No. 14-491

In The
Supreme Court of the United States

PAC ANCHOR TRANSPORTATION, INC., AND ALFREDO BARAJAS,

Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA, EX REL. KAMALA D. HARRIS, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

---

BRIEF *AMICUS CURIAE* OF CALIFORNIA TRUCKING ASSOCIATION IN SUPPORT OF PETITIONERS

RICHARD T. WILLIAMS*
LINDA AUERBACH ALLDERDICE
ROBERT BARTON
Holland & Knight LLP
400 South Hope Street
8th Floor
Los Angeles, California 90071
richard.williams@hklaw.com
(213) 896-2400

Counsel for Amicus Curiae

December, 2014 *Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

U.S. CONSTITUTIONAL

FEDERAL STATUTES

STATE STATUTES

RULES

OTHER AUTHORITIES AND REGULATIONS

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae California Trucking Association ("CTA") supports the petition for certiorari of the California Supreme Court's decision in *People ex rel. Harris v. Pac Anchor Transp., Inc.* ("*Pac Anchor*").[2]

CTA has over 2,000 member companies which operate over 350,000 trucks in California and transport 85 percent of the shipments that travel on California's highways each day. For over eighty years, CTA has served the businesses that operate trucks in California—from self-employed independent contractors (owner-operators), to small for-hire fleets, to the world's largest international motor carriers.

CTA promotes leadership in the California trucking industry, advocates sound transportation policies at all levels of government, and works to maintain a safe, environmentally responsible and efficient system for the transportation and movement of goods. CTA is keenly interested in protecting the interests of its members which serve as a vital link in this chain of interstate commerce

---

[1] Letters of consent have been filed with the Court. Counsel of record received notice of CTA's intent to file this amicus brief at least ten days prior to the due date. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] 59 Cal. 4th 772 (2014).

for the transportation of goods throughout the nation which is so critical to a robust economy.

Over the years that CTA has represented trucking interests in California, it has acquired knowledge and information about the practices and policies that regulate and affect this industry. It is the protection of the rights of motor carriers under the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") to compete without a patchwork quilt of conflicting state regulation which is the focus of this brief.

SUMMARY OF ARGUMENT

The FAAAA, Pub. L. No. 103-305, 108 Stat. 1569 (1994) (currently codified at 49 U.S.C. §14501(c)(1)), provides, in relevant part,

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

The erroneous exception to federal preemption constructed by the California Supreme Court presents a critical question for the California trucking industry concerning federal preemption under the FAAAA. By its single claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §17200 *et seq.*, against Pac Anchor, the State of California ("State") seeks to regulate all motor carriers in the State of California which use independent contractors rather than

employees to transport interstate freight that flows in and out of ports. This will have a devastating impact on how the trucking industry operates, including at the Port of Los Angeles, the nation's leading port in container volume and cargo value. The use of the UCL for this purpose is improper, as it will significantly interfere with, or even eliminate the use of independent contractors in the trucking industry, causing a sea change in the way motor carriers operate and compete.[3]

Pac Anchor presents a unique opportunity for the Court to decide whether an unfair competition statute such as the UCL, and the unfettered injunctions available thereunder, are subject to the FAAAA irrespective of the underlying state law whose enforcement is sought by the action.

Controlling principles of federal law preemption under the FAAAA, and the federal Leasing Regulations, protect the trucking industry's practice of using independent contractors from state regulation by way of the UCL. The injunction and restitution remedies under the UCL are the State's cudgel to force, or at least substantially to influence, decisions by motor carriers to cease doing business with independent contractors. Because it is to regulate competition, this form of state regulation under the UCL is facially preempted by the FAAAA.

Nothing about such preemption impedes the State from enforcing its laws because of state-based

---

[3] Independent contractor owner-operators are vital elements of the transportation industry in all 50 states and contract with motor carriers under the federal Leasing Regulations to provide interstate transportation services.

remedies to enforce state labor laws, assuming that in each individual instance and as applied to the specific facts, they would not also be preempted under the same federal standards that control here. Accordingly, the State, absent the UCL, had ample enforcement mechanisms to deploy in order to challenge specific employment practices.

ARGUMENT

I. Compelling Reasons Support the Grant of the Petition

There are compelling reasons to grant the petition for certiorari of *Pac Anchor*.

First, this case squarely presents an issue which this Court has not yet settled—whether a state's general deceptive trade practices laws or competition regulation, such as the UCL, are preempted because the provisions for injunctive relief and other remedies conflict with the FAAAA even if the underlying claims may not be preempted standing alone.[4] As the Court in *Northwest, Inc. v.*

[4] In this regard, the California Supreme Court's reliance on *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* ("*Mendonca*"), 152 F.3d 1184, 1190 (9th Cir. 1998) is misplaced. In *Mendonca*, the Ninth Circuit mistakenly assumed that increased costs arising from a prevailing wage statute were not preempted, categorizing such claims as having no more than an "indirect, remote, or tenuous" connection to prices, routes and services. In part, the court was moved by the fact that the prevailing wage statute was not itself transportation related. This rationale was squarely rejected in *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370-371 (2008), which held that even state laws with an indirect impact on prices were preempted. The California Supreme Court's reliance on *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013) is equally wrong. *Dan's City* did not stand for the

Ginsberg ("*Ginsberg*"), 134 S. Ct. 1422, 1430 (2014) observed, "[w]hat is important, therefore, is the effect of a state law, regulation or provision, not its form, . . . As the First Circuit has recognized, '[i]t defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry.' (citations omitted)." Thus, *Pac Anchor* presents a unique opportunity for the Court to resolve the use of the UCL and similar statutes in the 50 states against motor carriers engaged in interstate commerce who utilize independent contractor owner-operators. [5]

---

proposition that a state statute which was not specifically directed to transportation interests is immune from FAAAA preemption. (*see* App. 20-21.) Rather, *Dan's City* made a critical distinction, ignored by the California Supreme Court, that the tow (transportation) services provided by Dan's City would be subject to preemption under the FAAAA, while the storage services offered by Dan's City after those transportation services ended, are not subject to preemption. *Dan's City*, 133 S. Ct. at 1775. Here, it is undisputed that carriers like Pac Anchor and those represented by the CTA are engaged in the "transportation of property." The judicially-carved exceptions to FAAAA preemption in *Mendonca* and *Pac Anchor* must be addressed. Further, the court in *Mass. Delivery Ass'n v. Coakley* ("*Coakley*"), 769 F. 3d 11, 22-23 (1st Cir. 2014), noted that the U.S. Supreme Court in *Dan's City* did not overrule "all earlier precedent" in its holding, and that "[w]ithout a clear statement from the Court, we cannot assume that its opinion intended to do so."

[5] A motor carrier should always have the right to establish as a matter of fact or law why an effort to enforce state law in a particular instance is preempted by the FAAAA. *DiFiore v. Am. Airlines, Inc.,* 646 F.3d 81, 89-90 (1st Cir. 2011) (finding Massachusetts' tips law preempted by the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705 (1978)),

The issue before the California Supreme Court was not a "narrow" one, as the vital interests of all motor carriers utilizing independent contractors while conducting business in interstate trucking are affected. The California Supreme Court's ruling is in error.

The FAAAA expresses the clear intent of Congress to preclude states from enacting legislation

---

cert. denied, 132 S. Ct. 761 (2011); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1053, 1056 (9th Cir. 2009) (directing issuance of preliminary injunction against independent-contractor phase-out provision in California ports' concession agreements because, in relevant part, it "can hardly be doubted" that concession agreements containing such a provision "relate[s] to prices, routes or services of motor carriers," and because "the independent contractor phase-out provision is one highly likely to be shown to be preempted"); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 407-08 (9th Cir. 2011), *as amended* (Oct. 31, 2011) (ultimate merits decision in same case), *rev'd in part on limited issues*, 133 S. Ct. 2096 (2013); *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 288 (5th Cir. 2002) (in dispute between carrier and independent reservation booking contractor, "the carrier's relations with travel agents, as intermediaries between carriers and passengers, plainly fall within the ADA's deregulatory concerns."); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 611 (7th Cir. 2000) (state-law business-tort claims preempted in dispute between carriers helping each other provide services to the public); *Travers v. JetBlue Airways Corp.*, No. 08-10730-GAO, 2009 WL 2242391, at *9 (D. Mass. July 23, 2009) (finding the plaintiffs' Massachusetts state law claims, such as for minimum wage and tips, to be preempted by the ADA); *Blackwell v. Skywest Airlines, Inc.*, No. 06CV0307 DMS (AJB), 2008 WL 5103195, at *15-18 (S.D. Cal. Dec. 3, 2008) (preemption under ADA found where "[e]nforcing the state laws . . . would prompt the 'forbidden significant effect' on air carriers' services, prices and routes that the ADA seeks to avoid. [citation omitted]").

or pursuing enforcement actions "related to" the "prices, routes, or services" of a motor carrier. This necessarily means preempting state efforts related to how carriers accomplish the servicing of routes, how they route vehicles, or how they set prices. Moreover, the three elements specified in the FAAAA—prices, routes, services—are synonymous with competition, as a motor carrier would distinguish its services from another motor carrier's on the basis of these factors. These constitute the very core of a motor carrier's business: how it provides services, what it charges customers, where it decides to do business, and what services it undertakes to perform for customers in light of pricing, location, and the regulatory environment. Thus, these elements also express the clear intent of Congress to preempt any state effort to interfere with the terms of competition by imposing conditions on business model, market entry, innovation or competition.

Independent contractors are an integral part of the transportation industry generally and to the intermodal transportation industry specifically, as they provide a critical buffer against economic vagaries in the transportation industry. When shipments of freight retrench, motor carriers can withstand the business downturn by simply not engaging the contractors to haul freight. Likewise, the motor carriers do not stand to risk equipment dormancy and attendant economic losses. When freight surges, as it does based on consumer-driven purchasing such as during the holiday season, or due to weather-related events, motor carriers can readily ramp up their ability to add routes and service

clients at reasonable rates in a short period of time. The contractors are likewise free to follow the freight and to contract with the successor motor carrier.

Second, *Pac Anchor* wrongly decided critical issues of federal preemption so as to conflict with the relevant decisions of this Court. *See Ginsberg*, 134 S. Ct. 1422; *American Trucking Associations v. City of Los Angeles*, 133 S. Ct. 2096 (2013); *Rowe,* 552 U.S. 364, *Am. Airlines, Inc. v. Wolens* ("*Wolens*"), 513 U.S. 219 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Each of these cases preclude states from enacting legislation or pursuing enforcement actions "related to" the "prices, routes, or services" of a motor carrier or by imposing on motor carriers standards for doing business in California. Yet, this is precisely what the State has sought to do in its pursuit of its UCL Action.

Third, the decision conflicts with the decision of the First Circuit Court of Appeal in *Coakley,* which upheld the broad preemptive reach of the FAAAA. *Coakley* held that Congress's directive to immunize motor carriers from state regulations that threaten to unravel Congress's purposeful deregulation in this area, included potentially preempting a Massachusetts law which differentiated employees from independent contractors. That law was a precursor to the type of enforcement action facing Pac Anchor in this case.

The court held that the Massachusetts law potentially impacts the services the delivery company provides, the prices charged for the delivery of property, and the routes taken during this delivery and, therefore, would be subject to

preemption, rejecting the Massachusetts Attorney General's argument that "background state statutes," statutes that are generally applicable and not directed to a particular area of federal authority, could not be preempted. However, this "background statute" analysis was adopted by the California Supreme Court, bringing it directly into conflict with *Coakley*.

Furthermore, *Pac Anchor* may also be used to upend the sweeping preemption of the ADA, which current precedent recognizes and protects, as in the recent U.S. Supreme Court decision in *Ginsberg*. *Pac Anchor* should not provide an easy platform to carve out further exceptions to federal preemption. As such and for the reasons described in more detail below, this Court should grant review to resolve the conflict.

A. The UCL Action Directly Impacts the "Prices, Routes, and Services" of Motor Carriers Reserved Exclusively to Federal Regulation by the Commerce Clause and the FAAAA

In *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (Cal. 2003), the California Supreme Court described the purpose of the UCL as follows:

> We reaffirm that an action under the UCL "is not an all-purpose substitute for a tort or contract action." (*Cortez, supra*, 23 Cal.4th at p. 173.) Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit

> to prevent unfair business practices and restore money or property to victims of these practices. As we have said, the "overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition." (*Id.* at pp. 173–174.)

Korea Supply, 29 Cal. 4th at 1150.

The emphasis is on regulating the terms of competition. *Dey v. Cont'l Cent. Credit,* 170 Cal. App. 4th 721, 726 (Cal. Ct. App. 2008) (dismissing a UCL claim, the court held, "The UCL governs anti-competitive business practices as well as injuries to consumers, and has as a major purpose the preservation of fair business competition.") (Internal quotations and citations omitted.) More recently, a California Court of Appeal described the UCL as a broad-based statute directed to unfair competition:

> Section 17200 defines "unfair competition" to "mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" under section 17500. A claim made under section 17200 "'is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. [Citation.] Thus, California courts have consistently interpreted the language of section 17200 broadly.'"

Wilson v. Hynek, 207 Cal. App. 4th 999, 1007–08 (Cal. Ct. App. 2012) (internal citations omitted).

It is well-settled that "a UCL action does not 'enforce' the law on which a claim of unlawful business practice is based." *Rose v. Bank of America, N.A.,* 57 Cal. 4th 390, 396 (Cal. 2013), *cert. denied*, 134 S. Ct. 2870 (2014). As the California Supreme Court noted,

> "By proscribing 'any unlawful' business practice, [Business and Professions Code] 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the [UCL] makes *independently* actionable. [Citation.]" (*Cel-Tech*, *supra*, 20 Cal.4th at p. 180, italics added.)

Rose v. Bank of America, N.A., 57 Cal. 4th at 396.

After concluding its explanation of the UCL, the California Supreme Court restated the regulatory purpose of the UCL:

> Thus, we have made it clear that by borrowing requirements from other statutes, the UCL does not serve as a mere enforcement mechanism. It provides its own distinct and limited equitable remedies for unlawful business practices, using other laws only to define what is "unlawful." (See *Korea Supply Co v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150 [131 Cal. Rptr. 2d 29, 63 P.3d 937] [UCL provides equitable avenue for prevention of unfair business practices,

> with streamlined procedures and limited remedies].)

Rose v. Bank of America, N.A., 57 Cal. 4th at 397.

The UCL employs a "kitchen sink" approach to state regulation of unfair business practices. With the only limitation on a complaining party bringing a UCL claim being a showing of "actual injury," the UCL has no boundaries in what it purports to regulate. Claims under the UCL are too loose and too broad to avoid being intrusive with respect to prices, routes or services. This uncontrolled breadth drove this Court's opinion in *Wolens,* 513 U.S. 219, though even before the Court ruled on the preemption question concerning the Illinois' parallel Consumer Fraud Act, similar to the UCL, the Illinois Supreme Court had already recognized that the prayer for injunctive relief was clearly preempted by the ADA. *Id.* at 225.

Here, the UCL is directed to state regulation of commerce by directly influencing the decisions motor carriers make as to how to compete in the provision of "prices, routes, and services." The State is using the UCL to regulate the very types of business decisions that have been expressly reserved to motor carriers by federal law. This is underscored by the fact that all import and export trucking to and from the ports of Los Angeles and Long Beach—and up and down the coast of California—is by law interstate in nature and is reserved to federal regulation. U.S. Const. art. I, § 8, cl. 3.

This is not a minimum wage case or other type of enforcement action under the wage and hour provisions of the California Labor Code. Instead,

this case has at its core the regulation of competition through the UCL by using injunction and other statutory remedies. But the intrusion on interstate commerce is clear. Here are only a few of the circumstances that will be forever unsettled if *Pac Anchor* were allowed to stand:

- What will happen when a truck that is dispatched out-of-state crosses the California border and is driven by an independent contractor though the State disputes that status? A dispute over that status under the UCL will only encumber that transportation of goods in interstate commerce. The CTA member trucking company will have to decide whether or not to do business in California or at what price it is worthwhile to engage a California trucking company.
- Or, what will happen when a California trucking company transports goods in an interstate movement only to be compelled by the threat of being forced out of business to change its entire business model so that the prices of the interstate movement of good is now impacted?

Pac Anchor creates uncertainty in the industry and in the marketplace. It invites each of the 50 states to address independent contractors in their several and separate ways, creating a patchwork of regulations diametrically in conflict with the clear direction of this Court in protecting federal preemption under the FAAAA. It cannot be disputed that the UCL Action is tantamount to state

regulation of "prices, routes, and services" of motor carriers.

Contrary to the conclusion of the California Supreme Court, the State's pursuit of the UCL Action is precisely the type of "burdensome state economic regulation Congress sought to preempt." If the State is successful, it will be able to attack the design and operation of the interstate trucking business in its use of independent contractors, which will have a direct impact on the prices, routes and services trucking businesses can offer. Trucking companies will have to operate differently in California than they operate everywhere else in the country. Avoiding such a result was precisely the intent Congress had in enacting the FAAAA in the first place. Yet, the UCL Action will alter economic and competitive behavior of motor carriers in a way that directly contradicts Congressional intent in enacting the FAAAA. The clear effect of *Pac Anchor* is to encumber unduly interstate commerce.[6]

---

[6] As demonstrated above, *Pac Anchor* effectively gives the UCL extraterritorial application. Yet, the California Supreme Court has repeatedly said that the UCL should not apply beyond the borders of California. For example, in *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (Cal. 2011), the California Supreme Court noted,

> However far the Legislature's power may theoretically extend, we presume the Legislature did not intend a statute to be "'operative, with respect to occurrences outside the state, ... unless such intention is clearly expressed or reasonably to be inferred "from the language of the act or from its purpose, subject matter or history." [Citation omitted]. Neither the language of the UCL nor its legislative

B. The UCL Action Will Have a Substantial Impact on Motor Carriers by Virtue of the Threatened Relief

The threat of the injunction action alone will have the immediate effect of regulating the choice made by motor carriers as to the use of independent contractors or employees. As the Massachusetts District Court noted in *Travers*, "[w]hether indirectly, by threat of liability for money damages, or directly, by injunctive order, the plaintiffs' broader goal is to compel JetBlue to change its practices with respect to the imposition and collection of the curbside check-in fee. That relationship to JetBlue's prices and services is not 'tenuous, remote, or peripheral.'" *Travers,* 2009 WL 2242391, at *3.

A business model that has thrived for over eighty years is at risk. First, California interstate trucking operations are handled by companies that have their principal place of business in California or in other states. The impact of the UCL Action will also be felt in non-California jurisdictions, and affect business operations on a nationwide basis.[7] The

---

> history provides any basis for concluding the Legislature intended the UCL to operate extraterritorially.

Sullivan, 51 Cal. 4th at 1207.

[7] This also implicates the dormant Commerce Clause. "When a state statute directly regulates…interstate commerce…we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). "The Commerce Clause…precludes the application of a state statute to commerce that takes place

Attorney General's use of injunctive relief against motor carriers, which can be bolstered with civil penalties—clearly having the "force and effect of

---

wholly outside of the State's borders, whether or not the commerce has effects within the State" and "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (internal quotations marks and citations omitted). "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* (citation omitted). *See Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (holding that because the Illinois Business Takeover Act's regulation of takeover offers "purports to regulate directly and to indict instate commerce, including commerce wholly outside the State, it must be held invalid" under the Commerce Clause). Similarly, *see National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993), invalidating a Nevada law seeking to regulate disciplinary hearings by any national collegiate athletic association because it "would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules." The Second Circuit applied *Healy* in *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003) to strike down a Vermont law regulating Internet distribution of sexual material harmful to minors, finding that "in practical effect Vermont has projected its legislation into other States and *directly regulated* commerce therein, in violation of the dormant Commerce Clause." 342 F.3d at 104 (internal quotation marks and citation omitted) (emphasis in original). More recently, the Sixth Circuit in *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362 (6th Cir. 2013), when considering a Michigan law requiring "returnable bottles and cans to possess a unique-to-Michigan mark designation," held that "the Michigan statute is extraterritorial in violation of the dormant Commerce Clause because it impermissibly regulates interstate commerce by controlling conduct beyond the State of Michigan." 735 F.3d at 373, 376.

law"—will result in exactly the type of disparate treatment—a patchwork of regulation—that the FAAAA was enacted to prevent. The adverse impact on a nationwide basis was of particular concern in *Rowe. Rowe,* 552 U.S. at 373.

Second, California motor carriers, whether based here or elsewhere, will be confronted with having to make immediate decisions on whether to do business in California, and if so, having to change their business model from using independent contractors to employees. That may entail decisions to cease doing business with independent contractors who have relied on the business model now under attack for their own economic well-being.

This type of state regulation has been rejected in similar circumstances. In *Am. Trucking Ass'n, Inc. v. City of Los Angeles,* 660 F.3d 384 (9th Cir. 2011), *as amended* (Oct. 31, 2011), *rev'd in part on limited issues*, 133 S. Ct. 2096 (2013)[8] (hereinafter the "*POLA Litigation*"), the issue concerned the efforts by the Port of Los Angeles ("POLA") to control motor carriers by requiring them to enter into "concession agreements" as part of POLA's "Clean Truck Program" in order to do business at the Ports. One of the highly contested issues in the *POLA*

---

[8] The Ninth Circuit's ruling that the parking and placard requirements of POLA's concession agreement were not preempted by the FAAAA, the principal issue before the Supreme Court on certiorari, was reversed by the U.S. Supreme Court in *Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 133 S. Ct. 2096, 2103 (2013). The Ninth Circuit's ruling that the FAAAA preempted the mandated employee driver provision of the concession agreement was not before the Court. 133 S. Ct. at 2101, 2105.

Litigation was the mandate that within five years, motor carriers could use only employee drivers to transport container freight in and out of the port, a mandate that would have required motor carriers to cease doing business with independent contractors.

Enforcement of this provision was enjoined because it was preempted by the FAAAA as it related to "prices, routes and services." While noting the reasons for the adopted employee mandate, the Ninth Circuit squarely rejected the effort to regulate the conduct of motor carriers, and did so regardless of the underlying policies that were reflected in the unlawful regulation. The court concluded that "the employee driver provision seeks to impact third party behavior unrelated to the performance of the concessionaire's obligations to the Port." 660 F.3d at 408. Specifically, the court denied POLA's effort to achieve desired policy goals such as stability of services, less burdensome administrative demands, and higher wages for drivers "by unilaterally inserting itself into the contractual relationship between motor carriers and drivers." *Id.* The court, rejecting the Port's argument that preemption could be forestalled because it was acting as a "market participant," held that "[n]evertheless, under the circumstances, this is insufficient to outweigh the Port's avowed desire to impact wages not subsidized by the State. The employee-driver provision is 'tantamount to regulation' . . . ." *Id.* (quoting *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.,* 475 U.S. 282, 289 (1986)).

Under the guise of the UCL Action, the State is trying to *de facto* overrule the Ninth Circuit's decision and affect the motor carrier's use of

independent contractors rather than employees. As the State conceded before the California Supreme Court, its goal is to regulate the conduct of motor carriers as an "unfair business practice" despite the clear direction of the Ninth Circuit Court of Appeals that such an effort was preempted by the FAAAA.

In *Coakley,* the First Circuit Court of Appeals similarly rejected the effort by the State of Massachusetts to regulate motor carriers in such a way as to eliminate any possibility that independent contractor status would be established as a matter of law. The state law in question was also viewed as one of "economic regulation" and in this respect it has similar effect to the UCL. The court there noted that even the "potential" impact on a carrier's prices, routes and services was deemed sufficient to warrant FAAAA preemption, without the necessity of "empirical evidence." *Coakley*, 769 F.3d at 21; *see also Rowe,* 448 F.3d at 82 n.14. The court squarely rejected the lower court's view that in order for FAAAA preemption to apply, the underlying law must "regulate" the motor carrier's transportation of property. *Coakley*, 769 F.3d at 22–23

C. The UCL Action Is Not Saved from Preemption Because It Is Arguably an Exercise of State Police Power

The State's characterization of the UCL Action as an exercise in mere "police power" (App. 8, 20) and, therefore, not within the reach of the FAAAA is unavailing. As the State conceded, the UCL Action presents more than a simple exercise of local police-power as it clearly involves "state regulation" of unfair business practices—which by

definition concern the manner in which motor carriers do business and compete. Further, it is settled that the mere exercise of "police-power" does not trump federal preemption as the exercise of police power is not excluded from preemption. *See N.H. Motor Transp. Ass'n v. Rowe,* 448 F.3d 66, 76, 78 (1st Cir. 2006) ("An exclusion from preemption for police-power enactments would surely 'swallow the rule of preemption,' as most state laws are enacted pursuant to this authority. . . . We therefore conclude that the FAAAA preempts police-power enactments to the extent that they are 'related to' a carrier's prices, routes, or services."), *aff'd, Rowe,* 552 U.S. at 374; *see also Travers*, 2009 WL 2242391, at *2 (preempting state regulation under the parallel ADA, the court concluded, "[c]ontrary to the plaintiffs' assertion, state police power enactments are not excluded from preemption under the ADA. [citation omitted].")

Here, too, the State ignored a plethora of enforcement tools at its disposal to ensure that employers adhere to state laws establishing wage and hour and workers' compensation insurance requirements for employees. While even the use of these tools may sometimes be preempted by virtue of a relationship to prices, routes, or services, or the terms of competition, their preemption would, at least, not be as blatantly obvious as preemption of the UCL.

In this case, however, it is the very selection of this particular device to regulate motor carriers that creates the conflict with the FAAAA. The California Supreme Court erred in treating the UCL Action as

if it were simply another form of enforcement action under the Labor Code.

In numerous instances, federal courts and California state courts alike, including this Court, have found UCL actions to be preempted by federal law.[9] In allowing the UCL Action to proceed, the California Supreme Court decision ignored over

---

[9] *See, e.g., Wolens*, 513 U.S. 219; *Parks v. MBNA Am. Bank N.A.,* 54 Cal. 4th 376, 388, 393 (2012) (finding California's UCL preempted as a national bank would otherwise "be subject to monetary liability and its convenience check offers may be enjoined" for failing to abide by California's UCL); *In re Tobacco Cases II*, 41 Cal. 4th 1257, 1275–76 (Cal. 2007) (UCL action predicated on alleged violation of California Penal Code section 308 preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*); *Alvarez v. Chevron Corp.*, 656 F.3d 925, 934-35 (9th Cir. 2011) (UCL claims alleging that purchases of premium gasoline included amounts of "residual" lower-grade fuel preempted by the Petroleum Marketing Practices Act, 15 U.S.C. § 2824(a), and the FTC's "Posting Rule", 16 C.F.R. § 306.2); *Chae v. SLM Corp.*, 593 F.3d 936, 942 (9th Cir. 2010) (UCL claims challenging Sallie Mae's method for calculating student loan interest and late fees preempted by the Higher Education Act, 20 U.S.C. § 1098(g)); *Blackwell,* 2008 WL 5103195, at *15-18 (UCL claim to recover wages under California's meal and rest break rules as "unfair, unlawful or deceptive business practice" preempted by the ADA, *citing Morales,* 504 U.S. at 398); *Tanen v. Sw. Airlines Co.*, 187 Cal. App. 4th 1156, 1170 (Cal. Ct. App. 2010) (affirming dismissal of UCL claim preempted by the ADA, where claim was based on alleged violation of California Civil Code section 1749.5 for selling travel gift certificates with expiration dates); *Fitz-Gerald v. SkyWest Airlines, Inc.*, 155 Cal. App. 4th 411, 423 (2007) (UCL claim by unionized airline flight attendants based on alleged violation of California Labor Code section 203 preempted by the Railway Labor Act, 45 U.S.C § 151 *et seq.*, and the ADA), *as mod'f on denial of rehearing, overruled in part by Pac Anchor,* 59 Cal. 4th 772.

seventy-five years of federal regulatory history by which state interference with interstate transportation was preempted, as Congress mandated, by federal law.

D. The Federal Leasing Regulations Govern the Contractual Relationships between the Motor Carriers and the Truckers

In the context of motor carrier use of independent contractors, the stated public protection goals of Section 17200 are exactly addressed and accomplished by the federal Truth-in-Leasing Regulations ("Leasing Regulations").[10] *See* Ex Parte No. MC-43, at 142, 149–152; 49 C.F.R. § 376 (originally codified at 49 C.F.R. § 1057).[11] CTA

---

[10] The Leasing Regulations grew out of Congressional and Interstate Commerce Commission (ICC) concern that, while "... owner-operators have assumed an increasingly important role in the national transportation system; … they have little chance of individually bargaining any changes in any contract; . . ." and that, therefore, a comprehensive structure of the legal relationship between the parties be mandated by regulation. *See Lease and Interchange of Vehicles Ex Parte No. MC-43 (Sub-No. 7)*, 131 M.C.C. 141, 144, 1979 WL 11158 (I.C.C.) (Jan. 9, 1979). A principal objective of the Leasing Regulations was "to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry." 131 M.C.C. at 142. As noted by this Court, the purpose of the Leasing Regulations "is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system." *American Trucking Associations v. United States*, 344 U.S. 298, 310 (1953).

[11] The ICC Termination Act of 1995 transferred motor carrier regulatory functions previously vested in the ICC to the

submits that these protections signify Congressional intent to preserve the independent contractor model for doing business with motor carriers as contracted-for service providers. As with *Ginsberg,* the fact that federal protections are accorded to independent contractors for whose benefit the UCL Action would be undertaken bolstered the finding that FAAAA preemption should be enforced. *Cf. Ginsberg,* 134 S. Ct. at 1433 ("Federal law also provides protection for frequent flyer program participants.")

Pac Anchor presents a unique opportunity to avoid state re-regulation of interstate motor carriers even via indirect, but equally invasive means. Prior to federal preemption in FAAAA, each state had its own unique and conflicting rules governing motor carriers. That created a patchwork quilt of ever changing regulations that massively burdened interstate motor carriers. By federalizing interstate motor carriers, Congress created an even and predictable playing field in which motor carriers could compete. That preemption has resulted in a significantly reduced cost of interstate freight transportation.

While there is no explicit statement of preemption in the Leasing Regulations, the Leasing

---

Department of Transportation ("DOT") and the Surface Transportation Board. *See* 49 U.S.C. § 13501. The Leasing Regulations were initially promulgated pursuant to 49 U.S.C. §§ 13301 and 14102. With the Motor Carrier Safety Improvement Act of 1999, the new Federal Motor Carrier Safety Administration ("FMCSA") assumed all "duties and powers related to motor carriers or motor carrier safety vested in the Secretary [of Transportation]" including the Leasing Regulations. 49 U.S.C. § 113(f)(1); *see also* 49 C.F.R. § 1.73.

Regulations define the ingredients of the contract relationship and provide a private cause of action which supersedes conflicting state law. *See, e.g., Owner-Operator Indep. Drivers Ass'n, Inc., v. Bulkmatic Transp. Co.,* 503 F. Supp. 2d 961, 967 (N.D. Ill., E.D. 2007) (finding federal regulation of contractual relationship between motor carrier and independent contractors); *Owner–Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, 87 F. Supp. 2d 820, 825 (S.D. Ohio 2000) (*citing Owner–Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 785 (8th Cir. 1999)) (recognizing private right of action under Leasing Regulations), *rev'd in part on other grounds,* 636 F.3d 781 (6th Cir. 2011); *Turner v. Miller Transporters, Inc.,* 852 So. 2d 478, 485 (La.App. 1 Cir. 2003) (finding state contract law preempted by the Leasing Regulations and further finding that claims for damages related to a violation of 49 C.F.R. § 376.12 fall under the aegis of federal law rather than state law), *opinion adhered to as modified on reh'g,* 876 So. 2d 848 (La.App. 1 Cir. Feb. 23, 2004), *writ denied*, 874 So. 2d 174 (La. May 21, 2004).

Significantly, the use of independent contractors was expressly approved by the ICC in the Leasing Regulations. In setting out specific requirements for the contractual arrangement between the motor carrier and the independent contractor, Congress made it clear that independent contractors played a vital role in the "national transportation system." Ex Parte No. MC-43, at 144. Section 376.12(c)(4) provides,

> (4) Nothing in the provisions required by paragraph (c)(1) of this section is

> intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

49 C.F.R. § 376.12(c)(4).

Pac Anchor would interfere with the Leasing Regulations that define the motor carrier and independent contractor relationship, and, in particular, their respective business practices.

II. Conclusion

This case presents a significant issue of federal preemption. CTA submits that under the supremacy of federal law and principles of federal preemption, the UCL Action is facially preempted by the FAAAA, a law Congress passed for the express purpose of barring direct or indirect state regulation of the transportation industry and competition over "prices, routes, or services." Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD T. WILLIAMS*
LINDA AUERBACH ALLDERDICE
ROBERT BARTON
Holland & Knight LLP
400 South Hope Street
8th Floor
Los Angeles, California 90071
richard.williams@hklaw.com
(213) 896-2400

Counsel for Amicus Curiae

December, 2014 *Counsel of Record