No. 13-2307

In the
United States Court of Appeals
for the First Circuit

MASSACHUSETTS DELIVERY ASSOCIATION,

Plaintiff-Appellant,

v.

MARTHA COAKLEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

Defendant-Appellee.

Appeal from the United States District Court for the District of Massachusetts
Civil Action No. 10-CV-11521
Honorable Denise J. Casper

BRIEF OF THE MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT MASSACHUSETTS DELIVERY ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 29(c) (1), the Massachusetts Motor Transportation Association, Inc. ("MMTA") states that it is a nonprofit corporation organized under the laws of Massachusetts. MMTA further states that it has no parent company and that no publicly held corporation owns ten percent or more of its stock.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The MMTA is a nonprofit trade association representing the trucking industry in Massachusetts. It is the Massachusetts state affiliate of the American Trucking Associations, and its members consist of state, regional, and national trucking and logistics companies that operate within the state of Massachusetts. The MMTA actively represents its members before the Massachusetts legislature and Massachusetts administrative agencies by advocating for and against legislation and regulations relevant to its members' interests, as well as proposing legislation and regulations to advance those interests. The MMTA has also actively participated in previous litigation involving FAAAA preemption, namely, as one of the plaintiffs in the litigation that resulted in this Court's decision in *New Hampshire Motor Transp. Ass'n v. Rowe*, 448 F.3d 66 (1st Cir. 2006), which was subsequently affirmed by the Supreme Court, *see Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008).

Given the composition of its membership, its regular interaction with laws regulating transportation in Massachusetts, and its previous experience in FAAAA preemption litigation, the MMTA is well-suited to—and strongly interested in—

[1] Pursuant to Fed. R. App. P. 29(c)(5), MMTA states that: (A) no party's counsel authored the brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparation or submission of this brief; and (C) no person other than MMTA, MMTA's members, or MMTA's counsel contributed money that was intended to fund preparation or submission of this brief.

providing the Court with the perspective of the trucking industry in Massachusetts on FAAAA preemption and the district court's decision.

Source of Authority to File. Both parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The essence of the district court's opinion in this case is that M.G.L. ch. 149, § 148B is not preempted by the FAAAA, 49 U.S.C. § 14501(c)(1), because it is a wage-and-hour statute rather than a property-transportation statute. The district court reached this holding based primarily on a misreading of the Supreme Court's recent opinion in *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013). The district court should be reversed for two reasons. *First*, instead of asking only whether Section 148B was a property-transportation statute, the district court should have followed other courts, including this Court, by undertaking an examination of the relationship between Section 148B and what it means, under the FAAAA, to enforce state law related to the prices, routes, or services of motor carriers with respect to the transportation of property. *See DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 85–90 (1st Cir. 2011). *Second*, the district court erred in concluding that *Dan's City* creates a new foundation for limiting the required inquiry only to whether a particular statute is a property-transportation statute. *See Brown v. United Airlines, Inc.*, 720 F. 3d 60, 71 (1st Cir. 2013) (observing that

Dan's City "in no way retreated from existing precedent but, rather, reiterated and cited with approval a representative sampling of [the Supreme Court's] earlier decisions").

ARGUMENT

In its opinion below, the district court held that Section 148B is not preempted by the FAAAA because it is the wrong *type* of statute—a state wage-and-hour statute rather than a property-transportation statute. The district court reached this holding based primarily on a misreading of the Supreme Court's *Dan's City* opinion. According to that misreading, the FAAAA, unlike the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713, on which it was patterned, categorically exempts all non-property-transportation statutes from preemption.

This holding and the reasoning behind it entirely miss the point of the FAAAA. The FAAAA's point was to create a common, nationally uniform, and deregulated market in which "private terms" govern the affairs and relations of carriers that regard their prices, routes, and services. *Brown*, 720 F. 3d at 70 (citing *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995)). Congress sought to safeguard this deregulated market from obvious regulatory action in the form of direct price, route, and service regulation by federal and state regulators—i.e., from governance by obvious transportation statutes and regulations. But that was not all. Congress also sought to safeguard the market from the application of generally

applicable state law in ways that improperly sacrifice Congress's deregulatory objectives for state objectives, even when those state objectives are worthy. Fidelity to this intention of Congress is of paramount importance since fidelity to the intent of Congress is the ultimate touchstone of all preemption inquiries. *See Brown*, 720 F.3d at 63 ("Congressional intent is the principal resource to be used in defining the scope and extent of an express preemption clause.").

Accordingly, when confronted with a generally applicable state law, courts, including this Court, examine carefully the context in which the law is, or could be, enforced to guard against improper sacrifices of Congress's deregulatory objectives. *See DiFiore*, 646 F.3d at 85–90. Historical and industry background for the carrier practices at issue are important ingredients in such examination, and only tenuous, remote, or peripheral relationships to industry prices, routes, and services are beyond the reach of preemption. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992). At a minimum, such examination requires more than categorically excluding certain types of statutes from preemption. Because, in this case, the district court did nothing more than categorically exclude wage-and-hour statutes from preemption—an exclusion that is not supported by *Dan's City*—the district court should be reversed.

I. The district court erred by categorically exempting from preemption all statutes that are not property-transportation statutes rather than undertaking the required examination.

The FAAAA shares a common core of preemption language with the ADA, and the two statutes are therefore interpreted *in pari materia*. *See Brown*, 720 F.3d at 65. That common language provides that "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 . . . carrier . . . ." 49 U.S.C. § 41713(b); *id.* § 14501(c).[2] The district court committed reversible error in its application of this language for two reasons. First, the thrust of the Supreme Court's *Morales*, *Wolens*, and *Rowe* decisions, as well as this Court's decision in *DiFiore*, is that this language requires courts to carefully examine the ways in which a generally applicable state law is, or could be, enforced to prevent an improper sacrifice of Congress's deregulatory objectives for state goals. The district court failed to follow these decisions by not undertaking such an examination and instead holding Section 148B categorically exempted from preemption because it is not a property-transportation statute.

Second, the conference report regarding the FAAAA—the authority of which has already been recognized by the Supreme Court and this Court—demonstrates that Congress intended that the examination outlined in *Morales* and

[2] This language pertains not only to carriers, but also to brokers and freight forwarders. *See* 49 U.S.C. § 14501(c)(1); *id.* § 13102 (2), (8).

subsequent air-carrier cases be used to ensure both freedom from indirect regulation and a level competitive playing field among all air and motor carriers, including between motor carriers differing in the degree to which they use independent contractors. *See* H.R. Conf. Rep. No. 103-677, at 87–88 (1994). Because the district court did not undertake the examination outlined by the cases, its decision is also incompatible with Congress's expressed intent.

In addition, because the district court utilized a categorical exemption over a contextual examination, the district court could not recognize the potential for state regulation of relationships between motor carriers and independent contractors to impact "Congress' deregulatory and pre-emption-related objectives," *Rowe*, 552 U.S. at 371, in ways that Congress intended to be preempted, *see* Part I.B, *infra*. This is further reason to reverse the district court.

A. FAAAA preemption requires a careful contextual examination, which does not permit a categorical exemption.

1. *Supreme Court and First Circuit precedent establish that categorical exemption from preemption is inconsistent with congressional intent.*

Three Supreme Court cases, as well as this Court's *DiFiore* decision, establish that categorically exempting states laws from FAAAA preemption is inconsistent with congressional intent, which instead requires a contextual examination. In *Morales*, the Supreme Court made clear that the meaning of "relat[ing] to" in the ADA does not require that a state law be "specifically

addressed to the airline industry." 504 U.S. at 386. Such a requirement would both create "an utterly irrational loophole" by allowing states to impair the federal preemption scheme under the guise of a law of "general applicability" and be inconsistent with the breadth of the words "relating to." *Id.* In *Wolens*, the Court recognized that even breach of contract claims—or elements or doctrines within breach of contract claims—can be preempted. *Wolens*, 513 U.S. at 232–33 & n.8. Finally, the Court's decision in *Rowe* held that even statutes enacted for a worthy state purpose seemingly distant from transportation (e.g., public health) could not be immunized from preemption, because "it is frequently difficult to distinguish between a State's 'economic'-related and 'health'-related motivations." *Rowe*, 552 U.S. at 374. Permitting such immunization "would legitimate rules regulating routes or rates for similar public health reasons." *Id.* at 375. Together, these cases stand for the proposition that *any* state law may undermine Congress's preemptive intent, regardless of where the state places the statute in its code or why the state chose to adopt it. This Court has already explicitly recognized these principles. *See DiFiore*, 646 F.3d at 86 ("However traditional the area, a state law may simultaneously interfere with an express federal policy—here, one limiting regulation of airlines."). The district court erred by failing to recognize these principles in this case.

The Supreme Court's holding in *Morales* that Congress intended even laws of general applicability to be preempted in certain circumstances established the baseline principle that the type of state law at issue does not determine FAAAA preemption. Instead, what matters is whether the state law impermissibly impairs Congress's preemptive intent. In *Morales*, the Court interpreted the term "relating to" in the ADA, which determines how "relat[ed] to" a carrier's "prices, routes, or services" a state law must be to be preempted. The Court recognized that preemption under the ADA was "at bottom" a question "of statutory intent," and the Court thus began "with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." 504 U.S. at 383 (internal quotation marks omitted). The Court observed that the phrase "relating to" expresses "a broad pre-emptive purpose," because the ordinary meaning of "relating to" includes "to stand in some relation . . . ." *Id.* (quoting Black's Law Dictionary 1158 (5th ed. 1979)). Ultimately, the Court held that the ADA preempted all "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' . . . ." *Id.* at 384. Importantly, the Court also rejected the argument that only state laws "specifically addressed to the airline industry are pre-empted," reasoning that such an argument both "ignores the sweep" of the statutory text and "creat[es] an utterly irrational loophole" because "there is little reason why state impairment of the

federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Id.* at 386. *Morales* thus demands a contextual inquiry: courts must further Congress's broad preemptive intent expressed in the ADA's preemption clause by determining if the "application of" a "general statute" results in the "impairment of the federal scheme." *See id.* While it may be easier to conduct a preemption analysis by simply asking what type of statute is involved, *Morales* squarely holds that such a facile analysis would fail to honor the breadth of congressional intent contained in the phrase "relat[ed] to."

The Supreme Court's subsequent decision in *Wolens* was simply an application of *Morales*. In *Wolens*, the Court again held claims based on a generally applicable statute preempted and further determined that even a breach-of-contract claim could be preempted if it related to prices, routes, or services and sought more than "recovery solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. at 228.

The *Wolens* Court made clear that even particular elements or doctrines *within* a breach-of-contract claim may be preempted if those elements or doctrines would cause states to "impos[e] their own substantive standards with respect to rates, routes, or services" rather than simply "afford[] relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." *Id.* at 232–33. The Court explained that this distinction means that the ADA's

preemption provision "confines courts . . . to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 233. In other words, even all or part of a breach-of-contract claim may be preempted by the FAAAA if it "seek[s] to effectuate the State's public policies, rather than the intent of the parties." *Id.* at 233 n.8 (quoting Brief for United States as Amicus Curiae at 28); *see also, e.g.*, *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 854 & n.3 (8th Cir. 2009). It is difficult to imagine a claim of more general applicability than breach of contract, yet the Supreme Court has held that even it must be carefully examined to determine whether it is being used to impose state public policy in violation of the ADA's preemption provision. In short, *Wolens* demonstrated that the Court meant what it said about preemption of laws of general applicability in *Morales*.

The Supreme Court's decision in *Rowe* applied the same general principle to a different kind of state argument: that a state law's *purpose* may insulate it from FAAAA preemption. At issue in *Rowe* were two provisions of Maine law. One provision required tobacco shippers to use only carriers with certain recipient identification-verification procedures, while the other imputed to carriers knowledge of transporting tobacco products if the package was marked as such or originated from a shipper on a list distributed to carriers by the state. 552 U.S. at 368–69. While the Court's decision was made easier by the state's blatant

targeting of "trucking and other motor carrier services," *id.* at 371, which amounted to a state "effort[] to regulate carrier delivery services themselves," *id.* at 372, the Court also rejected two other arguments pertinent to this appeal.

First, the Court found that Maine's purpose of preventing minors' access to tobacco products and concomitant public health concerns was insufficient to create an implied exception to FAAAA preemption. *See id.* at 373–74. The Court observed that the FAAAA's text simply includes no such exception—although it explicitly includes other exceptions. The Court also rejected Maine's argument that the FAAAA was intended only to preempt state "economic" regulation, not state laws regulating public health. *Id.* at 374. The Court reasoned that "it is frequently difficult to distinguish between a State's 'economic'-related and 'health'-related motivations"—motivations that were vigorously disputed by the parties in *Rowe*. *Id.* The Court further noted that "[t]o accept Maine's justification in respect to a rule regulating services would legitimate rules regulating routes or rates for similar public health reasons." *Id.* at 375. Thus, acceptance of Maine's argument would create a slippery slope where every state could contribute to a patchwork of state laws that would undermine the FAAAA's very purpose. *See id.* at 374–75.

Second, the Court flatly rejected Maine's argument that its greater power to ban tobacco shipments into or through its borders included the lesser power to

regulate the manner of tobacco shipments. *See id.* at 376. Even assuming *arguendo* that the greater power existed, the Court reasoned that such a conclusion would "permit Maine to regulate carrier routes, carrier rates, and carrier services, all on the ground that such regulation would not restrict carriage of the goods as seriously as would a total ban on shipments," which in turn "would severely undermine the effectiveness of Congress' pre-emptive provision." *Id.*

Together, these two points in *Rowe* corroborate that FAAAA preemption requires a contextual examination and forecloses categorical exemption. *Morales* and *Wolens* had already established that *how* a state chose to regulate a carrier's "prices, routes, or services"—whether through general or targeted laws—was irrelevant, and *Rowe* added that this analysis is unchanged by a state's arguing *why* it enacted such a law. And the Court's rejection of Maine's argument that having the greater power to ban necessarily includes the lesser power to regulate means that the application of the specific law at issue must be examined against Congress's deregulatory objectives embodied in the FAAAA. Whether a state arguably has a particular power to regulate certain behavior in the first place is irrelevant. Instead, the inquiry, as always, remains how the invocation of state authority in a particular "enact[ment] or enforce[ment]" of state law conforms—or fails to conform—with congressional intent. *See* 49 U.S.C. § 14501(c)(1).

In *DiFiore*, this Court confirmed that such a contextual examination eschewing categorical exemption is required under the ADA. The Court observed that *Morales* and *Wolens* rejected arguments that state laws must be targeted at carriers to be preempted and *Rowe* rejected the argument that state law must be "aimed at *economic* regulation as opposed to other state interests." S*ee DiFiore*, 646 F.3d at 86 (emphasis in original). Thus, this Court noted that a state law may violate Congress's deregulatory objectives regardless of the type of state statute. *See id.* ("However traditional the area, a state law may simultaneously interfere with an express federal policy—here, one limiting regulation of airlines."). Accordingly, it is necessary to engage in a contextual inquiry regarding enforcement of even broadly defined state laws that, as a general matter of categorization, have nothing to do with air or motor carriers explicitly. *See id.* at 87 ("[I]t is hard to imagine that Congress would have been happier if, absent detailed guidelines or a law targeting carriers, the states in *Morales*, *Wolens*, and *Rowe* simply let the jury condemn the same carrier conduct by applying broader statutory terms (e.g., 'unfair' competition or 'deceptive' practices . . .)."). While the Court noted the divergent outcomes that the circuits had reached in various preemption cases (involving claims ranging from violation of anti-discrimination and retaliation laws to negligence), it ultimately observed that "[t]he dividing line turns on the statutory language 'related to a price, route, or service.'" *Id.* The

DiFiore Court then analyzed the specific enforcement of state law in the case—a statute "aimed at protecting employee compensation," *id.*—and concluded that the state law "*as applied here* directly regulates how an airline service is performed and how its price is displayed to customers." *Id.* at 88 (emphasis added). In other words, after thoroughly analyzing *Morales*, *Wolens*, and *Rowe*, this Court correctly concluded that a law that could be considered just a "wage-and-hour" statute, like the tips law in *DiFiore* or Section 148B here, can be preempted. *See id.* at 88 ("[I]n application, the Massachusetts tips statute, although mediated by a jury, has the same potential impact on American's practices as a guideline condemning the same conduct explicitly.").

Thus, precedent from both the Supreme Court and this Court calls for a context-driven examination that eschews categorical exemption to fully effectuate Congress's broad preemptive intent in the ADA and FAAAA.

2. *The conference report likewise establishes that categorical exemption from preemption is inconsistent with congressional intent.*

Just as Supreme Court and First Circuit precedent make plain that a categorical exemption is inconsistent with congressional intent in enacting the FAAAA, the legislative history of the FAAAA—specifically, the conference report, H.R. Conf. Rep. No. 103-677—compels the same conclusion.

Three parts of the conference report particularly support the conclusion that a categorical exemption is inappropriate. *First*, the conference report explicitly adopted the *Morales* standard in interpreting the FAAAA's preemption provision. *See* H.R. Conf. Rep. No. 103-677, at 83 ("In particular, the conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. TransWorld Airlines, Inc.*" (citation omitted)).[3] *Second*, the conference report expressly condemns indirect regulation by the states, stating that "[t]he conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." *Id.* Thus, it not only adopts *Morales*'s inquiry, but also independently provides that certain uses of state law may be preempted even if cloaked in the form of otherwise "unaffected regulatory authority." *Third*, the conference report also evidences Congress's intent to level the competitive playing field among types of carriers, including stopping states from discriminating against carriers that relied heavily on independent contractors. *See id.* at 86 (chronicling that the need for FAAAA preemption arose out of events including California's enactment of legislation that exempted from intrastate regulation motor carriers affiliated with direct air carriers who used a large percentage of

[3] Thus, while *Morales* drew in part on ERISA preemption analysis, *see Morales*, 504 U.S. at 384, the reach of ADA and FAAAA preemption is not limited by ERISA precedent, *Rowe*, 448 F.3d at 75–76.

employees, but not those using a large proportion of owner-operators). Thus, Congress recognized that the use of independent contractors to provide transportation services is a legitimate business practice that states should not use, by itself, as a criterion for imposing burdens on carriers that might serve as levers for indirect regulation of their activities.

B. Because the district court applied a categorical exemption rather than a contextual examination, it could not recognize laws regulating carrier relationships with independent contractors to be related closely to Congress's deregulatory objectives.

State regulation of independent-contractor relationships is a perfect example of how even laws of general applicability may be "related to" a motor carrier's "prices, routes, or services" in ways that a categorical determination will fail to recognize, which can in turn improperly short-circuit Congress's broad intent for FAAAA preemption. A brief examination of the history of federal regulation of interstate trucking demonstrates this critical flaw. A determination that a state law is not preempted merely because it is an "employment" or "wage-and-hour" law fails to consider the substantial efforts to integrate and account for independent contractors in the trucking industry throughout a nearly sixty-year period of pervasive federal regulation. In fact, such independent-contractor relationships continue to be regulated to this day through federal leasing and safety rules pursuant to which many MMTA members plan and conduct their operations.

Congress authorized widespread federal regulation of the motor-carrier industry in 1935 in response to extreme economic instability in the industry caused by the Great Depression and other related factors. *See* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 280–88 (2008). Over the next sixty years, the Interstate Commerce Commission ("ICC") presided over the regulatory apparatus, which included mandatory ICC approval of motor carriers' operating authority, prices, routes, and goods carried. *See* Thomas Gale Moore, *Trucking Deregulation*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (1993), *available at* http://www.econlib.org/library/Enc1/TruckingDeregulation.html. Through direct and indirect price, route, and service regulation, the ICC controlled who could compete in the motor-carriage markets, for what purposes, under what sorts of conditions, and for what prices. *See* Dempsey, *supra*, at 292–93 (summarizing the "structure of economic regulation," including rate regulation and entry-and-exit controls).

During this period, the ICC continually grappled with fitting independent drivers, known as owner-operators, into this federal regulatory framework. The federal regulatory scheme was focused on motor carriers, whereas owner-operators "are individuals who own one or more tractors or tractor-trailer units and who lease such vehicles with driver services to motor carriers." James C. Hardman, *Workers'*

Compensation and the Use of Owner-Operators in Interstate Motor Carriage: A Need for Sensible Uniformity, 20 TRANSP. L.J. 255, 256 (1992). Because aspects of the relationship between motor carriers and owner-operators were not covered by the federal regulatory regime, there were concerns that certain practices related to such relationships could undermine the comprehensive economic regulatory scheme contemplated by Congress. *See, e.g.*, *Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 302–06 (1953) (noting that the law permitted motor carriers to lease vehicles from owner-operators, but upholding ICC rules intended to prevent certain practices associated with such leasing from frustrating the success of the federal regulatory scheme). As a result, the ICC spent much of its six decades regulating the motor-carrier industry trying to maintain the comprehensive regulatory regime while accommodating the relationship between owner-operators and carriers.[4] In short, regulating the relationship between owner-operator-contractors and carriers was a critical, recurring feature of an ICC regulatory scheme that, in turn, was itself a form of pervasive economic regulation.

[4] Thus, for example, the ICC promulgated leasing regulations containing various requirements affecting the carrier/owner-operator relationship, including requirements related to carrier responsibility for lessor-owner-operators and restrictions on "interchanges" of drivers and cargo that threatened to allow circumvention of carriers' geographic restrictions. *See Am. Trucking Ass'ns*, 344 U.S. at 306–13 (upholding ICC's ability to regulate leasing). The ICC also considered whether and how to include or exclude the cost structure of owner-operators in fixing prices charged by common carriers that did and did not lease. *See generally* Michael T. Lyon, Note, *ICC Regulation: The Economics of Motor Carriage*, 19 STAN. L. REV. 217 (1966).

Moreover, although most federal regulation of the motor-carrier industry was dismantled in the 1990s, the regulation of motor-carrier relationships with independent contractors continues to this day in the form of regulations governing carrier leasing of vehicles or other equipment owned by another company or individual, 49 C.F.R. §§ 376.11–12; the associated provision of transportation services by an individual lessor or personnel of a larger lessor, *cf. id.* §§ 376.2(f)–(h) ("with or without driver"); and safety of the carrier's operations, *see* 49 C.F.R. ch. 3, subchapter B. The Secretary of Transportation has authority to "require a motor carrier providing transportation . . . that uses motor vehicles not owned by it to transport property under an arrangement with another party to" comply with various requirements, ranging from procedural leasing requirements to inspection and insurance requirements. *See* 49 U.S.C. § 14102(a).

Many motor carriers of various sizes and business forms use independent contractors, making them a standard, national way of doing business through contracts drawn up in the shadow of the regulations. *See, e.g.*, Douglas C. Grawe, *Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators over Time*, 35 TRANSP. L.J. 115, 137 n.2 (2008) (noting that of the one hundred largest motor carriers surveyed for a trade publication, eighty-three had breakdown of employee versus owner-operator usage; 59,690 tractors in those carriers' fleets had been leased from independent owner-operators; and that

seven carriers used only independent owner-operators); Hardman, *supra*, at 256 (noting that "[a] large segment of the [motor-carrier] industry utilizes independent contractors"); Owner-Operator Independent Drivers Association, Who We Are, http://www.ooida.com/WhoWeAre/ (last visited Feb. 3, 2014) (noting that membership consists of more than 150,000 members in all fifty states and Canada, who collectively "own and/or operate more than 240,000 individual heavy-duty trucks and small truck fleets").

The district court's categorical approach to FAAAA preemption could not account for this long regulatory history and the use of independent contractors in the motor-carrier industry. In fact, several courts have already recognized that state laws that attempt to ban the use of independent contractors by motor carriers are likely to be preempted by the FAAAA because they relate to carriers' prices, routes or services. In *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009), the Ninth Circuit noted that an attempt by the Port of Los Angeles to prohibit motor carriers from using independent contractors "is highly likely to be found preempted . . . ," *id.* at 1060. Likewise, in *Central Transport, Inc. v. Public Service Commission*, 566 N.W. 2d 299 (Mich. Ct. App. 1997), the court concluded that a Michigan law preventing motor carriers from leasing vehicles operated by independent contractors "is preempted as a provision relating to price, route or service," *id.* at 308.

While motor carriers have certainly been subject to certain state laws governing the classification of independent contractors, Section 148B stands alone in its effect on motor carriers' ability to use independent contractors. No party below has cited another state law that makes whether an individual performs in the usual course of the motor carrier's business the sole dispositive factor for determining independent-contractor status. Moreover, Section 148B is the subject of substantial ongoing private litigation in a number of cases regarding the trucking industry. These cases show considerable uncertainty about exactly what the remedial consequences of Section 148B are for motor carriers making leasing arrangements pursuant to the federal regulations and what contractual forms of such arrangements may be relied upon by industry participants as they try to structure their operations across state lines in a uniform way. Because the district court failed to conduct a contextual examination of the Section 148B and instead categorically dismissed it as a "wage-and-hour" law, the district court could not consider whether the law nevertheless impacts "Congress' deregulatory and pre-emption related objectives" for the FAAAA in ways that Congress intended to be preempted. *Rowe*, 552 U.S. at 371.

II. The district court's reasons for its approach are invalid.

The district court articulated invalid reasons for holding Section 148B categorically exempt from preemption instead of undertaking the required

contextual examination to ascertain whether the law improperly sacrificed congressional objectives for state objectives. First, and primarily, the district court misread the Supreme Court's recent *Dan's City* opinion to conclude that the FAAAA, unlike the ADA on which it was patterned, categorically exempts from preemption all statutes that are not property-transportation statutes. Second, in a confusing passage of its opinion, the district court held that generally applicable wage-and-hour laws, like Section 148B, are not preempted on their face and, after *Dan's City*, cannot be preempted as-applied, either, because Section 148B is not a property-transportation statute. In that same passage, the district court also appeared to hold that whenever a carrier can address the effects of a generally applicable state law by incurring additional costs, the law is immunized from preemption. Because none of these reasons are valid, the district court should be reversed.

A. *Dan's City* does not create a categorical exemption from preemption for non-property-transportation statutes.

As demonstrated in Part I, a categorical exemption from FAAAA preemption is inconsistent with congressional intent as interpreted by the Supreme Court and this Court and as expressed by Congress itself in the conference report. The district court nevertheless employed a categorical approach, primarily because it read one recent, factually unique Supreme Court case, *Dan's City*, as imposing a radical new limit on the broad scope of FAAAA preemption. Specifically, the

district court utilized a two-part test for FAAAA preemption: it held that a state law must relate not only "to prices, routes or services of a motor carrier," but also to "the transportation of property." *See* Op. at 10.[5] The district court then interpreted *Dan's City* to mean that the second prong of this test requires that a state law itself must be a property-transportation statute for FAAAA preemption to apply. *See id*. at 10–11. This interpretation misreads the *Dan's City* opinion.

The district court's error is premised on the Supreme Court's observation in *Dan's City* that the text of 49 U.S.C. § 14501(c)(1)—which requires that a state law relate to a "price, route, or service of any motor carrier . . . with respect to the transportation of property"—means that "[i]t is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property.'" 133 S. Ct. at 1778–79. The district court misinterpreted this statement to mean that generally applicable state laws—such as a labor-and-employment statute like Section 148B—never concern a motor carrier's transportation of property. *See* Op. at 10–12. In construing *Dan's City* so broadly, the district court ignored the unique

[5] The district court actually cited *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002), for this test. This is probably because *Dan's City* drew on language from a dissent in *Ours Garage*. *Dan's City*, 133 S. Ct. at 1778 & n.4. The page from *Ours Garage* cited by the district court merely recites the statutory language, however, and *Ours Garage* involved the safety exception to FAAAA preemption rather than the scope of the preemption clause itself, *Ours Garage*, 536 U.S. at 428.

factual circumstances of that case and read far too much into the opinion, contrary to binding precedent from this Court.

To begin with, the Supreme Court's discussion in *Dan's City* regarding the transportation of property was in the context of specific facts. The plaintiff had sued a local towing company for disposing of his car in violation of a state statutory scheme. 133 S. Ct. at 1777. Pursuant to that statutory scheme, the towing company had towed the car without the plaintiff's consent and then stored the car at its storage lot for three months. *Id.* at 1776–77. Because the car had stopped moving long ago, "transportation" was no longer involved. *Id*. at 1779. In the Supreme Court's view, the plaintiff's claims regarding the disposal of the car, months after the car had been towed, had nothing to do with the towing company's price for transporting property, or its routes, or its services for transporting property. *Id*. Thus, given those specific factual circumstances, the Court held that the plaintiff's claims did not concern a motor carrier's transportation of property.[6] *Id.* at 1775. That conclusion has no application here, where there is no question

[6] The Court also noted the incongruity that the towing company's right to tow the allegedly abandoned vehicle in the first place arose from the same body of statutory state law that the company argued was preempted by the FAAAA, *cf.* 49 U.S.C. § 14501(c)(2)(C), which the Court characterized as the towing company trying to have it "both ways." *Id.* at 1781.

that the conduct at issue—the use of independent contractors to transport and deliver packages—involves the transportation of property.[7]

The district court's interpretation of the "with respect to the transportation of property" language is also contrary to Congress's specific intent for that language, as expressed in the conference report, and this Court's decision in *Brown*. The conference report explains that Congress included the phrase "with respect to the transportation of property" to clarify that (1) "the motor carrier preemption provision does not preempt State regulation of garbage and refuse collectors" because garbage and refuse do not constitute "property," and (2) state regulation of passenger buses was preempted pursuant to that provision only insofar as those buses are carrying property. H.R. Conf. Rep. No. 103-677, at 85. In fact, there is a separate, narrower preemption provision in the FAAAA for motor carriers of passengers. *See* 49 U.S.C. § 14501(a).

Likewise, this Court's decision in *Brown* rejects the argument that *Dan's City* "somehow changed the landscape and reshaped preemption doctrine." 720 F.3d at 71. Instead, this Court emphasized that the *Dan's City* Court "in no way

[7] Indeed, the Secretary of Transportation's statutory authority to regulate certain leasing arrangements used by many MMTA members, discussed above, explicitly recognizes that arrangements for transportation by independent contractors do relate to the "transportation of property." *See* 49 U.S.C. § 14102(a) ("The Secretary may require a motor carrier providing *transportation* subject to jurisdiction under subchapter I of chapter 135 that uses motor vehicles not owned by it to *transport property* under an arrangement with another party to [comply with various requirements.]" (emphases added)).

retreated from existing precedent but, rather, reiterated and cited with approval a representative sampling of its earlier decisions." *Id*. Those earlier decisions include *Morales* and *Rowe*, which, as discussed in Part I, hold that FAAAA preemption has a broad scope and preclude the categorical approach to preemption employed by the district court.

Finally, although the district court did not draw on it, the MMTA recognizes the dicta in *Dan's City* suggesting that zoning ordinances are unlikely to be preempted because they "ordinarily are not 'related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.'" 133 S. Ct. at 1780. An argument that this statement indicates the Supreme Court's approval of a categorical approach would not be well-founded, however. To begin with, the statement is mere dicta, as the Court was considering neither zoning ordinances nor a categorical approach to preemption analysis in *Dan's City*. Moreover, the statement itself does not actually support a categorical exemption. The use of the word "ordinarily" indicates the Court's recognition that while many zoning ordinances may lack the requisite relationship to prices, routes, or services, unusual zoning ordinances may exist that have the necessary relationship. If anything, then, this supports the idea that preemption must be analyzed by looking carefully at the context in which a particular state law is being applied. Moreover, applications of state law touching on carrier selection of points to be served have

long been held preempted as related to motor carrier routes and services. *See United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 611 (7th Cir. 2000). The Ninth Circuit's opinions in *American Trucking Associations* show that even minimal burdens imposed as part of a group of regulations regarding conditions on operating at a particular "physical location"—the area around the Port of Los Angeles—remain preempted. *See generally Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046 (9th Cir. 2009); *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 660 F.3d 384 (9th Cir. 2011), *rev'd in part*, 133 S. Ct. 2096 (2013).

B. The district court's other reasons for finding Section 148B categorically exempt are also invalid.

In a somewhat confusing section of its opinion, the district court held that Section 148B's "connection to prices, routes and services is insufficient for the FAAAA facially to preempt it," Op. at 13, because it "may have multiple 'valid applications,'" Op. at 17 (quoting *McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004)). That same section also appears to hold that whenever a carrier can address the effects of generally applicable state law by incurring additional costs, the law is immunized from preemption. Then, in the next section, the district court compounded the confusion by holding that Section 148B cannot be preempted as-applied because "[e]ven if" its "impact was 'significant,' . . . this would not change the fact that" it "does not relate to the 'movement of property.'" Op. at 18 (internal citation omitted). The district court's circular approach, which purports not to rely

on *Dan's City* but then ultimately does, was incorrect for at least three reasons that closely relate to the foregoing analysis in this brief.

First, the inquiry required by *Morales*, its progeny, and the conference report does not require that a statute be facially preempted by virtue of having no valid applications. It is true that in some instances in which the state law is facially targeted at transportation, an appropriate contextual inquiry may require no more than reading the statute itself. In other instances involving state laws of broader applicability, however, an appropriate inquiry may require examining, as a matter of law, the "logical effect" of "a particular scheme" on the achievement of congressional objectives, considered in light of the overall historical and industry context for the carrier practices at issue. *Rowe*, 448 F.3d at 82 n.14; *see also Rowe*, 552 U.S. at 371. In still other instances, an appropriate inquiry may be a matter of examining "empirical evidence" regarding prices, routes, and services. *Rowe*, 448 F.3d at 82 n.14. In any event, the district court's purely facial inquiry was erroneous.

Second, a state law is not immunized from preemption merely because a court can speculate that carriers might be able to address its effects by incurring additional costs—however high or inconsistent those costs may be from state to state. While this appears to be the reasoning of dicta from the Seventh Circuit on which the district court relied, *see S.C. Johnson & Son, Inc. v. Transp. Corp. of*

Am., Inc., 697 F.3d 544, 558 (7th Cir. 2012), the Seventh Circuit better grasped the contextual inquiry actually required when it stated, in prior-panel precedent, that "*Morales* does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA. Instead, we must examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' airline rates, routes or services." *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996).

Third, the district court's discounting of even a "significant impact" of Section 148B as immaterial because Section 148B does not "relate to the 'movement of property'" is simply a restatement of the district court's previous misreading of *Dan's City* to hold that Section 148B is not preempted because it is a wage-and-hour statute rather than a property-transportation statute.

CONCLUSION

For all these reasons and those stated in the other briefs, the district court's decision should be reversed.

Respectfully submitted,

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Dated: February 5, 2014

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I hereby certify that on this 5th day of February, 2014, I caused a true and correct copy of the foregoing Brief of Amicus Curiae Massachusetts Motor Transportation Association to be filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the Court's CM/ECF system. Service was made on the following counsel using the CM/ECF system:

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