Julie Su in her official capacity as Labor Commissioner of the State of California Department of Industrial Relations (the "Commissioner"). The Commissioner is responsible for enforcing the California Labor Code, which affords certain benefits and protections to workers who qualify as employees. As with any other industry, the Commissioner applies the *Borello* standard to assess owner-operators' claims that they have been misclassified as independent contractors and so denied certain benefits under the Labor Code. CTA alleges the Commissioner's application of the *Borello* standard disrupts the contractual arrangements between owner-operators and motor carriers, which introduces inefficiencies into the transportation services market and is inconsistent with Congress' deregulatory goals under the FAAAA. CTA therefore seeks a declaration that the FAAAA preempts the Commissioner's application of the *Borello* standard to disrupt these contracts, and corresponding injunctive relief barring the Commissioner from applying the *Borello* standard to motor carriers.

The Commissioner moved to dismiss CTA's Complaint under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion, concluding that the *Borello* standard used by the Commissioner was not preempted under the FAAAA.

The district court denied CTA's motion for reconsideration, and CTA timely appealed the dismissal of its Complaint.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's decision regarding preemption, *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 640 (9th Cir. 2014), as well as a dismissal under Rule 12(b)(6), *Soo Park*, 851 F.3d at 918.

DISCUSSION

A. Background Principles

This case involves a purported clash between a common law test used to enforce California's labor laws and a federal statute aimed at preventing States from undermining federal deregulation of interstate transport. We provide a brief overview of each, before explaining why the latter does not preempt the former.

1. The *Borello* Standard

In *Borello*, the California Supreme Court discussed at length the common law test for determining whether a worker is an employee or an independent contractor. *See* 769 P.2d at 403–07; *see also Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 15 (Cal. 2018) (describing *Borello* as "the seminal California decision on this subject"). "Under the common law, "'[t]he principal test of an employment relationship is

whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."'" *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014) (quoting *Borello*, 769 P.2d at 404). "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause . . . ." *Id.* Aside from the right to control, courts also consider a list of "secondary indicia" that inform the task of classifying workers. *See id.* Drawn from the Restatement Second of Agency, these include

> (a) whether the one performing services is engaged in a distinct occupation or business;
> (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation;
> (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job;
> (g) whether or not the work is a part of the regular business of the principal; and
> (h) whether or not the parties believe they are creating the relationship of employer- employee.

Borello, 769 P.2d at 404. The *Borello* standard is neither mechanical nor inflexible; different cases can and do demand focus on different factors. *See id.* While an affirmative agreement to classify a particular worker one way or another may be considered, it "is not dispositive, and subterfuges are not countenanced." *Id.* at 403. Instead, the *Borello* standard is applied with an eye towards the purpose of the remedial statute being enforced. *Dynamex*, 416 P.3d at 19–20. "In other words, *Borello* calls for the application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification . . . best effectuates the underlying legislative intent and objective of the statutory scheme at issue." *Id.*

We have applied the *Borello* standard when assessing misclassification claims in the motor carriage industry. *See, e.g.*, *Narayan v. EGL, Inc.*, 616 F.3d 895, 900–04 (9th Cir. 2010). Relevant here, the Commissioner applies the *Borello* standard when adjudicating and enforcing claims within her jurisdiction. If she were to determine that, under *Borello*, certain owner-operators are employees of a motor carrier, this could result in obligations under the California Labor Code that are inconsistent with the parties' contractual arrangements (*e.g.*, who is responsible for truck maintenance expenses). CTA contends the FAAAA thus compels the Commissioner and courts to accept the parties' agreements at face value. The Commissioner, in turn, seeks the power (as with any other employer) to look behind the

agreements and apply the *Borello* standard to ensure that owner-operators are, in fact, independent contractors.[4]

2. The FAAAA

The FAAAA expressly preempts certain state regulation of intrastate motor carriage. 49 U.S.C. § 14501(c)(1). "In considering the preemptive scope of a statute, congressional intent is the ultimate touchstone." *Dilts*, 769 F.3d at 642 (citation and internal quotation marks omitted). With express preemption, "we focus first on the statutory language, which necessarily contains the best evidence of Congress' pre- emptive intent." *Dan's City*

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[4] Shortly after argument in this case, the California Supreme Court decided Dynamex, which addressed the classification of workers for purposes of California wage orders. 416 P.3d at 4–7, 25–42. Dynamex held that the "suffer or permit to work" definition of "employ" in a particular wage order must be determined based on the "ABC" test – not the Borello standard. See id. at 7, 40. Under the "ABC" test, a worker must meet three, separate criteria to be considered an independent contractor. See id. at 7, 36–40. One criteria ("B") is "that the worker performs work that is outside the usual course of the hiring entity's business." Id. at 7, 37–38. Under Borello, this is one factor among many – and not even the most important one. See 769 P.2d at 404.

We do not believe Dynamex has any impact here (nor have the parties argued that it does). CTA seeks relief from California's common law definition of employee, as reflected in Borello. CTA has not alleged that the Commissioner employs the "ABC" test, nor has it sought relief on this basis. Moreover, Dynamex did not purport to replace the Borello standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections. See 416 P.3d at 7 n.5, 13, 29.

Used Cars, Inc. v. Pelkey, 569 U.S. 251, 260 (2013) (citation and internal quotation marks omitted). The FAAAA provides:

> (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 . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). This language resembles that found in the air carrier preemption provision of the Airline Deregulation Act ("ADA"), except for the FAAAA's inclusion of the phrase, "with respect to the transportation of property." *Compare id.*, *with* 49 U.S.C. § 41713(b)(1). ADA preemption cases can therefore be consulted to analyze FAAAA preemption. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370–71 (2008).[5]

In the context of the ADA and FAAAA, "[t]he phrase 'related to' embraces state laws 'having a connection with or reference to' carrier 'rates, routes, or services,' whether directly or indirectly." *Dan's City*, 569 U.S. at 260 (quoting *Rowe*, 552 U.S. at 370). While "related to" preemption is broad, this "does not mean the sky is the limit," or else "pre- emption

[5] The Commissioner does not dispute that the transportation of property is involved here, and so we focus on the "related to a price, route, or service" element of FAAAA preemption.

would never run its course." *Id.* (citation and internal quotation marks omitted). Thus, the FAAAA does not preempt state laws that affect a carrier's prices, routes, or services in only a "tenuous, remote, or peripheral . . . manner" with no significant impact on Congress's deregulatory objectives. *Rowe*, 552 U.S. at 371 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)) (alteration in original). Our task, then, is to discern on which side of the line the *Borello* standard falls: a forbidden law that significantly impacts a carrier's prices, routes, or services; or, a permissible one that has only a tenuous, remote, or peripheral connection. *Dilts*, 769 F.3d at 643.

Because this task has nuance, we may "turn . . . to the legislative history and broader statutory framework of the FAAAA" to better glean Congress' intent. *Id.* We have previously recounted the FAAAA's history and purpose in detail, so, for our purposes here, it is sufficient to note that Congress passed the FAAAA to achieve two broad goals. *See Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998). First, it aimed "to even the playing field between air carriers and motor carriers." *Id.* (citation and internal quotation marks omitted). Prior decisions applied ADA preemption to regulations of air carriers, but not motor carriers, which gave air carriers a competitive advantage. *Id.* The FAAAA was an attempt at "parity." *Dilts*, 769 F.3d at 644. Second, Congress believed deregulation would address the inefficiencies, lack of innovation, and lack of competition caused by non-uniform state regulations of motor carriers. *Mendonca*, 152 F.3d at

1187. We have described this as the FAAAA's "principal purpose," namely, "prevent[ing] States from undermining federal deregulation of interstate trucking through a patchwork of state regulations" – with Congress particularly concerned about States enacting "barriers to entry, tariffs, price regulations, and laws governing the types of commodities that a carrier could transport." *Dilts*, 769 F.3d at 644 (citations and internal quotation marks omitted).

We have also detailed what was *not* intended by the FAAAA. "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services." *Id*. Rather, its "driving concern" was preventing States from replacing market forces with their own, varied commands, like telling carriers they had to provide services not yet offered in the marketplace. *See Dan's City*, 569 U.S. at 263–64. Thus, when assessing preemption, we are cognizant that, "[a]lthough Congress clearly intended FAAAA to preempt some state regulations of motor carriers who transport property, the scope of the pre-emption must be tempered by the presumption against the pre-emption of state police power regulations." *Dilts*, 769 F.3d at 643 (citation omitted). To this end, we have held that Congress did not intend to preempt laws that implement California's traditional labor protection powers, and which affect carriers' rates, routes, or services in only tenuous ways. *Dilts*, 769 F.3d at 647–50 (meal and rest break laws); *Mendonca*, 152 F.3d at 1189 (prevailing wage law).

B. The FAAAA Does Not Preempt the *Borello* Standard

With our task and that background in mind, we turn to assessing whether the Commissioner's use of the *Borello* standard has significant, and therefore preempted, impact or only tenuous impact on a carrier's prices, routes or service. Relying heavily on Supreme Court precedent, CTA contends that the FAAAA preempts the *Borello* standard because the Commissioner's use of it can replace freely-bargained, efficiency-driven contract terms with California's policy judgment about what those terms ought to be.

True, the Supreme Court has held state laws preempted when a *customer* invokes them to obtain certain *rates or services* beyond what was set forth in their contract with a carrier. *See generally Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 134 S. Ct. 1422 (2014); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). However, those cases did not announce a broad rule that preemption occurs whenever a state law touches any aspect of a carrier's contractual relationship with anyone. Instead, we have made clear that those cases are inapplicable, and so no preemption occurs, when the law is a generally applicable background regulation in an area of traditional state power that has no significant impact on a carrier's prices, routes, or services. *See Dilts*, 769 F.3d at 642–50; *Mendonca*, 152 F.3d at 1185–89. Despite CTA's arguments to the contrary, *Dilts* and *Mendonca* compel us to conclude that the *Borello* standard is not preempted. And this conclusion finds support in the FAAAA's legislative history, as well as

the California Supreme Court's view of the matter.

1. Interference with Customer Contracts at the Point of Sale

We begin with the Supreme Court decisions holding preempted state laws that interfered with a carrier's contractual relationship with its customers – on which CTA heavily relies. *See Ginsberg*, 134 S. Ct. at 1428–33; *Wolens*, 513 U.S. at 226–34. These cases did not announce a rule that preemption occurs whenever a state law effectively alters freely-negotiated contract terms; the preemption issues they addressed were, instead, quite distinct from the issue here.

In both *Ginsberg* and *Wolens*, customers objected to changes that an airline made to its "frequent flyer" program. *Ginsberg*, 134 S. Ct. at 1426–27 (objecting to being kicked out of frequent flyer program); *Wolens*, 513 U.S. at 224–25 (objecting to retroactive changes that devalued frequent flyer credits). The customers pointed to state laws, arguing that these laws compelled the air carrier to provide specific prices or services – like making flights or upgrades available on certain dates or for certain credit amounts – even if such obligations were absent from the parties' agreements. *Ginsberg*, 134 S. Ct. at 1431–33 (addressing a claim for breach of the covenant of good faith and fair dealing); *Wolens*, 513 U.S. at 226–27 (reviewing a consumer fraud act claim). In both cases, the Supreme Court held that the FAAAA preempted these state law claims because they would have resulted in a State's normative policies dictating what prices and services

an airline had to offer to its customers. *Ginsberg*, 134 S. Ct. at 1431–33*; Wolens*, 513 U.S. at 227–28.[6] Customers' breach of contract claims that sought merely to hold an airline to agreed-upon terms, however, were not preempted. *Wolens*, 513 U.S. at 230–33.

CTA emphasizes that the line drawn is "between what the State dictates and what the [carrier] itself undertakes." *Wolens*, 513 U.S. at 233. As explained in *Wolens*, a breach of contract claim against a carrier is cognizable because it enforces only the latter "with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.*; *see also id.* at 228–29 & n.5. Moreover, permitting such claims against carriers aligns with the ADA's goal of promoting reliance on market forces because "[m]arket efficiency requires effective means to enforce private agreements." *Id.* at 230. CTA urges us to focus on the fact that the *Borello* standard could replace efficiency-driven terms in its members' contracts with external ones found in California's labor laws (*e.g.*, *sua sponte* reallocating responsibility for truck maintenance costs from owner- operators to carriers).

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[6] The results in Wolens and Ginsberg flowed logically from Morales, which held that the ADA preempted States from using their general consumer protection statutes to combat deceptive airline advertisements. See 504 U.S. at 387–91. The States sought to use those statutes to enforce guidelines that mandated the content of airfare advertisements, and the prices and services an airline had to make available once it advertised certain fares. See id.

CTA's focus on this delineation in the broadest sense misses the trees for the forest – and does not square with our task of assessing whether Congress clearly intended to preempt *Borello* by analyzing its effect on prices, routes, and services. It is one thing to say market efficiencies are promoted when competitive forces compel a carrier to offer certain *services or prices*, and a *customer* can then enforce these promises – but only these promises. *See Hickcox- Huffman v. US Airways, Inc.*, 855 F.3d 1057, 1066 (9th Cir. 2017) (ruling that the ADA did not preempt breach of contract claim where airline freely undertook obligation to offer timely delivery of baggage). It does not follow that a state law will be preempted in every instance where it defeats any term in any carrier contract. Even if *Wolens* and *Ginsberg* draw a line between the permissible enforcement of contractual terms and the preempted enforcement of normative policies, that line does not control when the contractual relationship is between a carrier and its *workforce*, and the impact is on the *protections* afforded to that workforce.

2. Impacting Workforce Arrangements

Indeed, we have already explained that the details of *Wolens* and *Ginsberg* matter because Congress did not intend to hinder States from imposing normative policies on motor carriers as employers. *See Dilts*, 769 F.3d at 642–50; *Mendonca*. 152 F.3d at 1187–89. And *Dilts* and *Mendonca* all but dictate the result here.[7]

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[7] Mendonca was decided between Wolens and Ginsberg; Dilts was decided after both, and confirmed Mendonca's continued

Mendonca held that California's Prevailing Wage Law (CPWL) is not preempted, 152 F.3d at 1187–89, and *Dilts* later held that California's meal and rest break requirements are not preempted, 769 F.3d at 642–50. In effect, the laws at- issue in these cases compelled new terms in motor carriers' agreements with their workers. To be sure, in *Dilts* and *Mendonca* there was no dispute that the workers were employees. Still, we permitted California to interfere with the relationship between a motor carrier and its workforce. *Dilts* explicitly distinguished *Wolens* and *Ginsberg* based on where and how this interference occurs:

> Laws are more likely to be preempted when they operate at the point where carriers provide services to customers at specific prices.
> . . .
>
> On the other hand, generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide. Such laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment. . . . Nearly every form of state regulation

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vitality. 769 F.3d at 645.

> carries some cost. The statutory text tells us, though, that in deregulating motor carriers and promoting maximum reliance on market forces, Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability.

769 F.3d at 646 (citations omitted). We agree with the Commissioner that, in light of *Dilts* and *Mendonca*, CTA's position "defies logic." Our conclusion that Congress did not intend to preempt these generally applicable labor laws could be nullified if motor carriers have the unchecked ability to contract around these laws simply by obtaining owner- operators' consent to label them as independent contractors and thus exclude them from such protections.[8]

Similarly instructive is *Air Transport Ass'n of America v. City and County of San Francisco*, 266 F.3d 1064, 1070–75 (9th Cir. 2001), where we concluded that the ADA did not preempt a San Francisco ordinance barring city contractors from discriminating, even though it affected air carriers at San Francisco International Airport and could have increased their cost of doing business at that airport. The ordinance had the effect of "adding a contractual requirement" that interfered with an air carrier's relationship with its workforce because, for example, if it offered certain terms to an employee's spouse, it

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[8] For example, CTA does not refute the Commissioner's claim that the Labor Code prevents an employee from waiving rest breaks or the right to be reimbursed for business expenses. See Cal. Labor Code §§ 219, 1194, 2804.

was compelled to provide the same benefits to another employee's domestic partner. *Id.* at 1069, 1073. What mattered, however, was that the ordinance did not constitute improper compulsion *in the preemption sense*. *Id.* at 1074. As we framed the inquiry there, "[t]he question is not whether the Ordinance compels or binds them into not discriminating; the question is whether the Ordinance compels or binds them to a particular price, route or service." *Id.*

3. The *Borello* Standard's Impact on Workforce Arrangements

CTA contends that, nonetheless, if we look at the specific effects the *Borello* standard has on its members here, we will see that there *is* improper compulsion in the preemption sense. We reject this contention because the *Borello* standard does not compel the use of employees or independent contractors; instead, at most, it impacts CTA's members in ways that *Dilts* and *Mendonca* make clear are not significant, and so do not warrant preemption.

a. Compelling Who Provides Services

CTA argues that a state law or policy compelling a carrier to use employees to provide its services is preempted. Even so, the *Borello* standard does not, by its terms, compel a carrier to use an employee or an independent contractor. Nor does CTA contend that the nature of the *Borello* standard compels the use of employees to provide certain carriage services.

This case is therefore wholly different from *American Trucking*. *See* 559 F.3d at 1053–57. There, in reversing the denial of a preliminary injunction, we concluded that the FAAAA likely preempted the Ports of Los Angeles and Long Beach's directive that carriers must use only employee drivers and give hiring preference to drivers with more experience. *Id.* As compared to the *Borello* standard, which sets a background rule for ensuring a driver is correctly classified, *American Trucking* stands for the obvious proposition that an "all or nothing" rule requiring services be performed by certain types of employee drivers and motivated by a State's own efficiency and environmental goals was likely preempted. *Id.* at 1053–56.

For similar reasons, it is immaterial that other States have adopted the "ABC" test to classify workers, the application of which courts have then held to be preempted. *See Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 437–40 (1st Cir. 2016) (analyzing Massachusetts law). Like *American Trucking*, 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 an employer's usual course of business will never be considered an independent contractor. *Id* at 438. For a motor carrier company, this means it may be difficult to classify drivers providing carriage services as independent contractors. *Id.* at 439. But California's common law test – as embodied in the *Borello* standard – is to the contrary. Whether the work fits within the usual course of an employer's business is one factor among many – and not even the most important one. *See*

Borello, 769 P.2d at 404.[9] CTA has not alleged or shown how the *Borello* standard makes it difficult for its members to use independent contractors to provide their services.

b. Compelling or Foreclosing Prices, Routes, or Services

CTA also argues for preemption because of the potential impact on a motor carriers' financial arrangements with its drivers and their agreed-upon incentives; again, *Dilts* and *Mendonca* foreclose these arguments.

Specifically, CTA complains that, whereas owner- operators often control how their trucks are used and can accept or reject hauls offered by the carriers they are working with, an employee driver must accept a haul or face termination. In the relevant agreements, owner-operators are also responsible for expenses like maintenance, repair, parking, and fueling and then compensated at an agreed-upon rate; however, California law requires motor carriers to reimburse employee drivers for these expenses.

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[9] The First Circuit left in place the two other "prongs" of the "ABC" test, which align more closely with the Borello standard. See 813 F.3d at 433, 441 (classification depends on level of control and whether individual is regularly engaged in service being provided). The carrier in that case did not argue that those elements of the "ABC" test were preempted. See id. at 441. As previously discussed, we need not and do not decide whether the FAAAA would preempt using the "ABC" test to enforce labor protections under California law. See footnote 4 supra.

In *Mendonca*, we rejected similar arguments that CPWL was preempted because it would increase a carrier's prices by 25%, require it to change how it offered these services (*e.g.*, using independent owner-operators), and compel it to redirect and reroute equipment to compensate for lost revenue. 152 F.3d at 1189. *Mendonca* acknowledged that CPWL related to prices, routes, and services "in a certain sense," but relied on the Supreme Court's efforts in this arena "to preserve the proper and legitimate balance between federal and state authority." *Id.* Because CPWL was an area of traditional state regulation that did not "*acutely* interfer[e] with the forces of competition," it was not preempted. *Id.*

The question in *Dilts* was whether meal and rest break laws – either directly or indirectly – set prices, mandated or prohibited certain routes, or told motor carriers what services they could or could not provide. 769 F.3d at 647. The answer was no. *Id.* at 647–50. *Dilts* recognized that a motor carrier may have to hire more workers in order to stagger breaks and operate continuously. *Id.* at 648. Rest breaks could also result in drivers taking longer to travel the same distance, meaning motor carriers would need to reallocate resources or face increased costs, like hiring more drivers, to maintain a particular service level. *Id.* And motor carriers would need to take drivers' breaks into consideration when scheduling services. *Id.* There still was no preemption – even though motor carriers would have to arrange operations and services based on what the law requires, and not only on what the market demands. *See id.* at 648–50.

The specific effects CTA discusses – such as reallocation of truck maintenance costs and a potential change in who sets drivers' hours – are indistinguishable from those recognized as permissible in *Dilts* and *Mendonca*. There is no allegation that if a current driver is found to be an employee, CTA's members will no longer be able to provide the service it was once providing through that driver, or that the route or price of that service will be compelled to change. At most, carriers will face modest increases in business costs, or will have to take the *Borello* standard and its impact on labor laws into account when arranging operations. "[T]he mere fact that a motor carrier must take into account a state regulation when planning services is not sufficient to require FAAAA preemption, so long as the law does not have an impermissible effect, such as binding motor carriers to specific services, making the continued provision of particular services essential to compliance with the law, or interfering at the point that a carrier provides services to its customers." *Dilts*, 769 F.3d at 649 (citations omitted).

Nothing in CTA's Complaint suggests that application of the *Borello* standard will have these effects.

c. Generally Applicable Labor Protections

Rather than explain why *Dilts* and *Mendonca* do not control, CTA attempts to undercut their reasoning by arguing that it is improper to focus on the fact that the *Borello* standard applies across all

industries in an area traditionally reserved to the States. The laws at issue in *Dilts* and *Mendonca* involved generally applicable labor protections, *i.e.*, an area of traditional state power, and this factor was critical in these cases – as it is here. *See, e.g.*, *Dilts*, 769 F.3d at 642–43. Aside from the fact that we are bound by *Dilts* and *Mendonca*, CTA's argument is also unavailing because it misapprehends the authority on which it relies. *See Rowe*, 552 U.S. at 374; *see also Morales*, 504 U.S. at 386.

In *Rowe*, carriers hauling tobacco products risked liability under a Maine law unless they provided certain receipt and delivery verification services, like ensuring that the individual who purchased and received the tobacco was of legal age and that entities sending packages marked as containing tobacco were Maine-licensed tobacco retailers. 552 U.S. at 368–69, 372–73. *Rowe* reflects a straightforward application of FAAAA preemption: Maine could not require motor carriers to provide these tobacco-focused carriage services, which carriers may not have provided – or may have gotten rid of – if left unregulated. *Id.* at 372–73. In so holding, *Rowe* rejected Maine's argument that the importance of preventing underage smoking and promoting public health justified an *exception* to FAAAA preemption. *Id.* at 374–76. As *Dilts* observed, a law reflecting a State's traditional police power will not be immune from preemption "if Congress in fact contemplated [its] preemption." 769 F.3d at 643; *accord Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 946 (2016).

The Commissioner, however, is not seeking an *exception* to preemption; she argues there is no preemption in the first place because there is no clear intent to usurp the well- established test for triggering a State's traditional labor protection powers. In *Rowe*, Maine targeted only the carriage of tobacco products, enlisting motor carriers to accomplish its public health goals by telling carriers how to complete tobacco pick-up and delivery within that State. *Id.* at 373–75. To the contrary, the *Borello* standard is more comparable to a state regulation that *Rowe* described as not preempted, namely, one that "broadly prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public . . . ." 552 U.S. at 375.

This is not to say that the general applicability of a law is, in and of itself, sufficient to show it is not preempted. *See Morales*, 504 U.S. at 386. While general applicability is not dispositive, *Dilts* and *Rowe* still instruct that it is a relevant consideration because it will likely influence whether the effect on prices, routes, and services is tenuous or significant. 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 (*e.g.*, consumer or workforce) and what result it is compelling (*e.g.*, a certain wage, non-discrimination, a specific system of delivery, a specific person to perform the delivery). As we have already detailed, CTA's Complaint is devoid of any allegations that could demonstrate that the Commissioner's application of the *Borello* standard, in any significant way, impacts its members' prices, routes, or services.

4. Historical Context and Preemption in the Present

Our conclusion today brings us in accord with the California Supreme Court – and, as that court discussed, Congress' intent for the FAAAA's preemptive reach. *See generally People ex rel. Harris v. Pac Anchor Transp., Inc.*, 329 P.3d 180 (Cal. 2014).

Pac Anchor held that the FAAAA did not preempt a claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, premised on drivers being misclassified as independent contractors. *Id.* at 187–90. As with the Commissioner's use of the *Borello* standard, the UCL claim sought only "to ensure that employers properly classify their employees or independent contractors in order to conform to state law." *Id.* at 190.

Pac Anchor relied on *Mendonca*'s discussion of indirect evidence of Congress' intent, which we find persuasive. *See id.* When enacting the FAAAA, Congress identified ten jurisdictions (nine States and the District of Columbia ("States")) that did not regulate intrastate prices, routes, and services. *See Mendonca*, 152 F.3d at 1187 (citing H.R. Conf. Rep. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758). Because seven of these ten States had prevailing wage laws similar to CPWL, this was "indirect evidence" Congress did not intend to preempt that law – which was reinforced by the fact that there was no "*positive* indication in the legislative history that Congress intended preemption in this area of traditional state power."

Id. at 1187–88.[10]

As relevant here, eight out of the ten States that Congress initially identified had laws for differentiating between an employee and an independent contractor. *Pac Anchor*, 329 P.3d at 190. Moreover, nothing in the FAAAA's legislative history indicated that Congress intended to preempt the traditional power to protect employees or the necessary precursor to that power, *i.e.*, identifying who is protected. *See id.* This indirect evidence provides further support that Congress did not intend to foreclose States from applying common law tests to discern who is entitled to generally applicable labor protections.[11] For these additional reasons, then, we conclude that the FAAAA does not bar the Commissioner's application of the *Borello* standard to claims within her jurisdiction involving motor carriers.

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[10] While Rowe discredited reliance on this type of evidence of indirect intent, it did so in the context of rejecting a public health exception for Maine's law that directly regulated carrier services. 552 U.S. at 374–75. Such an exception would have been contrary to the FAAAA's purpose of avoiding "a patchwork of state service-determining laws" regulating how to carry certain products. Id. at 373–75. Again, the Commissioner is not arguing for an exception. And Dilts confirmed that Rowe did not call Mendonca into question. 769 F.3d at 645

[11] Even if the relevant tests vary across States, Dilts instructs that this would be a "permissible" patchwork under the FAAAA. See 769 F.3d at 647–48 & n.2.

CONCLUSION

The FAAAA does not preempt the Commissioner from using the *Borello* standard with respect to motor carriers because this generally applicable, common law test is not "related to" motor carriers' prices, routes, or services. Accordingly, we affirm the district court's order of dismissal.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 16-CV-1866 CAB MDD

CALIFORNIA TRUCKING ASSOCIATION,
Plaintiff,

v.

JULIE SUE,
Defendant.

ORDER DENYING MOTION FOR RECONSIDERATION

On January 6, 2017, the Court granted Defendant's motion to dismiss the complaint. Plaintiff now moves for reconsideration of that order. Plaintiff's motion is denied.

I. Legal Standard

Under Rule 59, "a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). A

motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Carroll v. Nakatini*, 342 F.3d 934, 945 (9th Cir. 2003). In other words, a motion for reconsideration is not intended "to provide litigants with a second bite at the apple." *Verble v. 9th U.S. Dist. Court*, Civil No. 07-CV-652-L(LSP), 2007 WL 1971990, at *1 (S.D. Cal. May 4, 2007).

II. Discussion

Plaintiff's primary argument for reconsideration is that the Court did not apply the correct legal standard for a motion to dismiss by not construing the allegations in the complaint as true. Specifically, Plaintiff contends that the Court disregarded allegations in the complaint concerning contracts between Plaintiff's members and truck owner- operators. Plaintiff is mistaken. The Court assumed as true the existence of contracts between Plaintiff's members and owner-operators. Nevertheless, the existence of a contract between a company and an owner-operator does not automatically render the truck driver an independent contractor or preclude the Labor Commissioner from using the factors listed in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 350-51 (1989), to determine whether, notwithstanding the terms of these contracts, these owner-operators are employees and therefore subject to the protections of California's labor laws. In other words,

assuming the truth of the allegations about contractual agreements in the complaint, FAAAA preemption does not prevent the Labor Commissioner from using the *Borello* factors to determine whether the owner-operators are independent contractors or employees. Thus, the Court declines to reconsider its ruling on this ground.

Plaintiffs remaining arguments are merely disagreements with the Court's analysis and are not a proper basis for reconsideration. Accordingly, the motion for reconsideration is **DENIED**.

It is **SO ORDERED**.

Dated: February 2, 2017

/s/Cathy Ann Bencivengo

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 16-CV-1866 CAB MDD

CALIFORNIA TRUCKING ASSOCIATION,
Plaintiff,

v.

JULIE SUE,
Defendant.

ORDER GRANTING MOTION TO DISMISS

[Doc. Nos. 4, 5]

This matter is before the Court on the Court's order requiring Plaintiff to show cause as to whether this Court has subject matter jurisdiction, and on Defendant's motion to dismiss for failure to state a claim. The motion to dismiss has been fully briefed, and Plaintiff filed a written response to the Court's order to show cause. The Court deems the issues before the Court suitable for submission without oral argument. For the reasons set forth below, the motion to dismiss is granted.

I. Allegations in the Complaint

Plaintiff California Trucking Association ("CTA") is an association with membership consisting of licensed motor carrier companies. The complaint alleges that CTA members sometimes contract with drivers that own or lease their own trucks. These drivers are referred to as "owner-operators." According to the complaint, California's Labor Commissioner, who is the named defendant here, has applied the factors listed in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 350-51 (1989), to determine whether, notwithstanding the terms of their contracts with CTA members, these owner-operators are employees and therefore subject to the protections of California's labor laws. The complaint seeks a declaration that the Labor Commissioner's application of these *Borello* factors is pre-empted by the Federal Aviation Administration Authorization Act of 1994 (the "FAAAA") and asks for injunctive relief preventing the Labor Commissioner from enforcing California's definition of employee using the *Borello* factors when a motor carrier has a contract with an owner-operator. The Labor Commissioner now moves to dismiss the complaint.

II. Subject Matter Jurisdiction

While the motion to dismiss was pending, the Court issued an order to show cause as to this Court's subject matter jurisdiction insofar as whether the complaint raises a federal

question, and if so, whether CTA has standing. Upon consideration of Plaintiff's response, and the absence any argument of a lack of subject matter jurisdiction from Labor Commissioner, the Court is satisfied that subject matter jurisdiction exists.

A. Federal Question Subject Matter Jurisdiction

In the order to show cause, the Court questioned the existence of a federal question because "[a] declaratory judgment plaintiff may not assert a federal question in his complaint if, but for the declaratory judgment procedure, that question would arise only as a federal defense to a state law claim brought by the declaratory judgment defendant in state court." *Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985). Thus, to determine subject matter jurisdiction, the Court can "reposition the parties in a declaratory relief action by asking whether [it] would have jurisdiction had the declaratory relief defendant been a plaintiff seeking a federal remedy." *Standard Ins. Co. v. Saklad*, 127 F.3d 1179, 1181 (9th Cir. 1997). Based on this authority, the Court noted that the complaint could be framed as an attempt to obtain a holding that a federal preemption defense would succeed in a wage and hour claim before the California Labor Commission.

In its response, Plaintiff argued that federal question jurisdiction exists under the Supremacy Clause of the Constitution. Because Plaintiff is seeking to enjoin *state officials* from

interfering with Constitutional rights, the Court is satisfied the federal question jurisdiction exists. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."); *see also California Shock Trauma Air Rescue v. AIG Domestic Claims, Inc.,* No. 2:09-CV-00759MCEJFM, 2009 WL 2230772, at *4 (E.D. Cal. July 24, 2009) ("While it is clear that a conflict between a state statute and federal regulations presents a justiciable controversy . . . that controversy is capable of federal adjudication, in other words is ripe, only when the State is a party to the action.") (internal quotation marks and citation omitted).

B. Associational Standing

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also Assoc. Gen. Contractors of Am. v. Metro. Water Dist. of S. California*, 159 F.3d 1178, 1181 (9th Cir. 1998) (same). The latter two requirements are satisfied because CTA is seeking to protect its members interests and only seeks injunctive relief. The Court's concern in issuing the order to show cause related

primarily to the first requirement. However, because it appears that Plaintiff's members would be able to assert a claim against the Labor Commissioner seeking the injunctive relief requested here, the Court is satisfied that Plaintiff has standing to sue on behalf of its members here.

III. FAAAA Preemption

"[S]tate laws dealing with matters traditionally within a state's police powers are not to be preempted unless Congress's intent to do so is clear and manifest." *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998). Here, CTA argues that the FAAAA pre-empts factors set forth in *Borello* to guide the determination of whether a worker is an independent contractor or an employee. This determination is significant because employees are entitled to certain benefits under California labor laws that are not provided to independent contractors.

> The relevant portion of the FAAAA's preemption provision states:
>
> a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). Although the "statutory 'related to' text is deliberately expansive and

conspicuous for its breadth", it "does not mean the sky is the limit." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014) (internal quotation marks and citations omitted). Thus, "§ 14501(c)(1) does not preempt state laws affecting carrier prices, routes, and services in only a tenuous, remote, or peripheral manner." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769, 1778 (2013); *see also Mendonca*, 152 F.3d at 1188 ("[S]tate regulation in an area of traditional state power having no more than an indirect, remote, or tenuous effect on a motor carriers' prices, routes, and services are not preempted."). To that end, "it is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property.'" *Dan's City Used Cars*, 133 S.Ct. at 1778-79.

In *Dilts*, the Ninth Circuit held that California's meal and rest break requirements as applied to motor carriers are not preempted under the FAAAA. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014). With this lawsuit, CTA nevertheless argues that its members should be able to avoid California's labor laws (which include meal and rest break requirements) under the guise of labeling truck drivers as independent contractors, even if the drivers would otherwise qualify as an employees under California law. This interpretation of the FAAAA's preemption provision cannot be reconciled with *Dilts*. To the contrary, if the labor laws themselves are not preempted because they do not relate to rates, routes, or services, California's determination as to

which truck drivers are protected by such laws necessarily does not relate to rates, routes or services either. *See generally Harris v. Pac. Anchor Transp., Inc.*, 59 Cal. 4th 772, 775 (2014) (holding that FAAAA did not pre-empt lawsuit by the state of California against a trucking company for misclassifying drivers and independent contractors). Further, the *Borello* factors are not preempted by the FAAAA because they are generally applicable to all workers and do not concern the transportation of property. *Dan's City Used Cars*, 133 S.Ct. at 1778-79; *see also Harris*, 59 Cal. 4th at 786 ("*Dan's City* emphasized the FAAAA limiting phrase 'with respect to the transportation of property,' which strongly supports a finding that California labor and insurance laws and regulations of general applicability are not preempted as applied under the FAAAA. . . .").[1]

CTA relies heavily on *Northwest, Inc. v. Ginsberg*, 134 S.Ct. 1422, 1430 (2014), where the Court held that a claim for breach of the implied covenant of good faith and fair dealing is "pre-

[1] CTA incorrectly argues in a footnote that "there can be no question here that the Commissioner's application of the *Borello* test to owner-operators relates to the transportation of property." This is incorrect. Every law, when applied to the trucking industry, could be argued to relate to the transportation of property. The relevant question, however, is whether the law itself relates to the transportation of property. Just as California's labor laws are generally applicable to all industries, so is the use of the *Borello* factors to determine whether the labor laws protect workers. Thus, California's generally applicable laws concerning the classification of employees do not relate to the transportation of property within the meaning of *Dan's City*. 134 S.Ct. at 1430.

empted [by the FAAAA] if it seeks to enlarge the contractual obligations that the parties voluntarily adopt." *Nw,* 134 S.Ct at 1426. The flaw in CTA's argument is that unlike *Northwest*, which concerned a common law claim for breach of the covenant of good faith and fair dealing, the issue of whether a truck driver is an employee or independent contractor is not a common law *claim*. Rather, it is a finding that must be made to determine whether and how California's labor laws (which are not pre-empted by the FAAAA) apply to a worker. In other words, the determination of whether a worker is an employee is merely an element of (or prerequisite for) a claim for violation of the labor laws, not a common law claim itself. *See, e.g., Taylor v. Shippers Transp. Exp., Inc.*, No. CV 13-2092 BRO (PLAx), 2014 WL 7499046, at *8-10 (C.D. Cal. Sept. 30, 2014) (holding that truck drivers' labor code claims were not pre-empted by the FAAAA in light of *Dilts*, and using the *Borello* factors to analyze whether the drivers are independent contractors or employees).

In *Borello*, the California Supreme Court merely identified some considerations relevant to the determination of whether a worker is an employee, but the *claims* to which such determination is relevant are claims under California labor laws that the Ninth Circuit has held are not preempted by the FAAAA.[2] Although

[2] In *Borello*, the issue was whether agricultural laborers who worked pursuant to a "sharefarmer" agreement were independent contractors exempt from workers' compensation

CTA members' contracts with truck drivers may be evidence as to whether the truck drivers are employees entitled to the benefits provided by California's labor laws, a finding that the drivers are employees and therefore entitled to such benefits "do[es] not arise out of the contract, involve[] the interpretation of any contract terms, or otherwise require there to be a contract." *Narayan v. EGL, Inc.*, 616 F.3d 895, 899, 903 (9th Cir. 2010) (holding that the existence of contracts expressly acknowledging that the workers were independent contractors is not dispositive). Thus, unlike in *Northwest*, the Labor Commissioner's use of the *Borello* factors to hold that a truck driver is an employee entitled to benefits under the labor code, notwithstanding the existence of a contract between the driver and a CTA member, is not a "common law claim" and does not "enlarge the contractual obligations that the parties voluntarily adopted." Accordingly, *Northwest* does not support CTA's position.[3]

American Trucking Associations, Inc. v. City of Los Angeles, 559 F.3d 1046 (2009), is also distinguishable. In that case, the Los Angeles Port attempted to require that motor carriers use employees instead of independent contractors. Here, the Labor Commissioner is setting no such

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coverage. *Borello*, 48 Cal. 3d at 345.

[3] As set forth in *Dilts*, *Northwest* is also distinguishable because it concerned an airline's relationship with its customers, whereas the labor laws are "generally applicable background regulations that are several steps removed from prices, routes, or services." See *Dilts*, 769 F.3d at 646. "Laws are more likely to be preempted when they operate at the point where carriers provide services to customers at specific prices." *Id*.

requirements. CTA members are free to use independent contractors or employees. *Cf. Villalpando v. Exel Direct Inc.*, No. 12-cv-4137-JCS, 2015 WL 5179486, at *25-26 (N.D. Cal. Sept. 3, 2015) (finding *ATA* to be inapposite because there was no requirement that the trucking company use independent contractors); *Robles v. Comtrak Logistics, Inc.*, No. 2:13-cv-161-JAM-AC, 2014 WL 7335316, at *4 (E.D. Cal. Dec. 19, 2014) (same). However, CTA members must do more than simply label a truck driver as an independent contractor; the truck driver must in fact be an independent contractor under California law. The label applied by a CTA member may be evidence of the status of a truck driver, but it is not dispositive. The concurrence in *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 998 (9th Cir. 2014) (Trott, J., concurring), a case concerning the classification of Federal Express truck drivers, artfully explains why CTA's position is untenable:[4]

> Abraham Lincoln reportedly asked, "If you call a dog's tail a leg, how many legs does a dog have?" His answer was, "Four. Calling a dog's tail a leg does not make it a leg." Justice Cardozo made the same point in *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 62 (1935), counseling

[4]Although the opinion does not address FAAAA preemption, in *Alexander* the Ninth Circuit used the *Borello* factors to analyze whether Federal Express truck drivers were employees. *Alexander*, 765 F.3d at 988.

> us, when called upon to characterize a written enactment, to look to the "underlying reality rather than the form or label." The California Supreme Court echoed this wisdom in *Borello*, saying that the "label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." 256 Cal. Rptr. 543. As noted by Judge Fletcher, "[N]either [FedEx's] nor the drivers' own perception of their relationship as one of independent contracting" is dispositive. *JKH Enters, Inc. v. Dept. of Indus. Relations*, 48 Cal. Rptr. 3d 563, 580 (2006).
>
> Bottom line? Labeling the drivers "independent contractors" in FedEx's Operating Agreement does not conclusively make them so when viewed in the light of (1) the entire agreement, (2) the rest of the relevant "common policies and procedures" evidence, and (3) California law.

IV. Conclusion

The *Borello* factors used by the Labor Commissioner to determine whether a truck driver is an employee or independent contractor are not preempted by the FAAAA. Accordingly, the motion to dismiss is **GRANTED**.

It is **SO ORDERED**.

Dated: January 6, 2017

/s/Cathy Ann Bencivengo

§ 14501. FEDERAL AUTHORITY OVER INTRASTATE TRANSPORTATION, 49 USCA § 14501

Subtitle IV. Interstate Transportation (Refs & Annos)

Part B. Motor Carriers, Water Carriers, Brokers, and Freight Forwarders (Refs & Annos) Chapter 145. Federal-State Relations

(a) Motor carriers of passengers.--

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

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

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

(C) the authority to Provide intrastate or Interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus transportation of any nature in the State of Hawaii.

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

(b) Freight forwarders and brokers.--

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

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

(c) Motor carriers of property.--

(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

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

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

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

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other

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

(3) State standard transportation practices.--

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

(i) uniform cargo liability rules,

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

(iii) uniform cargo credit rules,

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

(v) antitrust immunity for agent-van line operations (as set forth in section 13907), if such law, regulation, or provision meets the requirements of subparagraph (B).

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

this subparagraph if--

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

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

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

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

(5) Limitation on statutory construction.--Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such

owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

(d) Pre-arranged ground transportation.--

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

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

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

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

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

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

original State.

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

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

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

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

(C) as restricting the right of any State or political subdivision of a State to require, in a nondiscriminatory manner, that any individual operating a vehicle providing prearranged ground transportation service originating in the State or political subdivision have submitted to pre-licensing

drug testing or a criminal background investigation of the records of the State in which the operator is domiciled, by the State or political subdivision by which the operator is licensed to provide such service, or by the motor carrier providing such service, as a condition of providing such service.

CREDIT(S)

(Added Pub.L. 104-88, Title I, § 103, Dec. 29, 1995, 109 Stat. 899; amended Pub.L. 105-178, Title IV, § 4016, June 9, 1998, 112 Stat. 412; Pub.L. 105-277, Div. C, Title I, § 106, Oct. 21, 1998, 112 Stat. 2681-586; Pub.L. 107-298, § 2, Nov. 26, 2002, 116 Stat. 2342; Pub.L. 109-59, Title IV, §§ 4105(a), 4206(a), Aug. 10, 2005, 119 Stat. 1717, 1754; Pub.L. 114-94, Div. A, Title V, § 5514, Dec. 4, 2015, 129 Stat. 1557.)

Notes of Decisions (125)

49 U.S.C.A. § 14501, 49 USCA § 14501
Current through P.L. 115-281. Also includes P.L. 115-283 to 115-306, 115-308 to 115-324. Title 26 current through P.L.
115-324.

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STATE OF CALIFORNIA
LABOR CODE
SECTION 2802

2802. (a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

(b) All awards made by a court or by the Division of Labor Standards Enforcement for reimbursement of necessary expenditures under this section shall carry interest at the same rate as judgments in civil actions. Interest shall accrue from the date on which the employee incurred the necessary expenditure or loss.

(c) For purposes of this section, the term "necessary expenditures or losses" shall include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section.

(d) In addition to recovery of penalties under this section in a court action or proceedings pursuant to Section 98, the commissioner may issue a citation against an employer or other person acting on behalf of the employer who violates reimbursement obligations for an amount determined to be due to an employee under this section. The procedures for issuing, contesting, and

enforcing judgments for citations or civil penalties issued by the commissioner shall be the same as those set forth in Section 1197.1. Amounts recovered pursuant to this section shall be paid to the affected employee.

(Amended by Stats. 2015, Ch. 783, Sec. 4. (AB 970) Effective January 1, 2016.)