IN THE

SUPREME COURT OF CALIFORNIA

THE PEOPLE ex rel. KAMALA D. HARRIS, as Attorney General, etc., Plaintiff and Appellant, v. PAC ANCHOR TRANSPORTATION, INC., et al., Defendants and Respondents.	Case Number S194388

After a Decision by the Court of Appeal
Second Appellate District, Division Five
[Case No. B220966]

Appeal from a Judgment of the Superior Court for Los Angeles County
Hon. Elizabeth A. White, Judge
[Case No. BC397600]

REPLY TO ANSWER TO PETITION FOR REVIEW

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Service on the Office of the Attorney General and the District Attorney of the County of Los Angeles required by Bus. & Prof. Code § 17209

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INTRODUCTION

Defendant motor carriers Pac Anchor Transportation, Inc., and Alfredo Barajas have asked the Court to consider whether the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1), preempts the efforts of the State of California (the "State") to enforce its employment laws against motor carriers by seeking an injunction under the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, to compel them to treat individuals who drive trucks for them as employees, rather than independent contractors.

Because the FAAAA employs the same preemptive language as the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1); *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 369 (2008), the issue of whether the FAAAA preempts causes of action under the Unfair Competition Law to enforce state labor laws not only affects all motor carriers engaged in the interstate transportation of property ("motor carriers") in California, 49 U.S.C. §§ 13102(14), 13501, 13504, 14501(c), it also affects all air carriers operting in California. Consequently, on this issue, not only are motor carriers entitled to the same protections against state interference in the trucking industry as air carriers are in the airline industry, but they are also governed by the same federal laws.

The defendant motor carriers offer two reasons the Court should review this issue. First, review is necessary to secure the uniform application of the law to air and motor carriers. Two published decisions by the Court of Appeal for the Second Appellate District reached completely different conclusions on whether the preemption language employed by the FAAAA and the ADA preempts all actions under the Unfair Competition Law against air and motor carriers. In this matter, Division Five held that it does not. Opn. at 5 (attached to the Pet. for Review as Exhibit "A"). In contrast, in *Fitz-Gerald v. Skywest Airlines, Inc.*, 155 Cal. App. 4th 411,

423 (2007), *reh'g denied*, No. B187785, 2007 Cal. App. LEXIS 1719 (Oct. 16, 2007), *depublication denied*, No. S158366, 2008 Cal. LEXIS 1056 (Jan. 30, 2008), Division Six held that it does. By itself, that split is enough for review to be granted.

Second, review is necessary to resolve an ongoing and longstanding conflict between the State's policy dictating the use of employee drivers over independent contractors and the Congressional policy outlawing state interference with the forces of competition between motor carriers that was specifically adopted in reaction to the State's efforts to impose such a policy. H.R. Conf. Rep. 103-677 ("HRCR") at 87 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1715 ("USCCAN") at 1759 (1 Appx. at 270) (attached as Exhibit "B" to the Pet. for Review).

LEGAL DISCUSSION

I. THE STATE EFFECTIVELY CONCEDES THAT REVIEW IS NECESSARY TO RESOLVE A SPLIT BETWEEN THE DIVISIONS OF THE SECOND APPELLATE DISTRICT OF THE COURT OF APPEAL THAT AFFECTS ALL MOTOR CARRIERS AND AIR CARRIERS OPERATING IN CALIFORNIA.

In its Answer to the Petition for Review, the State fails to address the fact that, because the FAAAA uses the same preemptive language as the ADA, the decision by the Court of Appeal affects air carriers operating in California as well as motor carriers. By remaining silent, the State has essentially conceded that fact.

Moreover, the State's Answer fails to address the fact that Divisions Five and Six of the Second Appellate District have published decisions that reached completely opposite conclusions on whether the preemptive language employed by the FAAAA and the ADA preempts all actions under the Unfair Competition Law against air carriers and motor carriers. The Answer also fails to address the fact that when the U.S. District Court

for the Southern District of California considered this issue in its unpublished decision in *Blackwell v. Skywest Airlines, Inc.*, No. 06cv0307 DMS (AJB), 2008 WL 5103195 at *20 (S.D. Cal. Dec. 3, 2008), it agreed with the decision by Division Six and cited *Fitz-Gerald* with approval. Thus, not only does the appellate decision in this case conflict with a prior decision within the same district, it also conflicts with a federal court decision in California on the same issue.

By failing to address these facts, the State essentially concedes that a split exists between the divisions of the Court of Appeal for the Second Appellate District and that the decision in *Blackwell* indicates that federal courts may favor the position taken by Division Six in *Fitz-Gerald*. The split created by the Court of Appeal in this matter means that courts may permit litigants in California to maintain claims under the Unfair Competition Law against air and motor carriers in some cases and prohibit them from doing so in others. Unless and until the Court resolves the issue, the rights of air carriers, motor carriers, the State, employees, consumers, and competing carriers will remain uncertain. The Court should grant review to ensure that the law is applied uniformly in California.

II. REVIEW IS ALSO NECESSARY TO RESOLVE A CONFLICT BETWEEN AN EXPRESS FEDERAL POLICY AGAINST STATE INTERFERENCE WITH THE FORCES OF COMPETITION BETWEEN MOTOR CARRIERS AND A STATE POLICY FAVORING THE USE OF EMPLOYEE DRIVERS OVER INDEPENDENT CONTRACTORS.

Although the State does address the defendant motor carriers' contention that review is necessary to resolve a conflict between Congressional and State policy, the State's arguments lack merit. The State contends that no policy conflict exists. However, the State does not dispute that Congress specifically enacted the FAAAA to preempt a California law enacted by the California Legislature that discouraged the use of

independent contractor drivers by motor carriers operating in California, HRCR at 87, *reprinted in* USCCAN at 1759 (1 Appx. at 270) (attached to the Pet. for Review as Exhibit "B"), nor does the State dispute that the Port of Los Angeles has attempted to compel motor carriers to use independent contractor drivers by imposing mandatory concession agreements upon them which contain such a requirement, *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1049 (9th Cir. 2009), and that earlier this year the State Assembly introduced a bill designating all individuals that drive trucks for motor carriers operating in California ports as employees. A.B. 950, 2011-12 Leg., Reg. Sess. (Cal. 2011). That the trucking industry in California is under assault in California, and engaged in at least a three-front war on its business model, with all fronts centered on the industry's desired use of independent contractor drivers and the state's immense dislike of such a business model, is therefore a given.

Nevertheless, the State contends that these actions by the State do not evidence a fundamental conflict between state and federal policy regarding the use of independent contractors in the trucking industry. Answer at 2. However, the undisputed actions by the State and its subdivisions enumerated above and the State's claim against the defendant motor carriers under the Unfair Competition Law in this matter clearly demonstrate that the State has sought, and continues to seek, to impose a policy favoring the use of employee drivers on motor carriers in California.

The State agrees that in enacting the FAAAA Congress announced a policy promoting competition between motor carriers, but incorrectly argues that the FAAAA does not constitute a blanket prohibition against state regulation affecting such competition. Answer at 3. However, by enacting the preemptive language of the FAAAA (and the identical language of the ADA), which prohibits states from enacting or enforcing laws related to motor carrier prices, routes, or services, 49 U.S.C. §

14501(c)(1), Congress expressly announced that it intended to promote competition between carriers by leaving carriers to themselves, and not at all to the states. HRCR at 87, *reprinted in* USCCAN at 1759 (1 Appx. at 270); *Rowe*, 552 U.S. at 372; *Am. Airlines, Inc., v. Wolens*, 513 U.S. 219, 227-28 (1995). Consequently, the preemptive language of the FAAAA does constitute a blanket prohibition against state regulation affecting competition, even regulation that is consistent with Congress' goals. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 387 (1992).

Therefore, the State's efforts to impose a policy favoring the use of employee drivers directly conflict with the Congressional policy against state interference with the forces of competition between motor carriers. Review is necessary to resolve this policy conflict conclusively.

III. WHETHER THE DRIVERS ARE ACTUALLY EMPLOYEES IS IRRELEVANT TO THE ISSUE AND TO THE QUESTION OF WHETHER THE COURT SHOULD GRANT REVIEW.

The State also contends that it does not intend to discriminate against the use of independent contractor drivers; instead, it merely seeks to enforce state tax, insurance, and wage laws against the defendant motor carriers because the drivers are actually employees, not independent contractors. Answer at 1-3. That argument has three flaws. First, the State did not file a cause of action against the defendant motor carriers for the violation of state tax, insurance, or wage laws; it filed a single cause of action for unfair competition under the Unfair Competition Law premised on the violation of those state laws. Opn. at 3-4; 1 Appx. at 10:20-11:9, 13:6-14:7. Therefore, the State seeks to enforce the Unfair Competition Law as well as state labor laws against the defendant motor carriers.

Second, because this matter was presented to the trial court as a motion for judgment on the pleadings, the trial court and the Court of Appeal had to presume that the allegations of the complaint were true and

therefore had to presume that the drivers are employees. Opn. at 3-4, *citing Kapsimallis v. Allstate Ins. Co.*, 104 Cal. App. 4th 667, 672 (2002). Consequently, whether the drivers are actually employees has not been established yet, and is disputed. The fact that the State argued the presupposition that the drivers were employees, even though no court has ever so held, corroborates the contention made in Section II of this reply: namely that the state believes that all motor carrier drivers are employees and even if they are not the state is willing to ignore the intent of Congress and legislate, mandate, and litigate to ensure that they are.

Even if it had been established that the drivers were employees, the question of whether the drivers are employees is irrelevant here. The issue presented to the trial court, to the Court of Appeal, and to this Court in the Petition for Review is whether the FAAAA preempts the State from maintaining a cause of action under the Unfair Competition Law against the defendant motor carriers premised on the violation of state labor laws. Division Five incorrectly answered that it does not. The trial court, Division Six in *Fitz-Gerald*, and the U.S. District Court for the Southern District of California in *Blackwell* each correctly determined that it does.

When the trial court and Division Five considered the issue, because they did so on a motion for judgment on the pleadings, they assumed the drivers were employees. When Division Six and the district court considered the issue in *Fitz-Gerald* and *Blackwell*, respectively, there was no dispute regarding whether the workers were employees. Therefore, in answering the question of whether the preemptive language of the FAAAA preempts causes of action under the Unfair Competition Law against carriers premised on the violation of state labor laws, it is irrelevant whether the workers at issue are actually employees or not.

Finally, this argument by the State goes to the merits of the defendant motor carriers' appeal, not to the present question of whether the

Court should review the decision by Division Five. The employee-independent contractor issue only arises in this case when the effect test for preemption set forth in *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 388 (1992), is applied to the State's cause of action under the Unfair Competition Law, because the defendant motor carriers contend that by seeking an injunction to force them to treat the drivers as employees, rather than independent contractors, the State's action logically has the direct and significant effect on the carriers' prices, routes, and services that the FAAAA prohibits.

CONCLUSION

The Court should grant review because in published opinions two divisions of the Court of Appeal have expressly disagreed whether causes of action under the Unfair Competition Law against air carriers and motor carriers premised on the violation of state labor laws are preempted. *See* Cal. R. Ct. 8.500(b)(1). Moreover, the Court should grant review to resolve the ongoing conflict between the express Congressional policy against state interference with the forces of competition between motor carriers and the State's policy favoring the use of employee drivers. *See id.*

Dated: July 25, 2011

Respectfully submitted,

SANDS LERNER

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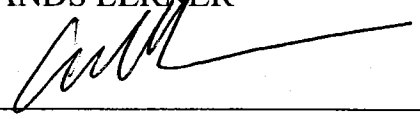
CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Rule 8.504(d)(1) of the California Rules of Court, the attached REPLY TO ANSWER TO PETITION FOR REVIEW uses 13 point Times New Roman font including footnotes and contains 2,096 words, which is less than the total number of words permitted by the Rules of Court. I rely on the word count of the computer program used to prepare this brief in making this certification.

Dated: July 25, 2011

Respectfully submitted,

SANDS LERNER



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Pac Anchor Transportation, Inc.**
Supreme Court Case No.: **S194388**; Court of Appeal Case No.: **B220966**

I declare:

I am employed at the law firm Sands Lerner, the office of a member of the California State Bar at whose direction this service is made. I am over the age of 18 and not a party to this action.

On **July 25, 2011**, I served the attached **REPLY TO ANSWER TO PETITION FOR REVIEW** by delivering copies thereof enclosed in sealed envelopes and addressed as follows to the common carrier Overnite Express, which promises overnight delivery by 11:00 a.m. on July 26, 2011, to the following recipients:

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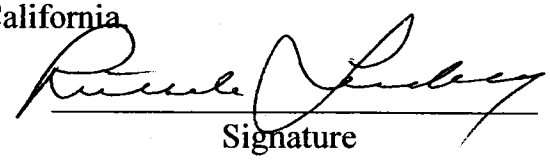
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **July 25, 2011**, at Los Angeles, California.

Ruthelene Luckey
Declarant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