No. 13-1478

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MANUAL MILTON SANCHEZ, CARMELO MEDINA, AND GERARD EDMOND, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

LASERSHIP, INC.

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE

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September 6, 2013

CORPORATE DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1 AND LOCAL RULE 26.1

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber. The Chamber is not aware of any publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. In particular, the Chamber has filed *amicus* briefs regarding the preemptive scope of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), as amended, as applied to motor carriers. *See, e.g., Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Dilts v. Penske Logistics, LLC*, No. 12-55705 (9th Cir.).

The Chamber files this brief because it raises important questions regarding the extent to which States may interfere with the prices, routes and services of motor carriers, which has significant economic implications for the carriers, their

[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

customers, and American consumers. The motor carrier industry affects nearly every business in the United States, whether directly or indirectly. Congress enacted the FAAAA to allow the market to dictate the prices, routes, and services motor carriers offer their customers, and not a balkanized system of state regulation. The district court's decision below upholds these purposes.

SUMMARY OF ARGUMENT

Through the FAAAA, Congress preempted state regulation of motor carriers' prices, routes, and services in the "public interest," in order "to facilitate interstate commerce." H.R. Conf. Rep. No. 103-677 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. Motor carriers transport trillions of dollars worth of goods each year in the United States. Inefficiencies, increased costs, and reduced quality affect not just motor carriers, but also every other sector of the economy. To ensure that businesses and consumers receive the highest quality at the lowest cost, Congress decided to let the free market determine what routes and services motor carriers provide and at what price, without interference from state regulation.

The district court's decision below correctly found that the Commonwealth of Massachusetts' independent contractor law, M.G.L. c. 149, § 148B ("section 148B") is preempted under the FAAAA as it inevitably alters the prices, routes, and services customers throughout the Northeast can receive from motor carriers.

Section 148B mandates that motor carriers engage their drivers as employees, not as independent contractors, as is the standard in that industry. The court below found that using employees rather than independent contractors would significantly increase shipping costs—for Lasership alone, by more than five times its profit margin— causing motor carriers to increase the prices they charge to their customers, contrary to the FAAAA's preemptive command. Likewise, section 148B's ban on independent contractor-drivers adversely affects the routes and services that motor carriers can offer their customers. Requiring motor carriers to use employees rather than independent contractors would hinder their ability to offer to innovative and useful shipping services, such as bundling and on-demand delivery—an increasingly important service given the tremendous growth of online commerce.

Although this case directly affects only motor carriers operating in the Commonwealth of Massachusetts, enabling one State to impose its preferred employment structure for the motor carrier industry on any others would enable all to do so, threatening price increases and service disruptions nationwide—all contrary to the goals of the FAAAA.

ARGUMENT

I. THE FAAAA PREEMPTS STATE REGULATION OF MOTOR CARRIERS THAT HAS THE EFFECT OF INCREASING PRICES OR REDUCING ROUTES OR SERVICES

The motor carrier industry plays a vital role in our economy. "Transport costs have significant impacts on the structure of economic activities as well as on international trade." Dr. Jean-Paul Rodrigue & Dr. Theo Notteboom, THE GEOGRAPHY OF TRANSPORT SYSTEMS (3d ed. 2013), http://people.hofstra.edu/geotrans/eng/ch7en/conc7en/ch7c3en.html (hereinafter "GEOGRAPHY OF TRANSPORT SYSTEMS"). "When transport systems are efficient, they provide economic and social opportunities and benefits that result in positive multiplier effects such as better accessibility to markets, employment and additional investments." *Id*. Conversely, "when transport systems are deficient in terms of capacity or reliability, they can have an economic cost," such that "raising transport costs by 10% reduces trade volumes by more than 20%." *Id*.

In the United States, the "transport system" predominantly consists of motor carriers driving over roads and highways. All told, motor carriers are involved in transporting almost 87 percent of all goods shipped in the United States, which have a total value of over $10.1 trillion.[2] Virtually every good purchased or sold in

[2] Department of Transportation, *Commodity Flow Survey*, Table 1a (April 2010), http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/commodity_flo

the United States or some component thereof has traveled by motor carrier—whether it be drayage of cargo from a freighter to a shipping dock; long-haul transportation over the interstate highways; distribution by a regional wholesaler to a retailer; or "last mile" deliveries of goods to end-users. *See* GEOGRAPHY OF TRANSPORT SYSTEMS, http://people.hofstra.edu/geotrans/eng/ch5en/conc5en/ch5c4en.html.

Congress was well aware of these realities when it passed the FAAAA. It expressly found that state economic regulations imposed "an unreasonable burden on interstate commerce; impeded the free flow of trade, traffic, and transportation of interstate commerce; and placed an unreasonable cost on the American consumers." Pub. L. No. 103-305, § 601(a), 108 Stat. 1605 (1994); *see also* H.R. Conf. Rep. No. 103-677, *reprinted in* 1994 U.S.C.C.A.N. at 1759 ("State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets."). In preempting state regulation of motor carriers, Congress' "overarching goal" was to ensure that businesses and consumers nationwide receive "transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency,

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w_survey/final_tables_december_2009/html/table_01a.html. Of the $11.7 trillion in goods transported in the United States, $8.3 trillion was by truck (71.4 percent), $1.5 trillion was by parcel or couriers (13.4 percent), $187 billion was by truck and rail (1.6 percent) and $58 billion was by truck and water (0.4 percent). *Id.*

innovation, and low prices,' as well as 'variety' and 'quality.'" *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (quoting *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

Given the centrality of motor carriers in the economy and the profound effect that inefficiencies in that industry can have on nearly every sector of the economy, Congress preempted state regulation of prices, routes and services. The FAAAA's language is expansive, preempting any state law or regulation that "relates to a price, route or service of any motor carrier … with respect to transportation of property." 49 U.S.C. § 14501(c)(1). Congress duplicated the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(a), in order to give the FAAAA the same "broad preemption interpretation adopted by the United States Supreme Court in *Morales v. TransWorld Airlines*." H.R. Conf. Rep. No. 103-677, *reprinted in* 1994 U.S.C.C.A.N. at 1755; *accord Rowe*, 552 U.S. at 370.

Consistent with the breadth of the statutory text and congressional purpose, the Supreme Court has staked out wide boundaries for FAAAA preemption. Any state laws or regulations "'having a connection with, or reference to' carrier 'rates, routes, or services' are pre-empted," provided that their impact on "Congress' deregulatory and pre-emption-related objectives" is more than "tenuous, remote or peripheral." *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 390); *see*

Smith v. Comair, Inc., 134 F.3d 254, 257 (4th Cir. 1998) (same; construing Airline Deregulation Act's cognate preemption provision). A state law may be preempted even if its "effect on rates, routes or services 'is only indirect.'" *Id*. at 370 (quoting *Morales*, 504 U.S. at 386). Thus, the FAAAA looks not only at the dictates of a state law, but also at the full "logical effect that a particular scheme has on the delivery of services or the setting of rates." *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 82 n.14 (1st Cir. 2006), *aff'd* 552 U.S. 364 (2008).

As a statute broadly intended to benefit the public and to facilitate interstate commerce, FAAAA preemption analysis therefore depends on the effect of the state law on the prices paid by customers and the routes and services that carriers can offer to customers. If the application of a State law to motor carriers would have more than a tenuous, remote, or peripheral effect on the prices, routes or services the motor carrier offers a customer, then the state law is preempted. *See Rowe*, 552 U.S. at 370. By this measure, it is clear that the FAAAA preempts section 148B.

II. SECTION 148B REQUIRES THE USE OF EMPLOYEES, THEREBY ADVERSELY AFFECTING THE PRICES, ROUTES, AND SERVICES MOTOR CARRIERS OFFER

Unlike any other law in the country, section 148B mandates that motor carriers operating in Massachusetts use employees, not independent contractors, to make deliveries. Forbidding carriers from using independent contractors and

requiring them to use employees will substantially increase motor carriers' labor costs, which necessarily leads to increases in prices. Furthermore, substantial restrictions on how and when *employees* may deliver products, not applicable to independent contractors, will reduce the routes and services motor carriers are able to offer their customers. The application of Massachusetts' laws regulating the use of independent contractors and employees to motor carriers is contrary Congress's express objective of allowing the market, not state regulation, to determine prices, routes, and services for customers. The FAAAA therefore preempts section 148B.

A. The Massachusetts Law Is Unique In Forbidding The Use Of Independent Contractors By Motor Carriers

As the district court correctly stated, section 148B "is an unprecedented and fundamental change in independent contractor law," which "commands Lasership [and any other motor carrier] to convert its independent contractors to employees." J.A. 2899, 2909. The Chamber is unaware of any other state law restricting businesses' use of independent contractors to only those circumstances where the services to be performed are entirely "outside the usual course of the business of the employer"; and is also unaware of any other extant law completely barring motor carriers from engaging drivers as independent contractors.[3]

[3] Notably, the Ninth Circuit held that a comparable ban on the use of independent contractors by motor carriers was preempted under the FAAAA. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1056 (9th Cir.

Appellants' assertion (Br. 43) that section 148B is "virtually identical" to the laws of Connecticut, Illinois, New Hampshire and Vermont is off base. As Appellants admit (Br. 44 n.25), each of these States' laws contains an additional clause, granting independent-contractor status if the person works "outside of all places of business" of the engaging entity,[4] a condition that surely would obtain for any driver. This clause, formerly present in section 148B but struck from the law in 2003, *see generally Massachusetts Delivery Association v. Coakley*, 671 F.3d 33, 36 n.1 (1st Cir. 2012), makes all the difference. With it, drivers in Massachusetts could be deemed independent contractors. For example, under Massachusetts' unemployment law, M.G.L. c. 151A, § 2(b), which unlike section 148B contains the "outside of all the places of business" exemption, the courts

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2009) (issuing preliminary injunction against, among other things, city's prohibition on use of independent contractors); *see also Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 407-08 (9th Cir. 2011) (entering final judgment preempting independent-contractor ban), *rev'd in part on other grounds*, 133 S. Ct. 2096 (2013.).

[4] *See* Conn. Gen. Stat. § 31-222(a)(l)(B)(ii)(II) (person may be independent contractor if services are "either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed"); 820 ILCS § 115/2 ("performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer"); N.H. Rev. Stat. Ann. § 282-A:9-III(b) ("either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed"); 21 VT Stat. Ann. 21 § 1301(6)(B)(ii) ("either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed").

have concluded that taxi drivers are independent contractors because "the service performed by the drivers occurred outside the business premises of Town Taxi." *Commissioner v. Town Taxi of Cape Cod*, 68 Mass. App. Ct. 426, 430-31 (2007). Similarly, drivers for a motor carrier (such as Lasership) necessarily work "outside the business premises" of the motor carrier. As applied to motor carriers, Massachusetts' severe limitations on the use of independent contractors is thus an extreme outlier.

B. Section 148B Is Preempted Because It Results In Higher Shipping Prices

Section 148B does not directly regulate what prices a motor carrier may charge. Nonetheless, the natural and logical effect of the law is to cause motor carrier costs to increase—and with them the prices paid by customers. Appellants could not credibly refute the court's conclusions, *see* J.A. 2918-24, that engaging drivers as employees rather than independent contractors would have a substantial and concrete effect on costs, and therefore on prices.

Indeed, the Ninth Circuit held that a comparable ban on the use of independent contractors by motor carriers, which likewise would have inflicted significantly increased costs (and ultimately prices), was preempted under the FAAAA. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1056 (9th Cir. 2009) (issuing preliminary injunction against, among other things,

city's prohibition on use of independent contractors); *see also Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 407-08 (9th Cir. 2011) (entering final judgment preempting independent-contractor ban).[5] The local ban at issue there would have increased costs for drayage services by 167% and would have added "an estimated $500 million to the annual operating costs of Port drayage"; and was therefore preempted because "drayage services prices thus would need to increase." *Am. Trucking Ass'ns v. City of Los Angeles*, 2010 U.S. Dist. LEXIS 88134, *56 (C.D. Cal. Aug. 26, 2010).[6]

Appellants and their *amicus* the Attorney General of the Commonwealth of Massachusetts argue (Sanchez Br. 29-33; Att'y Gen. Br. 9) that some costs the Court below identified (health, workers compensation and liability insurance) should not be considered in this analysis. The essence of their argument is that although section 148B may require a driver to be treated as an employee under

[5] Tellingly, the City of Los Angeles chose not to contest the Ninth Circuit's finding that the FAAAA preempted the independent contractor ban in a subsequent appeal to the Supreme Court. *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096, 2100 (2013) (deciding issues regarding unrelated regulations governing placards on trucks and parking).

[6] The district court ruled that although 49 U.S.C. § 14501(C)(1) would otherwise apply to preempt the City's regulation due to its 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 not subject to the FAAAA. *Am. Trucking Ass'ns,* 2010 U.S. Dist. LEXIS 88134, at 87-89. The Ninth Circuit disagreed with the market-participant holding and reversed, ultimately entering a final judgment that the employee requirement was preempted by the FAAAA. *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 407-08 (9th Cir. 2011), *rev'd in part on other grounds,* 133 S. Ct. 2096 (2013).

some statutes, the driver could still be deemed an independent contractor for other purposes (such as insurance). *Id*.

In practice, however, it might be too difficult to maintain that sometimes-yes-sometimes-no approach because following the employee-employer requirements for one law (such as section 148B) could create an employee-employer relationship in another. For example, if section 148B applies to motor carriers, then Massachusetts' meal break, day-of-rest, and overtime requirements, *see* M.G.L. c. 149, §§ 47, 51 (day-of-rest laws) & § 100 (meal breaks); M.G.L. c. 151, § 1A (overtime), would also apply. Courts have held that scheduling an individual for these purposes indicates a "right to control," which might suggest overall status as an employee. *See, e.g.*, *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 492 (7th Cir. 1996) (scheduling a worker's time indicates control and thus employee status); *Baker v. Flint Eng'g & Constr. Co*., 137 F.3d 1436, 1441 (10th Cir. 1998) (same). Some courts have been skeptical of employers attempting the kind of employee classification mixing-and-matching implied in Appellants' and the Attorney General's argument. *See, e.g.*, *Hopkins v. Duckett*, 2006 U.S. Dist. LEXIS 84559, *13 (D.N.J. 2006) ("Hopkins cannot be a non-employee for liability purposes while being an employee for ERISA purposes").

Even if a motor carrier could lawfully mix-and-match its employee and independent contractor designations, it would be administratively cumbersome for

an employer to treat an individual as sometimes an employee but sometimes not. The company would frequently have to reassess whether each individual is an employee or a contractor for the purposes of state and federal laws regarding payroll, scheduling, leaves of absence, benefits, accommodations, unemployment and workers' compensation. Designating a worker as a hybrid employee / independent contractor "would create havoc for employers and commerce" and cause "unnecessary complexity in bookkeeping, payroll, etc." *Scovil v. FedEx Ground Package Sys., Inc.*, 2012 U.S. Dist. LEXIS 113558, *13-14 (D. Me. Aug. 13, 2012). The FAAAA was meant to foster *efficiency* by allowing motor carriers "to conduct a standard way of doing business," not to create an administrative jumble. H.R. Conf. Rep. No. 103-677, *reprinted at* 1994 U.S.C.C.A.N. at 1759.

C. Section 148B Also Reduces The Routes And Services Motor Carriers Can Offer

The Court below also concluded that Section 148B would impose "dire consequences" on the route and service offerings of carriers, J.A. 2915; *see id*. at 2913-18, by restricting route options and diminishing services for businesses and consumers. For this reason, too, section 148B is preempted by the FAAAA.

The first consequence noted by the Court below is that motor carriers would be forced to cease the practice of "bundling," that is, having one independent contractor make deliveries for multiple motor-carrier companies on a single route.

J.A. 2914. This practice is available for independent contractors, but not employees. *Id.* Although an employee driver is obligated to follow his employer's command to deliver a package at a certain time to a certain place, an independent contractor can accept or reject an offered delivery, which gives that contractor the flexibility to make himself available to many motor carriers simultaneously and therefore make multiple deliveries. *See id.* The benefits of "bundling" are straightforward: one independent contractor driving one route to make three deliveries is of course cheaper and more efficient than having three employees each make one delivery on three separate routes for their respective employers. Such efficiencies and cost savings are passed on to customers as lower prices and improved quality, and would be lost through the use of employees by motor carriers. *See id*.

A second consequence of applying section 148B to motor carriers is that the carriers would have to "discontinue [their] on-demand services," that is, short-notice rush deliveries. J.A. 2921. The only way a motor carrier with employees can offer on-demand services is to have a staff of drivers waiting on-the-clock for a call, driving up labor costs substantially. On the other hand, independent contractors do not have to be paid while waiting, and are able to make themselves available to multiple motor carriers for on-demand deliveries throughout the day. *See id.* at 2915. The reduction or elimination of on-demand services would be a

significant loss for a variety of businesses that need items transported immediately and on unpredictable schedules, such as medical labs receiving specimens from patients; pharmacists delivering drugs to hospitals for emergencies; and manufacturers that need a critical part or tool, among others. *See Same-Day Delivery and the Messenger Courier Industry*, § 1.2.1 (2011), http://www.mcaa.com/IndustryResources/IndustryProfile tabid/186/Default.aspx. These on-demand customers require the highest quality and reliability. Reducing the number of motor carriers offering these services means less competition, which will lead to decreased quality and higher prices. At worst, fewer couriers offering on-demand work means reduced availability, and customers may have a difficult time finding a motor carrier to deliver a time-sensitive package.

Furthermore, the on-demand delivery market is on the verge of a significant expansion. Many leading online retailers, including Amazon, Google, eBay and Wal-Mart, are rolling out same-day delivery for online orders. Marcus Wohlsen, *Tech Giants Want to Win Same-Day Delivery – Even if It Never Makes Money*, WIRED, July 22, 2013, http://www.wired.com/ business/2013/07/ebay-now-same-day-delivery. These services rely on third-party motor carriers (like Lasership) to make these on-demand deliveries. *Id*.; J.A. 2894. Given the sheer complexity of fulfilling thousands of orders around the country within a window of just a few hours, these retailers require on-demand services, which can be delivered most

cost-effectively and efficiently through independent contractors. *Id*. Application of section 148B could undermine this nascent retail model before it even gets off the ground, denying consumers an innovative delivery option; again, the precise opposite of what was intended through the FAAAA's preemption provision. *Cf.* H.R. Conf. Rep. No. 103-677, *reprinted at* 1994 U.S.C.C.A.N. at 1759 (FAAAA designed to preempt regulation that "inhibit[s] innovation and technology and curtails the expansion of markets").

Appellants (Br. 27-28) insist that classifying drivers as employees rather than independent contractors just "means paying minimum wage, overtime and prohibits deductions," and does not have an effect on routes and services. Even if it were as simple as that, the point provides no answer to the bundling problem, which is a kind of service that is feasible only through the use of independent contractors who work for multiple companies, rather than a single firm. But an employee is not simply an independent contractor with a different paycheck. State and federal laws impose a panoply of restrictions on an employer for an employee that are not required for independent contractors, such as overtime compensation, leave, unemployment contributions, payroll tax withholdings, and recordkeeping requirements, to name but a few. These simultaneously increase the costs of hiring an employee and also reduce the hours the employee is able to work (thus necessitating either more employees and, in turn, higher costs, or reduced

services). Indeed, the record here is replete with examples of the difference in routes and services offered as between a company forced to engage drivers as employees rather than as independent contractors: fewer interstate deliveries, fewer deliveries for Amazon.com, and significantly shorter routes to avoid overtime. J.A. 2916-17, 2921. In the Chamber's experience, Lasership is not unique in this regard; section 148B would substantially affect the routes and services offered to their customers by all kinds and sizes motor carriers.

The detrimental effects of section 148B on routes and services would not only affect businesses and consumers in Massachusetts, but also those throughout the northeast corridor. A regional motor carrier lawfully using independent contractors in other States cannot send a contractor into Massachusetts without that driver being deemed an employee while in the Commonwealth. This injects needless complexity into an otherwise seamless system of interstate transportation. J.A. 2921-22. As an illustration, if a customer wanted to make a delivery from Maine to Rhode Island, a Maine-based motor carrier with independent contractors would have only three options, each of which would implicate the preemptive scope of the FAAAA. The carrier could direct the contractor to drive to the New Hampshire-Massachusetts border; switch the cargo to an employee-driver at the border; then transfer it to a third independent contractor-driver once the shipment reached Rhode Island. Or it could drive around the Commonwealth, adding

hundreds of miles to the route. Because neither of those options is practical (and both would certainly increase prices and would affect routes and services), the only remaining option would be for the carrier in Maine to comply with the otherwise-inapplicable Massachusetts law and convert its workforce to employees, leading to higher prices and reduced services in Maine and Rhode Island as well as Massachusetts. This is the very "state regulatory patchwork" that Congress found to be "inconsistent with [its] major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, 552 U.S. at 373 (citing H.R. Conf. Rep. No. 103-677, *reprinted in* 1994 U.S.C.C.A.N. at 1759 (noting carriers would ship products across borders solely to avoid state regulations)).

D. The Supreme Court's Recent Dan's City Decision Does Not Change This Analysis

Appellants and their *amicus* Public Citizen make much of the Supreme Court's recent decision in *Dan's City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769 (2013). But that decision has no effect on this case.

Dan's City stands for nothing more than the unremarkable proposition that the FAAAA reaches only those laws that have connection with or reference to "services related to the movement of property." 49 U.S.C. § 14501(c)(1). In *Dan's City*, the issue was whether the FAAAA preempted a state law as applied to

the sale of an impounded vehicle that had long since by towed by a carrier and had been sitting in a parking lot for months. 133 S.Ct. at 1779. By contrast here, as applied to motor carriers like Lasership section 148B "clearly relate[s] to transportation of property because [Appellants are] drivers who transport products" in interstate commerce. *Burnham v. Ruan Transp.*, 2013 U.S. Dist. LEXIS, *18 (C.D. Cal. August 16, 2013) (analyzing FAAAA preemption of California's employment laws as applied to drivers). Massachusetts' law has a direct impact on the prices a motor carrier can charge businesses and consumers for "the movement of property," and directly affects the routes and services they can offer to customers for "the movement of property." 49 U.S.C. § 14501(c)(1). Therefore, nothing in *Dan's City* undermines the district court's judgment that the FAAAA preempts section 148B as applied to motor carriers like Lasership.

CONCLUSION

By using independent contractors, motor carriers are presently able to offer low prices, diverse routes, and quality services to businesses and consumers, all determined through robust competition in the free market. Massachusetts' regulation prohibiting the use of independent contractors would increase prices and reduce the scope of routes and services—the exact results Congress sought to prevent by enacting the FAAAA. The judgment of the district court should be affirmed.

Respectfully submitted,

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September 6, 2013

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,512 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ F. Arthur Jones II
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CERTIFICATE OF SERVICE

I certify that on September 6, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Firm Name (if applicable)

617-737-0052
Fax Number

One International Place, Suite 2700

Boston, MA 02110
Address

ajones@littler.com
E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on 9/6/2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ F. Arthur Jones II
Signature

September 6, 2013
Date

11/17/2011
SCC