IN THE

SUPREME COURT OF CALIFORNIA

THE PEOPLE ex rel. KAMALA D. HARRIS, as Attorney General, etc., Plaintiff and Respondent, v. PAC ANCHOR TRANSPORTATION, INC., et al., Defendants and Petitioners.	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]

OPENING BRIEF ON THE MERITS

Neil S. Lerner (SBN 134031)
Arthur A. Severance (SBN 246691)
SANDS LERNER
12400 Wilshire Blvd., Suite 1300
Los Angeles, CA 90603
Tel.: (310) 979-9144
Fax: (310) 979-9244
Email: nsl@sandslerner.com;
aas@sandslerner.com
Attorneys for Alfredo Barajas and Pac Anchor Transportation, Inc.

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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ISSUE PRESENTED

Can the State of California (the "State") 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, or is such an action unconstitutional because it is preempted by the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1)?

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants-Petitioners Pac Anchor Transportation, Inc., and Alfredo Barajas request that the Court resolve this issue of importance to all motor carriers and air carriers. Causes of action under the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, against air and motor carriers interfere with the forces of competition in direct contravention of the FAAAA and the Airline Deregulation Act. ("ADA"), 49 U.S.C. § 41713, and are therefore preempted on their face.

In addition, the particular UCL claim the State has asserted against Petitioners is preempted because it seeks to force Petitioners to treat the drivers as employees, and therefore threatens to have a direct and significant effect on Petitioner's prices, routes, and services. Moreover, the claim threatens to impose the very State policy and erect the very entry control discouraging the participation of independent contractor drivers in the market that Congress sought to preempt when it enacted the FAAAA. Therefore, even if the effect of the State's claim on Petitioner's prices, routes, and services is remote it is nevertheless preempted.

The Opinion of the Court of Appeal in this matter has caused a split in authority regarding these issues. The Court should hold that the ADA and FAAAA preempt the UCL and the State's UCL claim, and resolve the tension between State and federal policy.

STATEMENT OF THE CASE

I. Proceedings in the Trial Court.

This case comes before the Court following the entry of judgment on a motion for judgment on the pleadings. Therefore, the material allegations of the State's Complaint are presumed to be true. *Smiley v. Citibank* ("*Smiley*"), 11 Cal. 4th 138, 145-46 (1995), *aff'd* 517 U.S. 735 (1996). Those allegations are that Petitioners transport cargo from the Ports of Los Angeles and Long Beach to various locations throughout Southern California using trucks that are owned by one of the Petitioners and leased to the other and which are operated by drivers that the Petitioners classify as independent contractors. (1 Appellant's App. ("A.A.") 9:26-10:3, 10:20-11:5, 13:6-7.) The State alleges that the drivers are employees, not independent contractors, and that by misclassifying the drivers Petitioners have violated the following California employment statutes, Sections 976, 976.6, 984, and 13020 of the Unemployment Insurance Code, Sections 226, 1194, 2802, and 3700 of the Labor Code, and Sections 4 and 7 of I.W.C. Wage Order 9-2001. (*Id.* 13:6-14:7.) The State's Complaint asserts a single cause of action against Petitioners, for relief under the UCL predicated on the alleged violations, and demands equitable relief, including restitution, a civil penalty, and a permanent injunction.. (*Id.* 13:1-14:23, 13:27-15:10.)

The State alleges that by failing to comply with the state employment statutes enumerated above, Petitioners have violated California law and have harmed the drivers, the general public, and the State. (*Id.* 14:8-15, 20-21.) The State further alleges that by misclassifying the drivers, Petitioners have "illegally lowered their costs of doing business," unfairly and unlawfully profited, and obtained an unfair advantage over their competitors. (*Id.* 10:3-11, 12:4-8, 14:8-12.)

Petitioners moved for judgment on the pleadings. (2 A.A. 428:22-24, 432:11-13.) The trial court granted the motion, concluding that the FAAAA preempted the State's UCL claim for three reasons.

First, the court determined that the court *Fitz-Gerald v. Skywest* ("*Fitz-Gerald*"), 65 Cal. Rptr. 3d 913, 921-22 (2007), held the preemptive language of the ADA to preempt all causes of action under the UCL against air carriers *per se* (*i.e.*, on its face). (2 A.A. 429:20-22.) Because the FAAAA uses the same preemptive language as the ADA, the trial court held that the FAAAA preempts all causes of action under the UCL against motor carriers *per se*. (*Id.* 429:23-430:3.)

Second, the court applied the effect test for FAAAA preemption. It found that the injunction the State seeks would force the carriers to treat the drivers as employees, which would affect the carriers' prices, routes, and services directly and significantly. (*Id.* 430:11-26.)

Third, the trial court found that Congress enacted the FAAAA "to remove a California entry control that discouraged the use of independent contractors by motor carriers," and that the requested relief would require the drivers "to purchase trucks or negotiate new leases" to remain independent contractors. (*Id.* 431:9-11, 17-20.) Consequently, the Court found that the State's UCL claim "seeks to erect the specific type of entry control that Congress sought to dismantle" when it enacted the FAAAA. (*Id.* 431: 21-24.) The trial court therefore held that the State's UCL claim threatens to interfere with Congress' deregulatory purpose and is preempted "even if it is only remotely connected with" the carriers' prices, routes, and services. (*Id.* 431:25-28.)

II. The Court of Appeal's Decision.

The Court of Appeal reversed. The court disagreed with the holding of *Fitz-Gerald* that the preemptive language of the ADA preempts all causes of action under the UCL against air carriers. The court stated, "Where a cause of action is based on allegations of unlawful violations of the State's labor and unemployment insurance laws, we see no reason to find preemption merely because the pleading raised these issue under the UCL, as opposed to separately stated causes of action." (Opn. at 8.)

In applying the effect test for FAAAA preemption, the court focused on the fact that the State's UCL claim is based on alleged violations of state employment laws. The court found that those laws were ones of general applicability. (Opn. at 9-10.) Therefore, it held that the effect of those laws on Petitioners' prices, routes, and services is too tenuous for the FAAAA to preempt them. (Opn. at 10.) The court also held that the State's UCL claim based on the alleged violation of those laws "is not an action related to the price, route, or service of a motor carrier and, therefore not preempted by the FAAAA." (Opn. at 10.)

The court did not address the reference test for FAAAA preemption and did not address the trial court's holding that the State's UCL claim is preempted because it threatens to interfere with Congress' deregulatory purpose by erecting an entry control.

ARGUMENT

I. LEGAL BACKGROUND

A. This Matter Is Subject to *De Novo* Review.

The Court's review of rulings on motions for judgment on the pleadings is *de novo* because such motions, like general demurrers, present "a mixed question of law and fact that is predominantly legal: does the plaintiff's complaint state facts sufficient to state a cause of

action against the defendant?" *Smiley*, 11 Cal. 4th 138, 145-46 (1995), *aff'd* 517 U.S. 735 (1996); *see also* Cal. Civ. Proc. Code § 438(c)(1).

In reviewing such rulings, the Court is not limited to considering theories raised below; instead, it may consider new grounds because it is reviewing the validity of the rulings below, not the reasons the rulings were reached. *Harris v. Wachovia Mortgage*, 111 Cal. Rptr. 3d 20, 22-23 (2010); *Smith v. Wells Fargo Bank, N.A.*, 38 Cal. Rptr. 3d 653, 666 (2005).

In conducting its review, the Court must accept the properly plead factual allegations of the Complaint as true, may consider defects appearing on the face of the Complaint, and may consider matters regarding which the Court may take judicial notice. *Smiley*, 11 Cal. 4th at 146; *Harris*, 111 Cal. Rptr. 3d at 23; *Hood v. Santa Barbara Bank & Trust*, 49 Cal. Rptr. 3d 369, 376 (2006).

Because the question of federal preemption based on such undisputed facts is one of law, the Court's review of rulings regarding preemption, including determinations regarding Congress' preemptive intent, is also *de novo*. *Hood*, 49 Cal. Rptr. 3d at 24; *Smith*, 28 Cal. Rptr. 3d at 666.

B. The FAAAA Preempts State Action Related to Motor Carrier Prices, Routes, or Services.

The preemptive provision of the FAAAA states, in relevant part:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce any law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . .

49 U.S.C. § 14501(c)(1). There are several enumerated exceptions to FAAAA preemption, none of which applies to the facts of this case.

The FAAAA applies to state action regarding motor carriers of property. § 14501(c). It defines a motor carrier as "a person providing

motor vehicle transportation for compensation." § 13102(14). The State alleges that Petitioners transport cargo using trucks. (1 A.A. 10:20-11:3.) Therefore, they transport property using motor vehicles. The State further alleges that Petitioners "lowered their costs of doing business," "conduct business," and have "competitors," (*Id.* 10:4, 26, 11:6-7, 14:9) creating the logical inference that Petitioners transport property using motor vehicles for compensation. Therefore, Petitioners are motor carriers of property within the meaning of the FAAAA.

C. Congressional Intent Is the Touchstone of Preemption Analysis.

To determine whether the FAAAA preempts the State's UCL claim, the Court must consider whether Congress intended such preemption. Under the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, federal law enacted pursuant to the Constitution such as the FAAAA is supreme over, and therefore preempts, state law, even state law that is consistent with the federal law's substantive requirements. *Morales v. Trans World Airlines* ("Morales"), 504 U.S. 374, 387 (1992); *N.H. Motor Transp. Ass'n v. Rowe* ("*N.H.*"), 448 F.3d 66, 74 (1st Cir. 2006), *aff'd Rowe v. N.H. Motor Transp. Ass'n* ("*Rowe*"), 552 U.S. 364 (2008);[1] *Smiley*, 11 Cal. 4th at 147.

However, federal law is presumed not to preempt traditional state police powers unless Congress' purpose to the contrary is clear and manifest. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* ("*Mendonca*"), 152 F.3d 1184, 1185 (9th Cir. 1998); *Smiley*, 11 Cal. 4th at 148. Therefore, "[i]n every preemption case, 'the purpose of Congress is the ultimate touchstone.'" *E.g.*, *N.H.*, 448 F.3d at 72; *Smiley*, 11 Cal. 4th at 147.

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[1] "Although they are not binding, decisions of the lower federal courts are entitled to great weight on questions of federal law." *S.Cal. Gas Co. v. Occup. Safety & Health App. Bd.*, 67 Cal. Rptr. 2d 892, 896 (1997).

Congress borrowed the preemptive "related to" language it used in the FAAAA from comparable provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), and the ADA; therefore, case law regarding ERISA and ADA preemption is precedential authority regarding Congress' intent in enacting the FAAAA and regarding the breadth of FAAAA preemption.[2] H.R. Conf. Rep. 103-677 ("HRCR") at 83-85 (1993) (1 A.A. 266-68); *Rowe*, 552 U.S. at 370; *Mendonca*, 152 F.3d at 1188 nn.4-5.

D. The Court Must Apply a Reference and an Effect Test to Determine Whether State Action Is Preempted.

The U.S. Supreme Court considered Congress' intent regarding the preemptive language used in the ADA and the FAAAA in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), a case regarding ADA preemption in the context of state consumer protection statutes, including the UCL. *Id.* at 383; *see Trans World Airlines v. Mattox* ("*TWA*"), 712 F. Supp. 99, 105 (W.D. Tex. 1989) *and id.*, 897 F.2d 773, 776, 788 (W.D. Tex. 1990), *aff'd in relevant part*, *Morales*, 504 U.S. 374; Req. for J. Not. ¶ 1, Ex. A at 1, 3-4. In *Morales*, the Court stated that the best evidence of Congress' preemptive intent is the plain language and ordinary meaning of the preemption provision itself, and that the intent may also be ascertained from the provision's structure and purpose. *Morales*, 504 U.S. at 383.

The Court examined the preemptive language of the ADA, and found that by using the phrase "related to," Congress did not merely intend to preempt the enactment and enforcement of state laws,

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[2] There is some variation in language in case law and statutory law regarding preemption resulting from recodification. However, Congress stated that it intended no change in meaning or judicial interpretation when it changed "relating to" to "related to" and when it changed "rate" to "price." HRCR at 83-84 (1 A.A. 266-67). As the FAAAA uses "related to" and "price," those terms are used herein.

regulations, and other provisions having the force and effect of law (hereinafter collectively "state action") directly regulating air carrier prices, routes, or services. *Id.* at 385-86. Instead, Congress deliberately and broadly expressed an intent to preempt state action having "a connection with, or reference to," air carrier prices, routes, or services, even state action that is consistent with federal law, not intended to affect prices, routes or services, or indirect. *Id.* at 384, 386-87.

The Court performed two tests to determine whether the ADA's preemptive provision preempted the Attorneys General of various states, including California, from enforcing advertising guidelines against air carriers using state consumer protection statutes, including the UCL. *Id.* at 378, 380, 383, 390; s*ee TWA*, 712 F. Supp. at 105; *id.*, 897 F.2d at 788; Req. for J. Not. ¶ 1, Ex. A at 1, 3-4. In each instance, the Court relied upon logical reasoning rather than empirical evidence.

First, the Court considered whether the advertising guidelines "related to" the air carriers' prices, routes, or services by referring to them (the "reference test"). *Morales*, 504 U.S. at 388. The Court found that the guidelines referred to airfares, and did so in a way that would give rise to a cause of action under a Texas consumer protection statute to enforce advertised airfares lacking required disclaimers. *Id.* The Court indicated that such a cause of action would be "related to" air carrier prices, routes, and services, and would therefore be preempted. *See id.* at 388.

The Court also considered whether the advertising guidelines were preempted for having the "forbidden significant effect" on the air carriers' prices, routes, or services (the "effect test"). *Id.* The Court determined that the guidelines would significantly impact the air carriers' marketing, and consequently would have a significant effect on their prices. *Id.* at 389-90. The court indicated that the effect test therefore provided an alternate ground for finding the guidelines preempted. *See id.* at 389.

However, the Court cautioned that in other instances certain state action such as state gambling and prostitution laws, may affect prices, routes, and services in "too tenuous, remote, or peripheral a manner" to be preempted under the effect test. *Id.* at 390.

The Court held the advertising guidelines to be preempted and affirmed the decisions by district court and the court of appeals to permanently and prospectively enjoin the states from taking action related enforcing the guidelines. *Id.* at 380, 382-83, 390-91; *see TWA*, 897 F.2d at 788 (indicating the injunction only applied prospectively). Although the Court framed the issue presented as whether the ADA preempted enforcement of the advertising guidelines by means of state consumer protection statutes, because such enforcement was only threatened, the court did not expressly hold it to be preempted, *Id.* at 378, 382-83. However, because the injunction encompassed such state action, the Court's holding also indicated that the ADA preempted the use of state consumer protection statutes, including the UCL, to enforce the guidelines.

Because Congress adopted the preemptive language from the ADA in enacting the FAAAA, the analysis the Court employed in *Morales* applies to FAAAA preemption, too. Therefore, *Morales* sets forth two tests to determine whether Congress explicitly intended the FAAAA to preempt state action such as the State's UCL claim:

1. A reference test under which state action that refers to motor carrier prices, routes, or services is preempted; and
2. An effect test under which state action that directly and significantly affects the carriers' prices routes and services.

In applying these tests, courts need not consider empirical evidence; it is sufficient to demonstrate a logical effect. *See N.H.*, 448 F.3d 66, 82 n.14 (1st Cir. 2006), *aff'd Rowe*, 552 U.S. 364 (2008).

Morales further indicates that claims under state consumer protection statutes, including the UCL, and the state laws whose violation serves as the predicate for such claims are subject to preemption, and that the Court may consider the structure and purpose of the FAAAA in addition to applying the reference and effect tests to determine whether the provision preempts the State's UCL claim.

E. The State's UCL Claim Is Preempted on Its Face.

The U.S. Supreme Court revisited the issue of Congress' intent in enacting the preemptive language used in the ADA and the FAAAA in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 225 (1995), another case regarding ADA preemption of claims under state unfair competition and consumer protection statutes (hereinafter "state consumer protection statutes"). The Court expressly held that the ADA preempted claims under the consumer protection statute at issue. *Id.* at 228.

That statute was the Illinois Consumer Fraud and Deceptive Business Practices Act ("Illinois Consumer Fraud Act"), 815 Ill. Comp. Stat. § 505, which like the UCL prohibits "'unfair methods of competition and unfair or deceptive acts or practices,'" *Wolens*, 513 U.S. at 227, *quoting* 815 Ill. Comp. Stat. § 505/2; *compare* 815 Ill. Comp. Stat. § 505/2 *with* Cal. Bus. & Prof. Code § 17200. Both laws parallel Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), such that courts look to case law regarding the Act when interpreting the state consumer protection statutes. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* ("*Cel-Tech*"), 20 Cal. 4th 163, 185 (1999); *Robinson v. Toyota Motor Credit Corp.*, 775 N.E. 2d 951, 960 (Ill. 2002); 815 Ill. Comp. Stat. § 505/2.

The Court fleetingly confirmed that the ADA explicitly preempts state claims "relating to" the prices, routes, and services of air carriers by finding that the complaints at issue stated claims related to prices, routes,

and services. *Wolens*, 513 U.S. at 226. Just as in *Morales*, the Court did not consider any empirical evidence in reaching that holding. However, in contrast to *Morales*, the Court did not expressly perform the reference and effect tests.

Instead, the Court stated that it "need not dwell on the question" of whether the claim was preempted that way and proceeded to analyze the nature both of the Illinois Consumer Fraud Act and of the preemptive language of the ADA. *Id.* at 226-28. The Court looked to the language and purpose each provision, *see id.* at 227-28, confirming the procedure it set forth in *Morales* of looking both to the plain language of the preemptive provision and to its structure and purpose to determine the preemptive effect Congress intended it to have.

The Court examined the phrase "enact or enforce" in the preemption provision and noted the prescriptive effect of the state consumer protection statute at issue and the "potential for intrusive regulation of [carrier] business practices inherent in consumer protection legislation . . . ." *Id.* at 227. The Court found that because state Attorneys General could draw up guidelines regarding carrier business practices from preexisting state law and enforce them through consumer protection statutes, as they had tried in *Morales*, consumer protection statutes provided a unlawful means for states "to guide and police" the business practices of carriers. *Id.* at 228. The Court stated:

> In light of the full text of the preemption clause, and of the ADA's purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services, we conclude that [the ADA's preemption clause] preempts plaintiffs' claims under the Illinois Consumer Fraud Act.
>
> . . . Congress could hardly have intended to allow the States to hobble competition . . . through the application of restrictive state laws.

Id. (internal quotation and alteration omitted).

The Court differentiated claims under state consumer protection statutes from breach of contract claims, characterizing the former as being dictated by the states and requiring a showing of unfair or deceptive business practices and the latter as merely involving the enforcement of self-imposed obligations "with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 233. The Court therefore held that breach of contract claims are not preempted. *Id.* at 232. It implied that contract claims might still be preempted where they seek to enforce state policies, *id.* at 233 n.8, but did not similarly leave the door open to hypothetical claims under state consumer protection statues not seeking to enforce such policies.

The Court appears not to have done so because it considered such claims to be invariably preempted. Such an interpretation of *Wolens* is consistent with its expressed concern with the "potential for intrusive regulation" presented by such statutes. *Id.* at 228; *see also* § III, *infra*.

Thus, *Wolens* expanded the holding of *Morales*, determining that claims under state consumer protection statutes such as the UCL are not only preempted because they are "related to" prices, routes, and services under the reference and effect tests, they are also preempted for the independent reason that the express language of the preemptive provision

and its purpose exhibit an intent by Congress to preempt state action that interferes with the forces of competition.[3]

Therefore, *Wolens* not only confirmed the lessons of *Morales* that empirical evidence is not necessary to demonstrate that state action is "related to" prices, routes, and services under the reference and effect tests, that state consumer protection statutes like the UCL are subject to preemption, and that courts interpreting Congress' preemptive intent should look to the express language, structure, and purpose of the preemptive provision. It also held that claims under state consumer protection statutes are preempted on their face because they impose state policies regarding competition on motor carriers.

F. State Action That Only Tenuously Affects Prices, Routes, or Services Is Preempted If Its Acute Economic Effect Frustrates Congress' Deregulatory Purpose by Interfering with the Forces of Competition.

In *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1185 (9th Cir. 1998), the court addressed the question of whether the FAAAA preempted the California Prevailing Wage Law ("CPWL"), Cal. Lab. Code §§ 1770-80. The court applied the effect test to determine whether Congress intended the FAAAA to preempt the CPWL. *Id.* at 1188-89. The court also noted

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[3] Some courts treat this as an additional preemption test. *See Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Abdu-Brisson v. Delta Airlines, Inc.*, 927 F. Supp. (S.D.N.Y. 1996), *aff'd in relevant part*, 128 F.3d 77, 81 (2d Cir. 1997); *see also Cont'l Airlines, Inc. v. Kiefer*, 920 S.W. 2d 274, 279 (Tex. 1996) (acknowledging *Wolens'* separate approach). However, some of them treat it as an "enact or enforce" test, requiring the state action to be based in statutory law, rather than common law, for there to be preemption, thereby creating an additional element to the *Morales* and *Wolens* tests. *See, e.g., Travel*, 73 F.3d at 1432; *Tanen v. Sw. Airlines Co.*, 114 Cal. Rptr. 3d 743, 755 (2010). Even such a test exists, it is satisfied here, because the UCL is clearly an enacted state law rather than common law.

the *Wolens* holding that the preemptive language of the ADA and FAAAA preempts state action that imposes state substantive standards carrier prices, routes, or services. *Id.* at 1188, *citing Wolens*, 513 U.S. 219, 232 (1995).

To determine whether the effect of the CPWL on prices, routes, and services was direct and significant or tenuous, the court looked to two ERISA cases, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997). *Mendonca*, 152 F.3d at 1188-89. The court applied the holding from *Travelers* that, where state action has only an indirect effect, it is nevertheless preempted if it "produce[s] 'acute, albeit indirect economic effects' . . . ." *Id.* at 1188. It also adopted the approach from *Dillingham* of looking to the preemptive provision's purpose when determining the significance of its effect and what state action Congress intended to survive preemption. *Id.* at 1188-89.

The court found the CWPL affected, and therefore was related to, motor carrier prices, routes, and services by increasing operating costs, requiring the use independent contractors, and requiring the re-routing of equipment. *Mendonca*, 152 F.3d at 1189. However, the court found that effect to be "indirect, remote, and tenuous." *Id.* It stated, "We do not believe that the CPWL frustrates the purpose of deregulation by *acutely* interfering with the forces of competition." *Id.* Therefore, the court held that the FAAAA does not preempt the CWPL. *Id.*

The court's application of *Wolens*, *Travelers*, and *Dillingham* essentially broke the *Morales* effect test into two prongs: State action is preempted if it directly affects motor carrier prices, routes, or services. If the effect is indirect, state action is nevertheless preempted if its acute

economic effects threaten Congress' deregulatory purpose by interfering with the forces of competition.

State action that neither directly affects prices, routes, or services nor interferes with the forces of competition is too remote or tenuous to be preempted. Generally applicable laws such as the CPWL and state gambling and prostitution laws fall into this category. *See id.* 1187, 1189; *Morales v. TWA*, 504 U.S. 374, 390 (1992).

G. The FAAAA Preempts State Action That Remotely Affects Prices, Routes, or Services If the Effect Is Significant in Light of Congress' Deregulatory Goals.

The U.S. Supreme Court addressed the question of FAAAA preemption directly in *Rowe v. N.H. Motor Transp. Association*, 552 U.S. 364, 367 (2008), a case that concerned the enforcement of state tobacco statutes, rather than state consumer protection statutes. In *Rowe*, the Court applied case law regarding ADA preemption, including *Morales* and *Wolens*, because Congress knowingly copied the ADA's preemptive language when it enacted the FAAAA. *Id.* at 370.

The Court once again confirmed that preemptive language reflects a Congressional intent to preempt state action connected with, or referencing motor carrier prices, routes, or services, even state action that is consistent with federal regulation or indirect. *Id.* at 370. It also confirmed that the preemptive language used by the FAAAA preempts claims under state consumer protection statutes. *Id.* at 371, 377.

Without considering any empirical evidence, the Court performed the *Morales* reference test, finding that one of the tobacco statutes at issue 'focuses on trucking services and other motor carrier services . . . .' *Id.* at 371. Like the court in *Mendonca*, it also essentially divided the effect test into two prongs: direct effect and significant effect. The Court reiterated *Morales*' limit on preemption regarding state action that too tenuously or

remotely affects prices, routes, or services and stated that "preemption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Id.* at 371, 375 (citations omitted).

The Court confirmed that interpretation when it performed the effect test. It found the state laws at issue required motor carriers to perform services they did not otherwise provide. *Id.* at 372-73. It also found that although the effect of the laws was not very direct, they significantly impacted the carriers' services "in respect to the [FAAAA]'s ability to achieve its pre-emption-related objectives," "produc[ing] the very effect the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide," and were therefore preempted. *Id.* at 371-73.

Thus, the Court confirmed that the effect test has two separate prongs – directness and significance: State action is preempted if it affects motor carrier prices, routes, or services directly. If it affects prices, routes, or services indirectly, it is nevertheless preempted if its effect significantly impacts Congress' deregulatory purpose. *See In re Korean Air Lines Co.*, 642 F.3d 685, 697 (9th Cir. 2011); *Tanen v. Sw. Airlines, Co.*, 114 Cal. Rptr. 3d 743, 750 (2010).

Two federal courts in California have recently applied a different ,standard to determine whether state action that tenuously affects prices, routes, and services is preempted. In *American Trucking Associations v. City of Los Angeles*, ("*ATA*"), No. 10-56465, 2011 WL 4436256 (9th Cir. Sept. 26, 2011), the court applied a pre-*Rowe* test regarding whether the state action "binds the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry." *Id.* at *7 (internal omission omitted). The court in *Dilts v.*

Penske Logistics LLC ("*Dilts*"), No. 08-CV-318 JLS (BLM), 2011 WL 4975520 at *8 (S.D. Cal. Oct. 19, 2011), also adopted that standard. Although the court in *ATA* cited *Rowe* for other propositions regarding state action indirectly affecting prices, routes, and services, it did not analyze how *Rowe* treated such cases. Because the court omitted that analysis, its adoption of the pre-*Rowe* standard is not persuasive.

Applying the *Rowe*-standard here, Congress' purpose in enacting the FAAAA is essential. *Rowe* indicates that Congress' intent was to end a patchwork of state regulation affecting not only the motor carriers at issue in the case, but motor carriers nationwide as they passed through multiple states imposing different policies. *Rowe*, 552 U.S. at 375. The Court further indicated that Congress' intent behind the preemptive language was to promote "maximum reliance on competitive market forces . . . ." *Id.* at 371, *quoting Morales*, 504 U.S. at 378.

In conducting its analysis, the Court considered not only the effect on motor carriers in the state that enacted the laws, but also the effect on motor carriers in general, stating that if the laws were not preempted, other states could enact similar ones, subjecting motor carriers travelling through multiple states to a patchwork of state regulation inconsistent with Congress' deregulatory intent. *Id.* at 375.

Rowe therefore confirms the lesson of *Mendonca* that state action is prohibited if its acute, albeit indirect, economic effects threaten Congress' deregulatory purpose by interfering with the forces of competition between motor carriers. *See Cardenas v. McLane Foodserv's, Inc.*, No. SACV 10-473 DOC, 2011 WL 2714420 at * 7 (FFMx) (C.D. Cal. July 8, 2011) (finding *Rowe* reaffirmed *Mendonca*).

The Court also stated that the state's alleged reason for adopting the laws at issue, concern for public health, did not invoke any of the specifically enumerated exceptions the FAAAA. *Id.* at 374.

Furthermore, the Court found that the state laws were not "general" ones that only affected the carriers "solely in their capacity as members of the general public," *id.* at 376, suggesting, as *Mendonca* did, that such laws would have too tenuous or remote a connection to with prices, routes, and services to be preempted.

Rowe thereby confirms the lessons of *Morales* and *Wolens* that state consumer protection statutes like the UCL are subject to preemption, that empirical evidence is not necessary to demonstrate that a state action is "related to" a carrier's prices, routes, and services under the reference and effect tests for preemption, and that state action is preempted even if it is consistent with federal law or indirect.

In addition, *Rowe* essentially broke the *Morales* effect test into directness and significance prongs and reaffirmed that laws applicable to the general public, such as laws regarding gambling and prostitution, are not preempted because their effect on prices, routes, and services is too tenuous or remote, suggesting that they are not significant in light of Congress' purpose in enacting the preemptive provision.

H. The Court Should Follow the Roadmap of *In Re Tobacco Cases II.*

The California Supreme Court addressed federal preemption in the context of the UCL in *In re Tobacco Cases II* ("*Tobacco*"), 41 Cal. 4th 1257 (2007). *Tobacco* concerned a cause of action under the UCL premised on the violation of a California statute prohibiting the sale of tobacco to minors, Cal. Penal Code § 308. *Tobacco*, 41 Cal. 4th at 1263-64. The Court examined whether the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §§ 1331 *et seq.*, which prohibits states from regulating the advertising of cigarettes based on concerns about smoking and health, preempted the UCL action. *Id.* at 1265-66.

The Court applied a two-step analysis. First, it analyzed whether the FCLAA preempted the UCL on its face. *Id.* at 1272. The Court found the UCL to be a law of general application, as opposed to one regarding advertising, that is not motivated by or based on concerns about smoking or health. *Id.* at 1272-73, 1276. Therefore, the Court held that the FCLAA did not preempt the UCL on its face. *Id.* at 1272.

The Court determined that the decisions of the U.S. Supreme Court in *Morales*, 504 U.S. 374, 386, and *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504, 523-30 (1992) (plur. opn. of Stevens, J.), also compelled it to consider whether the particularized application of the UCL in the case before it was preempted. *Tobacco*, 41 Cal. 4th at 1271-73. The Court first considered whether the FCLA preempted the statute prohibiting the sale of tobacco to minors upon which the UCL claim was predicated. *Id.* at 1272-72. The Court found the statute did not refer to tobacco advertising, *id.* at 1267, implying that the Court did not find the statute or its combination with the UCL preempted on its face.

The Court then considered the legislative history of the statute prohibiting the sale of tobacco to minors and determined that it was based on concerns about health and smoking. *Id.* at 1276. The Court found the enforcement of a statute based on such concerns by means of the UCL resulted in a cause of action that sought to regulate tobacco companies by imposing upon them "a duty not to advertise in a way that could encourage minors to smoke," precisely what Congress enacted the FCLAA to prohibit. *Id.* at 1273, 1275-76. Therefore, the Court held that the FCLAA preempted the cause of action under the UCL.

The Court reached that holding despite the fact it appears to have found that the predicate statute was not preempted. Therefore, *Tobacco Cases II* stands for the proposition that a UCL claim can be preempted even if the predicate statute is not. The courts in *Blackwell v. Skywest*

Airlines, Inc. ("*Blackwell*"), No. 06cv0307 DMS (AJB), 2008 WL 5103195 at *20 (S.D. Cal. Dec. 3, 2008), and *Fitz-Gerald*, 65 Cal. Rptr. 3d 913, 915, 922, n.7 (Cal. App. 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), found that the ADA preempted UCL claims in similar circumstances.

Tobacco Cases II lays out a roadmap that the Court should follow here: First, the Court should determine whether the statutes at issue are preempted on their face; then it should determine whether the cause of action resulting from the particular application of those statutes is preempted.

III. THE UCL IS PREEMPTED ON ITS FACE.

The State's Complaint states a single claim, for unfair competition under the UCL, predicated on the violation of multiple state employment laws. However, the State's UCL claim does not merely allege that Petitioners violated those laws; instead, it attacks Petitioners' business practices as unfairly competing in the trucking market. The State alleges that "[d]ue to Defendants' unfair and unlawful practices . . . , Defendants have obtained an unfair advantage over [their] competitors . . . ." (1 A.A. 14:8-12.). Furthermore, the State does not merely seek to impose an administrative fine for the alleged violations; instead it seeks an injunction, restitution, and civil penalties to forbid and discourage Petitioners from continuing allegedly unfair business practices. (*Id.* A.A. 14:27-15:10.)

The UCL defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Cal. Bus. & Prof. Code § 17200. The UCL therefore "governs 'anti-competitive business practices' as well as injuries to consumers, and has as a major purpose 'the preservation of fair

business competition.'" *Cel-Tech*, 20 Cal. 4th 163, 180 (1999). Rather than proscribe any specific business practice, the UCL borrows violations of other laws. *Id.*; §17200. It is nonetheless an independent cause of action, and its remedies of injunctive relief, restitution, and civil penalties are "cumulative to the remedies or penalties available under all other laws of the state . . . ." *Id.* at 179-80, *quoting* § 17205; §§ 17203, 17206.

Because the statute defines unfair competition to include unfair or fraudulent business practices, in addition to unlawful ones, the Court has found that the Legislature intended its scope to be "broad" and "sweeping" so as to permit courts to enjoin business practices that are not otherwise proscribed by law. *Cel-Tech*, 20 Cal. 4th at 180-81. Thus, the Legislature granted plaintiffs seeking relief from unfair business practice access to the extraordinary remedies of restitution, civil penalties, and injunctions. *Troyk v. Farmers Group, Inc.*, 90 Cal. Rptr. 3d 589, 613-14, 617 (2009), *review denied*; *see Barber Auto Sales, Inc. v. United Parcel Serv's*, 494 F. Supp. 3d 1290, 1294 (N.D. Ala. 2007); *Deerskin Trading Post, Inc. v. United Parcel Serv.*, 972 F.Supp. 665, 673, 675 (N.D. Ga. 1997).

Here the State seeks that very extraordinary relief in the form of an injunction to enjoin Petitioners from misclassifying the alleged employees as independent contractors, a business practice that is not unlawful. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1208 (2011). If the State had merely sought to enforce its employment laws directly, it would not have had access to such relief. Instead, it would likely have only been able to impose fines. Thus, the UCL differs from the state employment laws the State is using it to enforce in that it permits the State to regulate Petitioners' behavior, not just penalize it.

In *Tobacco*, 41 Cal. 4th 1257, 1272 (2007), the Court found the FCLAA did not preempt the UCL "*on its face* . . . ." The FCLAA

prohibits states from regulating the advertising of cigarettes based on concerns about smoking or health. *Id.* at 1265-66; 15 U.S.C. §§ 1331 *et seq.* Because the UCL does not specifically address those subjects, it is a law of general applicability with respect to the FCLAA. Therefore, the Court went on to analyze whether the particularized application of the UCL was preempted. *Tobacco*, 41 Cal. 4th at 1272, *citing Morales v. TWA*, 504 U.S. 374, 386 (1992).

In contrast, the UCL is invariably concerned with correcting the effect that unfair, unlawful, or fraudulent business practices have on the nature, quality, or price of goods and services. *Cel-Tech*, 20 Cal. 4th at 180, The FAAAA specifically preempts state action that affects prices, routes, or services. 49 U.S.C. § 14501(c)(1). Because the UCL addresses those subjects, it is not a law of general applicability with respect to the FAAAA. Consequently, the FAAAA does not require particularized analysis to determine whether it preempts a claim under the UCL. The FAAAA preempts the UCL on its face.

The conclusion that the FAAAA preempts the UCL on its face is consistent with *American Airlines v. Wolens*, 513 U.S. 219 (1995), and the case law interpreting it. In *Wolens*, the U.S. Supreme Court recognized that state consumer protection statutes such as the UCL serve as a method for states to intrusively guide and police carrier business practices and held them to be preempted. *Id.* at 227-28. On that basis, some cases have held that *Wolens* prohibits the award of injunctive relief against motor carriers. *Barber Auto Sales, Inc. v. United Parcel Serv's*, 494 F. Supp. 3d 1290, 1294 (N.D. Ala. 2007); *Deerskin Trading Post, Inc. v. United Parcel Serv.*, 972 F.Supp. 665, 673, 675 (N.D. Ga. 1997).

A number of other state and federal district courts have noted that *Wolens* held claims under state consumer protection statutes to be preempted on their face because such statutes seek to regulate

competition and business practices, thereby thwarting "the whole purpose of deregulation . . . ." *Butler v. United Air Lines, Inc.*, No. C 07-04369, 2008 WL 1994896 at *5 (N.D. Cal. 2008), *Aguayo v. U.S. Bank*, 658 F.Supp. 2d 1226, 1235 (S.D. Cal. 2009); *Flaster/Greenberg P.C. v. Brendan Airways, LLC*, No. 08-4333, 2009 WL 1652156 *7 (D.N.J. June 10, 2009); *Greer v. Fed. Ex.*, 66 F.Supp.2d 870, 873 n.2 (W.D. Ky. 1999); *W. Parcel Ex. v. United Parcel Serv. of America, Inc.*, No. C 96-1526, 1996 WL 756858 *2 (N.D. Cal. 1996).

The court in *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 281 (Tex. 1996), agreed when it considered the meaning of *Wolens* in deciding whether the ADA preempts state law personal injury claims. The court stated that in *Wolens*

> the issue was not, according to the Court, whether the private lawsuits related to airline rates and services . . . . The issue, instead, was whether the private actions constituted state enactment or enforcement of any law prohibited by the preemption provision.
> Suit on the Illinois consumer protection statute, the Court held, violated the prohibition because "the potential for intrusive regulation of airline business practices inherent in state consumer protection legislation."

Id. at 279. The court interpreted *Wolens* to preempt all claims under state consumer protection statues because such claims are inherently policy-laden, but not to preempt breach of contract actions that are more policy neutral. *Id.* at 279-281. The court found personal injury claims to be policy neutral, and therefore held that such claims do not constitute state enforcement of law subject to preemption. *Id.* at 282-83.

The court in *Fitz-Gerald v. Skywest, Inc.*, 65 Cal. Rptr. 3d 913, 914, 922 (2007), similarly interpreted *Wolens* to have held all state consumer protection claims preempted on their face. It therefore held that a UCL claim premised on an air carrier's violation of Section 4 of the

Wage Order was preempted on its face. *Id.* at 921. The court reasoned that under *Morales* and *Wolens*, "claims under a state unfair business practices statute . . . would impose economic regulation on [carriers]" and are therefore preempted. *Id.* at 921.

The plaintiff-appellants in *Fitz-Gerald* advanced five causes of action, four for violations of California labor laws similar to those alleged here and one for relief from unfair business practices under the UCL predicated on the alleged labor law violations. *Id.* at 915. The court affirmed the trial court's grant of summary judgment on all five causes of action. *Id.* at 914.

The court performed a thoughtful analysis of federal preemption as it applies to California labor laws and determined that two of the causes of action were preempted under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, and a third was subject to an exception to the Wage Order. *Fitz-Gerald*, 65 Cal. Rptr. at 920. The court found that because the first three causes of action failed, there was no violation to support the fourth cause of action, for waiting time penalties under Section 203 of the Labor Code, or the fifth cause of action, for unfair business practices under the UCL. *Id.* at 920-21. Therefore, the court found held that the fourth and fifth causes of action were barred. *Id.*

However, the court did not stop there. It went on to analyze preemption of the third cause of action under the Interstate Commerce Clause, U.S. Const., art. I, § 8, cl. 3, and found it to be preempted. *Id.* at 921. Moreover, the court applied the preemptive provision of the ADA to the UCL and found that the ADA preempted it. *Id.* at 921-22.

In reaching the ADA preemption holding, the court first analyzed and rejected the argument that the ADA preempted the California employment laws, the violation of which formed the basis of the UCL claim. *Id.* In determining whether the ADA preempted the employment

laws, the court analyzed their effect on prices, routes, and services. *Id.* at 922, n.7.

Then the court considered whether the ADA preempted the UCL itself. *Id.* at 921-22. Instead of analyzing the effect of the UCL on prices, routes, and services, as it had with the labor laws, the court looked to three cases concerning the attempted enforcement of state law under state unfair business practices statutes, *Morales*, *Wolens*, and *In re JetBlue Airways Corp. Privacy Litigation*, 379 F.Supp. 2d 299, 315-16 (E.D.N.Y. 2005), noting that the latter held an "action brought under [the] California Unfair Business Practices Act [was] preempted by [the] ADA . . . ." The court stated that these cases held claims under state unfair business practices statutes to be preempted by the ADA, and concluded that the ADA therefore preempted the cause of action under the UCL. *Id.* at 921-22.

Thus, *Fitz-Gerald* presents the well-reasoned holding that the ADA preempts the UCL on its face. Since case law interpreting the preemptive effect of the ADA is applicable to the preemptive effect of the FAAAA, the FAAAA also preempts the UCL on its face.

In the unpublished opinion *Blackwell v. Skywest Airlines, Inc.*, No. 06cv0307 DMS (AJB), 2008 WL 5103195 at *20 (S.D. Cal. Dec. 3, 2008), a federal district court agreed with *Fitz-Gerald.* Citing *Fitz-Gerald* with approval, the court found it was "settled" that the ADA preempts actions against air carriers under the UCL and held that such an action based on the violation of California employment laws was preempted.

The Opinion of the Court of Appeal in this case disagrees with *Fitz-Gerald*, Opn. at 8, creating a split between the divisions of the Second Appellate District and a potential split between state and federal courts in California on this issue. Until the issue resolved, the rights of

motor carriers, air carriers, the State, employees, and consumers in California remain unclear, as some courts may permit UCL claims against carriers to go forward, while others bar them.

IV. PETITIONERS CANNOT HAVE VIOLATED SECTION 984 OF THE UNEMPLOYMENT INSURANCE CODE OR SECTION 1194 OF THE LABOR CODE.

The State's UCL claim as predicated on violations of Section 984 of the Unemployment Insurance Code and Section 1194 of the Labor Code fails as a matter of law. Because the UCL "borrows" violations of other laws as the basis for liability, *Cel-Tech*, 20 Cal. 4th 163, 180 (1999), a defendant must violate a borrowed law in order for the law to support a claim under the UCL. Petitioners cannot have violated either statute. Therefore, it is not necessary to consider whether the statutes are preempted on their face.

Section 984 requires workers to pay state disability insurance contributions and explains how to calculate such contributions. The State has not alleged that Petitioners are workers. Therefore, Section 984 does not require them to do anything, and they cannot have violated it.

Section 1194 establishes a remedy for employees whose employers fail to pay minimum wage or overtime as otherwise required by law. Although the State does allege Petitioners failed to pay minimum wage by alleging they violated Section 4 of I.W.C. Wage Order 9-2001, unlike Section 4, Section 1194 does not purport to require Petitioners to do anything. Instead, it creates a remedy for the violation of another law. Consequently, Petitioners also cannot have violated Section 1194.

V. SECTIONS FOUR AND SEVEN OF I.W.C. WAGE ORDER 9-2001 ARE PREEMPTED ON THEIR FACE.

Petitioners also cannot have violated Sections 4 and 7 of I.W.C. Wage Order 9-2001 (the "Wage Order"), because those state regulations are preempted by the FAAAA. Section 4 requires employers to pay their

employees a minimum wage, and Section 7 requires employers to maintain records regarding hours, breaks, and pay. Wage Order §§ 4, 7.

In *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998), the court conceded that a state minimum wage law had an effect on motor carrier prices, routes, and services and therefore was "related to" them. However, because the law applied to all employers equally, regardless whether they were motor carriers, the court concluded the law was one of general applicability, and held it not to be preempted because its affect on motor carrier prices, routes, and services was only tenuous. *Id.* at 1187, 1189. *See Oliveira v. Advanced Delivery Sys.*, 27 Mass. L. Rptr. 402 at *3-4, nn. 4-5 (Mass. Supp. 2010) (laws that affect carriers as members of the general public are laws of general applicability that only tenuously affect prices, routes, and services).

In *Fitz-Gerald v. Skywest, Inc.*, 65 Cal. Rptr. 3d 913, 922 n.7 (2007), the court considered whether Section 4 was preempted by the ADA. It found that Section 4 only had a tenuous effect on prices, routes, and services, and therefore concluded that it was not preempted. *Id.* However, the court employed the more restrictive, pre-*Rowe* definitions of prices, routes, and services that *Rowe* implicitly overturned. *Air Transp. Ass'n of Am., Inc. v. Cuomo* ("*Cuomo*"), 520 F.3d 218, 223 (2d Cir. 2008) (per curiam); *see also Blackwell*, No. 06cv0307 DMS (AJB), 2008 WL 5103195 at *17 (S.D. Cal. Dec. 3, 2008).

Moreover, the court failed to consider the fact that the Wage Order specifically seeks to regulate the transportation industry directly. Wage Order § 1. The Wage Order narrowly targets businesses "operated for the purpose of conveying persons or property from one place to another," which include motor carriers as defined by the FAAAA. Wage Order §§ 1, 2(P); 49 U.S.C. §§ 13102(14), 14501(c). Thus, Section 4 of the Wage

Order is not a law of general applicability such as the minimum wage statute in *Mendonca*. Instead, it directly regulates motor carriers. Such regulation is significant in light of Congress' stated purpose of protecting motor carriers from state regulation. *See Brown v. United Air Lines*, 656 F. Supp. 2d 244, 252 (D. Mass. 2009) (employment laws targeted at air transportation industry workers had a significant effect and were therefore preempted). Therefore, the Wage Order's effect on motor carriers is both direct and significant, and Section 4 is preempted under both prongs of the effect test.

The U.S. District Court for the Southern District of California has twice held that the preemptive language of the ADA and FAAAA preempts Sections 11 and 12 of the Wage Order, which concern meal and rest breaks, as well as state labor law claims based thereon. *Dilts*, Case No. 08-CV-318 JLS (BLM), 2011 WL 4975520 at *2, 12-13 (S.D. Cal. Oct. 19, 2011) (motor carriers); *Blackwell*, Case No. 06cv0307 DMS (AJB), 2008 WL 5103195 at *2, 10, 18 (S.D. Cal. Dec. 3, 2008) (air carriers). In each instance, the court found that the requirement to take breaks affected the carriers' routes. *Dilts*, 2011 WL 4975520 at *9; *Blackwell*, 2008 WL 5103195 at *18.

One court additionally found that the requirement would affect how many deliveries a motor carrier could make in a day, and therefore also found it affected the carrier's services and prices. *Dilts*, 2011 WL 4975520 at *9. The other court found that the increased labor costs associated with breaks would affect ticket prices, which would ultimately require the air carrier to discontinue service to certain communities. *Blackwell*, 2008 WL 5103195 at *18. On that basis, one court found Sections 11 and 12 of the Wage order to be preempted, and both courts found claims based thereon to be preempted. *Dilts*, 2011 WL 4975520 at *12, 13; 2008 WL 5103195at *18.

The U.S. District Court for the Central District of California also addressed the issue of meal and rest break preemption under the FAAAA. *Cardenas v. McLane Foodserv's, Inc.*, Case No. SACV 10-473 DOC (FFMx), 2011 WL 2714430 at *1, 6 (C.D. Cal. July 8, 2011). However, it did not specifically identify whether it was addressing Sections 11 and 12 of the Wage Order. Citing, among other authorities, the Opinion of the Court of Appeal in this matter, the court determined that the effect of the break laws may be too tenuous for them to be preempted. *Id.* at * 8. However, here, too the court failed to consider the fact that the Wage Order specifically seeks to regulate the transportation industry directly. Moreover, the court did not measure the significance of the effect against Congress' preemptive purpose as *Rowe* directs. In any event, the court declined to decide the issue, as it was considering it on cross-motions for summary judgment and concluded that a genuine issue of material fact existed. *Id.*

Furthermore, the Southern District held Sections 11 and 12 to be preempted. *Dilts*, 2011 WL 4975520 at *2, 12. State laws that are preempted for one motor carrier are preempted for all motor carriers. *N.H.*, 448 F.3d 66, 72(1st Cir. 2006), *aff'd Rowe*, 552 U.S. 364 (2008), *citing* HRCR at 87 (1 A.A. 270). Accordingly, Sections 11 and 12 are preempted for Petitioners and all other motor carriers.

Because Sections 4, 11, and 12 of the Wage Order are preempted, Petitioners cannot have violated Section 7. Section 7 requires employers to maintain certain records regarding employees' personal identifiers, hours, breaks, and pay and to provide employees with that information when the employee is paid. Wage Order § 7. Since the State is preempted from directly regulating wages and breaks as it has attempted to do in the Wage Order, it follows logically that the State is also preempted from directly regulating what records carriers must keep and

what reports they must make regarding such issues. Here, too, the Wage Order applies narrowly to employers in the transportation industry, rather than all employers generally. Therefore, the Section 7 is preempted or at least a nullity.

Sections 4 and 7 of the Wage Order constitute a forbidden attempt by the State to directly regulate motor carrier prices, routes, and services. They are therefore preempted by the FAAAA. To hold otherwise would be to allow the State to regulate motor carrier prices, rates, and routes through piecemeal regulation of their component aspects, a result that Congress cannot possibly have intended.

Petitioners concede that the remaining state employment laws are not, standing alone, preempted by the FAAAA. Nevertheless, the State's UCL claim predicated upon their violation is preempted.

VI. THE UCL AND THE STATE'S UCL CLAIM ARE PREEMPTED BECAUSE THEY REFER TO MOTOR CARRIER PRICES, ROUTES, OR SERVICES.

A. The UCL Refers to Motor Carrier Prices, Routes, and Services.

Moreover, the UCL is preempted under the reference test for FAAAA preemption. As set forth in *Morales* and confirmed in *Rowe*, state action that refers to motor carrier prices, routes, and services is preempted by the FAAAA. As established by *Morales*, *Wolens*, and *Rowe*, unfair competition laws such as the UCL constitute state action subject to FAAAA preemption.

The UCL establishes a cause of action for unfair competition, which it defines as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Cal. Bus. & Prof. Code § 17200. In *Cel-Tech*, the Court found that language to be broad and sweeping, encompassing "anti-competitive business practices as well a injuries to consumers, and has as a major

purpose the preservation of fair business competition." *Cel-Tech*, 20 Cal. 4th 163, 180 (1999) (internal quotations omitted).

Thus, by referring to "unfair competition," the UCL refers to business practices and competition between businesses. The FAAAA deregulates competition between motor carriers of property, 49 U.S.C. § 14501(c), and defines the term "motor carrier" as "a person providing motor vehicle transportation for compensation," § 13102(14). Thus, in the context of the FAAAA, the business practices and competition to which the UCL refers are the business practices of, and competition between, businesses transporting property for compensation. It follows logically that those business practices concern the prices the carriers charge for providing such transportation, the services they offer, and the routes they use. Therefore, by establishing a cause of action for "unfair competition," the UCL refers to motor carrier prices, routes, and services.

Although the UCL does not expressly use the words "prices," "routes," or "services," the U.S. Supreme Court can hardly have meant the reference test to be so narrow as to require the use of the actual words prices, routes, and services or their synonyms for state action to be preempted under the reference test. Otherwise, states and plaintiffs could circumvent preemption merely by avoiding the use of those words in enacting legislation and asserting claims, promoting form over substance.

Because the UCL refers to motor carrier prices, routes, and services, it is preempted by the UCL. Therefore, the State's Complaint fails to state a cause of action.

B. State's UCL Claim Refers to Petitioners' Prices, Routes, and Services.

Not only does the UCL refer to motor carrier, prices, routes, and services, so too does the State's UCL claim. As established by *Morales*, *Wolens*, and *Rowe*, claims under unfair competition laws such as the UCL

constitute state action subject to FAAAA preemption. In the claim, the State alleges that Petitioners "illegally lowered their costs of doing business" by failing to pay the costs of the alleged labor law violations, that they thereby "gained an unfair advantage over competing trucking companies," and that they profited from doing so. (1 A.A. 10:3-11; 14:8-12.) The logical inference is that:

1. The carriers offer the same services and operate on the same routes as their competitors at a lower prices;
2. The carriers offer the same services and operate on the same routes as their competitors at the same price as their competitors, but realize higher profits than their competitors; or
3. The carriers offer more services and/or access more or different routes than their competitors can afford to offer without increasing prices.

Thus, by alleging that Petitioners lowered their costs of doing business and thereby gained an unfair competitive advantage against other motor carriers, the claim refers to Petitioners' prices, routes, and services. Consequently, the State's UCL claim is preempted by the FAAAA, and the State's Complaint fails to state a cause of action.

VII. THE STATE'S UCL CLAIM IS PREEMPTED BECAUSE IT DIRECTLY AFFECTS MOTOR CARRIER PRICES, ROUTES, AND SERVICES.

The State's UCL claim is also preempted under the first prong of the effect test. As established in *Morales* and broken down in *Mendonca* and *Rowe*, the FAAAA preempts state action that directly affects motor carrier prices, routes, or services.

The Opinion of the Court of Appeal applied the effect test to determine whether the state employment laws underlying the State's

claim are directly related to motor carrier prices, routes, and services. (*See* Opn. at 10.) Petitioners have conceded that those state employment laws, other than those which they cannot have violated or which are themselves preempted, are laws of general application whose effects on the carriers' prices, routes, and services is remote. *See* § V.B, *supra*. Therefore, such an analysis is unnecessary.

Under *Tobacco Cases II*, the proper method for analyzing federal preemption in UCL cases is to consider not only whether the state laws upon which the UCL claim is predicated are preempted, but to also consider whether the UCL, and the combination of the state laws and the UCL are preempted. *Mendonca*, 152 F.3d 1184, 1188-89 (9th Cir. 1998). The Opinion of the Court of appeal did perform such separate analyses.

1. The UCL Directly Affects Motor Carrier Prices, Routes, and Services.

The UCL establishes a cause of action for unfair competition. Cal. Bus. & Prof. Code § 17200. As previously discussed, by referring to "unfair competition" in the context of the FAAAA, the UCL refers to the business practices of, and competition between, motor carriers. *See* § VI.A, *supra*. The UCL empowers court to enjoin anticompetitive business practices between motor carriers and to award restitution and impose civil penalties regarding those practices. §§ 17203, 17206.

As also discussed, because the FAAAA deregulates competition between persons transporting property for compensation, the business practices that the UCL empowers courts to enjoin and regarding which courts may award restitution and impose civil penalties logically concern the prices carriers charge for providing such transportation, the services they offer, and the routes they use. Consequently, each time the UCL is enforced against a motor carrier, it directly affects the motor carrier's prices, routes, or services.

Other than the Opinion of the Court of Appeal, Petitioners are unaware of any cases in which a court has found that a cause of action under the UCL or any other state consumer protection law was not preempted by the preemptive language of FAAAA. Instead, in addition to *Morales*, *Wolens*, *Blackwell*, *Fitz-Gerald*, and *Dilts*, in case after case, courts have either stated or found the law was preempted, or a cause of action under it was preempted. *In re Korean Air Lines Co.*, 642 F.3d 685, 688, 697 (9th Cir. 2011); *In re Jet Blue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005); *In re EVIC Class Action Litig.*, Case No. M-21-84 (RMB), 2002 WL 1766554 at * 1, 8 (S.D.N.Y. July 31, 2002); *Fed. Exp. Corp. v. U.S. Postal Serv.*, 55 F. Supp. 2d 813, 814, 818 (W.D. Tenn. 1999); *W. Parcel Ex. v. United Parcel Serv. of America, Inc.*, No. C 96-1526, 1996 WL 756858 *1, 3 (N.D. Cal. 1996); *Cont'l Airlines, Inc. v. Am. Airlines, Inc.*, 824 F. Supp. 689, 693, 695 (S.D. Tex. 1993); *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F.Supp. 1399, 1402, 1409 (D. Colo. 1989); *Tanen v. Sw. Airlines Co.*, 114 Cal. Rptr. 743, 745, 752, 756 (2010); *Beyer v. ACME Truck Line, Inc.*, 802 So. 2d 798 (La. Ct. App. 2001); *but see Cardenas v. McLane Foodserv's, Inc.*, No. SACV 10-473 DOC, 2011 WL 2714420 at * 8 (FFMx) (C.D. Cal. July 8, 2011) (issue remains open after cross-motions for summary judgment). That pattern supports the conclusion that actions under the UCL directly affect motor carrier prices, routes, or services.

Because actions under the UCL against motor carriers directly affect motor carrier prices, routes, or services, they are preempted by the FAAAA. Therefore, the State's UCL claim is preempted, and the State's Complaint fails to state a cause of action.

2. The State's UCL Claim Directly Affects the Prices, Routes, and Services of Petitioners and the Drivers.

Moreover, the State's claim under the UCL is preempted because the particularized application of the UCL here affects motor carrier prices, routes, and services. Not only are Petitioners "motor carriers of property" within the meaning of the FAAAA, the drivers are as well. The FAAAA defines a motor carrier as "a person providing motor vehicle transportation for compensation." § 13102(14). The State alleges that Petitioners transport cargo using trucks operated by drivers that the carriers classify as independent contractors. . (1 A.A. 9:26-10:3, 10:20-11:5, 13:6-7.) The State further alleges that Petitioners "lowered their costs of doing business," "conduct business," and have "competitors," (*Id.* 10:4, 26, 11:6-7, 14:9) creating the logical inference that the drivers are compensated for providing such transportation. Therefore, they transport property using motor vehicles for compensation and are also motor carriers within the meaning of the FAAAA.

Under the UCL, the State seeks an injunction against Petitioners to enjoin them "from engaging in . . . acts and practices alleged in [the] complaint . . . ." (*Id.* 14:27-15:3.) Because the State's UCL claim is premised on the allegation that Petitioners "misclassified" drivers who drive trucks owned by one of the carriers and leased to the other as independent contractors, rather than as employees (*Id.* 9:1-10:3, 10:28-11:5, 13:6-16), the State can only prevail if the independent contractors are found to be employees.

Such a finding will necessarily imply a finding that the current leasing arrangement between Petitioners and the drivers is a sham, despite the fact that such leasing arrangements are permitted and regulated by the U.S. Department of Transportation. *See* 49 C.F.R. Part

376. Consequently, the injunction would require Petitioners to classify drivers who drive trucks owned by one of the Petitioners and leased to the other as employees. (*See* 1 A.A. 10:10-11:5, 13:6-16.)

This reasoning is supported by the fact that the permanent injunctions the State obtained in each of the other five cases, regarding which Petitioners have asked the Court to take judicial notice, effectively prohibit the motor carriers from using independent contractors altogether. Pursuant to Section 376.11 of Title 49 of the Code of Federal Regulations, motor carriers may only transport property in motor vehicles they own or which they lease on specified terms. 49 C.F.R. §§ 376.11, 376.12.

The injunctions prohibit motor carriers from "[m]isclassifying truck drivers as independent contractors including, but not limited to, classifying drivers who operate trucks that are provided, owned, or leased by [motor carrier(s)] as independent contractors." Req. for J. Not. ¶¶ 6, 10, 14; *see id.* ¶¶ 8, 10. Because motor carriers only have those two options, and because the injunctions broadly prohibit the motor carriers from classifying drivers who operate trucks under either condition as independent contractors, the injunctions effectively prohibit the motor carriers from using independent contractors altogether.

Such changes will dramatically alter the business operations of the drivers, directly affecting their prices, routes, and services. Drivers that continue to drive for Petitioners will become employees. They will stop being motor carriers and small business owners, and their business operations will necessarily cease altogether. Therefore, they will no longer charge prices, offer services, or service routes.

Drivers that wish to remain motor carriers and small businesses will have to negotiate a new relationship with Petitioners that the State does not perceive as a misclassification, make a significant capital

investment by purchasing their own trucks, and/or enter into new agreements with other motor carriers. Each option presents a significant economic hurdle to the drivers that will directly affect their prices, routes, and services. Those drivers who wish to operate as independent contractors but cannot afford the cost will be forced out of the market.

The changes will also dramatically alter Petitioners' business operation, directly affecting their prices, routes, and services. Two courts in the parallel case of *ATA v. City of Los Angeles* have examined the effect that forcing motor carriers in the Ports of Los Angeles and Long Beach to reclassify their drivers will have on prices, routes, and services. Each court found the effect to be direct and significant.

In *ATA v. City of Los Angeles*, 559 F.3d 1046, 1048-49, 1058 (9th Cir. 2009), in determining whether to enjoin the implementation of a mandatory concession agreement between the Port of Los Angeles and motor carriers, the court examined the effect a provision in the agreement that requires carriers to transition from the use of independent contractors to employee drivers over five years is likely to have on prices, routes, and services. The court found that the costs associated with such a transition are "vast" and could drive smaller carriers from the market altogether. *Id.* at 1058. Therefore, the court found that requiring carriers to reclassify their drivers threatens to directly and significantly affect their prices, routes, and services. *See id.* at 1056, 1060.

Following remand and trial, in *ATA v. City of Los Angeles*, No. CV 08-4920 CAS (RZx), 2010 WL 3386436 at *10, 19 (C.D. Cal., Aug. 26, 2010), the trial court found that the same contractual provision requiring reclassification threatened to increase motor carrier operating costs, by 167% by one estimate. The court found that such cost increase would logically increase motor carrier prices and therefore held that the

provision was preempted by the FAAAA barring an exception that is not applicable here. *Id.* at *19.

Because Petitioners are motor carriers competing in the same trucking market as the motor carriers in the *ATA* cases, they face the same logical effect if they are forced to treat the drivers as employees. To cover the associated increase in capital and personnel expenditures, Petitioners logically will have to charge higher prices, stop servicing routes that become cost-prohibitive, and/or stop offering services that become too expensive.

Moreover, because the State's UCL claim seeks to require Petitioners to make such changes overnight, rather than gradually over five years, it will cost them significantly more to implement the changes, and the effect of the changes on their prices, routes, and services will be much more direct and dramatic. Consequently, the State's UCL claim threatens to affect prices, routes, and services even more directly than the concession agreements in the *ATA* cases. In essence, the State's UCL claim also threatens to force Petitioners out of the market.

It is irrelevant whether the State intends for its claim to change the business model of Petitioners and the drivers and thereby to affect their prices, routes, and services. Because the State's UCL claim threatens to affect those prices, routes, and services directly, the claim is preempted under the first prong of the effect test, and the State's Complaint fails to state a cause of action.

VIII. THE STATE'S UCL CLAIM IS PREEMPTED EVEN IF ITS AFFECT IS REMOTE BECAUSE IT INTERFERES WITH THE FORCES OF COMPETITION.

As set forth in *Morales* and confirmed in *Wolens*, *Rowe*, and *Mendonca*, state action is not preempted if its effect on motor carrier prices, routes, and services is too remote or tenuous. As mentioned in

Wolens and as broken down by *Mendonca* and *Rowe*, the effect test has a second prong under which state action that only indirectly affects motor carrier prices, routes, and services is nevertheless preempted if its acute economic effect threatens Congress' deregulatory purpose by interfering with the forces of competition. The Opinion of the Court of Appeal omits this test. To determine whether the UCL and the State's UCL claim run afoul of Congress' deregulatory purpose, it is necessary to examine that purpose.

1. The UCL Threatens Congress' Deregulatory Purpose.

Congress' "central purpose" in adopting the FAAAA was "to extend to all . . . carriers . . . the identical intrastate preemption of prices, routes and services" and thereby "create a completely level playing field' between air carriers," who were already protected from State regulation under the ADA, and motor carriers, who were not. H.R. Conf. Rep. 103-677 at 82, 85 (1993) (1 A.A. 266, 268); *Mendonca*, 152 F.3d at 1187.

In doing so, Congress sought to end the patchwork of regulation and deregulation that motor carriers had been operating under since 1980. HRCR at 87 (1 A.A. 270). In its findings regarding the FAAAA, Congress stated:

> Congress finds and declares that the regulation of intrastate transportation of property by the States has imposed an unreasonable burden on interstate commerce; impeded the free flow of trade, traffic, and transportation of interstate commerce; and placed an unreasonable cost on the American consumers; and certain aspects of the State regulatory process should be preempted.

P.L. 103-305 § 601(a) (1994) (internal divisions omitted), *quoted in* HRCR at 39 (1 A.A. 214).

Congress further stated that:

> [P]reemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic

> regulation of motor carrier operation causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

HRCR at 87 (1 A.A. 270).

From these statements, it is clear that Congress intended to preempt state law, regulations, and enforcement actions in order to foster competition between motor carriers and protect them from state regulation by "leav[ing] [carriers] largely to themselves, and not at all to States . . . ." *Wolens*, 513 U.S. 219, 228 (1995).

The UCL, by establishing a cause of action for unfair competition, Cal. Bus. & Prof. Code § 17200. threatens to interfere with this purpose. As previously discussed, in the context of the FAAAA, by regulating competition, the UCL regulates the business practices of, and competition between, motor carriers. *See* § VI.A, *supra*. The UCL does so by granting courts the power to enjoin anticompetitive business practices, to award restitution and impose civil penalties regarding those practices. Cal. Bus. & Prof. Code §§ 17203, 17206.

In *Wolens*, U.S. Supreme Court found that the Illinois Consumer Fraud Act, which like the UCL establishes a cause of action for unfair competition, *compare* § 17200 *with* 815 Ill. Comp. Stat. § 505/2, to be "prescriptive" in that "it controls the primary conduct of those falling within its governance." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 227 (1995). The Court found that because the Act and other consumer protection statutes can be used to enforce state Policies, such laws have an inherent "potential for intrusive regulation" in that they can be used to "guide and police" carrier business practices." *Id.* at 228. Because the UCL is very similar to the Illinois Consumer Fraud Act, it has the same

inherent potential for the State to impose its policies on carriers. Indeed, as demonstrated below, the State's UCL claim seeks to do just that.

Moreover, if California can regulate unfair competition between motor carriers under the UCL, so too can the other states, and motor carriers are subject to a patchwork of differing standards regarding unfair competition. *Frontier Airlines, Inc. v. United Airlines, Inc.*, 758 F. Supp. 1399 (D. Colo. 1989). In freeing motor carriers from state interference with the forces of competition, Congress cannot possibly have intended them to be subject to such standards.

By regulating unfair carrier competition, the UCL runs afoul of Congress' prohibition against state regulation of carriers and against state interference with competition between carriers. Because the UCL interferes with the forces of competition, its effect is significant within the meaning of the second prong of the effect test. Therefore, even if the UCL only remotely or tenuously affects carrier prices, routes, or services, it is nevertheless preempted, and the State's Complaint fails to state a cause of action.

2. The State's UCL Claim Erects the Very Entry Control That Congress Intended to Dismantle.

Moreover, the State's UCL claim is preempted because it threatens to interfere with Congress' deregulatory purpose by imposing the very state policy that Congress sought to preempt and to erect the very entry control that Congress sought to dismantle when it enacted the FAAAA.

Congress singled out a particular California law, 1993 Stats. ch 1226 § 4 (AB 2015 (Oct. 11, 1993)) ("AB 2015"), *codified at* Cal. Pub. Util. Code §§ 4120 *et seq.* (1994), that prompted it to enact the FAAAA. AB 2015 exempted intermodal air and motor carriers from California's regulation of motor carrier operations, but "denied this exemption . . . to

those using a large proportion of owner-operators instead of company employees . . . ." HRCR at 87 (1 A.A. 270).

In addition, Congress specifically identified entry controls as a "'typical form' of harmful regulation" imposed by the states. *N.H.*, 448 F.3d 66, 77 (1st Cir. 2006), *aff'd Rowe*, 552 U.S. 364 (2008), *quoting* HRCR at 86 (1 A.A. 269). It stated, "Strict entry controls often serve to protect carriers, while restricting new applicants from directly competing for any given route and type of trucking business." HRCR at 86-87 (1 A.A. 269-70).

AB 2015 was such an entry control. It discouraged the participation of independent contractors in the market by prohibiting deregulated motor carriers from "utiliz[ing] subhaulers or otherwise directly or indirectly purchas[ing] transportation by motor vehicle" to generate more than ten percent of their gross intrastate revenue. § 4128.5. It subjected carriers that violated the law to fines and imprisonment. § 4139. Moreover, it provided a mechanism for suspending and cancelling state motor carrier registrations, thereby denying violating carriers the right to use public highways. §§ 4125(a), 4135, 4136.

By expressly pointing to AB 2015 as one of the reasons for enacting the FAAAA, and by identifying entry controls as the sort or regulation it intended to preempt, Congress demonstrated it intended to extend the benefit of deregulation to motor carriers that use independent contractors by dismantling barriers to the participation of such drivers in the trucking market and to encourage motor carriers to use such drivers where competitive forces determined it to be profitable, rather than where the State determined it to be desirable. By using the language "related to a price, route, or service of a motor carrier" to achieve this purpose, Congress demonstrated that state action creating entry controls and

discouraging the use of independent contractors is significantly "related to" motor carrier prices, routes, and services.

The acute economic effect of the State's UCL claim directly threatens Congress' deregulatory purpose in enacting the FAAAA. As discussed above, the injunction the State seeks will require Petitioners to treat the drivers as employees, and likely will force the carriers to cease using independent contractors altogether. Drivers that become employees will cease to participate in the market as motor carriers and small businesses. Drivers who wish to continue to participate in the market will have to negotiate a new relationship with Petitioners that the State does not perceive as a misclassification if the resulting injunction permits the use of independent contractors at all. They could enter into new agreements to with other motor carriers, but they will likely have to negotiate a different relationship than the current one to avoid the State perceiving another misclassification. Alternately, they could make a significant capital investment by purchasing their own trucks. Each of those options presents a significant economic hurdle to their continued participation of those drivers in the market. Drivers who cannot afford the associated costs will be forced out of the market altogether.

Thus, the State's UCL claim threatens to have a chilling effect on the participation of independent contractors in the market by erecting an entry control that discourages their participation. Because Congress announced that it intended to dismantle such entry controls by enacting the FAAAA, the acute economic effect of the State's claim threatens Congress' deregulatory purpose. Consequently, the effect of the State's UCL claim "significantly" affects motor carrier prices, routes, and services. Therefore, the State's UCL claim is preempted even if its effect is remote or tenuous, and the State's Complaint fails to state a cause of action.

3. The State's UCL Claim Threatens to Create a Patchwork of State Regulation.

This issue does not just affect Petitioners and the independent contractors who provide services to Petitioners The State's UCL claim is only one of at least six cases that the State filed against motor carriers operating in Southern California ports seeking to enjoin the carriers from using independent contractors. Req. for J. Not. ¶¶ 5, 7, 9, 11, 13. In each of the other cases, the State obtained a permanent injunction that effectively prohibits the carriers from using independent contractors altogether. *See* § VII.2, *supra*. Unless the Court holds the State's UCL claim to be preempted, the state will be free to use the UCL to force one motor carrier after another to stop using independent contractors or to only use those who own trucks.

The State will almost certainly attempt to do so. Its UCL claims in these cases represent just one of the many tactics it has used in its campaign to impose upon motor carriers a long-standing California policy favoring the use of employee drivers, who could then unionize, over independent contractors. For more than thirty years, the State and its political subdivisions have fought to substitute that State policy for the Congressional policy mandating that such decisions be left to competitive market forces.

In 1980, Congress deregulated the trucking industry. *Rowe*, 552 U.S. 364, 367 (2008). In 1993, the California legislature enacted AB 2015, which, as demonstrated, discouraged the use of independent contractors by denying the benefits of deregulation to motor carriers using such drivers to any significant degree. In 1994, Congress responded by enacting the FAAAA to dismantle that requirement. Since then, the State and its political subdivisions have continued their efforts to impose the State's policy on motor carriers using a variety of tactics.

In one of the most recent attempts, the State Assembly introduced a bill that would have designated all individuals who drive trucks for motor carriers operating in California ports as employees. A.B. 950, 2011-12 Leg., Reg. Sess. (Cal. 2011). In another, the Division of Labor Standards Enforcement of the State's Department of Labor investigated independent contractors for employment law violations. *See* Req. for Judicial Notice ¶ 4, Ex. B.

Furthermore, the Cities of Los Angeles and Long Beach, and their respective harbor departments and boards of harbor commissioners, attempted to unlawfully impose mandatory concession agreements on motor carriers operating in the Ports of Los Angeles and Long Beach that would have required the carriers to transition from the use of independent contractors to employee drivers over a five-year period.[4] *ATA*, No. 10-56465, 2011 WL 4436256 at * 1-2, 4 (9th Cir., Sept. 26, 2011); *ATA*, 559 F.3d 1046, 1048, nn. 1-2, 1049 (9th Cir. 2009). The district court found that such a requirement significantly affects motor carrier prices and is therefore preempted by the FAAAA unless rescued by the market participant exception to preemption. *ATA*, No. CV 08-4920 CAS (RZx), 2010 WL 3386436 at *19, *33 (C.D. Cal., Aug. 26, 2010); *ATA*, 2011 WL 4436256 at *17. On appeal, the court held that the exception does not apply because "[t]he employee-driver provision is tantamount to regulation." *ATA*, 2011 WL 4436256 at * 18 (internal quotation omitted).

The State's use of the UCL against Petitioners, and the other motor carriers against whom it obtained permanent injunctions prohibiting the use of independent contractors, is also tantamount to regulation. Under the pretext of correcting misclassifications, the State

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[4] The City of Long Beach and its political subdivisions abandoned the requirement and settled. *See ATA*, 2011 WL 4436256 at *25 n.5; *ATA*, 2010 WL 3386436 at *1 nn. 1-2.

has attempted to, and in at least four other cases has succeed, regulated motor carriers by forcing them to abandon the prevailing business model of using independent contractors and to instead adopt the State's preferred model of using employee drivers.

The State's efforts to impose that policy were one of the stated reasons given by Congress for enacting the FAAAA. Thus, the State's continued efforts to impose the policy present a federalism problem that the Court should resolve by holding that the preemptive provision of the FAAAA preempts the State's UCL claim.

As demonstrated above, the claim threatens to erect an entry control that will require Petitioners, their drivers, who are also motor carriers within the meaning of the FAAAA's preemption provision, and other motor carriers operating in California to restructure their business models. If the Court permits the State to erect this entry control, motor carriers will find themselves subject to a patchwork of differing state requirements regarding the use of independent contractors, such as requirements that such drivers own trucks in some states but not in others.

Given the State's long-standing policy of favoring employee drivers, the State is unlikely to give up its efforts to force motor carriers to use them. Therefore, it is doubtful that motor carriers can restructure their business models in a way that will permit them to continue to use independent contractors without the State filing further UCL claims against them. Consequently, unless the Court holds that the State's UCL claim is preempted, some and potentially all motor carriers in California will be prohibited from using independent contractors, whereas others, at the very least carriers operating in other states, will not.

Rowe specifically held that state action whose effect threatens Congress' purpose in enacting the FAAAA by interfering with the forces

of competition, including state action that threatens to subject motor carriers to a patchwork of differing state requirements, is significant within the meaning of the *Morales* effect test and is therefore preempted even if its effect on motor carrier prices, routes, or services is remote or tenuous. *Rowe*, 552 U.S. 364, 371 (2008). Because the State's UCL claim threatens to erect an entry control and to create the potential for such a patchwork, its effect is significant, and it is preempted by the FAAAA even if its effect on prices, routes, or services is remote or tenuous. Consequently, the State's Complaint fails to state a claim.

CONCLUSION

The Opinion of the Court of Appeal has created a split between the divisions of the Second Appellate District regarding the preemption of UCL claims against air and motor carriers. In addition, the State's UCL claim is at tension with an express Congressional policy against the state interference with the forces of competition in the trucking industry. The Court's intervention is necessary to resolve the uncertainty caused by these institutional problems. *See* Cal. R. Ct. 8.500(b)(1).

The State's UCL claim as premised on Sections 1194 and 984 of the Labor and Unemployment Insurance Codes, respectively, fails as a matter of law because those statutes impose no duty on Petitioners.

As demonstrated above, the FAAAA preempts the UCL, Sections 4, 7, 11, and 12 of the Wage Order, and the State's UCL claim. These matters do not merely affect Petitioners, they affect all motor carriers operating in California. Furthermore, because the ADA has the same preemptive effect as the FAAAA, these matters also affect all air carriers operating in California.

To resolve the split within the Court of Appeal and the tension between the State's policies and Congress' express intention to free air

and motor carriers from state regulation, the Court should find the UCL, the Wage Order, and the State's UCL claim to be preempted.

Therefore, the Court should hold that the State's Complaint fails to state a cause of action and return the case to the Court of Appeal with instructions to remand the case to the trial court and reenter the original judgment.

Dated: October 24, 2011

Respectfully submitted,

SANDS LERNER

Neil S. Lerner
Arthur A. Severance
Attorneys for Defendant-Petitioners Alfredo Barajas and Pac Anchor Transportation, Inc.

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 13,938 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: October 24, 2011

Respectfully submitted,

SANDS LERNER

Neil S. Lerner
Arthur A. Severance
Attorneys for Defendant-Petitioners Alfredo Barajas and Pac Anchor Transportation, Inc.

DECLARATION OF SERVICE

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 **October 24, 2011**, I caused the original and thirteen (13) copies of the attached **OPENING BRIEF ON THE MERITS** to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-4797, via Norco Overnight.

On **October 24, 2011**, I served the attached **OPENING BRIEF ON THE MERTIS** on the following recipients by delivering copies thereof enclosed in sealed envelopes and addressed as follows to the common carrier Norco Overnite, which promises overnight delivery by 11:00 a.m. on October 25, 2011:

Kamala D. Harris, Esq.
Mark J. Breckler, Esq.
Jon M. Ichinaga, Esq.
Maurice R. Jourdane, Esq.
Satoshi Yanai, Esq.
Office of the Attorney General
300 S. Spring St., Ste. 1702
Los Angeles, CA 90013
Attorneys for Plaintiff-Respondent, People of the State of California

Clerk of the Court
Los Angeles County Superior Court
Central District
Stanley Mosk Courthouse
111 N. Hill Street
Los Angeles, CA 90012

Clerk of the Court
Second District Court of Appeal,
Division Five
300 S. Spring Street
Second Floor, North Tower
Los Angeles, CA 90013

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013-1230
[Bus. & Prof. Code § 17209]

Office of the District Attorney
County of Los Angeles
210 West Temple Street
Los Angeles, CA 90012
[Bus. & Prof. Code § 17209]

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 **October 24, 2011**, at Los Angeles, California.

Diane Adams
Declarant

Signature

EXHIBIT "A"

Filed 5/18/11

MAY 18 2011

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE ex rel. KAMALA D. HARRIS, as Attorney General, etc., Plaintiff and Appellant, v. PAC ANCHOR TRANSPORTATION, INC., et al., Defendants and Respondents.	B220966 (Los Angeles County Super. Ct. No. BC397600)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. White, Judge. Reversed.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Mark J. Breckler, Senior Assistant Attorney General, Jon M. Ichinaga and Satoshi Yanai, Deputy Attorneys General, for Plaintiff and Appellant.

Sands Lerner, Neil S. Lerner and Arthur A. Severance for Defendants and Respondents.

Plaintiff and appellant State of California appeals from a judgment following an order granting judgment on the pleadings in favor of defendants and respondents Alfredo Barajas and Pac Anchor Transportation, Inc. The State contends the Federal Aviation Administration Authorization Act (FAAAA) (49 U.S.C. § 14501 et seq.) does not preempt this action under California's unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) based on alleged violations of California labor and unemployment insurance laws. We agree the State's unfair competition action is not related to a price, route, or service of a motor carrier with respect to the transportation of property, and therefore, the action is not preempted by the FAAAA. We reverse.

FACTS

Pac Anchor is a trucking company in Long Beach, California. Barajas is an owner of Pac Anchor, where he works as a manager and truck dispatcher. Pac Anchor has contracts with shipping companies to transport shipping containers from the ports of Los Angeles and Long Beach to locations in Southern California, including warehouses and railroad freight depots.

Barajas owns 75 trucks. He recruits drivers, then leases his trucks and the drivers to Pac Anchor. Barajas and Pac Anchor classify the drivers as independent contractors. As a result, Barajas and Pac Anchor do not obtain workers' compensation insurance, withhold state disability insurance or income taxes, pay unemployment insurance or employment training fund taxes on behalf of the drivers, reimburse business expenses, insure payment of the state minimum wage, or provide itemized written statements of hours and pay to the drivers.

The drivers do not invest any capital, however, or own the trucks that they drive. They use trucks, tools, and equipment furnished by Barajas and Pac Anchor. The drivers are employed for extended periods of time, but can be discharged without cause. The drivers take all their instructions from Barajas and Pac Anchor. They are not skilled workers and do not have substantial control over operational details. The drivers do not

have other customers or their own businesses. The drivers do not have Department of Transportation operating authority or other necessary permits and/or licenses to independently engage in the transport of cargo. They are an integrated part of Barajas's and Pac Anchor's trucking business, because they perform the core activity of delivering cargo.

PROCEDURAL HISTORY

On September 5, 2008, the State filed a complaint against Barajas and Pac Anchor for violation of the UCL. The complaint alleged that Barajas and Pac Anchor misclassified drivers as independent contractors and, as a result, "illegally lowered their costs of doing business." Specifically, Barajas and Pac Anchor violated the UCL "by engaging in acts of unfair competition including, but not limited to, the following: [¶] a. Failing to pay unemployment insurance taxes as required by Unemployment Insurance Code [section] 976; [¶] b. Failing to pay Employment Training Fund taxes as required by Unemployment Insurance Code [section] 976.6; [¶] c. Failing to withhold State Disability Insurance taxes as required by Unemployment Insurance Code [section] 984; [¶] d. Failing to withhold State income taxes as required by Unemployment Insurance Code [section] 13020; [¶] e. Failing to provide workers' compensation as required by Labor Code [section] 3700; [¶] f. Failing to provide employees with itemized written statements as required by Labor Code [section] 226 and to maintain and provide employees with records required by [California Industrial Welfare Commission (IWC)] Wage Order [No.] 9, subsection 7; [¶] g. Failing to reimburse employees for business expenses and losses as required by Labor Code [section] 2802; [and] [¶] h. Failing to ensure payment at all times of California's minimum wage as required by Labor Code [section] 1194 and [IWC] Wage Order 9, subsection 4." As a result of these practices, Barajas and Pac Anchor "have obtained an unfair advantage over its competitors, deprived employees of benefits and protections to which they are entitled under California law, harmed their truck driver employees, harmed the general public, and

deprived the State . . . of payments for California state payroll taxes." The State sought restitution, civil penalties, and injunctive relief.

Barajas and Pac Anchor filed a motion for judgment on the pleadings on August 21, 2009. After a hearing on September 22, 2009, the trial court found the action was preempted by the FAAAA for three reasons. First, the court concluded that the holding of *Fitz-Gerald v. SkyWest, Inc.* (2007) 155 Cal.App.4th 411 (*Fitz-Gerald*) required finding all UCL causes of action against motor carriers preempted by the FAAAA. Second, the court found that requiring Barajas and Pac Anchor to treat its truck drivers as employees would increase the motor carrier's operational costs, and therefore, the action related to the motor carrier's prices, routes, and services. Third, the court concluded that the action threatened to interfere with the forces of competition by discouraging independent contractors from competing in the trucking market. The court entered an order granting judgment on the pleadings on October 13, 2009, and entered judgment in favor of Barajas and Pac Anchor on October 14, 2009. The State filed a timely notice of appeal.

DISCUSSION

Standard of Review

"A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. (Code Civ. Proc., § 438, subd. (c)(3)(B)(ii).) A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. [Citations.] All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law; judicially noticeable matters may be considered. [Citations.]" (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

Federal Preemption Principles

"The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law. (U.S. Const., art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516; *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949.) There are four species of federal preemption: express, conflict, obstacle, and field. [Citation.]" (*Viva! Internat. Voice For Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935, fns. omitted.)

"First, express preemption arises when Congress 'define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.' [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when '"under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [Citations.] Finally, field preemption, i.e., 'Congress' intent to pre-empt all state law in a particular area,' applies 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.' [Citations.]" (*Viva! Internat. Voice For Animals v. Adidas Promotional Retail Operations, Inc.*, *supra*, 41 Cal.4th at p. 936.)

Express Preemption Provision of the FAAAA

The FAAAA preempts state and local regulation relating to the prices, routes or services of motor carriers with respect to the transportation of property. (49 U.S.C. § 14501(c).) Specifically, section 14501(c) of title 49 of the United States Code provides in pertinent part: "(1) . . . Except as provided in paragraphs (2) and (3), a State . . . may

not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."

As part of the deregulation of motor carriers, Congress believed it was necessary to eliminate non-uniform state regulations which had caused "'significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtail[ed] the expansion of markets.' H.R. Conf. Rep. No. 103-677, at 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60." (*Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1187 (*Mendonca*).)

The preemption provision of the FAAAA is identical to the preemption provision of the Airline Deregulation Act of 1978 (ADA) to "'even the playing field' between air carriers and motor carriers. [H.R. Conf. Rep. No. 103-677, *supra*,] at 85, 1994 U.S.C.C.A.N. at 1757, 1759." (*Mendonca, supra*, 152 F.3d at p. 1187.)

The preemption clauses of the FAAAA and the ADA are interpreted broadly and expansively. (*Mendonca, supra,* 152 F.3d at p. 1188, fn. 5.) "The phrase 'related to' in this general preemption provision is 'interpreted quite broadly.' [Citation.] Thus, '"[a] state or local regulation is related to the price, route, or service of a motor carrier if the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services."' [Citations.]" (*CPF Agency Corp. v. Sevel's 24 Hour Towing Service* (2005) 132 Cal.App.4th 1034, 1044.)

The issue before us in this case is whether the State's unfair competition action relates to "a price, route, or service" provided by Barajas and Pac Anchor.

Relevant Cases Applying the Preemption Standard

Three relevant federal court cases have interpreted and applied the preemption provisions of the ADA and the FAAAA. In *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 383 (*Morales*), the United States Supreme Court considered whether enforcement of certain fare advertising guidelines through state consumer protection laws

was preempted by the ADA. The *Morales* court held that "[s]tate enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are pre-empted under [the ADA]." (*Id.* at p. 384.) The court found that the guidelines were indisputably related to fares. (*Id.* at pp. 387-388.) Therefore, the court held that the fare advertising guidelines were preempted by the ADA. (*Id.* at p. 391.)

The United States Supreme Court further developed the scope of the ADA preemption in *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219 (*Wolens*). The plaintiffs in *Wolens* had filed class action lawsuits for breach of contract and violation of state consumer protection and deceptive business practices laws, based on changes to American Airlines' frequent flyer program. (*Id.* at pp. 224-225.) "Plaintiffs' claims relate to 'rates,' *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-serve upgrades unlimited by retrospectively applied capacity controls and blackout dates." (*Id.* at p. 226.) The *Wolens* court held that the plaintiffs' claims under the state consumer protection law amounted to enforcement of a law related to air carrier rates, routes, or services and, therefore, were preempted. (*Id.* at p. 228.) However, common-law remedies for breach of contract were not a requirement imposed under state law, and therefore, the plaintiffs' breach of contract claims based on the airline's voluntary contractual commitments were not preempted. (*Id.* at pp. 228-229.)

In *Mendonca, supra,* 152 F.3d at page 1189, the Ninth Circuit held that enforcement of California's Prevailing Wage Law (CPWL) (Lab. Code, §§ 1770-80) was not preempted by the FAAAA. CPWL requires contractors and subcontractors awarded public works contracts to pay workers the prevailing wages. (Lab. Code, § 1771.) A group of motor carriers argued that CPWL directly affected "prices, routes, or services," because rates were based on costs, performance factors, and conditions, including prevailing wage requirements. (*Mendonca, supra,* at p. 1189.) The appellate court concluded that although the wage law was "related to" the motor carrier's prices, routes, and services in a sense, the effect was "no more than indirect, remote, and tenuous."

(*Ibid.*) CPWL did not frustrate "the purpose of deregulation by *acutely* interfering with the forces of competition." (*Ibid.*)

Division Six of this appellate district similarly found in *Fitz-Gerald, supra,* 155 Cal.App.4th at page 423, that actions to enforce California's minimum wage laws and labor laws governing meal and rest breaks are not preempted by the ADA. Specifically, the *Fitz-Gerald* court concluded the plaintiffs' causes of action for unpaid minimum wages under Labor Code section 1194, unpaid meal and rest breaks, unpaid overtime, and waiting time penalties under Labor Code section 203 were not preempted by the ADA. (*Fitz-Gerald, supra,* at p. 415.) The *Fitz-Gerald* court found that although state minimum wage laws ultimately result in higher fares, fewer routes, and less service, the connection was too tenuous for preemption to apply. (*Id.* at p. 423, fn. 7.) "If the rule was otherwise, 'any string of contingencies is sufficient to establish a connection with price, route or service, [and] there will be no end to ADA preemption. [Citation.]' [Citation.]" (*Id.* at p. 423.)

The court in *Fitz-Gerald* also held, however, that the ADA bars causes of action under the UCL. (*Fitz-Gerald, supra,* 155 Cal.App.4th at p. 423.) We disagree with *Fitz-Gerald's* cursory citation to *Morales* and *Wolens* to support the conclusion that all state unfair business practices statutes are preempted by the ADA. Where a cause of action is based on allegations of unlawful violations of the State's labor and unemployment insurance laws, we see no reason to find preemption merely because the pleading raised these issues under the UCL, as opposed to separately stated causes of action. We respectfully disagree with *Fitz-Gerald's* contrary conclusion as to preemption of causes of action under the UCL.

The State's UCL Action

The State contends its action under the UCL is not preempted by the FAAAA, because it is not related to the price, route or service of any motor carrier. We agree.

The UCL defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (Bus. & Prof. Code, § 17500 et seq.)]." (Bus. & Prof. Code, § 17200.) "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. [Citation.]" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949 (*Kasky*).) "'Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are *unlawful, or unfair, or fraudulent.*' [Citation.]" (*Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1157, emphasis added.)

"An 'unlawful' business practice or act within the meaning of the UCL 'is an act or practice, committed pursuant to business activity, that is at the same time *forbidden by law.* [Citation.]' [Citation.] The California Supreme Court has explained that '[b]y proscribing "any unlawful" business practice, "[Business and Professions Code] section 17200 'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law makes independently actionable. [Citation.]' [Citation.]" (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 351-352.) "In addition, under [Business and Professions Code] section 17200, 'a practice may be deemed unfair even if not specifically proscribed by some other law.' [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.)

The State's action against Barajas and Pac Anchor under the UCL is based on alleged violations of statutory obligations concerning employees. Specifically, the State alleges violations of certain laws governing minimum labor standards, including Labor Code section 1194 (requiring the payment of California's minimum wage), Labor Code section 226 (requiring issuance of itemized wage statements to employees), Labor Code section 2802 (requiring reimbursement of employee expenses), Labor Code section 3700 (requiring employers to secure workers' compensation insurance or receive certification to self-insure), and certain laws governing generally applicable state payroll tax requirements, including Unemployment Insurance Code section 976 (requiring

contributions to the State Unemployment Fund), Unemployment Insurance Code section 976.6 (requiring contributions to the State Employment Training Fund), Unemployment Insurance Code section 984 (requiring employee contributions to the State Disability Fund, which employers must withhold from employee wages under Unemployment Insurance Code section 986), and Unemployment Insurance Code section 13020 (requiring employers to withhold income taxes from employee wages).

"'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples.' [Citation.] State laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays, and those dictating payment to employees for time spent at the polls or on jury duty all have withstood scrutiny. [Citation.]" (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756.)

In this case, the State's action to enforce Barajas's and Pac Anchor's statutory obligations as an employer is not related to Pac Anchor's prices, routes, or services, even though it may remotely affect the prices, routes, or services that the motor carrier provides. Case law supports finding that the effect of California's minimum wage law (Lab. Code, § 1194) on a motor carrier's prices, routes, and services is too tenuous for preemption under the FAAAA. (See *Fitz-Gerald, supra,* 155 Cal.App.4th at p. 423 [connection of minimum wage law to higher fares, fewer routes, and less service is tenuous]; *Mendonca, supra*, 152 F.3d at p. 1189 [California's prevailing wage law applicable to public works contractors is not preempted by the FAAAA].) Other California labor and unemployment insurance provisions that Barajas and Pac Anchor allegedly violated have a similarly indirect and tenuous connection to Pac Anchor's prices, routes, and services. We hold that the State's UCL action based on Barajas's and Pac Anchor's alleged violations of generally applicable state laws governing an employer's relationship with employees is not an action related to the price, route, or service of a motor carrier and, therefore, not preempted by the FAAAA.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to appellant State of California.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.

EXHIBIT "B"

Cal Pub Util Code § 4120 (1994)

§ 4120. "Integrated intermodal small package carrier"

For purposes of this chapter, "integrated intermodal small package carrier" means any person or corporation that transports by motor vehicle packages or articles weighing not more than 150 pounds and that provides, by itself or through a company affiliated through common ownership, intermodal air-ground transportation service for the packages or articles in both interstate and intrastate commerce. The incidental or occasional use of aircraft in transporting packages or articles does not constitute integrated intermodal operation within the meaning of this section.

HISTORY: Added Stats 1993 ch 1226 § 4 (AB 2015).

Cal Pub Util Code § 4125 (1994)

§ 4125. Registration requirement

(a) Except as provided in Section 4129, no integrated intermodal small package carrier shall operate a motor vehicle on any public highway of this state unless it is currently registered with the commission.

(b) The commission shall grant registration upon the filing of the application and the payment of the fee as required by this article, and shall assign an identification number to the carrier.

(c) The transportation of packages or articles larger than 150 pounds by a person or corporation registered pursuant to Section 4125 does not relieve that person of any obligation imposed by this chapter.

HISTORY: Added Stats 1993 ch 1226 § 4 (AB 2015).

Cal Pub Util Code § 4128.5 (1994)

§ 4128.5. Subhaulers

(a) Any person or corporation who subhauls for an integrated intermodal small package carrier shall be a highway contract carrier.

(b) No integrated intermodal small package carrier may utilize subhaulers or otherwise directly or indirectly purchase transportation by motor vehicle to provide services for which registration is required under this chapter, if the total amount paid to all subhaulers or for the purchased transportation exceeds 10 percent of the gross intrastate revenue of the integrated intermodal small package carrier derived from transporting packages or articles described by Section 4120 in any calendar year.

HISTORY: Added Stats 1993 ch 1226 § 4 (AB 2015).

Cal Pub Util Code § 4135 (1994)

§ 4135. Grounds for suspension

Upon the receipt of a written determination from the department that an integrated intermodal small package carrier is engaged in unsafe operation, has failed the terminal inspection program or has failed to enroll its drivers in the pull notice program, the commission shall suspend the registration of the integrated intermodal small package carrier.

HISTORY: Added Stats 1993 ch 1226 § 4 (AB 2015).

Cal Pub Util Code § 4136 (1994)

§ 4136. Notice and hearing

(a) The commission shall determine that the department has complied with Section 4137 before suspending any registration pursuant to Section 4135.

(b) The commission shall notify the integrated intermodal small package carrier of any action taken pursuant to Section 4135.

(c) Whenever the commission suspends the registration of an integrated intermodal small package carrier pursuant to Section 4135, the commission shall furnish the carrier written notice of the suspension and shall hold a hearing within a reasonable time, not to exceed 21 days, after a written request therefore is filed with the commission.

(d) At the hearing, the carrier shall show cause why the suspension should not be continued. At the conclusion of the hearing, the commission may terminate the suspension, continue the suspension, or cancel the carrier's registration.

(e) The commission may cancel the registration of any carrier suspended pursuant to Section 4135 at any time 90 days or more after its suspension if the commission has not received a written recommendation for reinstatement from the department and the carrier has not filed a written request for a hearing with the commission.

HISTORY: Added Stats 1993 ch 1226 § 4 (AB 2015).

Cal Pub Util Code § 4139 (1994)

§ 4139. Fines and imprisonment

Any person who violates any provision of this chapter is guilty of an infraction and is punishable by a fine of not more than two thousand five hundred dollars ($ 2,500) or by imprisonment in a county jail for not more three months for each day of unlawful operation, and in addition shall be liable for any unpaid registration and renewal fees imposed by Section 4127 during the period of unlawful operation, together with the costs of enforcement.

HISTORY: Added Stats 1993 ch 1226 § 4 (AB 2015).

EXHIBIT "C"

ASSEMBLY BILL No. 950

Introduced by Assembly Members John A. Pérez and Swanson

February 18, 2011

An act to add Section 2750.7 to the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 950, as introduced, John A. Pérez. Employment: drayage truck operators.

Existing law provides guidelines to determine whether a person who performs work for another pursuant to a contract is an employee or an independent contractor.

This bill would deem drayage truck operators as employees of those persons who arrange for or engage their services, with the exception of public agency employers.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) Nonemployee truck operators cannot freely report many safety concerns without fear of retaliation against them, as only employees enjoy thorough protection from retaliation.

(b) Nonemployee truck operators typically lack workers' compensation insurance. Requiring workers' compensation

insurance would enhance safety as insurers would prompt hazard-prevention efforts by the businesses involved.

(c) Drayage driving involves a greater degree of public health and safety and worker health and safety concerns than other types of commercial driving due to the heavy weights, large loads, and frequent trips through neighborhoods, which are adversely impacted by truck pollution.

SEC. 2. Section 2750.7 is added to the Labor Code, to read:

2750.7. (a) Notwithstanding any other law, for purposes of all of the provisions of state law that govern employment, including workers' compensation and insurance pursuant to Division 4 (commencing with Section 3200), occupational safety and health pursuant to Part 1 (commencing with Section 6300) of Division 5, and provisions that prohibit retaliation or discrimination against employees, a drayage truck operator is an employee of the entity or person who arranges for or engages the services of the operator.

(b) For purposes of this section, "drayage truck operator" means the driver of, or any person, party, or entity that controls the operation of, any in-use on-road vehicle with a gross vehicle weight rating greater than 33,000 pounds operating on or transgressing through port or intermodal rail yard property for the purpose of loading, unloading, or transporting cargo, including containerized, bulk, or break-bulk goods.

(c) This section shall not be construed to deem a public agency the employer of a drayage truck operator without the consent of the public agency.

SEC. 3. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

O