No. 13-1478

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MANUEL MILTON SANCHEZ, *et al.*,
Plaintiffs-Appellants,

v.

LASERSHIP, INC.,
Defendant-Appellee.

On Appeal from the United States
District Court for the Eastern District of Virginia
The Honorable Gerald Bruce Lee, U.S.D.J.

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Scott L. Nelson
Andrew R. Kaufman
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

July 24, 2013

Counsel for Amicus Curiae
Public Citizen, Inc.

CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock. To the knowledge of amicus curiae, there is no publicly held corporation other than the Defendant-Appellee that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement. The parties have not identified any such corporation in their own corporate disclosure statements.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

BACKGROUND AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The FAAAA Preempts Only State Laws That Concern or Target Motor Carriers With Respect to the Transportation of Property. 6

II. The Massachusetts Wage Laws Do Not Relate to Motor Carrier Prices, Routes, or Services. 9

A. State Laws Are Not Preempted Merely Because They Relate to Business Models or Employment Relationships. 10

B. State Laws Are Not Preempted Merely Because They Raise the Cost of Providing Services. 12

C. State Laws Are Not Preempted Merely Because They Differ From Those of Neighboring States 17

CONCLUSION 19

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES **Pages**

Air Transport Ass'n of America v. City and County of San Francisco, 266 F.3d 1064 (9th Cir. 2001) 17

Aretakis v. Federal Express Corp., 2011 WL 1226278 (S.D.N.Y. Feb. 28, 2011) 16

Californians for Safe & Competitive Dump Truck Transportation v. Mendonca, 152 F.3d 1184 (9th Cir. 1998) 14, 16

City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424 (2002) 6, 7, 8, 10, 13

Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769 (2013) .....*passim*

DiFiore v. American Airlines, Inc., 646 F.3d 81 (1st Cir. 2011) 13

Martins v. 3PD, Inc., 2013 WL 1320454 (D. Mass. Mar. 28, 2013).....15

Morales v. Trans World Airlines, 504 U.S. 374 (1992) 2, 4, 13, 14

Professional Towing & Recovery Operators of Illinois v. Box, 2008 WL 5211192 (N.D. Ill. Dec. 11, 2008) 17

Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364 (2008) .....*passim*

S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.,
697 F.3d 544 (7th Cir. 2012) 12, 13, 14, 15

Schwann v. FedEx Ground Package System, Inc.,
2013 WL 3353776 (D. Mass. July 3, 2013) 7, 10

United Parcel Service, Inc. v. Flores-Galarza,
318 F.3d 323 (1st Cir. 2003) 17

STATUTES AND LEGISLATIVE HISTORY

49 U.S.C. § 14501(c)(1) 3, 9

49 U.S.C. § 41713(b)(1) 2

Airline Deregulation Act of 1978,
Pub. L. No. 95-504, 92 Stat. 1705 2

Federal Aviation Administration Authorization Act of 1994,
Pub. L. No. 103-305, 108 Stat. 1606 3

Motor Carrier Act of 1980,
Pub. L. No. 96-296, 94 Stat. 793 2

H.R. Conf. Rep. No. 103-667 (1994),
reprinted in 1994 U.S.C.C.A.N. 1715.....3, 4, 18, 19

Statement of President William J. Clinton on Signing the FAAAA,
30 Weekly Comp. of Pres. Doc. 1703 (1994), *reprinted in*
1994 U.S.C.C.A.N. 1762-1 4

OTHER AUTHORITIES

Black's Law Dictionary (9th ed. 2009) 19

R. Preston McAfee, Hugo M. Mialon & Michael A. Williams, *What Is A Barrier to Entry?*, 94 Am. Econ. Rev. 461 (2004) 19

INTEREST OF AMICUS CURIAE

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer and worker interests in litigation, and it regularly files amicus curiae briefs in cases in the United States Supreme Court and the federal appellate courts.

Among Public Citizen's particular concerns is that defendants in a broad range of cases increasingly rely on arguments that federal laws preempt state statutes protecting consumers and workers. Public Citizen submits this brief because it is concerned that the argument of the trucking industry in this case and related cases—that federal law displaces basic state labor protections—reflects an overly broad reading of the preemptive scope of the Federal Aviation Administration Authorization Act (FAAAA). This brief seeks to provide an understanding of the language, purposes, and goals of the FAAAA and its express preemption clause, which do not include a sweeping displacement of background wage-and-hour laws that apply to all

businesses and relate only tenuously to motor carrier prices, routes, and services.

This brief is accompanied by a Motion for Leave to File as required by Federal Rule of Appellate Procedure 29(b). No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

BACKGROUND AND SUMMARY OF ARGUMENT

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

In 1980, Congress similarly deregulated the trucking industry, *see* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, but did not

preempt state trucking regulation. By 1994, many states regulated "intrastate prices, routes and services of motor carriers." H.R. Conf. Rep. No. 103-667, at 86-87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715. Concerned that state controls were anti-competitive and advantaged airlines over motor carriers, Congress "sought to pre-empt state trucking regulation." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). The Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, § 601(c), 108 Stat. 1606, included an amendment to Title 49 entitled "Preemption of State Economic Regulation of Motor Carriers." "Borrowing from the ADA's preemption clause, but adding a new qualification," *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1775 (2013), that amendment provides that states may not enact or enforce laws "related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

The conference report accompanying the FAAAA described the kinds of state laws that concerned Congress. "Typical forms of regulation include[d] entry controls, tariff filing and price regulation, and types of commodities carried" and were "usually designed to ensure … not that prices [were] kept low, but that they [were] kept high enough to cover all costs and

[were] not so low as to be 'predatory.'" H.R. Conf. Rep. No. 103-667, at 86-87; *see also* Statement of President William J. Clinton on Signing the FAAAA, 30 Weekly Comp. of Pres. Doc. 1703 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1762-1 ("State regulation preempted under this provision takes the form of controls on who can enter the trucking industry within a State, what they can carry and where they can carry it, and whether competitors can sit down and arrange among themselves how much to charge shippers and consumers.").

Based on its concerns, Congress "resolved to displace '*certain* aspects of the State regulatory process.'" *Dan's City*, 133 S. Ct. at 1780 (quoting FAAAA § 601(a)). Those aspects, the Supreme Court has explained, include state laws "having a connection with, or reference to" motor carrier prices, routes, or services, and those that have a "'significant impact' related to Congress' deregulatory and pre-emption-related objectives[.]" *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 384, 390). But the FAAAA does not preempt state laws that affect prices, routes, or services "in only a 'tenuous, remote, or peripheral … manner.'" *Id.*

The district court in this case held that the FAAAA preempts Massachusetts's misclassification law, which defines when a person is an employee and thus determines when an employer must pay the person a

minimum wage and overtime compensation. That conclusion is wrong. In *Dan's City*, 133 S. Ct. 1769, a case decided after the district court issued its opinion, the Supreme Court clarified that FAAAA preemption extends only to state laws that concern or target a motor carrier "with respect to the transportation of property." The state wage laws at issue here do not target motor carriers of property; they apply generally to all businesses. Moreover, the wage laws do not relate to motor carrier prices, routes, or services. State laws are not preempted merely because they regulate employment relationships or affect motor carriers' "business models." JA 2899. Nor does the FAAAA prevent states from enacting laws of general applicability that raise motor carriers' costs of doing business. Finally, state laws are not preempted merely because they may differ from the laws of surrounding states. The FAAAA dictates that states may not enact laws relating to prices, routes, or services, not that states must standardize laws that do not have that forbidden relationship. Accordingly, the FAAAA does not preempt generally applicable labor laws, such as those that require motor carriers to comply with minimum wage and overtime requirements.

ARGUMENT

I. THE FAAAA PREEMPTS ONLY STATE LAWS THAT CONCERN OR TARGET MOTOR CARRIERS WITH RESPECT TO THE TRANSPORTATION OF PROPERTY.

In *Dan's City*, a case decided after the district court issued its opinion, the Supreme Court emphasized that, although the FAAAA's preemption provision was modeled after that of the ADA, "the FAAAA formulation contains one conspicuous alteration—the addition of the words 'with respect to the transportation of property.'" 133 S. Ct. at 1778. Quoting Justice Scalia's dissent in an earlier FAAAA case, the Court stated that the addition of those words "massively limits the scope of preemption." *Id.* (quoting *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting)).[1] That limitation means that "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.'" *Id.* at 1778-79. Thus, although states may not "single out for special treatment 'motor carriers of property,'" they "remain free to enact and enforce general traffic safety laws, general restrictions on the weight of

[1] The Court noted that "nothing in the [majority] opinion in [*Ours Garage*] is in any way inconsistent with the dissent's characterization of § 14501(c)(1)." *Dan's City*, 133 S. Ct. at 1778 n.4.

cars and trucks that may enter highways or pass over bridges, and other regulations that do not target motor carriers 'with respect to the transportation of property.'" *Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting).

The labor laws here do not single out motor carriers of property for special treatment. Rather, Massachusetts's statute defining who is considered to be an employee for purposes of statutes requiring that employers pay employees a minimum wage and compensate them for overtime apply to motor carriers "solely in their capacity as members of the general public." *Rowe*, 552 U.S. at 375. The wage laws "apply broadly to all employees of businesses located in the Commonwealth" and have "nothing to do with the regulation of the 'carriage of property.'" *Schwann v. FedEx Ground Package Sys., Inc.*, 2013 WL 3353776, at *3 (D. Mass. July 3, 3013) (quoting *Dan's City*, 133 S. Ct. at 1775). In that sense, wage laws are just like state laws governing taxes, zoning, trespassing, speed limits, workplace discrimination, corporate structure and internal affairs, and financial transactions.

The district court, JA 2908-11, 2916, 2924, repeatedly compared this case to *Rowe*, in which the Supreme Court held that the FAAAA preempted

Maine statutes that required tobacco retailers to use delivery services that provided particular recipient-verification services, and deemed motor carriers to know that a package contained a tobacco product if the package included certain markings and identifying information. But the Maine laws in *Rowe* were "aim[ed] directly at the carriage of goods, a commercial field where carriage by commercial motor vehicles plays a major role." *Rowe*, 552 U.S. at 375-76. The Supreme Court explained that the tobacco laws "focuse[d] on trucking and other motor carrier services" by prescribing "particular delivery procedures" for tobacco products. *Id.* at 371. Moreover, in deeming carriers to know that packages contained tobacco, the laws placed the onus on motor carriers to "examine every package" for certain markings and so "directly regulate[d] a significant aspect of the motor carrier's package pickup and delivery service." *Id.* at 372-73 (emphasis omitted). In other words, the laws preempted in *Rowe* "concern[ed]," *Dan's City*, 133 S. Ct. at 1779, and "target[ed]," *Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting), motor carriers "with respect to the transportation of property."

The laws here, unlike the laws in *Rowe*, do not single out motor carriers for special treatment or govern the way they transport property. Like other general restrictions that apply in the same way to all businesses,

the misclassification statute and the wage laws it triggers are outside the FAAAA's preemptive sweep.

II. THE MASSACHUSETTS WAGE LAWS DO NOT RELATE TO MOTOR CARRIER PRICES, ROUTES, OR SERVICES.

The Massachusetts wage laws also do not "relate[] to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). The district court concluded that the Massachusetts wage laws are preempted because they (1) affect motor carriers' business models and employment relationships, (2) increase carriers' costs, affecting services, and (3) result in a "patchwork of varying state laws." JA 2900. But whether the laws affect motor carriers' business models or employment relationships is irrelevant; the question for FAAAA preemption is whether the state laws relate to prices, routes, or services with respect to the transportation of property, not whether they somehow affect how the motor carrier does business. Likewise, background laws that merely increase the costs of doing business are not preempted because, although they may influence motor carriers' business decisions, they do not regulate prices, routes, or services. Finally, laws do not create a forbidden "patchwork" of state regulation simply because they differ from the laws of nearby states. The FAAAA prevents a patchwork of service-

regulating laws, but does not force states to harmonize laws that do not relate to prices, routes, and services.

A. State Laws Are Not Preempted Merely Because They Relate to Business Models or Employment Relationships.

The district court held that the Massachusetts independent contractor misclassification statute is preempted because it "impermissibility dictates the type of employment relationship motor carriers may utilize" and "relates to Lasership's business model." JA 2906, 2910. Whether or not those conclusions are correct as factual matters, they are irrelevant in the context of FAAAA preemption. A court analyzing FAAAA preemption must focus on the relationship between state laws and motor carriers' "prices, routes, or services," not motor carriers' "business models" or "employment relationships." *See Schwann*, 2013 WL 3353776, at *4.

In *Dan's City*, for instance, the Court held that the FAAAA does not preempt state laws regulating how towing companies may store and dispose of towed cars. *Dan's City*, 133 S. Ct. at 1775.[2] It did not matter that, as part of its business, the towing company in question sold cars that were not

[2] Tow trucks are "motor carriers" for FAAAA purposes. *Ours Garage*, 536 U.S. at 430.

retrieved after being towed. *Id.* at 1780-81. The laws in question did not "relate to" the towing service, and so were not preempted. *Id.* at 1779.

Here, the district court stated that "[a]s in *Rowe*, Section 148B relates to Lasership's business model by changing the contractual relationships Lasership currently has with its drivers and dictating what relationships it may use in the future." JA 2910. But the laws at issue in *Rowe* regulated the contractual relationships between motor carriers and the *customers of their transportation services*—shippers and receivers—not, as here, those between motor carriers and their employees. As a result, Maine required motor carriers to offer services they would not otherwise provide. *Rowe*, 552 U.S. at 372. In contrast to customers, truck drivers do not participate in the market for motor carrier services. Accordingly, regulating their employment relationship is not equivalent to regulating motor carrier services.

In enacting the FAAAA, Congress was not concerned with state laws that relate to any aspect of a motor carrier's business, only those aspects central to robust competition within the industry: prices, routes, and services. Laws that affect motor carriers in other ways, like the laws at issue here, are "far removed from Congress' driving concern" and are not preempted. *Dan's City*, 133 S. Ct. at 1780.

B. State Laws Are Not Preempted Merely Because They Raise the Cost of Providing Services.

The district court reasoned that the Massachusetts laws are preempted because "compliance significantly increases Lasership's costs, which impacts its prices, routes, and services." JA 2918. But background rules that merely raise costs do not "determin[e] (to a significant degree) the services that motor carriers will provide," *Dan's City*, 133 S. Ct. at 1780, and thus lack the required connection to "Congress' deregulatory and pre-emption-related objectives." *Rowe*, 552 U.S. at 370-71.

The Massachusetts wage laws impose background conditions under which all employers conduct business. The laws do not, as the district court held, "require Lasership to alter its routes," or "force [it to] discontinue[] deliveries to remote destinations." JA 2917, 2921. In requiring that certain workers be paid a minimum wage and overtime, Massachusetts leaves motor carriers entirely free to decide which routes and services to offer. The laws simply require that if a motor carrier chooses to offer a certain service, then, like any other business it will have to hire employees and pay them to perform the service.

To be sure, the wage laws may affect the cost of that decision, and so may influence motor carriers' prices or services. *See S.C. Johnson & Son,*

Inc. v. Transp. Corp. of Am., 697 F.3d 544, 558-59 (7th Cir. 2012) ("[A]n effect on price may be necessary for preemption, but it is not sufficient."). But on that score, wage laws are like many other background laws. For example, state and local zoning regulations dictate where motor carriers may locate their operations and in that way may affect the cost of providing certain services. But "[i]t is hardly doubtful that state or local regulation of the physical location of motor-carrier operations falls outside the preemptive sweep of § 14501(c)(1)." *Dan's City*, 133 S. Ct. at 1780. The same is true of "general traffic safety laws" or "general restrictions on the weight of cars and trucks that may enter highways or pass over bridges." *Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting); *see also DiFiore v. Am. Airlines*, 646 F.3d 81, 89 (1st Cir. 2011) (rejecting the argument that "state regulation is preempted [by the ADA] wherever it imposes costs on airlines and therefore affects fares" because "[t]his would effectively exempt airlines from state taxes, state lawsuits of many kinds, and perhaps most other state regulation of any consequence.").

Laws like these are outside the FAAAA's preemptive scope because any effect they have on motor carrier prices, routes, or services is "tenuous, remote, [and] peripheral," *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S.

at 390), and "far removed from Congress' driving concern." *Dan's City*, 133 S. Ct. at 1780. Though they may have some effect, background wage, zoning, and traffic laws do not amount to a "direct substitution of [a state's] own governmental commands for 'competitive market forces.'" *Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378).

The principle that background labor laws, even though they may increase the cost of doing business, are too tenuously connected to prices, routes, and services to be preempted, is well established. In *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), motor carriers claimed that the FAAAA preempted a California law requiring public works contractors providing transportation services on publicly funded projects to pay a prevailing wage. The motor carriers argued that the law increased their costs so much that they raised their prices by 25 percent, forced them to hire independent owner-operators, and compelled them to "re-direct and re-route equipment to compensate for lost revenue." *Id.* at 1189. The Ninth Circuit disagreed, holding that the effect of the prevailing wage law, large as it might be, was "no more than indirect, remote, and tenuous." *Id.* As the Seventh Circuit later explained,

> [T]he production function that drives market transactions in the transportation industry … typically includes inputs such as labor,

> capital, and technology. These inputs are often the subject of a particular body of law. For example, labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations. Capital is regulated by banking laws, securities rules, and tax laws, among others. Technology is heavily influenced by intellectual property laws. Changes to these background laws will ultimately affect the costs of these inputs, and thus, in turn, the "price ... or service" of the outputs. Yet no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws …. Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its customer a service for a particular price.

S.C. Johnson, 697 F.3d at 558; *see also Martins v. 3PD, Inc.*, 2013 WL 1320454, at *12 (D. Mass. Mar. 28, 2013) (The argument that the "FAAAA preempts wage laws because they may have an indirect impact on [a motor carrier]'s pricing decisions amounts to an invitation to immunize it from all state economic regulation.").

The district court rejected plaintiffs' reliance on *Mendonca* for several reasons, all misguided. First, the court noted that *Mendonca* preceded *Rowe*, which, according to the district court, "explicitly held that state law indirectly related to motor carriers' prices, routes, and services may nonetheless be preempted by the FAAAA if the effect is more than tenuous or remote." JA 2910. But the effects of the laws preempted in *Rowe* were not tenuous or remote; the laws "directly regulate[d] a significant aspect of the motor carrier's package pickup and delivery service." 552 U.S. at 372-73. And

nothing in *Rowe* disturbed *Mendonca*'s conclusion that the effect of wage laws is in fact "indirect, remote, and tenuous." 152 F.3d at 1189.

Second, the district court dismissed *Mendonca* as focusing "entirely on the … requirement of paying wages," not the "effect of binding carriers … to a specific business model." JA 2910-11. But as discussed above, a state law's effect on a carrier's "business model" is irrelevant. Rather, the central issue is the relationship between the law and motor carrier prices, routes, and services, precisely the question *Mendonca* considered.

Third, the court deemed *Mendonca* inapplicable because the Ninth Circuit "did not fully analyze a complete evidentiary record." *Id.* at 2922. But the Ninth Circuit did not quibble with the motor carriers' factual arguments; instead, the court recognized that basic, generally applicable wage laws are not preempted regardless of their effect on motor carriers' costs.

Finally, the court concluded that cases subsequent to *Mendonca* "have held that preemption can occur upon a finding that a state law sufficiently relates to carriers' prices by significantly increasing costs." *Id.* at 2922-23. But the cases that the district court cited dealt with a negligence claim that, as applied, dictated how the service was to be performed, *Aretakis v. Fed. Exp. Corp.*, 2011 WL 1226278, at *4 (S.D.N.Y. Feb. 28, 2011), or considered

laws that were not generally applicable, *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 325 (1st Cir. 2003) (statute prohibited air carriers from delivering packages without proof of excise tax payment); *Prof'l Towing & Recovery Operators of Ill. v. Box*, 2008 WL 5211192, at *1 (N.D. Ill. Dec. 11, 2008) (statute prescribed rules for tows from public highways). The last case cited by the district court on this point, *Air Transport Ass'n of America v. City & County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001), at least dealt with an employment law of general applicability, but the court found that the law, which required the provision of employment benefits to employees' domestic partners, would not significantly affect airlines' costs and was *not* preempted. *Id.* at 1073-75. The court thus did not reach the question whether a large effect on costs would be sufficient to require preemption of a generally applicable employment law.

C. State Laws Are Not Preempted Merely Because They Differ From Those of Neighboring States.

The district court held that the Massachusetts laws, by differing from the laws in surrounding states, "create a barrier of entry for interstate carriers and place an undue burden on market competition" and so impermissibly "create[] a patchwork of differing state laws that impact motor carriers' routes and services." JA 2924-25. It is true that one purpose of the

FAAAA is to prevent "a patchwork of state *service-determining* laws, rules, and regulations." *Rowe* 552 U.S. at 373 (emphasis added). But the FAAAA accomplishes this objective by telling states that they may not enforce laws "related to a price, route, or service of any motor carrier," not that laws that do *not* have the forbidden connection must nevertheless conform to surrounding state's laws. Congress was concerned not with patchworks generally, but with "*this* patchwork of regulation," referring to the "[t]ypical forms of regulation" in effect in 1994. H.R. Conf. Rep. No. 103-677, at 86-87 (emphasis added). Congress's goal was to remove "governmental commands," *Rowe*, 552 U.S. at 372, that prevent motor carriers from competing, not to insulate the trucking industry from the normal multi-state landscape of labor, taxing, and zoning laws that apply to all businesses.

The court also was wrong to view differences between the Massachusetts laws and the laws of nearby states as a "barrier of entry." JA 2925. Barriers to entry are laws or costs that prevent new entrants from competing with incumbent motor carriers, not background state laws that may discourage a carrier from doing business in a state. *See* H.R. Conf. Rep. No. 103-677, at 86 ("Strict entry controls often serve to protect carriers, while restricting new applicants from directly competing for any given route

and type of trucking business."); Black's Law Dictionary (9th ed. 2009) (defining "barrier to entry"); R. Preston McAfee, Hugo M. Mialon & Michael A. Williams, *What Is A Barrier to Entry?*, 94 Am. Econ. Rev. 461, 461-65 (2004) (same). Wage laws do not determine which companies may operate as motor carriers, nor do they have different effects on incumbent carriers than on potential new entrants. They apply equally to all motor carriers and, indeed, to other members of the public as well.

CONCLUSION

The Court should reverse the district court and hold that the Massachusetts independent contractor misclassification statute and the associated minimum wage and overtime requirements are not preempted by the Federal Aviation Administration Authorization Act.

Respectfully submitted,

/s/ Scott L. Nelson
Scott L. Nelson
Andrew R. Kaufman
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

July 24, 2013

Counsel for Amicus Curiae
Public Citizen, Inc.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,971 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Century Expanded (BT).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, which will send notice of such filing to the following registered CM/ECF uses:

John Thomas Harrington, Jr.
The Employment Law Group PC
888 17th St NW, Suite 900
Washington, DC 20006

Robert Scott Oswald
The Employment Law Group PC
888 17th St NW, Suite 900
Washington, DC 20006

Nicholas Woodfield
The Employment Law Group PC
888 17th St NW, Suite 900
Washington, DC 20006

Harold L. Lichten
Lichten & Liss-Riordan, PC
100 Cambridge St., 20th Floor
Boston, MA 02114

Paul DeCamp
Jackson Lewis LLP
10701 Parkridge Blvd., Suite 300
Reston, VA 20191

Douglas John Hoffman
Jackson Lewis LLP
75 Park Plaza, 4th Floor
Boston, MA 02116

Joseph Erwin Schuler
Jackson Lewis LLP
10701 Parkridge Blvd., Suite 300
Reston, VA 20191

/s/ Scott L. Nelson
Scott L. Nelson