No. 12-55705

In The

United States Court of Appeals for the Ninth Circuit

MICKEY LEE DILTS, RAY RIOS, AND DONNY DUSHAJ,
ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

PENSKE LOGISTICS, LLC AND PENSKE TRUCK LEASING CO., L.P.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of California

No. 3:08-cv-00318-CAB-BLM

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for the Chamber of Commerce of the United States of America certifies that it does not have a parent corporation, and that neither it (nor any affiliate) has issued shares or debt securities to the public.

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing 300,000 direct members and an underlying membership of more than 3,000,000 businesses and professional organizations. Chamber members operate in every sector of the economy and transact business worldwide, including throughout California. The Chamber represents the interests of its members before the legislative, executive, and judicial branches of government, and in other public policy forums. As part of that representation, the Chamber files *amicus curiae* briefs in cases involving issues of concern to its members and has appeared many times in this Court.[1]

The Chamber has a strong interest in this case because it raises important and recurring questions concerning the extent to which states may regulate the prices, routes, and services of motor carriers. A substantial number of Chamber members are motor carriers themselves and/or rely on the services of motor carriers in their day-to-day business. Affirming the decision below would continue to allow motor carriers to compete freely and more efficiently, with

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than the amicus, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

prices and service options dictated by the marketplace instead of by state regulation. It would also ensure that individuals and businesses continue to enjoy a full range of services at the best possible price, dictated only by the free market, consistent with Congress's goals when it passed the Federal Aviation Administration Authorization Act of 1994 ("FAAAA").

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellees Penske Logistics, LLC and Penske Truck Leasing Co., L.P. operate distribution and inventory management services in California. They hire employees to deliver and to install a variety of products including home appliances. California's meal and rest period laws require employers to provide a 30-minute meal period for every work period of more than five hours and a second 30-minute meal period for every work period of more than ten hours. Cal. Lab. Code § 512(a). California also requires every employer to permit all employees to take rest periods at the rate of ten minutes per four hours worked, in the middle of the work period if possible. Cal. Lab. Code § 226.6; Industrial Welfare Commission ("IWC") Order 9-2001(12). Employers must also provide one additional hour of pay for each day that the employer fails to provide the meal or rest period. Cal. Lab. Code § 226.6; IWC Order 9-2001(11-12).

Appellants sued Appellees on behalf of a putative class, claiming that Appellees failed to provide their drivers with rest and meal periods under

California law. The United States District Court for the Southern District of California subsequently granted in part Appellees' motion for summary judgment, ruling that the FAAAA preempted Appellants' meal and rest period claims because they "depriv[e] [carriers] of the ability to take any route that does not offer adequate locations for stopping, or by forcing them to take shorter or fewer routes . . . [thereby binding] motor carriers to a smaller set of possible routes." *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109, 1118-19 (S.D. Cal. 2011). Appellants challenge that decision in this appeal and assert that the district court applied FAAAA preemption too broadly.

While the Chamber joins in all arguments raised by Appellees and the other *amici* in this matter it submits this separate *amicus* brief to expand on two issues that have been raised by the parties. First, Appellants have taken the position that FAAAA preemption does not apply where the only effect of the state law at issue is to raise a motor carrier's costs, no matter the effect on the prices charged by the carrier. However, as explained below, numerous courts, including the Ninth Circuit, have recognized that costs are closely connected to motor carriers' prices in the FAAAA context and that state laws imposing significant additional costs are preempted, especially where these costs will be passed on to customers.

Second, Appellants argue that preemption does not apply here because although the California meal and rest period laws would narrow the universe of

routes that carriers can use, the laws would not limit carriers to a ***particular*** route. Appellants read far too much into Ninth Circuit precedent in making this argument, as the rule has never been applied in the manner they suggest. For FAAAA preemption to apply, it is not necessary that a state law bind a carrier to operating on a specific route or that it dictate any particular price. Indeed, Supreme Court precedent establishes that preemption applies whenever the state law at issue would force carriers to modify the manner in which they undertake deliveries, thereby interfering with the outcome that competitive market forces would otherwise dictate.

ARGUMENT

I. THE FAAAA PREEMPTS STATE LAWS, LIKE THE CALIFORNIA LAWS AT ISSUE, THAT SIGNIFICANTLY AFFECT MOTOR CARRIERS' COSTS.

The FAAAA contains a broad preemption clause providing that "[s]tates may not enact or enforce a law . . . related to a price, route, or service of any motor carrier."[2] 49 U.S.C. § 14501(c)(1). In passing the FAAAA, Congress expressed concern that state regulation of interstate motor carriers was resulting in "increased costs" to these carriers. H.R. Rep. No. 103-677 (1994). Nevertheless, relying on this Court's decision in *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir.

[2] Appellants do not dispute that Appellees are "motor carriers" within the meaning of the FAAAA.

1998), Appellants argue that a state law that "merely" increases carriers' costs is not preempted under the FAAAA, even if it leads to increased prices. Appellants' Br. at 40, 47-48 ("That these options might be more costly does not mean that the meal-and-rest-break laws are preempted.") (citing *Mendonca*, 152 F.3d at 1189). Not only would Appellants' interpretation of *Mendonca* read the word "price" out of the FAAAA's preemption clause, but *Mendonca* itself appears to have been grounded in what is now outdated precedent.[3]

In *Mendonca*, this Court held that the FAAAA did not preempt a state prevailing wage statute even though carriers claimed that the law forced them to increase their prices by 25% to offset the increased costs. *Mendonca*, 152 F.3d at 1189. The Court's rationale appears to be that the increased costs resulting from the prevailing wage law were not a sufficiently direct cause of the price increase.[4] In reaching its holding, *Mendonca* explained that state laws

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[3] This Court recognized in *Mendonca* that the law of FAAAA preemption was still evolving. *Mendonca*, 152 F.3d at 1188 (9th Cir. 1998) (these "principles seldom can be settled on the basis of one or two cases, but require a closer working out") (quoting *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 234-35 (1995)).

[4] At least one federal district court has opined that the reasoning behind the Court's holding in *Mendonca* is somewhat unclear. *Travers v. JetBlue Airways Corp.*, 2009 U.S. Dist. LEXIS 63699, at *6-7 (D. Mass. July 23, 2009) (holding that Airline Deregulation Act preempts a Massachusetts tip statute and characterizing *Mendonca* as "not persuasive because it contains little explanation for its holding that the prevailing wage law was not preempted by the FAAAA").

with no more than an "***indirect***, remote, or tenuous" connection are not preempted. *Mendonca*, 152 F.3d at 1185, 1188-89 (emphasis added). However, *Mendonca* preceded the Supreme Court's decision in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), which held that even state laws with an ***indirect*** connection to carriers' prices, routes, and services are preempted as long as the connection is more than "tenuous, remote, or peripheral." *Id.* at 371 (quoting *Morales v. TWA*, 504 U.S. 374, 390 (1992)).

Indeed, subsequent to *Mendonca*, this Court's decision in *Air Transport Ass'n of America v. City & County of San Francisco*, 266 F.3d 1064, 1075 (9th Cir. 2001) ("*ATAA*"), stated that increased costs, could, in fact, be sufficient to trigger preemption under the Airline Deregulation Act (the "ADA").[5] *Id.* at 1075 ("Hypothetically, there might be some contract term the City could demand whose costs would be so high that it would compel the Airlines to change their prices, routes or services.") (citing *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). However, in *ATAA*, this Court concluded that the additional costs caused by the statute at issue were "a small, if not inconsequential, fraction of the Airlines'

[5] The ADA and FAAAA preemption clauses are identical, and courts regularly cite precedents on either act interchangeably. *See, e.g.*, *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 86 n.4 (1st Cir.), *cert. denied*, 132 S. Ct. 761 (2011).

costs of flying through [San Francisco]" and thus insufficient to establish preemption. 266 F.3d at 1074.

Following *Mendonca*, district courts within the Ninth Circuit have recognized that costs are closely connected with prices in the FAAAA context and that significant additional costs likely to be passed on to customers warrant preemption. For example, the Central District of California, in a holding later affirmed in pertinent part by this Court, determined that a state law requiring carriers at the Port of Los Angeles to use employee drivers instead of independent contractors "would increase drayage operational costs by 167%" and "add an estimated $500 million to the annual operating costs of Port drayage." *Am. Trucking Ass'ns v. City of Los Angeles*, 2010 U.S. Dist. LEXIS 88134, at *56 (C.D. Cal. 2010). The district court concluded that because of these increased costs, "drayage services prices thus would need to increase." *Id.* Because "at least some of the increased costs of drayage services caused by the employee courier provision [would] impact drayage pricing," the court held that the FAAAA preempts the employee-driver requirement.[6] *Id.*

[6] The district court held that while FAAAA preemption would ordinarily apply due to the effect on prices, routes, and services, the Port of Los Angeles was acting as a "market participant" rather than as a regulator and therefore was exempt from the FAAAA. *Id.* at *87-89. This Court reversed the district court's ruling on the market participant issue, holding the state law preempted by the FAAAA. *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 398 (9th Cir. 2011) ("a State

Similarly, in *Blackwell v. Skywest Airlines, Inc.*, 2008 U.S. Dist. LEXIS 97955, *51-54 (S.D. Cal. Dec. 3, 2008), the court found that wage, hour, and break laws would sharply increase the employer's labor costs because the employer would "have to pass labor costs on to the consumer," resulting in increased prices and the elimination of unprofitable routes, the very effect "on air carriers' services, prices and routes that the ADA seeks to avoid." *Id.* at *52-54.[7] Courts in other jurisdictions have reached the same conclusion. *See UPS v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) (finding preemption because "[t]he costs of this [state law] necessarily have a negative effect on UPS's prices"); *Aretakis v. Fed. Express Corp.*, 2011 U.S. Dist. LEXIS 22022, at *13 (S.D.N.Y. Feb. 28, 2011) (plaintiff's negligence action preempted because such potential exposure "may also have a direct impact on the fees [a motor carrier] charges for its services, as it is likely to pass on any added costs associated with this exposure to its customers"); *Prof'l Towing & Recovery Operators v. Box*, 2008 U.S. Dist. LEXIS 100002, at *25 (N.D. Ill. Dec. 11, 2008) (even state laws that do not directly affect price may

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may condition access to State property so long as the conditions do not ***impose costs that compel the carrier to change rates***") (emphasis added).

[7] Even pre-*Mendonca* Supreme Court decisions recognized in the ERISA context that state laws with economic effects so acute or prohibitive as to compel conduct are preempted. *Travelers*, 514 U.S. 645, 668 ("We acknowledge that a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise . . . that such a state law might indeed be pre-empted"); *De Buono v. Nysa-Ila Med. & Clinical Servs. Fund*, 520 U.S. 806, 816 n. 16 (same).

"have a substantial indirect effect on prices to the extent [they] can be shown to impose significant additional costs . . . that [carriers], in turn, may pass on to their customers").

Mendonca's holding also rested in part on the premise that "state laws dealing with matters traditionally within a state's police powers" are subject to a heightened standard for preemption. *Mendonca*, 152 F. 3d at 1186. As the First Circuit more recently observed in *DiFiore v. American Airlines*, 646 F.3d 81 (1st Cir.), *cert. denied*, 132 S. Ct. 761 (2011), there is no basis in the Supreme Court's preemption decisions under the FAAAA and the ADA for a presumption against preemption in areas "historically occupied by state law." *Id.* at 86 ("However traditional the area, a state law may simultaneously interfere with an express federal policy -- here, one limiting regulation of airlines."). Indeed, the First Circuit's decision in *Rowe*, later affirmed by the Supreme Court, refused to create an exception to FAAAA preemption where a statute is related to the state's "police power" and instead held that, as with any other state law, "the FAAAA preempts state police-power enactments to the extent that they are 'related to' a carrier's prices, routes, or services." *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 78 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008). The First Circuit thus rejected the notion that any such presumption against preemption should apply to "police power" enactments.

Id. at 74 n.10. That court went so far as to hold that the FAAAA's intent to preempt state laws related to carrier prices, routes, and services is so clear from the statutory language that it would overcome any such presumption even if it existed. *Id.*

As explained in Appellees' brief, California's meal and rest break laws would subject carriers to significant additional costs, in turn affecting prices paid by the customers of these carriers. Thus, the FAAAA preempts these laws.

II. FAAAA PREEMPTION APPLIES WHERE, AS HERE, STATE LAW BINDS CARRIERS TO A SMALLER SET OF CHOICES THAN COMPETITIVE MARKET FORCES WOULD OTHERWISE DICTATE.

Appellants argue that FAAAA preemption does not apply in this matter because the California meal and rest break laws, at most, only "bind[] motor carriers to smaller set of routes." Appellants' Br. at 41. Appellants argue that preemption can apply only if a state law actually "binds the carrier to a ***particular*** price, route or service." *Id.* at 38 (emphasis added). Appellants evidently believe that preemption would apply only if a state law actually restricted carriers to ***one*** particular route, or otherwise dictated ***specific*** prices or services. Appellants again read too much into this Court's prior decisions, as the Court has never applied the preemption standard in the manner Appellants suggest.

Appellants' proposed standard finds no support in the Supreme Court's decisions in *Wolens*, *Morales*, or *Rowe*. Indeed, it is foreclosed by *Morales*, which held that a state law regulating the manner in which an airline ***advertised*** its prices had the requisite connection to justify preemption. *Morales*, 504 U.S. at 388. The law at issue in *Morales* did not bind carriers to any particular rate, route, or service, yet to the Supreme Court, preemption under those facts did not present even a "borderline question." *Id.* at 390.

Under Supreme Court precedent, for FAAAA preemption to apply the Court need determine only that state law would force carriers to modify the manner in which they perform deliveries and that the law interferes with the outcome that competitive market forces would otherwise dictate. *Rowe*, 552 U.S. at 372 (FAAAA preempts Maine statute forbidding tobacco retailers from employing a "delivery service" unless that service followed certain delivery procedures because the statute interfered with "competitive market forces"). *See also Prof'l Towing & Recovery Operators v. Box*, 2008 U.S. Dist. LEXIS 100002, at *25 (N.D. Ill. Dec. 11, 2008) (*Rowe* "stand[s] for the proposition that if the '***effect*** of the regulation would be that carriers would have to offer different services than what the market would otherwise dictate, the law ha[s] a sufficient effect on carrier services for preemption to apply'") (emphasis in original).

The origin of the language quoted by Appellants was this Court's decision in *ATAA*, decided seven years *before* the Supreme Court's decision in *Rowe*. In *ATAA*, air carriers argued that the ADA preempted a non-discrimination ordinance imposed upon them at city airports in San Francisco. The carriers argued that the ordinance interfered with their routes and services because the cost of compliance was too expensive and would compel them to make a choice between complying with the ordinance or no longer doing business with the airport.[8] *ATAA*, 266 F.3d at 1071. Writing without the benefit of the Supreme Court's opinion in *Rowe*, this Court looked to ERISA preemption cases for guidance as to when the requisite "connection" exists. These cases held that for preemption to apply, the state law "must compel or bind an ERISA plan administrator ***to a particular course of action*** with respect to the ERISA plan." *Id.* (citation omitted) (emphasis added). The Court concluded by stating that "[b]y analogy, a local law will have a prohibited connection with a price, route or service if the law ***binds the air carrier to a particular price, route or service*** and thereby interferes with competitive market forces within the air carrier industry." *Id.* at 1072 (emphasis added).

As is apparent from the Supreme Court's decision in *Rowe*, *ATAA*'s description of the requisite "connection" is narrower than the Supreme Court intended. There is a clear difference between binding a motor carrier to a

[8] The air carriers eventually conceded that they would fly routes into San Francisco regardless of the ordinance due to competitive demands. *Id.* at 1074.

particular price, route, or service -- such as dictating that a carrier use only one specific route between deliveries or setting specific prices for services -- and binding an ERISA plan administrator to a "particular course of action." Notably, the "particular price" language has never been endorsed by any other federal appellate court.[9]

In fact, the Ninth Circuit has used the "particular price, route, or service" language only one other time in the context of ADA or FAAAA preemption. In *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384 (9th Cir. 2011) ("*ATA*"), this Court explained that in situations where a state law does not specifically regulate or reference rates, routes, or services, the situation becomes "murkier." *Id.* at 396. In such an instance, the Court stated the case is "borderline" and that preemption applies where the state law directly or indirectly "binds the . . . carrier to a particular price, route or service." *Id.* at 396-97. However, the Court does not seem to have applied this language as Appellants interpret it. In *ATA*, the Court affirmed the district court's ruling, among others, that the Port of Los Angeles's employee-only driver requirement "would affect motor carrier's routes or services, by prohibiting trucks driven by independent

[9] Indeed, only one federal district court outside of the Ninth Circuit has ever used this language in articulating the standard for FAAAA preemption, though it was not necessary to that Court's decision. *Owens v. Anthony*, 2011 U.S. Dist. LEXIS 139961, at *7-9 (M.D. Tenn. Dec. 6, 2011) (holding that the FAAAA does not preempt common law negligence claims).

owner-operators from providing drayage services to and from marine terminals at POLA, [and because it] would significantly affect costs." *Id.* at 410; *Am. Trucking Ass'ns v. City of Los Angeles*, 2010 U.S. Dist. LEXIS 88134, 55-56 (C.D. Cal. 2010). The state law at issue did not dictate any particular rate, route, or service for carriers to provide, yet preemption applied regardless.

The "particular price" language cited by Appellants simply cannot reasonably be interpreted to mean that preemption applies only where a carrier is bound to route his vehicles in a particular manner -- such as on a particular road -- or is bound to charge a particular price for its services. The better reading of this language is to mean, as the court said in *ATAA* when summarizing the ERISA cases, that preemption occurs when the state law binds motor carriers to "a particular course of action" with respect to prices, routes and services. *ATAA*, 266 F.3d at 1071. This was the case in *ATA*, where state law forced carriers to use employee drivers instead of independent contractors to perform services. *ATA*, 660 F. 3d at 410. It likewise occurs here, where California motor carriers would be compelled to apply California's strict meal and rest period requirements to their drivers, binding them to a smaller set of routes than the free market would otherwise dictate.

CONCLUSION

For these reasons, the order of the district court should be affirmed.

Respectfully submitted,

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