CASE NO. 20-55106; 20-55107

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA TRUCKING ASSOCIATION, ET AL,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, ET AL.,

Defendants-Appellants,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 3:18-CV-02458-BEN-BLM
The Honorable Roger T. Benetez, Judge

BRIEF OF AMICUS CURIAE OF CALIFORNIA LABOR FEDERATION AFL-CIO, IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, proposed Amicus Curiae, California Labor Federation AFL-CIO, is an unincorporated association and is a labor organization.

Dated: March 18, 2020

Respectfully Submitted,

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I. IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The California Labor Federation, AFL-CIO ("Federation") is a labor federation that consists of more than 1,200 unions that represent 2.1 million union members in the manufacturing, retail, construction, hospitality, public sector, health care, entertainment and other industries. The Federation is dedicated to promoting and defending the interests of working people and their families for the betterment of California's communities. From legislative campaigns to grassroots organizing, its affiliates are actively engaged in every aspect of California's economy and government. The Federation's three main areas of work include: legislative action, political action and economic action. The Federation's achievements have included restoring daily overtime pay, raising the minimum wage, passing the nation's first paid family leave law and passing Assemb. B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019) ("AB 5").[2]

The Federation has also been centrally involved in legislative action within the three particular areas of law, which are discussed in this brief, along with their relationship to AB 5. Over the years, the Federation has participated in efforts to reform and modify these provisions of law: (1) unemployment insurance; (2) occupational health and safety; and (3) workers' compensation. It is therefore particularly familiar with the impact of these laws on California workers and the impact of AB 5 on these laws. The first provision is the California Unemployment

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[1] Amicus certifies that no party or party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person made a monetary contribution to support the preparation or submission of this brief.

[2] Cal. Lab. Code § 2750.3 and Cal. Unemp. Ins. Code § 621.

Insurance Code. The second area of law encompasses California's employment health and safety provisions contained in Division 5 of the California Labor Code, beginning with section 6300 of the California Labor Code through section 9104 and, in particular, the provisions regarding Occupational Safety and Health, beginning at section 6300 of the California Labor Code through section 6721. The third area includes the provisions for Workers' Compensation benefits, beginning at section 3200 of the California Labor Code through section 6208. These provisions, some of which have been part of California law since the early part of the twentieth century, are all now governed by AB 5.

These provisions, all of which the proposed Amicus is thoroughly familiar with, having been involved in both litigation over their enforcement and legislation to reform the provisions, will be governed by the outcome of this case. The Federation presents a focused analysis to compare the preemptive effect of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) ("FAAAA") on these three legal regimes as it impacts motor carriers, with which the Federation is very familiar.[3]

II. INTRODUCTION

Defendants-Appellants, Xavier Becerra, et al. ("Becerra") and the Intervenor-Defendant-Appellant, International Brotherhood of Teamsters ("Teamsters") argue that the Court erroneously focused upon the "ABC test" of AB 5, rather than analyzing the various statutes contained within the California Labor Code or the California Unemployment Insurance Code, all of which have coverage provisions that are governed by AB 5, section 2750.3 of the California

[3] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

Labor Code. This amicus brief reviews three statutory schemes that have been part of the background rules governing employers and employees (in some cases for more than a century) to determine whether they are subject to preemption by the FAAAA. We shall show that those three schemes, including: (1) unemployment insurance, (2) occupational safety and health laws applicable to drivers of vehicles not governed by the Federal Motor Carrier Safety Act and (3) workers' compensation, cannot reasonably be subject to FAAAA preemption. As we will show in this brief, when looking at those three historic statutory schemes, Congress could not have understood that the FAAAA would affect those laws' administration on a state level, which would be applicable to truck drivers, who are subject to the deregulation effects of the FAAAA.

Congress authorized the states to adopt their own eligibility standards for unemployment and their own health and safety standards to comply with federal OSHA. In fact, at the time Congress enacted FUTA in 1935 and the states shortly thereafter adopted unemployment compensation programs, many states used the ABC test to determine eligibility. As to OSHA, the FAAAA has an explicit safety exception and the FMSCA has a specific exception allowing states to regulate small vehicles. As a result, AB 5's adoption of the ABC test to determine eligibility for unemployment and coverage by OSHA could not be preempted. Workers compensation has historically been exclusively a state program and Congress could not have thought that deregulation by the FAAAA would free trucking companies of the obligations under state law to provide workers' compensation.

The unemployment insurance scheme in California was enacted before the Social Security Act of 1935 created the Federal Unemployment Tax Act, 26 U.S.C. § 3301–3311, ("FUTA"), which encouraged all states to implement unemployment insurance. Within a few years, all states enacted unemployment programs.

Unemployment insurance is thus a creation of federal law, but it is a famously considered a "federal/state partnership" in which the federal government allows each state broad application and administration of unemployment principles, subject to the basic restrictions contained in the federal law.[4] Thus, as we will show, the states have historically been allowed to implement any state law defining employee and/or independent contractor status to ensure that unemployment insurance is available to those who need it under the definitions of state laws. More particularly, we will show that the ABC test has historically been embedded in various state laws since states began enacting their own unemployment insurance laws in 1935 as a result of the enactment of FUTA. Congress could not have thought that deregulation, as provided for in the FAAAA, would have affected this famous federal/state partnership, which allows states to apply their own definition of employee status for purposes of providing (or denying) unemployment insurance.

The Supreme addressed this point emphatically in a case involving preemption:

> The voluminous history of the Social Security Act made it abundantly clear that Congress intended the several States to have broad freedom in setting up the types of unemployment compensation that they wish. We further noted that when Congress wished to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the States' freedom to legislate in this area.

N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 537-38 (1979)

Similarly, Congress enacted the federal Occupational Safety and Health Act ("OSHA") program in 1970. 29 U.S.C. §§ 651–678. The statute, however, allows

[4] Cal. Unemp. Ins. Code § 101. *Cf.* Cal. Unemp. Ins. Code § 100 (adopted in 1935 before federal FUTA).

states to adopt their own programs, subject to minimum requirements monitored by the Department of Labor ("DOL"). 29 U.S.C. § 667. California has adopted its own state plan, which has been approved by the DOL. Cal. Lab. Code §§ 6300–6720. However, there's another provision of the federal OSHA, which provides, in general, that OSHA does not apply where other federal statutes govern safety in the workplace. 29 U.S.C. § 653(b)(1).

The Federal Motor Carrier Safety Act ("FMCSA") governs the safety conditions of many, but not all, truck drivers. Thus, many truck drivers who drive in interstate commerce are governed by the FMCSA's safety regulations.[5] However, the FMCSA does not apply to drivers of smaller vehicles, which weigh less than 10,001 pounds. *See* 49 U.S.C. § 31101(1)(A). The right to regulate the safety of such drivers reverts back to state law for drivers of motor vehicles that weigh less than 10,001 pounds and for larger trucks that are not involved in interstate commerce.. Thus, California's OSHA has jurisdiction over many truck drivers in California who drive smaller vehicles.

Finally, we address workers' compensation laws in California. No one in Congress could have reasonably contemplated that the FAAAA would have preempted California's workers' compensation law, which has always broadly defined the employee/employer relationship. AB 5 changes that to some degree by applying the ABC test, but no one, including the California Trucking Association,

[5] The Secretary of Transportation issued a determination that California's meal and rest break provisions are preempted by the FMSCA (not the FAAAA). That determination is similarly limited to commercial motor vehicles ("CMV"). 83 Fed. Reg. 67470-80. The district court dismissed Plaintiffs' claim related to meal and rest breaks, E.R. 32-34 & n.3, noting that petitions for review were pending in *International Brotherhood of Teamsters, Local 2785 v. Federal Motor Carriers Safety Administration*, Nos. 18-73488, 19-70323, 19-70329, 19-70413 (9th Cir., filed May 30, 2019). This underscores our two points that first, there are many drivers exempted from the FMCSA safety rules, and second, each state's law must be considered separately.

could reasonably suggest that the FAAAA somehow preempts California's workers' compensation laws or the workers' compensation laws of any other state.

Thus, as we shall show, a closer examination of some of the laws affected by AB 5 demonstrate that preemption under the FAAAA could never have been contemplated by deregulation. This supports the argument of Becerra and the Teamsters that the Court erred in looking at the ABC test of employee status, which itself imposes no substantive obligations, rather than the statutes and legal regimes involved in the California Labor Code and California Unemployment Insurance Code.

III. SUMMARY OF ARGUMENT

Consistent with the argument of the Teamsters and Becerra, the Court erred in holding that, as to motor carriers, [6] the application of the ABC test to the California Labor Code, including workers' compensation and occupational health and safety, and the California Unemployment Insurance Code was wholesale preempted by the FAAAA.

A finer analysis focusing on three statutory regimes: (1) unemployment insurance, (2) California's OSHA as applied to drivers of smaller vehicles (weighing less than 10,001 pounds) and (3) workers' compensation, demonstrates that there is no reasonable basis to conclude that the FAAAA preempts those statutory schemes in California.

The first two regimes, unemployment insurance and occupational health and safety, are authorized and regulated by federal law and regulated by different

[6] We use the term "motor carrier" as used by the district court in this case. As we see, *infra*,the FMCSA contains a definition of "commercial motor carrier," which excludes smaller vehicles.

agencies, and grant states the authority to adopt their own eligibility tests for coverage. The third regime, workers' compensation, could not have been understood by Congress to be preempted by the deregulation effect of the FAAAA.

In summary, this case should be remanded to the district court for reconsideration that is based upon a more careful analysis of the impact of the use of the AB 5 employment test to decide the applicability of various and different statutory schemes provided for in the California Labor Code and the California Unemployment Insurance Code as to motor carriers—that is, whether the use of that test for purposes of those statutory schemes has the kind of effects on rates, routes, or services that the FAAAA preempts.

IV. ARGUMENT

A. EXERCISES OF THE STATE'S TRADITIONAL POLICE POWER ARE NOT PREEMPTED UNLESS THAT IS THE CLEAR AND MANIFEST PURPOSE OF CONGRESS

The determination of whether California unemployment insurance, occupational safety and health and workers' compensation laws are preempted must be guided by the presumption that state laws dealing with matters traditionally within a state's police powers are not preempted absent a clear statutory command. As the Supreme Court has instructed, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,'" courts must "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

This presumption against preemption is fully applicable here. State laws regulating the employment relationship or protecting worker health and safety are squarely within the state's traditional police power. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples."); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) ("[P]re-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State.").

The district court appeared to conclude that the presumption against preemption should not be applied where an express preemption provision is at stake (E.R. 10-11), but the Supreme Court has specifically rejected this argument where matters within a state's traditional police power are concerned. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 518, 523 (1992) (finding that "the presumption against the pre-emption of state police power regulations" was applicable where health and safety was concerned, and concluding that "in light of the strong presumption against pre-emption" in such fields, the Court was required to "narrowly construe the precise language" of a statutory provision that expressly pre-empted state law); *Medtronic*, 518 U.S. at 485 (noting the argument that the presumption against preemption "should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the scope of its intended invalidation of state law," but stating that the Court had previously "used a 'presumption against the pre-emption of state police power regulations' to support a narrow interpretation of such an express command in *Cipollone*" and concluding

that the presumption was appropriate even where an express preemption provision was concerned).

Accordingly, courts have routinely applied the presumption against the preemption of exercises of a state's traditional police powers in cases involving express preemption provisions. *See*, *e.g.*, *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 642-43 (9th Cir. 2014) (expressly discussing the presumption issue and finding that the express preemption provision did not apply to employment regulation); *Tillison v. Gregoire*, 424 F.3d 1093, 1098 (9th Cir. 2005) ("Although Congress clearly intended FAAAA to preempt some state regulations of motor carriers who transport property, the scope of the preemption must be tempered by the 'presumption against the pre-emption of state police power regulations.'"); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186-87 (9th Cir. 1998) (interpreting an express preemption provision providing that states "may not enact or enforce a law . . . related to a price, route, or service of any motor carrier" and requiring "a clear and manifest intent to preempt" California's Prevailing Wage Law because the law was an instance of state action in a field long regulated by the states) (emphasis omitted); *Massachusetts v. United States Dep't of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996) (determining that the Department of Transportation's interpretation of an explicit preemption provision to preempt state law could not be upheld under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, "in light of the strong presumption against federal preemption").

Similarly here, the determination of whether California law is an impermissible law on "price, route or service" must be guided by the understanding "that Congress does not cavalierly pre-empt state-law causes of action," especially where matters traditionally within a state's police powers are concerned. *Medtronic*, 518 U.S. at 485.

The tests must be applied on remand to each statutory regime involved, but it must be apparent that unemployment insurance programs, regulation of occupational safety and health, and workers' compensation programs (as well as the tests used to determine the coverage of those programs and regulations) cannot be preempted absent the clearest expression of Congressional intent to preempt such traditional state powers, particularly where they are authorized by other federal statutes.

Similarly, to the extent that the state laws at issue are authorized or controlled by federal law, the Court must harmonize those federal laws with the FAAAA's preemption provision. The harmonization is easy since, in the cases of both unemployment insurance and the safety of drivers excluded from the FMSCA coverage, the issues were left entirely to state law. So there is really no conflict between the FAAAA and FUTA or OSHA in that both delegate to states the determination of employee coverage. As the Supreme Court noted in reconciling two directly conflicting federal laws: "Perhaps worse still, the employees' theory runs afoul of the usual rule that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes.'" *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1626-27 (2018). The very general language of the FAAAA cannot override the specifics of FUTA and OSHA, particularly where there is a specific savings clause as to safety regulation by states of drivers.

B. UNDER THE TERMS OF THE FEDERAL UNEMPLOYMENT TAX ACT, WHICH ALLOWS EACH STATE TO ESTABLISH COVERAGE FOR UNEMPLOYMENT INSURANCE, THE ABC TEST HAS BEEN HISTORICALLY ALLOWED BY THE DEPARTMENT OF LABOR, AND THEREFORE THE FAAAA CANNOT BE INTERPRETED TO UPSET THAT RELATIONSHIP

The unemployment insurance system is a historic, precedent setting and enduring federal/state partnership. *See* U.S. Dep't of Labor, *Unemployment*

Compensation Federal-State Partnership (May 2019), https://oui.doleta.gov/unemploy/pdf/partnership.pdf, and U.S. Dep't of Labor, *Unemployment Insurance Directors' Guide: Essential Information for Unemployment Insurance (UI) Directors* 1 (Mar. 2020) https://oui.doleta.gov/unemploy/docs/ui_directors_Mar2020.pdf. Enacted as part of the New Deal, FUTA imposed a federal employment tax upon employers. The law has been amended many times since then with respect to benefits, taxation and other rules. *See* U.S. Dep't of Labor, *Chronology of Federal Unemployment Compensation Laws* (Nov. 9, 2018), https://oui.doleta.gov/unemploy/pdf/chronfedlaws.pdf (currently 117 pages of summary of such amendments).[7] In essence, under FUTA employers are taxed by the federal government, but that tax money is almost entirely returned to the states to administer unemployment systems, which must comply with minimal federal requirements. Within a few years after the enactment of FUTA, every state adopted an unemployment program in order to route the tax monies directly back to its citizens. California was one of those few states that acted before the federal enactment to establish an unemployment insurance program.[8] These state law provisions have been modified over the years and are now provided for in the California Unemployment Insurance Code as well as regulations, precedent benefit decisions and enforcement mechanisms.

[7] *See* Edwin E. Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21 (1945).

[8] *Gillum v. Johnson*, 62 P.2d 1037, 1041–42 (Cal. 1936). Note that the state act creating unemployment in California was approved by the federal government in conformity with the subsequent enactment of federal FUTA. *Id*. at 1043.

Under FUTA, the DOL, which administers the unemployment program, must approve within 30 days of submission any change in unemployment law by a state if the change meets the requirement of the statute. 26 U.S.C. § 3304(a). The Secretary of Labor must certify to the Secretary of the Treasury "each State whose law he has previously certified." 26 U.S.C. § 3304(c). The governor of each state must also be advised of the Secretary of Labor's approval. 26 U.S.C. § 3304(b). The DOL has recognized AB 5's impact on the administration of unemployment insurance in California. *See* U.S. Dep't of Labor, *Report on State Legislation* 8 (2019), https://oui.doleta.gov/unemploy/content/strpt/2019/strpt19-Cumulative.pdf. The DOL has not taken action and has not notified the governor of California that AB 5 "may not be certified." 26 U.S.C. § 3304(d).

Moreover, since the beginning, the DOL, Congress and the courts have recognized that the ABC test has been applied by many states to determine employee status. Sources demonstrate that when Congress enacted the Act, the DOL immediately recognized that the ABC test was widespread.[9] The Office of Unemployment Insurance ("OUI") of the Employment Training Administration of the DOL archives reviews of state laws. Those archives are available electronically from 1960.[10] In 1960 twenty-six states used a form of the ABC test:

[9] *See* Benjamin S. Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 Yale L. J. 76, 83-106 (1945) (analyzing the ABC test in twenty-three pages of text).

[10] The DOL has long recognized the problems of misclassification for the unemployment system. *See* U.S. Dep't of Labor, *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* (Feb. 2000), https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

> Most of the laws have a broader concept of what constitutes an employer-employee relationship. They have incorporated strict tests of what constitutes such absence of control by an employer over a worker that he would be classed as an independent contractor rather than an employee. In a few States the effect of these tests has been negated by court decisions holding that if the employer-employee or master-servant relationship is not established, the tests need not be applied. Twenty-six States provide that service for remuneration is considered employment unless it meets each of three tests:
>
> (A) the worker is free from control or direction in the performance of his work under his contract of service and in fact; (B) the service is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed; and (C) the individual is customarily engaged in an independent trade, occupation, profession, or business. Four States require the first test only: 2 States, the third; 2 States, any 1 of them; 7 States, the first and 1 other (table 4).

See U.S. Dep't of Labor, *Comparison of State Unemployment Insurance Laws* 6-8 (Jan. 1, 1960), https://oui.doleta.gov/unemploy/pdf/uilawcompar/1960/Jan/Coverage.pdf (table omitted).

While the three-pronged ABC test has been applied differently by different states—with some states having more liberal tests and others restrictive—the ABC test (as well as other tests applied by the states) has never been challenged by the Department of Labor as inconsistent with FUTA. The OUI annually summarizes the extent of coverage of state unemployment laws. Most recently, it again noted the range of coverage based on employee or independent contractor status under state law. *See* U.S. Dep't of Labor, *Comparison of State Unemployment Insurance Laws*1-4–1-7 (2019), https://oui.doleta.gov/unemploy/pdf/uilawcompar/2019/coverage.pdf. The breadth

of this range is consistent with the federal/state partnership and the grant of authority to states to make these types of determinations.

Neither the Department of Transportation, nor the Federal Motor Carrier Safety Administration is entrusted by statute with the oversight of the unemployment program. It is only the DOL that has such authority. 26 U.S.C. § 3304.

It is thus inconceivable that when Congress adopted the FAAAA by replicating airline deregulation to the trucking industry, it thought[11] that it would somehow interfere with unemployment insurance programs in the various states administered by the DOL.[12]

Two courts have addressed this issue and held that state unemployment insurance laws are not preempted by the FAAAA. *See Company v. Ind. Dep't of Workforce Dev.*, 86 N.E.3d 204 (Ind. Ct. App. 2017), and *Swanson Hay Co. v. Emp't Sec. Dept.*, 404 P.3d 517 (Wash. Ct. App. 2017). Neither court, however,

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[11] Congress borrowed the language of the FAAAA's preemption provision from the Airline Deregulation Act, which used "nearly identical" language. *Dilts*, 769 F.3d at 644. There is no evidence that between the time the airlines were deregulated and when the trucking industry became subject to deregulation, that the airlines escaped unemployment insurance, OSHA or workers' compensation.

[12] On remand, the district court may have to sort through various aspects of the California Unemployment Insurance Code. For example, California provides for Paid Family Leave ("PFL"). Cal. Unemp. Ins. Code §§ 3300–3308. PFL does not provide for job protection and PFL is only wage replacement. It allows employees to take time off with some income, particularly when employees are otherwise entitled to leave under federal and state statutes. Whether PFL is preempted will be another inquiry the district court needs to conduct because its impact on "routes, price or service" is non-existent since the program is funded by an employee tax; an employer does not have to pay anything.

considered the arguments above that FUTA preserves the rights of states to use any state law test for unemployment purposes, subject to DOL approval.

It is not to be ignored that the application of AB 5's test in the unemployment insurance program to motor carriers will have a negligible impact. This will not increase their federal FUTA tax burden, which is set by federal statute. Presently, that rate is 6.2% of payroll on the first $7,000 of income per employee, which is a maximum of $434. More directly, for federal tax purposes, the federal definition of employee applies, not the state definition.[13]

There is a very small tax known as the Employment Training Tax of 0.1% of payroll to a maximum of $7 per year. The application of that tax would depend on the state-law definition of "employee." To the extent that AB 5 requires reclassification of drivers as employees rather than independent contractors, that tax would amount to $700 per year for a company with 100 drivers, and the employer would benefit from the state training programs.

Similarly, to the extent that AB 5 requires reclassification of drivers (some of whom may have been misclassified to begin with under the *Borello* standard*, S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989) ("*Borello* standard") as employees rather than independent contractors, an employee payroll tax would apply to certain truck drivers. That tax, which equals 1% of payroll on the first $122,909 of payroll, funds state disability and Paid

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[13] These rates and explanations can be found at California Employment Development Department, *What Are State Payroll Taxes?* https://www.edd.ca.gov/Payroll_Taxes/What_Are_State_Payroll_Taxes.htm (last visited Mar. 15, 2020).

Family Leave. That tax is wholly paid by the employee but funds important benefits for employees. The employer's only expense in relation to this tax would be a negligible incremental cost in deducting those taxes, but that cost would be marginal since the employer would already be making this deduction for other employees such as clerical, sales, dock, dispatchers, management, etc.

This all demonstrates that the application of AB 5 has no effect on "price." It only benefits workers who receive additional coverage for state benefits, although the trucking company would be free to pay the FUTA tax on employees, but would not be required to do so if it chose to keep the drivers as independent contractors for FUTA purposes.

The classic understanding of the broad right of states to create unemployment programs subject to minimal federal control arose in a preemption case. In that case, the question was whether a state could provide unemployment benefits for striking workers without being preempted by the National Labor Relations Act, 29 U.S.C. §§ 141–191. The state of New York provided unemployment benefits after seven weeks of a strike or lockout. The employer argued this interfered with the rights of the employer to lockout or withstand a strike because the unemployment benefits prolonged the strike. The Supreme Court rejected this argument on the ground that the text of the statute and the legislative history showed that Congress intended to give states "broad freedom" to implement and administer unemployment insurance. The Court stated:

> Title IX of the Social Security Act of 1935 established the participatory federal unemployment compensation scheme. The statute authorizes the provision of federal funds to States having programs approved by the

> Secretary of Labor. In *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, an employee who was involuntarily deprived of his job because of a strike claimed a federal right under Title IX to collect benefits from the Ohio Bureau. Specifically, he contended that Ohio's statutory disqualification of claims based on certain labor disputes was inconsistent with a federal requirement that all persons involuntarily unemployed must be eligible for benefits.
>
> Our review of both the statute and its legislative history convinced us that Congress had not intended to prescribe the nationwide rule that Hodory urged us to adopt. *The voluminous history of the Social Security Act made it abundantly clear that Congress intended the several States to have broad freedom in setting up the types of unemployment compensation that they wish. We further noted that when Congress wished to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the States' freedom to legislate in this area.*
>
> The analysis in *Hodory* confirmed this Court's earlier interpretation of Title IX of the Social Security Act . . . and was itself confirmed by the Court's subsequent interpretation of Title IV of the Act . . . . *These cases demonstrate that Congress has been sensitive to the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria.* It is therefore appropriate to treat New York's statute with the same deference that we have afforded analogous state laws of general applicability that protect interests "deeply rooted in local feeling and responsibility." With respect to such laws, we have stated "that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244.(emphasis supplied)

N.Y. Tel. Co. v. N.Y. State Dep't of Labor, supra, 440 U.S. at 536-40 (1979) (emphasis added). The Court explained, "Congress has been sensitive to the

importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria." *Id.* at 539. Thus, harmonizing the two federal statutes, the Court held the eligibility disqualification could not be preempted by the NLRA.

There are two points here: (1) states are free to set their own standards regarding the structure of unemployment benefits and (2) courts should not read other federal statutes to preempt state definitions of eligibility for unemployment benefits, which Congress intended to leave to the states.

When analyzing unemployment insurance, there is a strong argument that the states, including California, have the right to apply any test, whether it's a strict or liberal test, to determine employee status, instead of independent contractor status for purposes of providing unemployment benefits. Those tests are subject to approval or disapproval by the Department of Labor, but the FAAAA does not regulate unemployment insurance.

C. BECAUSE THE FEDERAL MOTOR CARRIER SAFETY ACT EXPRESSLY ALLOWS CALIFORNIA TO REGULATE THE OCCUPATIONAL SAFETY AND HEALTH OF DRIVERS OF VEHICLES RATED LESS THAN 10,001 POUNDS, AND THE FAAAA HAS A SAFETY EXCEPTION, THE FAAAA CANNOT PRECLUDE CALIFORNIA'S APPLICATION OF HEALTH AND SAFETY PROVISIONS TO THOSE EMPLOYEES

Occupational safety and health illustrates another aspect of the error of the court below in determining that AB 5 could not be applied as a test, as opposed to reviewing each statutory provision that was affected by AB 5. AB 5 applies to California's occupational safety and health. *See* Cal. Lab Code §§ 6300–6720.

Under the federal OSHA, states are permitted to adopt their own programs, so long as they meet federal standards at a minimum. States are authorized to impose stricter standards, but not lesser standards. California has an approved state plan. U.S. Dep't of Labor, Occupational Safety & Health Admin., *State Plans*, https://www.osha.gov/stateplans/ (last visited Mar. 15, 2020). State plans are subject to review by the DOL, Occupational Safety and Health Administration. *See* U.S. Dep't of Labor, Occupational Safety & Health Admin., *Federal Annual Monitoring and Evaluation (FAME) Reports*, https://www.osha.gov/stateplans/famereport (last visited Mar. 15, 2020).

California has a very robust occupational safety and health program as contained in statutes, regulations and enforcement procedures. The application of OSHA is a little more complicated with respect to truck drivers. As noted above, the federal program expressly provides that where a different federal statute governs the health and safety of workers, that statute applies, and not federal OSHA. The Mine Safety and Health Act, 39 U.S.C. § 801, applies to mines, so that the federal OSHA Act does not apply, and thus California law also does not apply.

The FMCSA applies to many truck drivers who are engaged in interstate commerce. The FMCSA, however, does not reach the full extent of the Commerce Clause because it limits its application to those drivers who carry goods in interstate commerce. Some drivers of vehicles weighing more than 10,001 pounds, who are not engaged in interstate commerce are also exempt from FMCSA regulation. *See* 49 C.F.R. § 390.5 (definition of "interstate commerce" and

"commercial motor vehicle").[14] What affects a much larger number of drivers, is the rule that drivers of vehicles weighing *less* than 10,001 pounds are statutorily exempt from the FMCSA. A "commercial motor vehicle" is defined as:

> a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle (A)has a gross weight rating or gross vehicle weight of at least 10,001 pounds whichever is greater . . . .

49 U.S.C. § 31132(1)(A).

This group of drivers involves a significant segment of the truck driving population in California. Nothing in the record indicates how many there are, but there certainly are, by all accounts, many such drivers in smaller vehicles, particularly local pick-up and delivery drivers. They are highly visible to the public. Amazon, Instacart, DHL, UPS (not the package cars but smaller vans) and other drivers are delivering property on city streets all the time. They are, however, exempt from the FMCSA and, thus, revert to the federal OSHA, which allows California's approved state program. Federal OSHA agrees that OSHA applies. See, https://www.osha.gov/laws-regs/standardinterpretations/1989-07-10

Federal OSHA allows states to adopt their own provisions, including defining employee status. California had defined employee status with respect to independent contractors in *Borello* which defined a standard that is different than the federal standard. Nonetheless, the *Borello* standard and other standards applicable in other states have never been challenged when applied to determining

[14] *See* Fed. Motor Carrier Safety Admin., *FMCSA Regulations and Interpretations*, Part 390, Question 6, https://www.fmcsa.dot.gov/regulations/title49/section/390.3 (last visited Mar. 16, 2020).

employee status under state OSHA.[15] Since California OSHA applies to drivers of vehicles less than 10,001 pounds, California has the right, subject only to the approval by the DOL of its state program, to apply whatever standard of employment status it deems appropriate. Here, the standard is now controlled by AB 5, which applies throughout the Labor Code, not only to OSHA.

Under the federal OSHA statute, the Secretary of Labor must make a continuing evaluation of state plans. 29 U.S.C. § 667(f). Plans that are not in conformity with federal OSHA standards are subject to having their approval withdrawn. That has not happened. Specific oversight and review of state plans by the Secretary of Labor undermine any argument that the general language of the FAAAA preempts state law as to those drivers governed by OSHA and not the FMSCA.

This is furthermore assured by the FAAAA, which protects state safety regulations. The statutory language explicitly excludes several types of state laws and regulations:

> (1) General rule. Except as provided in paragraphs (2) and (3), 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 (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) [49 U.S.C. § 41713(b)(4)]) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> (2) Matters not covered.--Paragraph (1)--

[15] All the federal OSHA cases use the common law test, which is not used for state OSHA cases.

> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

49 U.S.C. § 14501(c)(1), (2).[16]

This plainly shows that the FAAAA was not meant to restrict state OSHA laws because of the express exemption for "safety regulatory authority."

Finally, as with unemployment insurance, the cost of compliance is negligible. Presumably, the trucking company requires that its drivers, whether characterized as employees or independent contractors, act safely and use safe equipment. All have to have appropriate licenses. Moreover, employers already must comply with California OSHA for the remainder of its employees. The incremental cost of a safety program for drivers is negligible.[17]

The injunction issued below extended to these drivers when California law applies and not federal law. Congress has deliberately exempted drivers of smaller vehicles from federal safety regulation under the FMSCA, and, as a result, it is error to impose FAAAA preemption.[18] On remand, the district court must consider this in determining whether any injunctive relief is permissible.

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[16] *See Cal. Dump Truck Owners Ass'n v. Davis*, 302 F. Supp. 2d 1139, 1144 (E.D. Cal. 2002) (size and weight restrictions are not preempted).

[17] A safe working environment reduces insurance costs and other business risks, so there may well be a net savings.

[18] *See Solus Indus. Innovations, LLC v. Superior Court*, 410 P,3d 32 (Cal. 2018) (federal OSHA does not preempt state law claims), *cert den.*, 139 S.Ct. 376 (2018).

D. THE FAAAA CANNOT PREEMPT THE WORKERS' COMPENSATION SYSTEM OF CALIFORNIA AND ALL OTHER STATES WHICH HAVE BEEN AN HISTORIC FORM OF STATE REGULATION OF EMPLOYMENT

States have had workers' compensation laws in various forms since the late part of the twentieth century. The first workers' compensation law was enacted in 1911 in California.[19] No federal law has preempted the general application of state workers' compensation laws. Federal OSHA itself preserves the right of states to have their own workers' compensation programs, unimpeded by OSHA's requirements. *See* 29 U.S.C. § 653(b)(4). Workers' compensation is part of California's Constitution. Cal. Const., art. XIV, § 4.

The same must be said about the FAAAA. There is no suggestion that Congress believed that the general principles of FAAAA would preempt California's (and all other states) workers' compensation laws, whether the *Borello* or the ABC test or any other test of employee status govern.[20]

Tthe trucking industry concedes that the *Borello* standard can apply. Indeed, *Borello* itself is a classic example of a dispute over whether employees were independent contractors. The California Supreme Court found that the

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[19] In 1911, California first provided for voluntary workers' compensation disability benefits (Roseberry Act). Then, in 1913, the Boynton Act was enacted establishing a compulsory workers' compensation system followed by "The Workman's Compensation Insurance and Safety Act of 1917"

[20] One court easily disposed of the claim that the FMCSA preempted a state workers' compensation program. *Black v. Dixie Consumer Prods., LLC*, 516 Fed. App'x 412, 418-19 (6th Cir. 2013). It would be even a more difficult argument that the FAAAA preempts all state worker compensation programs. As with the other two regimes reviewed in this brief, however, the district court on remand will have to consider workers' compensation insurance separately.

sharecroppers involved in *Borello* were not independent contractors, but employees, and Borello was required to have workers' compensation insurance. This principle equally applies to the application of the ABC test to drivers. Workers' compensation is wholly a state matter, not related to the interests of deregulation.

The logic of the Appellees' argument is not that California's workers' compensation law is preempted by the FAAAA because it applies the AB 5 test, rather than the *Borello* test. The logic is that *any* workers' compensation law applied to any motor carrier is preempted since it affects certainly price.

Indeed, if workers' compensation is preempted for drivers of commercial motor vehicles, then trucking companies that treat drivers as employees would be excused from providing for workers' compensation. Congress could not have thought deregulation would have created a complete escape for motor vehicle carriers from state workers' compensation laws. Injured workers would become a burden on the state to take care of their health care, lost wages and all the other benefits provided by a workers' compensation system. This point should prove that workers' compensation cannot be preempted by the FAAAA.

E. CONCLUSION

With respect to three regimes, there can be no reasonable argument that FAAAA preemption applies. Each of the statutory schemes must be analyzed differently and separately, given their interrelationship with federal law or even exclusion from federal law. To the extent that AB 5 results in more truck drivers being classified as employees, employers will be required to pay a minimal state

employment tax (but not FUTA), to make deductions for employee-paid unemployment taxes, to comply with OSHA regulations and, finally, to provide workers' compensation. Congress did not intend for the FAAAA to apply a simple increased cost (meaning increased marginal price increase) test. *See Mendonca*, 152 F.3d at 1189. If it is applicable this, like other arguments the Appellees may make, should be made and considered as applied to specific substantive obligations on remand.

The court's error in focusing on the ABC test, rather than looking at each of the substantive mandates that it makes applicable, is highlighted by focusing on these three state programs, which Congress clearly meant to leave to the states.

V. CONCLUSION

For the reasons suggested above, consistent with the position of the Teamsters and Becerra, the preliminary injunction should be vacated and the matter should be remanded to the district court for further consideration.

Dated: March 18, 2020

Respectfully Submitted

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FOR THE NINTH CIRCUIT

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