No. 15-1110

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BEAVEX, INC.,
*Defendant-Appellant, Cross-Appellee*,

v.

THOMAS COSTELLO, MEGAN BAASE KEPHART, OSAMA DAOUD, et al., individually and on behalf of all others similarly situated,
*Plaintiffs-Appellees, Cross-Appellants*.

On Petition for Interlocutory Appeal from an Order of the United States District Court for the Northern District of Illinois
Case No. 12-cv-7843
The Honorable Judge Virginia M. Kendall

# BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE ON THE PREEMPTION ISSUE

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April 28, 2015

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## CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. Public Citizen has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock.

Public Citizen Litigation Group, a part of Public Citizen Foundation, Inc., is representing Public Citizen, Inc. in this case. There is no other law firm whose partners or associates will appear for Public Citizen, Inc. in this case.

Respectfully submitted,

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April 28, 2015

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Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its nationwide membership before Congress, administrative agencies, and courts 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, including as amicus curiae 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 argue 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 of 1994 (FAAAA), Pub. L. No. 103-305, § 601(c), 108 Stat. 1569. This brief seeks to provide an

[1] 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.

understanding of the language, purposes, and goals of the FAAAA and the statute's express preemption clause. As we explain, the FAAAA does not sweepingly displace labor laws that apply to all businesses and relate only tenuously to motor carrier prices, routes, and services.

## 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 the 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. 103-677, at 86 (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 FAAAA included an amendment to Title 49 entitled "Preemption of State Economic Regulation of Motor Carriers." Pub. L. No. 103-305, § 601(c). "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. 103-677, at 86; *see also* Statement by President William J. Clinton Upon 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 include state laws with respect to the transportation of property that "hav[e] a connection with, or reference to" motor carrier prices, routes, or services. *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 384 (emphasis omitted)). But the FAAAA does not preempt state laws that affect prices, routes, or services "in only a 'tenuous, remote, or peripheral … manner.'" *Id.* at 371 (quoting *Morales*, 504 U.S. at 390). The term "related to" is broad, but "the breadth of the words … does not mean the sky is the limit." *Dan's City*, 133 S. Ct. at 1778.

In this case, BeavEx, Inc., a courier company, argues that the FAAAA preempts the application to motor carriers of a provision of the Illinois Wage Payment and Collection Act (IWPCA) requiring workers to be classified as employees rather than independent contractors for certain employment purposes unless the workers meet certain conditions, including performing "work which is either outside the usual course of business or is performed

outside all of the places of business of the employer." 820 Ill. Comp. Stat. 115/2. BeavEx claims the provision would affect its obligations under wage-and-hour laws and objects to having to pay hourly wages, plus overtime, and to having to pay "payroll taxes, purchas[e] workers compensation and medical insurance, and contribut[e] to unemployment insurance" to the same degree as other employers of employees in Illinois. BeavEx Br. 6, 31. Below, the district court held that the IWPCA employee provision is not preempted, explaining that BeavEx's argument was "tantamount to arguing immunity from all state economic regulation." RSA.010. The law "only applies to the employment relationship between employers and employees in general, therefore operating at least a step away from the point that BeavEx offers services to customers," the court explained. RSA.012. "[T]he Court finds no evidence that Congress set out to preempt these generic prevailing wage laws." *Id.*

The district court's decision is correct. State laws are not preempted merely because they regulate employment relationships or affect motor carriers' "business models." Nor does the FAAAA prevent states from enacting laws of general applicability that only raise the costs of doing business. Indeed, this Court has already held that the fact that changes in a

generally applicable law may affect the costs of doing business, which may in turn affect the prices a motor carrier charges, is not a sufficient connection to prices, routes, and services for that law to be preempted. *See S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012). This case fits squarely within that holding. 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 they must standardize laws that do not have that forbidden relationship. Accordingly, the FAAAA does not preempt generally applicable labor laws such as the IWPCA.

## ARGUMENT

### I. THE IWPCA DOES NOT RELATE TO MOTOR CARRIER PRICES, ROUTES, OR SERVICES.

The IWPCA employee provision does not reference or regulate motor carrier prices, routes, or services. It does not "limit when, where, or how" package delivery services are performed. *Dan's City*, 133 S. Ct. at 1779. It does not "requir[e] a motor carrier to offer services not available in the market." *Id.* at 1780. And it does not "'freez[e] into place services that carriers might prefer to discontinue in the future.'" *Id.* (quoting *Rowe*, 552

U.S. at 372). It requires only that workers be classified as employees rather than independent contractors unless certain conditions are met.

Nonetheless, BeavEx contends that the IWPCA provision is "related to a price, route, or service of [a] motor carrier." 49 U.S.C. § 14501(c)(1). BeavEx makes three main arguments in support of its position: that the provision relates to its business models and employment relationships; that complying with the provision would increase its costs, which would lead it to cease certain services and raise its prices for others; and that, because other states have different definitions of "employee," the provision is "exactly the sort of state law Congress targeted when passing the FAAAA." BeavEx Br. 15. None of BeavEx's arguments demonstrates a sufficient connection between the IWPCA employee provision and motor carrier prices, routes, and services for FAAAA preemption to apply.

### A. State Laws Are Not Preempted Merely Because They Relate to Motor Carriers' "Business Models" or "Employment Relationships."

BeavEx argues that the IWPCA employee provision is preempted because it relates to the "very business model" that BeavEx uses and "*mandates*" certain employment relationships. BeavEx Br. 14, 15 (emphasis in original). But whether a law affects a motor carrier's "business model" or

how the employer-worker relationship is defined is irrelevant to the FAAAA preemption inquiry; the question for FAAAA preemption is whether the law relates to prices, routes, or services, not whether it somehow relates to how the motor carrier does business.

Thus, for example, in *Dan's City*, the Court held that the FAAAA does not preempt state laws regulating how towing companies may store and dispose of towed cars. 133 S. Ct. at 1775. It did not matter that, as part of its business, the towing company in question—a motor carrier—sold cars that were not retrieved after being towed. *Id.* at 1780-81. The laws in question did not relate to towing prices, routes, or services and, therefore, were not preempted. *Id.* at 1779. Likewise, here, it does not matter whether the IWPCA affects motor carriers' business models or employment relationships, or how motor carriers structure their administrative staffs. The only relevant question is whether the law relates to the prices, routes, and services the motor carriers offer to their clients.

In other words, BeavEx gets it exactly wrong in claiming that the Court should ask "whether [the drivers] seek to substitute a state-mandated policy … in place of the terms of their independent contract agreements with BeavEx." BeavEx Br. 32. The FAAAA is not concerned with the agreements

the company has with its workers, but with the prices, routes, and services it offers its customers. Here, contrary to BeavEx's claims, the IWPCA employee provision does not require the company "to offer services of a type and in a manner dictated not by the market, but by state policy." BeavEx Br. 15. The law leaves BeavEx free to offer the exact same package-delivery services, at the exact same prices, and in the exact same manner as it would if the law did not exist. The provision does not relate to motor carrier prices, routes, or services, and, accordingly, is not preempted.

### B. State Laws Are Not Preempted Merely Because They Raise a Motor Carrier's Costs.

BeavEx's primary argument is that the IWPCA is preempted because complying with it would cause the company's costs to increase. The additional costs, it contends, would "inevitably impact [BeavEx's] prices" and would cause BeavEx to stop offering certain of its services. BeavEx Br. 28. "This alone," BeavEx claims, "is sufficient to trigger FAAAA preemption." *Id.* at 27.

This Court has already squarely rejected BeavEx's argument. *See S.C. Johnson*, 697 F.3d at 558. Although complying with a generally applicable law may cost a company money, and although an increase in a business's costs may lead motor carriers to change their prices, this "effect on price,"

the Court explained, is "too 'remote'" for preemption to apply. *Id.* (quoting *Morales*, 504 U.S. at 390).

> [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, *see, e.g., Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (minimum wage laws not preempted), because their effect on price is too "remote." *Morales*, 504 U.S. at 390, 112 S. Ct. 2031. 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.

*Id.*

Indeed, many background laws may affect the costs of doing business, and may therefore affect the cost of providing services, yet that does not mean those laws are preempted. For example, state and local zoning regulations dictate where motor carriers may locate their operations and in that way may affect both the cost of using a particular location and decisions about whether to open or maintain operations in that location. 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. Likewise, one could imagine that if a state tax rate were raised, some motor carriers operating on the edge of profitability would decide that their businesses were no longer profitable and decide to cease operations, just as BeavEx threatens that it will stop offering on-demand services if it is required to properly classify its drivers. But such an effect would not immunize motor carriers from paying generally applicable taxes. *See S.C. Johnson*, 697 F.3d at 559 (noting that sales taxes are not preempted). Here, the IWPCA employee provision is part of the "network of labor laws" discussed in *S.C. Johnson*. *Id.* at 558. It falls squarely within the category of background laws that may increase the costs of doing business, and may thereby affect the company's decisions of what services to offer at what prices, but that are too remote from prices, routes, or services to be preempted.

BeavEx contends that because not all states have adopted the IWPCA's definition of "employee," the IWPCA is not a "generally-applicable background law" or a "'basic rule[] for a civil society.'" BeavEx Br. 15, 32 (quoting *S.C. Johnson*, 697 F.3d at 558 (explaining that laws such as labor

laws, tax laws, anti-discrimination laws, and laws prohibiting gambling "set basic rules for a civil society, rather than particular terms of trade between parties to a transaction")). BeavEx misunderstands these concepts. When people talk about generally applicable or background laws or about rules for a civil society in the FAAAA context, they mean laws that do not specifically reference motor carriers or apply just to motor carriers. These are the laws that structure society and provide the background against which businesses and markets operate. Such laws do not need to be identical from state to state in order to be too attenuated from motor carrier prices, routes, and services to be preempted. States do not need to adopt identical zoning schemes, for example, for state and local regulation of zoning to "fall outside the preemptive sweep of § 14501(c)(1)." *Dan's City*, 133 S. Ct. at 1780.

BeavEx also contends that the IWPCA attempts to "substitute Illinois's own governmental policies for the competitive forces within the motor transportation industry." BeavEx Br. 15. As the Court explained in *S.C. Johnson*, however, laws such as generally applicable labor laws, zoning laws, and laws prohibiting theft and embezzlement do not attempt "to change the bargain that the parties had reached." 692 F.3d at 558. Instead, such laws "provide the backdrop for private ordering," *id.*, keeping parties from having

to "lard a contract with clause after clause promising not to violate such laws, whether those laws are the anti-gambling laws to which the Supreme Court referred in *Morales* or they are minimum wage laws, safety regulations …, zoning laws, laws prohibiting theft and embezzlement, or laws prohibiting bribery or racketeering." *Id.* In other words, such laws do not override "competitive forces within the motor transportation industry," BeavEx Br. 15; they provide the background against which the market forces act.

Of course, not all generally applicable laws fall into this category. The Supreme Court determined that the duty of good faith and fair dealing at issue in *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1433 (2014), sought "to enlarge [the parties'] contractual agreement." And this Court determined that the fraudulent misrepresentation and conspiracy to commit fraud claims at issue in *S.C. Johnson* sought "to substitute a state policy … for the agreements that the parties had reached." 697 F.3d at 557. But the existence of generally applicable laws that alter the parties' bargain does not negate the existence of a wide swath of generally applicable background laws that do *not* alter the parties' bargain.

Here, the IWPCA falls squarely within the category of background laws that do not seek to alter a party's bargain with its customers. Motor

carriers and their customers do not contract over whether the companies' drivers are classified as independent contractors or employees; indeed, it is hard to imagine that customers care about the classification of the people who deliver their packages. Rather, the IWPCA is just one generally applicable law among numerous labor laws, zoning laws, tax laws, criminal laws, and other laws that provide the backdrop against which motor carriers and their customers contract. To the extent that the law may have any effect on prices, routes, or services, it is only because it may be more expensive for a motor carrier to comply with the law than it is for the motor carrier to violate the law—just as it may be more expensive for a motor carrier to pay its taxes than not to pay its taxes, or to locate its company in an area zoned for commercial use than one zoned for residential use—and motor carriers may decide to raise their prices or change their services in response to the costs of following the law. As this Court explained in *S.C. Johnson*, this effect on prices and services is too "tenuously related to the regulation of the rates, routes, and services in the trucking industry to fall within the FAAAA's preemption rule." 692 F.3d at 559. That BeavEx may raise its prices or abandon certain of its services in response to being required to follow the

IWPCA does not make the law "related to a price, route, or service" within the meaning of the FAAAA. 49 U.S.C. § 14501(c)(1).

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

BeavEx argues that because Illinois's definition of employee differs from those in other states, it is "exactly the sort of law Congress targeted when passing the FAAA." BeavEx Br. 15. The FAAAA, however, does not preempt the application to motor carriers of all state laws that differ from one state to the next. Rather, it preempts state laws only when they are "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). In enacting the FAAAA, Congress was concerned not with differing laws generally, but with the creation of "a patchwork of state *service-determining* laws, rules, and regulations." *Rowe*, 552 U.S. at 373 (emphasis added). Congress's goal was to remove "governmental commands" that prevent motor carriers from competing, *id.* at 372, not to insulate the trucking industry from the normal multi-state landscape of labor, taxing, and zoning laws that apply to all businesses.

BeavEx also errs in suggesting that Congress had laws similar to the IWPCA in mind when it enacted the FAAAA. BeavEx Br. 13, 22-23. The

FAAAA's legislative history demonstrates that Congress enacted the FAAAA in part to address inequity about which motor carriers were and were not exempt from state economic regulation. The conference report on which BeavEx relies explains that, in 1994, the Ninth Circuit held that state economic regulation did not apply to Federal Express's motor carrier operations because Federal Express was organized as an air carrier, and the ADA's preemption provision thus applied to it. H.R. Conf. Rep. No. 103-677, at 87 (discussing *Federal Express Corp. v. Cal. Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991)). Although several of Federal Express's competitors had motor carrier operations similar to those of Federal Express, they were not organized as air carriers. ADA preemption thus did not apply to them, putting them at a competitive disadvantage. In response, the conference report states, "California enacted legislation … which extended the exemption enjoyed by Federal Express as a result of its court victory to its competitors that are motor carriers affiliated with direct air carriers." *Id.* California "denied this exemption, however, to those using a large proportion of owner-operators instead of company employees," *id.*, thereby maintaining inequity between different motor carriers.

Thus, although BeavEx is correct that the conference report "included a reference" to a law that affected motor carriers that relied on workers who were not employees, BeavEx Br. 22, what the conference report found problematic about that law was that it denied an exemption from economic regulation to motor carriers that used independent contractors.[2] Here, there is no question that the FAAAA applies equally to all motor carriers, whether or not they rely on independent contractors, and the conference report's discussion of the California law is thus inapposite. Although the conference report indicates that the conferees considered it "unfair to create a level playing field for most of the industry, while leaving an unfortunate few still bound by economic regulatory controls," H.R. Conf. Rep. No. 103-677, at 88, the report does not indicate that Congress found it problematic for states to define who is an independent contractor and who is an employee or for those definitions to be different in different states.

[2] BeavEx at one point implies that the California law *prohibited* the use of independent contractors, rather than merely making the nature of the economic regulation to which they were subject dependent on their use of contractors. *See* BeavEx Br. 13; *but see* BeavEx Br. 22-23. Even if that were an accurate reading of the now-repealed statute, it was not the reading given to it by the conference report, which makes clear that what Congress found objectionable was a law that imposed price, route and service regulation on carriers that made use of contractors, not that it found regulation of employment practices of motor carriers problematic in and of itself.

Instead of discussing differing state definitions of independent contractor, the conference report discusses the problems with having a variety of different *state economic regulatory regimes*. It cites examples of instances "in which rates for shipments within a state exceed rates for comparable distances across state lines" and noted that "companies frequently ship goods across state lines and back into the state of origin to avoid the higher rates for purely intrastate shipments." *Id.* In other words, Congress was focused on differing state laws related to motor carrier prices, routes, and services, not on differing state labor laws, and the IWPCA is "far removed from Congress' driving concern" in enacting the FAAAA. *Dan's City*, 133 S. Ct. at 1780.

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

In addition to not being preempted because it does not relate to motor carrier prices, routes, and services, the IWCPA provision is not preempted because it is not a law "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

In *Dan's City*, 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 49 U.S.C. § 14501(c)(1)). Quoting Justice Scalia's dissent in an earlier FAAAA case (and noting that nothing in the majority opinion in that case was inconsistent with Justice Scalia's characterization of the statute), the Court stated that the addition of the words "with respect to the transportation of property" "'massively limits the scope of preemption.'" *Id.* (quoting *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting)). 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 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 IWPCA does not "concern" a motor carrier's transportation of property. *Dan's City*, 133 S. Ct. at 1779. It concerns the proper classification of workers. And it does not single out motor carriers of property for special treatment. It applies to motor carriers "solely in their capacity as members of the general public." *Rowe*, 552 U.S. at 375. In that sense, the IWPCA is just like state laws governing taxes, zoning, trespassing, speed limits, workplace discrimination, corporate structure and internal affairs, and financial transactions.

BeavEx addresses the "transportation of property" language only in a footnote, stating that "it is undisputed that BeavEx is engaged in the transportation of property via motor carriage, and that Plaintiffs' contractual work for BeavEx specifically related to such transportation of property." BeavEx Br. 25 n.7. BeavEx's statement is true as far as it goes, but does not demonstrate that the IWPCA concerns the transportation of property. In *Dan's City*, it was undisputed that the petitioner towing company engaged in the transportation of property, and that the car at issue had been transported by the company. Nonetheless, the Supreme Court held that the FAAAA did not preempt state-law claims related to the storage and disposal of the car. That the company transported property and that its possession of

the car was related to that transportation were not sufficient for the state law to concern the transportation of property, where the plaintiff did not "object to the manner in which his car was moved or the price of the tow." 133 S. Ct. 1779. Likewise, here, that BeavEx transports property, and that its drivers' work relates to that transportation, are not sufficient for the IWPCA to concern the transportation of property, where the plaintiffs are not challenging the manner in which BeavEx delivers packages or the price it charges for that delivery.

BeavEx also suggests that the IWPCA concerns the transportation of property because of the "potential impact" of the law on its prices, routes, and services. BeavEx Br. 25 n.7. Just as the law's possible effect on prices is too remote for the law to be "related to" prices, routes, and services, however, its effect is too remote for it to be "with respect to the transportation of property." Not all state laws with which it may cost a motor company money to comply—and whose costs the company may take into account in setting its prices and services—are state laws that concern the transportation of property. If they were, the Supreme Court could hardly have stated that the phrase "with respect to the transportation of property"

"'massively limits the scope of preemption.'" *Dan's City*, 133 S. Ct. at 1778 (quoting *Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting)).

Moreover, just as BeavEx claims that the IWPCA would impact its services, the towing company in *Dan's City* claimed that permitting state-law claims about the sale of towed cars to go forward would "have a significant impact" on *its* services. Petitioner's Brief on the Merits at 36, *Dan's City*, No. 12-52 (U.S. 2013).[3] Indeed, just as BeavEx threatens to abandon certain of its services if the IWPCA is not preempted, the towing company suggested that tow trucks would abandon certain of their services if the state-law claims in *Dan's City* were not preempted. *See id.* at 21-22 (stating that the sale and disposition of towed vehicles "ensure[d] payment to tow truckers for their towing and storage of vehicles that are never claimed," and that "tow truckers would not provide the essential service of towing vehicles ... if there were no assurance of payment if the vehicle is abandoned"). Rather than considering whether the claims would cause the company to alter its transportation services, however, the Supreme Court focused on the fact that the challenged conduct—the storage and disposal of towed cars—did not itself "involve 'transportation' within the meaning of the federal Act." *Dan's*

[3] Available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-52_pet.authcheckdam.pdf

*City*, 133 S. Ct. at 1779. Likewise, here, the challenged conduct—the misclassification of drivers as independent contractors—does not itself involve transportation within the meaning of the FAAAA. Like the laws in *Dan's City*, the IWPCA is "'related to' neither the 'transportation of property' nor the 'service' of a motor carrier." *Id.* at 1778. Accordingly, the FAAAA does not preempt it.

## CONCLUSION

The Court should affirm the district court and hold that the IWPCA is not preempted by the FAAAA.

Respectfully submitted,

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April 28, 2015

## 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 4,924 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 Word 2010 in 14-point Century Expanded BT.

/s/ Scott L. Nelson
Scott L. Nelson

**CERTIFICATE OF SERVICE**

I hereby certify that on April 28, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Scott L. Nelson
Scott L. Nelson