No. 17-2346

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ALEJANDRO LUPIAN, JUAN LUPIAN, ISAIAS LUNA, JOSE REYES, and EFRAIN LUCATERO, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

JOSEPH CORY HOLDINGS LLC,
Defendant-Appellant.

Interlocutory Appeal from the United States District Court
for the District of New Jersey
Civ. No. 2:16-05172
The Honorable Judge William J. Martini

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Adina H. Rosenbaum
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

October 18, 2017

Counsel for Amicus Curiae
Public Citizen, Inc.

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.

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INTEREST OF AMICUS CURIAE[1]

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-law protections for 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 laws—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] All parties have consented to the filing of this brief. 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 its express preemption clause. As explained below, the FAAAA does not displace labor laws that affect the relationship between a motor carrier and its workers, but do not affect the transportation services the motor carrier provides, the prices charged for those services, or the routes used to provide those 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), by enacting 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*, 569 U.S. 251, 256 (2013), that amendment, which was included in the FAAAA, provides that 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).

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." 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 these concerns, Congress "resolved to displace '*certain* aspects of the State regulatory process.'" *Dan's City*, 569 U.S. at 263 (quoting FAAAA § 601(a)) (emphasis in *Dan's City*). 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 preemption does not extend to "state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Id.* at 375 (quoting *Morales*, 504 U.S. at 390). Although the term "related to" is broad, "the breadth of the words … does not mean the sky is the limit." *Dan's City*, 569 U.S. at 260.

In this case, delivery drivers who reside in Illinois sued Joseph Cory Holdings LLC (Cory), a delivery company, alleging that the company took deductions from their wages in violation of the Illinois Wage Payment and Collection Act (IWPCA), 820 Ill. Comp. Stat. 115. The IWPCA requires employers to follow certain rules regarding payment of employee wages and

final compensation. With a few exceptions, the Act prohibits employers from taking deductions from their employees' wages without obtaining the employees' written consent at the time of the deductions. *Id.* 115/9. The Act defines an employee as "any individual permitted to work by an employer in an occupation," unless the worker meets 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." *Id.* 115/2.

Cory argues that the FAAAA preempts the IWPCA because enforcement of the state statute would affect the market for drivers in the transportation industry and "re-write" Cory's contracts with its drivers. Cory Br. 18. But state laws are not preempted merely because they affect motor carrier employment relationships or contractual commitments. Contrary to Cory's claim, the FAAAA does not preempt "*any* state interference with the operations of a motor carrier." *Id.* at 31. It preempts only state laws related to motor carrier prices, routes, or services with respect to the transportation of property. Because the IWPCA does not relate to the prices motor carriers charge, the routes they use, or the services they provide, the FAAAA does not preempt it.

ARGUMENT

I. The IWPCA Does Not Relate to Motor Carrier Prices, Routes, or Services.

A. The FAAA preempts a state law only if it is "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). State laws "relate to" prices, routes, or services if they have "a connection with or reference to" them. *Morales*, 504 U.S. at 384. "The requisite connection exists either where the law expressly references the [motor] carrier's prices, routes or services, or has a forbidden significant effect upon the same." *Gary v. Air Grp., Inc.*, 397 F.3d 183, 186 (3d Cir. 2005) (internal quotation marks and citation omitted).

The "service of [a] motor carrier" to which a state law must relate to be preempted is the transportation service the motor carrier provides—a service it provides to its customers. *See Dan's City*, 569 U.S. at 262 (explaining that state-law claims "survive[d] preemption" under the FAAAA because they were "unrelated to a 'service' a motor carrier renders its customers"); *id.* at 263 (explaining that state-law claims were not preempted where the law had no "connection to any transportation services a motor carrier offers its customers"). Likewise, the "price … of [a] motor carrier" is the price the motor carrier charges its customers for its transportation

services. And the "route … of [a] motor carrier" is the route the motor carrier uses in providing transportation services to its customers.

Thus, to fall within the scope of the FAAAA's preemption provision, a state law must "expressly reference[] … or ha[ve] a forbidden significant effect," *Gary*, 397 F.3d at 186, on the transportation service a motor carrier provides its customers, the route it uses in providing that service, or the price it charges its customers for that service.

B. The IWPCA does not have the necessary connection to transportation prices, routes, or services to trigger preemption under the FAAAA. To begin with, the IWPCA does not expressly reference or directly regulate motor carrier prices, routes, or services. It is a generally applicable state labor law that governs wage deductions and other aspects of wage payment and collection, not the prices, routes, or services motor carriers offer their customers.

Moreover, enforcement of the IWPCA would not have a significant effect on motor carrier prices, routes, or services. As the Seventh Circuit explained in addressing the exact question at issue here, "[t]he scope of the IWPCA is limited." *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1055 (7th Cir. 2016) (holding FAAAA does not preempt IWPCA), cert. denied, 137 S. Ct.

2289 (2017). It requires only that employers refrain from taking deductions from their employees' paychecks without express written consent at the time of the deduction, 820 Ill. Comp. Stat. 115/9, and that they follow various rules around payment of wages and final compensation, such as paying employees at least semi-monthly and notifying employees at the time of hiring of the rate, time, and place of payment, *id.* 115/3, 115/10. Enforcing these provisions would not have a significant impact on Cory's prices, routes, or services. Cory can continue to provide the exact same delivery services, using the exact same routes, regardless of whether it takes deductions from its drivers' wages or follows any of the IWPCA's other provisions. *See Costello*, 810 F.3d at 1056. And although prohibiting the company from taking illegal deductions may increase its costs, which may in turn influence the prices it charges, Cory has offered no evidence that any "increased labor cost will have a *significant* impact on the prices" it charges. *Id.* Indeed, Cory does not demonstrate that enforcement of the wage deduction and other provisions of the IWPCA would have *any* impact on the prices it charges. Thus, as the United States Solicitor General explained to the Supreme Court in urging it to deny review of *Costello*, "the IWPCA is not preempted under the 'significant impact' formulation." Br. for the U.S. as Amicus Curiae at 12,

BeavEx, Inc. v. Costello, 137 S. Ct. 2289 (2017) (No. 15-1305), 2017 WL 2303089 (Supp. App. 17).[2]

C. Rather than arguing that enforcement of the IWPCA's provisions would have a significant effect on its prices, routes, or services, Cory states that "the independent contractor model" can lead to lower prices, Cory Br. 8, and that it "elected to utilize independent contractors to meet its customers' *service* demands," *id.* at 24. Even putting aside the vagueness of these statements, Cory's comments on the effects of the "independent contractor model" are inapposite because the IWPCA does not require Cory to change its employment model. The terms "employee" and "independent contractor" are simply labels that are used to determine whether certain laws apply. The only effect of determining that a driver is an "employee" under the IWPCA is that the provisions of *that law* apply; it does not mean that the driver

[2] Cory contends that *Costello*'s determination that the IWPCA's scope is limited is "flawed," Cory Br. 31 n.6 because Illinois' unemployment insurance law's definition of "employee" is almost identical to the IWPCA's definition. S*ee* 820 Ill. Comp. Stat. 405/212. But the similarity in the two laws' definitions is irrelevant. Because preemption depends in part on effect, not only on statutory language, if two laws have the same language but different impacts, one might be preempted while the other is not. The question for determining whether the IWPCA is preempted is whether *the IWPCA* has the requisite forbidden effect, not whether the unemployment insurance law does. In any event, Cory has not demonstrated that the unemployment insurance law has a significant effect on motor carrier prices, routes, or services.

needs to be considered an employee for any other purpose. Thus, as the Seventh Circuit explained in *Costello*, there is "no basis for concluding that the IWPCA would require" a motor company "to switch its entire business model from independent-contractor-based to employee-based." 810 F.3d at 1056; *see also* Br. for the U.S. at 13, *BeavEx*, 137 S. Ct. 2289 (No. 15-1305) (Supp. App. 18) (noting that BeavEx cited "no authority to show that … respondents' narrow claim for enforcement of the IWPCA's deduction restriction" would necessarily "requir[e] a change in its business model").

Accordingly, whether "the independent contractor model" allows "some motor carriers … to meet customer demands at lower prices," Cory Br. 11, or whether an independent contractor who assumes the risks and benefits of selecting his own routes would choose different routes than an employee who has "ha[s] different incentives and may be subject to additional break requirements," *id.* at 28, are of no moment here. The question is not whether the "independent contractor model" affects prices, routes, and services, but whether enforcement of *the IWPCA* would have the requisite forbidden effect. Cory has not shown that it would.

D. Even apart from the IWPCA's limited scope, any effect that the IWPCA might have on prices, routes, or services would be too "remote" to

trigger preemption under the FAAAA. *Morales*, 504 U.S. at 390 (citation omitted). As the Supreme Court has explained, "the breadth of the words 'related to'" in the FAAAA "does not mean the sky is the limit." *Dan's City*, 569 U.S. at 260. The FAAAA "does not preempt state laws affecting carrier prices, routes, and services 'in only a 'tenuous, remote, or peripheral ... manner.'" *Id.* at 261 (quoting *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390)).

Thus, in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, this Court held that defamation claims against an airline were not preempted, although the statements at issue arguably referred to an air carrier service, because the claims were "simply 'too tenuous, remote, or peripheral' to be subject to preemption." 164 F.3d 186, 195 (3d Cir. 1998). And in *Gary*, this Court held that a claim under a state whistleblower statute by a pilot who had expressed concerns that another pilot was unqualified and either had or would violate FAA regulations was not preempted because the connection between the claim and the air carrier's service was "simply too remote and too attenuated to fall within the scope of the ADA." 397 F.3d at 189. "Instead," the Court stated, the plaintiff's "actions are more properly viewed as comparable to a garden variety employment claim." *Id.*

Here, the IWPCA is one of numerous labor laws, zoning laws, tax laws, and criminal laws that operate "one or more steps away from the moment at which the firm offers its customer a service for a particular price"—that is, one or more steps away from the motor carrier's prices, routes, or services. *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012). To the extent that the IWPCA 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, and motor carriers may decide to raise their prices or change their services in response to the costs of compliance. This second-hand effect, however, is too attenuated for the law to fall within the FAAAA's preemption provision. Many generally applicable state laws affect the costs of doing business, and may therefore affect motor carriers' decisions about their prices and services, yet that consequence does not render those laws preempted. For example, a rise in a state tax rate might impact a motor carrier's decision about what services to offer, but such an effect would not immunize motor carriers from paying generally applicable taxes. Similarly, state and local zoning regulations dictate where motor carriers may locate their operations and, in that way, may affect the cost of operating in a

specific area. But it "is hardly doubtful that state or local regulation of the physical location of motor-carrier operations falls outside the preemptive sweep" of the FAAAA. *Dan's City*, 569 U.S. at 264; *see generally S.C. Johnson*, 697 F.3d at 558 (noting that numerous state laws, including labor laws, intellectual property laws, banking laws, securities rules, and tax laws, among others, "ultimately affect the costs" of doing business, and thus may affect the price a company charges, but that "no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws ... because their effect on price is too 'remote'" (quoting *Morales*, 504 U.S. at 390)).

As the Seventh Circuit has explained, laws such as generally applicable labor laws, zoning laws, and criminal laws do not attempt "to change the bargain" that parties to a contract for transportation services have reached. *S.C. Johnson*, 697 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.* Stated differently, such laws do not override "competitive

forces of the market" for transportation services, *Taj Mahal*, 164 F.3d at 194; they provide the background against which those market forces act.

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 for the purpose of wage deductions; indeed, it is hard to imagine that customers care about the classification of the people who deliver their packages. Rather, the IWPCA is one of numerous labor laws, zoning laws, tax laws, criminal laws, and other laws that provide the backdrop against which motor carriers and their customers contract. The IWPCA is "far removed from Congress' driving concern," in enacting the FAAAA, *Dan's City*, 569 U.S. at 263, and its connection to motor carrier prices, routes, and services is "simply too remote and too attenuated to fall within" the FAAAA's preemptive scope, *Gary*, 397 F.3d at 189.

II. State Laws Are Not Preempted Merely Because They Affect Contracts or the Market for Labor in the Transportation Industry.

Instead of focusing on whether the IWPCA expressly references or has a forbidden significant impact on its prices, routes, or services, Cory's brief primarily argues that the IWPCA is preempted because enforcement of the

state law would "alter the terms" of its agreements and disrupt "the operation of the free market in the transportation industry." Cory Br. 1, 16. But the agreements to which Cory refers are contracts with its drivers—not contracts with its customers for transportation services. And the market to which it refers is the market for labor in the transportation industry—not the market for transportation services. The FAAAA, however, is not concerned with state laws that affect contracts or labor markets unless those laws relate to transportation prices, routes, or services.

A. As Cory notes, in enacting the ADA's preemption provision, Congress sought to "achieve 'maximum reliance on competitive market forces.'" *Dan's City*, 569 U.S. at 255 (citation omitted). Congress, however, was not interested in immunizing *all* aspect of air carriers' businesses from state regulation. Rather, it wanted to "ensure *transportation rates, routes, and services* that reflect 'maximum reliance on competitive market forces.'" *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378 (citation omitted)) (emphasis added). Thus, it enacted a provision that preempts state laws related to the price, route, or service of an air carrier. The FAAAA then borrowed that provision's language to preempt state laws related to the price, route, or service of a motor carrier.

Accordingly, it is irrelevant whether Cory and the drivers are "market participants" in the market for labor in the transportation industry, Cory Br. 15, or whether enforcement of the IWPCA would affect that market. The FAAAA is not concerned with the market for labor; it is concerned with the market for transportation services and with the prices charged and routes used in that market. Regardless of its effect on the market for labor, a state law is not preempted unless it has the requisite connection to transportation prices, routes, or services.

B. For similar reasons, it is irrelevant whether the IWPCA would "re-write" the contracts between Cory and its drivers. Cory Br. 18. The FAAAA does not preempt state laws that affect contracts unless the laws have the requisite forbidden relationship to transportation prices, routes, or services.

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995), on which Cory relies, is not to the contrary. In *Wolens*, the Supreme Court considered whether breach-of-contract claims involve the "enact[ment] or enforce[ment]" of a law, regulation, or other provision having the force or effect of law within the ADA preemption provision's meaning. *See* 49 U.S.C. § 41713(b)(1) (preempting the "enact[ment] or enforce[ment] [of] a law, regulation, or other provision having the force and effect of law related to a

price, route, or service of an air carrier"). Explaining that it did not read the provision "to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings," *Wolens*, 513 U.S. at 228, the Court held that breach-of-contract claims do not involve the enactment or enforcement of a law, *id.* at 228-29. Accordingly, although the Court had already determined that the breach-of-contract claim at issue related to prices, routes, or services, *id.* at 226, the Court held that the claim was not preempted. The Court's holding that breach-of-contract claims that relate to prices, routes, or services are *not* preempted does not remotely suggest that claims affecting contracts that do not relate to prices, routes, and services *are* preempted.

Cory contends that the IWPCA claims are preempted because they "arise outside the 'four corners' of [the drivers'] contracts with Joseph Cory, they seek relief to which [the drivers] would not be entitled under those contracts, and are entirely predicated on Illinois state law and policies." Cory Br. 23-24 (quoting *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 853 (8th Cir. 2009)). But the inquiry into whether claims arise from a contract or are predicated on state law only speaks to the question whether the claims

involve the "enact[ment] or enforce[ment]" of a law. *See Data Mfg.*, 557 F.3d at 853 (considering these questions in the context of determining whether claims "derive[d] from the enactment or enforcement of state law"). It does not speak to the question whether the claims relate to prices, routes, and services. For a claim to be preempted, however, it must *both* involve the enactment and enforcement of a law *and* be related to prices, routes, or services. *See* 49 U.S.C. § 14501(c)(1); *see also*, *e.g.*, *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1431-33 (2014) (separately considering whether claim was based on state-imposed obligation and whether it related to prices, routes, or services); *Data Mfg.*, 557 F.3d at 852-53 (same). Even if a claim is "entirely predicated on … state law and policies," Cory Br. 24, it is not preempted if it does not relate to transportation prices, routes, and services.

An example helps demonstrate the principle: If the FAAAA and ADA preempted all claims affecting motor and air carrier contracts, regardless of whether they related to transportation prices, routes, or services, airlines could enter into contracts to provide gambling and prostitution services, and states would be forbidden from substituting their "policy judgment" against gambling and prostitution "for the decisions of [the] 'market participants'" who entered into the contracts. Cory Br. 19. As the Supreme Court

specifically stated in *Morales*, however, the Court was not "set[ting] out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines." 504 U.S. at 390.

Cory repeatedly notes that the agreements between it and its drivers concern "the terms on which they agreed to transport property." Cory Br. 1-2. But the fact that Cory contracted with the drivers to provide delivery services is not sufficient for the IWPCA claims to be preempted; rather, the state-law claims *themselves* must relate to motor carrier prices, routes, or services. *See* 49 U.S.C. § 14501(c)(1). Cory also claims that the IWPCA relates to its services because it would alter the "service terms" of its contract. Cory Br. 22. But the terms of its agreements with its drivers are not the terms on which Cory provides services to its customers. Sticking the word "service" before "terms" does not cause claims that would invalidate terms of a contract to be preempted if the claims are not related to transportation prices, routes, or services within the meaning of the FAAAA.

In sum, Cory's focus on the market for labor in the transportation industry and on its contracts with its drivers is a distraction from the question whether the IWPCA claims are "related to a price, route, or service

of any motor carrier." 49 U.S.C. § 14501(c)(1). Because the claims are not related to motor carrier prices, routes, or services, they are not preempted.

CONCLUSION

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

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen, Inc.

October 18, 2017

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Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, this brief was served on counsel of record for all parties through the Court's ECF system.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum