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Preemption as a Tool of Misclassification

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ABSTRACT

The Federal Aviation Administration Authorization Act (FAAAA)—which prohibits state and local regulation “related to a price, route, or service” of interstate trucking firms—is a statute with enormous legal and economic significance that operates largely in the dark. This Article seeks to bring the FAAAA to light, explain what is at stake in its interpretation, and argue against its application to state and local labor and employment law. Our primary aim is to spotlight—and challenge—the growing use of the FAAAA by the trucking industry as a strategy for misclassifying truck drivers. To do so, we situate industry’s mobilization of FAAAA preemption to shield labor practices from state and local regulation within the broader context of industry efforts to denunionize trucking firms. Building on a review of FAAAA doctrine, we focus particular attention on the recent case of *California Trucking Association v. Su*, in which the Ninth Circuit rejected the claim that the FAAAA preempted the California state law test for determining employee status (known as the *Borello* test). We argue that this case stands for a broader limiting principle: that the FAAAA only applies to state and local regulation that specifically targets trucking companies, and is not intended to—and should not—apply to general labor and employment schemes that cover trucking companies equally alongside other employers.

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INTRODUCTION

Preemption is a famously complex and esoteric legal doctrine. There is an enormous literature explicating and debating nuanced doctrinal points, such as how to interpret statutes that do not contain explicit preemption provisions,¹ the various types of preemption (conflict, obstacle, field),² the scope of local autonomy,³ the difference between preemption as a floor and ceiling,⁴ and whether exceptions to preemption exist and, if so, how far they extend.⁵ Despite its obscure status, many people are familiar with the basic concept of preemption in a federalist system, where there has to be a hierarchy of law in order for the system to function effectively and resolve disputes among the various tiers. The notion of federal supremacy—that the U.S. Constitution and laws enacted by the federal government control all others⁶—is compelling as a governing principle in a decentralized democracy. And, indeed, many are familiar with the preemptive force of major federal schemes such as immigration,⁷ labor,⁸ and environmental law.⁹

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1. See generally Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S. C. L. REV. 967 (2002); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004).
 2. See, e.g., Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).
 3. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Erwin Chemerinsky, *Empowering States When It Matters—A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).
 4. See, e.g., William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007); Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579 (2008); Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. REV. 1283 (2013).
 5. See, e.g., Michael Burger, *“It’s Not Easy Being Green”: Local Initiatives, Preemption Problems, and the Market Participation Exception*, 78 U. CIN. L. REV. 835 (2010).
 6. Federal supremacy is based on the Supremacy Clause of the U.S. Constitution, Art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . .”). See *Gibbons v. Ogden*, 22 U.S. 1, 82 (1824) (“The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of the acknowledged State powers, interfere with, or are contrary to the laws of Congress In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”).
 7. See generally Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Karl

Far fewer, however, understand the intricacies of federal preemption that purports to regulate a *single industry*, rather than an entire area of law. This is especially true when such preemption is contained in a statute that is as clumsily and confusingly titled as the Federal Aviation Administration Authorization Act, or FAAAA—a federal law that aims to preempt state and local regulation of interstate trucking (despite its name).¹⁰ Adding even more complexity is the nature of FAAAA preemption—by its own terms not a statute that preempts by reference to controlling federal law that occupies the field, but rather one that preempts by mandating *the absence of law*. In short, the FAAAA advances *preemption by deregulation*: explicitly prohibiting state and local regulation “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”¹¹

The literature on FAAAA preemption is sparse.¹² It remains an area of law within the primary domain of a small cadre of transportation industry lawyers who understand its technical features and are called on to defend trucking companies accused of *misclassification*—the practice of illegally classifying drivers as independent contractors, without the protection of labor and employment law, while in fact treating them as employees. The FAAAA, in this sense, is a statute with enormous legal and economic significance that operates largely in the dark.

Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939 (1995); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561 (2019); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008).

8. See generally Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011).
9. See generally Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879 (2008); Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237 (2000).
10. 49 U.S.C. § 14501(c)(1) (2012).
11. *Id.*
12. There are only a handful of academic articles on the Federal Aviation Administration Authorization Act (FAAAA), many of which are in trade-oriented journals. See, e.g., TJ England, *The Federal Aviation Administration Authorization Act: The Scope of Federal Preemption of State Motor Carrier Regulation*, 77 J. OF TRANSP. L., LOGISTICS & POL'Y 115 (2010); Brenna Elizabeth Moorhead, *Clean Air by Contract: American Trucking Associations, Inc. v. City of Los Angeles*, 65 PLAN. & ENVTL. L. 4 (2013); Michael Shirk, *Federal Preemption Under the Federal Aviation Administration Authorization Act of 1994*, 17 TEX. TECH. ADMIN. L.J. 57 (2015).

This Article, written in connection with a symposium honoring Ninth Circuit Judge A. Wallace Tashima, seeks to bring the FAAAA to light, explain what is at stake in its interpretation, and argue against its application to state labor and employment law. Its primary aim is to spotlight—and challenge—the growing use of the FAAAA by the trucking industry as a strategy for misclassifying truck drivers. To do so, we focus particular attention on the recent case of *California Trucking Association v. Su*,¹³ in which Judge Tashima, writing for a three-judge panel of the Ninth Circuit, rejected the claim that the FAAAA preempted California state law for determining employee status. We argue that this case stands for a broader limiting principle: that the FAAAA only applies to state and local regulation that *specifically targets* the “price, route, or service” of trucking companies. In other words, the FAAAA was not intended to—and should not—apply to general labor and employment schemes that cover trucking companies equally alongside other employers.

To advance that argument, we first situate the *California Trucking Association* decision in the context of the decades-long transformation of the port trucking industry and the struggle to challenge the misclassification of port truck drivers. Part I provides background on the port trucking industry and describes the recent effort by some trucking firms to weaponize the FAAAA in order to shield illegal practices from state regulatory review. Part II then lays out the doctrinal framework of the FAAAA, showing how it was only intended to preempt state and local laws directly targeting the trucking industry and imposing significant impacts on the “price, route, or service” of motor carriers. Part III then examines the *California Trucking Association* case in close detail, analyzing the way it reinterprets the preemption doctrine and adds appropriate limitations on industry’s sweeping claims. In Part IV, we reflect on the broader implications of the case, suggesting how it clarifies the scope of FAAAA preemption and redefines the nature of the free market in ways that push back against the “new preemption”: the deliberate mobilization of federal deregulatory law by business interests to facilitate practices at the heart of the so-called gig economy.

13. 903 F.3d 953 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1331 (2019).

I. THE BACKGROUND: PREEMPTION IN THE PORT TRUCKING INDUSTRY

The trucking industry used to be among the most heavily unionized industries in the United States.¹⁴ This was a product of the post–New Deal regulatory regime built upon two key legal features: strict federal regulation of interstate trucking and robust labor rights set forth by federal labor law.

The original Motor Carrier Act, supported by the nascent American Trucking Associations (ATA), was passed in 1935 as part of the New Deal. The Act was designed to regularize interstate trucking as an industry of vital economic importance. It did so by placing interstate common carriers (those shipping the commercial and residential goods of other people and companies, not their own) under the authority of the Interstate Commerce Commission (ICC), which made three broad changes.¹⁵ The first was to strictly define the routes that trucks were permitted to travel in hauling cargo and what type of cargo could be hauled across which routes.¹⁶ The second change was to significantly limit entry into the market by requiring new carriers to apply for and receive certificates of public convenience and necessity that “were issued only where routes were not previously being served and if entry would not economically damage existing carriers.”¹⁷ The third change was to make rate setting by trucking companies exempt from antitrust laws.¹⁸

Although the Motor Carrier Act did not cover the entire trucking industry (private and local carriers were not included, and the transportation of some commodities, like agriculture, was exempt), regulated carriers’ operating revenues far exceeded those of exempt carriers, suggesting that the majority of the industry fell under the Act’s provisions.¹⁹ Because the Act restricted entry, the common carrier market consisted of a relatively small number of companies with a large numbers of drivers. And because rates were fixed at high levels, regulated firms were able to earn what economists called “monopoly returns.”²⁰

14. RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT 51 (2006).

15. Shipping Act, ch. 498, 49 Stat. 543 (1935).

16. Barry T. Hirsch, *Trucking Regulation, Unionization, and Labor Earnings: 1973–85*, 23 J. HUM. RESOURCES 296, 298 (1988).

17. *Id.*

18. *Id.* The creation of rate bureaus was exempted from antitrust by the Reed-Bullwinkle Act.

19. *Id.* at 297–98.

20. *Id.*

For truck drivers, this meant that large, lucrative trucking firms could be—and were—unionized.²¹ This was partly because of the enhanced bargaining power that drivers gained from ICC regulation; but it was also a result of the structure of federal labor law, which permitted the International Brotherhood of Teamsters to effectively strike trucking terminals and rely on boycotts by workers in other supply chain industries (like longshoremen) to effectively take wages out of competition—ultimately winning a National Master Freight Agreement in 1964.²² As a result, by the 1960s, truck drivers in the United States were among the most heavily unionized in the country and enjoyed widespread benefits and job security.²³ Indeed, according to Michael Belzer, in the 1970s, the trucking industry was almost completely unionized.²⁴

This changed dramatically starting in the late 1970s, when the ICC began to loosen regulations on the trucking industry across the board—expanding exemptions, relaxing barriers to entry, and rescinding limits on the number of trucking firm customers.²⁵ These deregulatory steps were codified and expanded in the Motor Carrier Act of 1980, which effectively stripped away all of the regulations that had constrained interstate trucking operations up to that point, including rate and route restrictions.²⁶ The result was that what had been a carefully controlled, heavily unionized industry reverted to the “law of the jungle.”

The deregulation of trucking was part of broader deregulation of transportation in the United States. In this regard, the trucking industry model followed that of the airline industry, which was deregulated by the Airline Deregulation Act (ADA) in 1978, when Congress determined that “maximum reliance on market forces” would “favor lower airline fares and better airline service.”²⁷ In order to “ensure that the States would not undo federal deregulation with regulation of their own,” the ADA included a provision stating that “no State . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier.”²⁸

21. As Hirsch notes, this was facilitated by the ICC, which set rates as a ratio of operating costs—to which labor was among the most significant—to revenues. *Id.* at 299. Accordingly, labor increases could largely be passed through as higher rates. *Id.*

22. *Id.*

23. See MILKMAN, *supra* note 14, at 51–52.

24. MICHAEL H. BELZER, SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION 107 (2000).

25. Hirsch, *supra* note 16, at 299.

26. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

27. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008).

28. *Id.* at 368 (citation omitted).

To protect trucking deregulation from contrary state or local standards, Congress passed, and President Bill Clinton signed, the FAAAA in 1994. In addition to subsuming the ADA, the FAAAA included new language—modeled precisely on the ADA—that declared that a “State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”²⁹

As a result of trucking deregulation, strengthened by the preemptive force of the FAAAA, there was a tectonic market shift in the trucking industry. Within a short period of time, the industry began to fragment. Although interstate carriers in the Less-than-Truckload market, such as Knight and Swift Transportation, remained unionized, smaller regional companies began to proliferate, particularly around large ports of entry, through which an increasing volume of cargo flowed.³⁰ As deindustrialization shifted the U.S. market toward growing reliance on manufactured imports, trade from China and other Asian countries increased exponentially, clogging west coast ports—particularly the Ports of Los Angeles and Long Beach—with cargo.³¹ Innovations in logistics technology, especially the creation of intermodal transport facilitated by standardized containers, positioned short-haul or “drayage” trucking as a critical link in the global supply chain: responsible for transporting containers from ocean liners to railheads or regional warehouses. The increase in demand for drayage carriers produced an explosion in unregulated supply comprised primarily of small non-asset based firms that operated almost entirely on an independent contractor model.³² This meant that drayage firms, instead of buying trucks and hiring drivers as employees to operate them, contracted out with drivers. These drivers had to acquire their own trucks, typically through the secondary market, and pay all the expenses of business operation, from insurance to maintenance to

29. 49 U.S.C. § 14501(c)(1).

30. See BELZER, *supra* note 24, at 109; see also MILKMAN, *supra* note 14, at 98–99 (“[W]hile unions retained a foothold in long-distance trucking, many other segments of the industry—among them the short-haul trucking that served shippers in the massive Los Angeles–Long Beach port—soon became dominated by nonunion owner-operators who labored long hours for relatively low pay without any of the extensive fringe benefits that had once been standard features of Teamster contracts Costs and risks were increasingly transferred to workers in the deregulated environment as small firms contracting work out to owner-operators began to replace the larger, unionized trucking companies that had once dominated the industry.”).

31. SCOTT L. CUMMINGS, *BLUE AND GREEN: THE DRIVE FOR JUSTICE AT AMERICA’S PORT* 35, 38 (2018).

32. Studies have placed the percentage of drivers who are independent contractors at nearly 90 percent. *Id.* at 48.

taxes to gas—thereby permitting firms to reduce their costs. In addition, and perhaps more importantly, the independent contractor model negated unionization since only statutory employees are permitted to organize unions. Independent contractors are, legally speaking, designated as business owners and thus precluded from organizing in restraint of trade under federal antitrust law.³³

This shift toward formally independent-owner drivers in the port trucking industry set up a legal conflict that has roiled the industry for the past twenty years. Many port drivers have claimed that they are independent contractors in name only—that, in fact, trucking firms exert near total control over every aspect of their work. Firms tell drivers what cargo to haul, when to pick it up, and where to take it; they have often required drivers to label their trucks with firm logos, and even made the drivers wear firm uniforms; some firms have also made drivers agree not to haul cargo for any competitor firms. In short, drivers have asserted that they are systematically misclassified as independent contractors when, in fact, they are employees illegally deprived of the protections that status affords.³⁴

In the early 2000s, there were roughly 16,000 truck drivers at the Ports of Los Angeles and Long Beach, working an average of fifty-six hours per week for less than ten dollars per hour after factoring in their expenses.³⁵ They were, in effect, low-wage workers laboring in noxious conditions—owners of dirty diesel trucks, on average seventeen years old, which filled truck cabs with pollution that increased “health risks by up to 2,600 excess cancers per million drivers.”³⁶ It was in this context that labor leaders began devising a plan to address the misclassification of port truck drivers and thus solve the double dilemma of labor precarity and the air pollution to which it was linked. The labor movement’s effort was motivated less by the size of the port trucking industry, which was modest, than by its strategic significance: a critical “choke point” in the global supply chain that ran from East Asian manufacturers to Amazon warehouses and Walmart shelves.³⁷ Organizing port trucking was therefore viewed as the first step toward organizing the entire the supply chain. The Ports of Los Angeles and Long Beach were significant targets: Together they formed the largest port complex in the United States, and one of the largest in the world, through which

33. See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016).

34. REBECCA SMITH ET AL., *THE BIG RIG: POVERTY, POLLUTION, AND THE MISCLASSIFICATION OF TRUCK DRIVERS AT AMERICA’S PORTS* 13–14, 21–22 (2010).

35. CUMMINGS, *supra* note 31, at 48–49.

36. *Id.* at 49.

37. *Id.* at 300.

flowed approximately a half trillion dollars in cargo per year and which collectively accounted for one million jobs in Southern California.³⁸

In labor's quest to organize drivers, the first major conflict was around the Port of Los Angeles's Clean Truck Program, which was passed in 2008 after a two-year, labor movement-led campaign. Addressing misclassification, L.A.'s Clean Truck Program—codified in a concession agreement between the port and trucking companies—contained a provision that required trucking companies to classify their drivers as employees, not independent contractors, to gain legal access to the ports as concessionaires.³⁹ That employee provision was immediately challenged by the ATA as part of a broader lawsuit contesting the validity of the entire Clean Truck Program, titled *American Trucking Associations, Inc. v. City of Los Angeles*.⁴⁰ After a rollercoaster ride up and down the Ninth Circuit, the appeals court held in 2011 that the employee provision was preempted by the FAAAA. The court specifically noted that the employee provision did not fall within the market participant exception to preemption, which permits a government agency to impose conditions in its proprietary capacity, since the Los Angeles port sought to “impact third party behavior unrelated to the performance of the concessionaire's obligations to the Port”⁴¹—that is, in the court's view, the port sought to restructure trucking firm relationships with drivers in order to facilitate unionization.

Building on the success in using the FAAAA to invalidate the labor centerpiece of L.A.'s Clean Truck Program, trucking industry actors initiated an affirmative project to weaponize the FAAAA—using it not simply to block specific local rules, like the Clean Truck Program, but to broadly mobilize FAAAA preemption to thwart the application of *any* state labor and employment law to port truck drivers. In doing so, the industry asserted the sweeping argument that port truck drivers should be denied the protections of such laws because they came within the FAAAA's deregulatory scope.⁴²

38. *Id.* at 17. For recent figures, see PORT OF L.A., FACTS & FIGURES 2018, <https://kentico.portoflosangeles.org/getmedia/fe3515ee-309e-47b3-83ad-b09d58edec67/2018-facts-figures> [<https://perma.cc/LD62-XYL6>]; *Facts at a Glance*, PORT OF LONG BEACH, <http://www.polb.com/about/facts.asp> [<https://perma.cc/FSN5-B8AJ>].

39. CUMMINGS, *supra* note 31, at 152–53.

40. *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 660 F.3d 384 (9th Cir. 2011), *rev'd in part*, 569 U.S. 641 (2013). The lawsuit was also filed against the Port of Long Beach, which had instituted a similar, though not identical, Clean Truck Program—one that lacked the crucial employee provision. The Port of Long Beach eventually settled the lawsuit and dropped out. CUMMINGS, *supra* note 31, at 162.

41. *Am. Trucking Ass'ns*, 660 F.3d at 408.

42. CUMMINGS, *supra* note 31, at 320–21.

The first test of this theory technically preceded the *American Trucking Associations* case. In one of his final acts as California Attorney General, Jerry Brown brought lawsuits against five port trucking companies under the state's Unfair Competition Law (UCL), which prohibits any "unlawful, unfair or fraudulent business act or practice."⁴³ The Attorney General's basic claim was that the companies violated the UCL by misclassifying drivers and thus illegally gained cost advantages by not paying employment taxes, driver business expenses, and minimum wage and overtime. One of the defendant companies, Pac Anchor Transportation, argued in response that the UCL claim "related to a price, route, or service" of the company and therefore was preempted by the FAAAA.⁴⁴ On appeal from a ruling in Pac Anchor's favor, the California Supreme Court rejected the preemption claim, holding that, because the FAAAA does not preempt generally applicable employment law, it could not preempt the UCL, which operates by using violations of employment law as predicates for the unfair competition claim.⁴⁵ The U.S. Supreme Court denied certiorari.

After the *American Trucking Associations* case invalidated the employee provision of the Clean Truck Program, there was a groundswell of private litigation challenging the misclassification of port truck drivers. Several class and mass action lawsuits were filed by private law firms, claiming damages—primarily back pay and unreimbursed business expenses—for misclassified drivers. In 2012, a group of plaintiffs' lawyers filed a class action against Shippers Transport Express (*Taylor v. Shippers Transport Express, Inc.*).⁴⁶ In that case, defendants Shippers and its parent company, SSA Marine, moved for summary judgment on the ground that the plaintiffs' labor claims were preempted by the FAAAA.⁴⁷ The district court, in a short opinion, dismissed that claim in light of *Dilts v Penske Logistics, LLC*, in which the Ninth Circuit rejected a similar argument that California meal and rest break laws were preempted by the FAAAA.⁴⁸

In addition to class action suits, by 2017 over 800 individual drivers had filed wage claims against trucking firms with the California Division of Labor Standards Enforcement (DLSE), which has authority to issue orders for back pay

43. CAL. BUS. & PROF. CODE § 17200 (West 2019); see also CUMMINGS, *supra* note 31, at 190–91.

44. *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal. 4th 772, 782–87 (2014).

45. *Id.*

46. No. CV 13–02092, 2014 WL 7499046 (C.D. Cal. Sept. 30, 2014).

47. *Id.*

48. *Id.* at *8.

and other remedies for employees whose labor rights have been violated.⁴⁹ Drivers won nearly all of these claims, collecting more than \$35 million in judgments.⁵⁰ Before issuing an award in wage claim actions by port truck drivers, the Labor Commissioner must first determine that the drivers are, in fact, misclassified employees under the state law test for employee status.⁵¹ In 2016, port trucking industry leaders sought to shut down the growing number of wage claims by bringing an affirmative FAAAA preemption lawsuit against the DLSE's application of California state employment law to port drivers. Specifically, the California Trucking Association filed suit against the Labor Commissioner, Julie Su, arguing that the DLSE was preempted by the FAAAA from using the state common law standard for determining whether port truck drivers were misclassified employees.

The *California Trucking Association* case—which we dissect in Part III—struck at the heart of the state's power to define illegal misclassification through enforcement of its own employment law. As such, it represented the culmination of the extreme preemption theory put forward by the trucking industry: that the FAAAA completely shielded the industry's illegal employment practices from *any* state legal review. This extreme theory relied on a reading of FAAAA precedent that, industry argued, required *preemption by deregulation*: the elimination of any state or local law impinging on what industry characterized as the free play of market forces. At issue in this extreme theory was precisely what deregulation meant. Given that almost any state or local law would impact a company's "price, route, or service," did it literally mean that there could be no law governing trucking industry behavior outside of contract? Or did deregulation incorporate baseline state and local law rules, like minimum wage and overtime laws, such that FAAAA preemption only applied to laws singling out the trucking industry for special restrictions? The answers, while having immediate consequences for port truck drivers, ultimately have implications far beyond the FAAAA—raising fundamental questions about which rules define what counts as the "free market" in a multilevel federal system.

II. THE DOCTRINE: FAAAA PREEMPTION BY DEREGULATION

In order to address questions about the meaning of deregulation, and before examining the *California Trucking Association v. Su* case, this Part lays out the

49. CUMMINGS, *supra* note 31, at 269.

50. *Id.*

51. *Id.* at 308.

doctrinal framework of FAAAA preemption. As Part I demonstrated, preemption is an assertion of exclusive federal power that can render invalid “state law that conflicts with federal law.”⁵² Using the FAAAA, trucking companies have sought to limit state law protections for port truck drivers. Central to their argument is the FAAAA’s express preemption provision, which prohibits any state and local law or “other provision having the force and effect of law *related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.*”⁵³ This text, trucking companies have claimed, broadly preempts laws affecting the trucking industry—completely shielding illegal conduct from legal review.

Legal battles shaping the trucking industry’s labor practices have risen and fallen on courts’ interpretation of one key phrase: “related to.” This Part reviews the legal genealogy of this apparently simple phrase in FAAAA jurisprudence. Cases arising in the context of airline deregulation under the ADA laid the groundwork for the Supreme Court’s jurisprudence on FAAAA preemption, establishing the framework for determining when state laws impermissibly regulate price, route, or service. When the Supreme Court first explicitly considered FAAAA preemption in 2008, it applied the ADA framework to establish a “related to” test.⁵⁴ While these cases suggest that both the ADA and FAAAA broadly preempt state law, the Court has also established some limitations. Specifically, state laws related to price, route, or service in “too tenuous, remote, or peripheral a manner” are not preempted by the FAAAA.⁵⁵

Following this precedent, the Ninth Circuit has upheld the application of prevailing wage law, a local antidiscrimination ordinance, and meal and rest breaks laws,⁵⁶ emphasizing the tenuous or peripheral connection between those laws and trucking “price, route, or service.” In *Dilts v. Penske Logistics, LLC*, mentioned in Part I, the Ninth Circuit reconciled California’s meal and rest break laws with the FAAAA by characterizing them as “background rules for almost *all* employers” that neither bind motor carriers nor freeze into place “prices, routes, or services.”⁵⁷ *Dilts* and other ADA and FAAAA preemption precedents are essential to the Ninth Circuit’s reasoning in *California Trucking Association v. Su*

52. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992).

53. 49 U.S.C. § 14501(c)(1) (emphasis added).

54. *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 370–71 (2008).

55. This principle comes from *Rowe. Id.* at 375.

56. *Cal. for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998); *Air Transp. Ass’n of Am. v. City & Cty. of S.F.*, 266 F.3d 1064 (9th Cir. 2001); *Dilts v. Penske Logistics LLC*, 769 F.3d 637 (9th Cir. 2014).

57. *Dilts*, 769 F.3d at 647.

and, in this Part, are reviewed in detail. Doing so reveals an arc of doctrinal development bisected by the Supreme Court's decision in *Rowe v. New Hampshire Motor Transport Association*, the first case in which the Supreme Court directly addressed the FAAAA. Prior to *Rowe*, case law in the Ninth Circuit addressing the FAAAA's "related to" clause carved out exemptions from preemption for state laws authorized by traditional police powers that were only tangentially connected to "price, route, or service." After *Rowe*, courts shifted to exempting state laws expressing generally applicable rules that did not directly target the trucking industry.

A. "Related to" Test in the Supreme Court

The Supreme Court has long made clear that the scope of federal preemption is tempered by respect for state and local lawmaking.⁵⁸ Thus, in any preemption analysis, courts must precisely "identify the domain expressly preempted,"⁵⁹ in accordance with the "two cornerstones of . . . pre-emption jurisprudence."⁶⁰ First, because "the purpose of Congress is the ultimate touchstone,"⁶¹ courts must discern whether Congress in fact sought to preempt subfederal lawmaking when enacting federal legislation. Second, the Supreme Court has made clear that there is a presumption against federal preemption of "historic police powers of the States," "particularly" when Congress "legislate[s] in a field which the States have traditionally occupied."⁶² When state police powers are at stake, courts must rule against preemption without finding a "clear and manifest purpose of Congress" to override state law.⁶³

Courts apply ordinary statutory interpretation principles to discern what precisely is preempted by federal law, looking to the text, structure, and purpose of the federal statute at issue. The Supreme Court has acknowledged, however, that the plain meaning of statutes like the FAAAA, which expressly preempts state

58. See, e.g., *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) ("Our analysis of this problem must be guided by respect for the separate spheres of governmental authority preserved in our federalist system. Although the Supremacy Clause invalidates state laws that 'interfere with, or are contrary to the laws of Congress . . .,' *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824), the 'exercise of federal supremacy is not lightly to be presumed,' *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 203 (1952).").

59. *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013).

60. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

61. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted).

62. *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

63. *Id.*

laws “related to” the statute’s covered area, often provide little interpretive guidance. Indeed, the phrase “related to” is “broad” in meaning and “deliberately expansive.”⁶⁴ As Justice Antonin Scalia once lamented, “everything is related to everything else.”⁶⁵ Because of this breadth, when interpreting the FAAAA, the Supreme Court has emphasized that the scope of “related to” is “massively limit[ed]” by the latter half of the statute’s express preemption provision, which makes clear that preemption only applies to state laws “related to” motor carrier price, route, or service “with respect to the transportation of property.”⁶⁶ Thus, “the breadth of the words ‘related to’ does not mean the sky is the limit.”⁶⁷ For this reason, the FAAAA, for instance, would not apply to state or local laws regulating waste hauling by trucks. Yet defining the outer boundary of “related to” in the context of the trucking industry’s interstate transportation of property has proven to be a significant challenge in which the core dilemma is how much respect to give state laws setting the rules of the marketplace.

Until the Supreme Court’s decision in *Rowe v. New Hampshire Motor Transport Association* in 2008, FAAAA preemption analysis relied on cases interpreting the ADA. Therefore, it is important to start by examining these cases. In *Morales v. Trans World Airlines Inc.*, the Court held that state regulation of airfare advertisements through consumer protection statutes was preempted by the ADA.⁶⁸ The Court looked to case law interpreting the Employee Retirement Income Security Act of 1974 to establish the standard that the ADA preempts state law “having a connection with, or reference to, airline ‘rates, routes, or services.’”⁶⁹ Evaluating state efforts to enforce guidelines regulating airline fare advertising promulgated by state Attorneys General, the Court reasoned that the “obligations imposed by the guidelines would have a significant impact upon the airlines’ ability to market their product, and hence a significant impact upon the fares they charge.”⁷⁰

64. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992) (referencing cases interpreting the Employee Retirement Income Security Act (ERISA) preemption provision to interpret the Airline Deregulation Act, the text of which is nearly identical to that of the FAAAA preemption provision).

65. *Cal. Div. of Lab. Standards Enft v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) (referencing the ERISA preemption provision, which superseded state laws that “relate to” employee benefit plans).

66. *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 255, 261 (2013) (emphasis in original).

67. *Id.* at 260.

68. *Morales*, 504 U.S. at 391.

69. *Id.* at 384.

70. *Id.* at 390.

This argument was two-pronged. First, the Court reasoned that restrictions on advertising would make it more difficult for consumers to identify the lowest cost seller.⁷¹ Second, the Court stated that the guidelines were not aligned with the airlines' business model, which required selling as many seats as possible at higher prices to business travelers—whose purchases were “insensitive to price”—and then selling the remaining seats at lower prices to consumers whose “demand is very price sensitive.”⁷² This model required airlines to restrict the number of lower-priced seats at the same time that they aggressively advertised them.⁷³ The state guidelines at issue undermined that model by requiring that an advertised fare “be available in sufficient quantities to ‘meet reasonably foreseeable demand’ on every flight on every day in every market in which the fare is advertised,” thereby mandating that airlines sell a fixed number of tickets at a fixed price.⁷⁴ The Court held that such a constraint on airline pricing was “forbidden” under the ADA.

Despite this conclusion, the Court was careful to note that “some state actions may affect airline fares in too tenuous, remote, or peripheral a manner” to have preemptive effect.⁷⁵ The Court declined, however, to identify which state actions would be sufficiently peripheral, noting only that “the present litigation plainly does not present a borderline question.”⁷⁶ In a subsequent case, *American Airlines v. Wolens*, the Court held that the ADA preempted plaintiffs' claims challenging American Airlines' retroactive changes to its frequent flyer program under the Illinois Consumer Fraud Act. Following *Morales*, the Court held that the act attempted to “guide and police airline marketing practices,” and was thus preempted, but stressed that the ADA did not preempt claims in which plaintiffs sought recovery for airlines' breach of contract terms to which the parties themselves entered.⁷⁷

When the Court took on the task of interpreting the FAAAA's express preemption for the first time in *Rowe v. New Hampshire Motor Transport Association*, the Justices applied the framework developed in *Morales* and *Wolens*. At issue in *Rowe* was a Maine statute requiring state-licensed tobacco shippers to use trucking carriers that provided a recipient verification service

71. *Id.* at 388–89.

72. *Id.* at 389.

73. *See id.*

74. *Id.* at 387–90.

75. *Id.* at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

76. *Id.* (quoting *Shaw*, 463 U.S. at 100 n.21).

77. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995).

confirming the buyer was of legal age and imposing civil liability on the carrier for delivering tobacco to unlicensed buyers; a carrier was “deemed to know that a package contain[ed] a tobacco product” if the package was so marked or received from a retailer on a list kept by the state. Citing *Morales* (and noting that the preemption provision of the FAAAA derived from the ADA), the Court set forth four principles of preemption: (1) “state enforcement actions having a connection with, or reference to carrier rates, routes, or services are pre-empted;” (2) “such pre-emption may occur even if a state law’s effect on rates, routes, or services is only indirect;” (3) “it makes no difference whether a state law is consistent or inconsistent with federal regulation;” and (4) “pre-emption occurs at least where state laws have a significant impact related to Congress’s deregulatory and pre-emption–related objectives.”⁷⁸

Applying these principles, the Court held that the Maine statute was indeed preempted by the FAAAA, resting on three main grounds. First, by forbidding state-licensed tobacco shippers from using delivery services that did not offer a recipient verification service, there was a clear nexus between the state regulation and carrier services.⁷⁹ Second, while the Court conceded that the connection was indirect (because the statute regulated shippers rather than carriers), the effect of the regulation forced trucking companies to offer a service (recipient verification) that “the market does not now provide (and which the carriers would prefer not to offer).”⁸⁰ Third, requiring carriers to offer this service would have a “significant impact” related to Congress’s deregulatory objectives because it substituted “governmental commands for ‘competitive market forces’ in determining . . . the services the motor carrier will provide.”⁸¹ As in *Morales*, in which restrictions on airline advertising would “bind” airlines to certain pricing, the Maine law would “freeze in place” a particular set of services.⁸² The long term effect, in the Court’s view, would be a “patchwork” of state laws, rules, and regulations inconsistent with the goal of deregulation.⁸³

In *Rowe*, the Court also rejected Maine’s argument that the FAAAA did not preempt public health laws, dismissing the notion that the FAAAA created an exception for a specific area of state regulation, no matter how important.

78. *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 370–71 (2008) (internal citations, quotations, and emphasis omitted) (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 384–90 (1992)).

79. *Id.* at 371.

80. *Id.* at 372.

81. *Id.* at 371–72 (quoting *Morales*, 504 U.S. at 378, 390).

82. *Id.* at 373.

83. *Id.*

However, the Court stressed that not all state public health regulation would be preempted by the FAAAA. For instance, “state regulation that broadly prohibits certain forms of conduct and affects . . . truck drivers only in their capacity as members of the public” was outside the purview of the FAAAA.⁸⁴ Returning to *Morales*, the Court also reiterated that “state laws that affect rates, routes, or services in ‘too tenuous, remote, or peripheral a manner’” would not be preempted.⁸⁵ Moreover, the Court emphasized that only those laws with a “*significant impact*” on price, route, or service are “forbidden.”⁸⁶

The Court has only considered FAAAA preemption on two other occasions. In *Dan’s City Used Cars, Inc. v. Pelkey*, the Court focused on whether state regulations related to price, route, or service “with respect to the transportation of property.”⁸⁷ In *Dan’s City*, the Court held that state laws regulating the storage of towed vehicles did “not sufficiently connect[] to a motor carrier’s service with respect to the transportation of property to warrant preemption.”⁸⁸ While recognizing *Rowe*’s guiding principles, the Court held that the transportation of property required a nexus to interstate commerce that towing did not provide.⁸⁹ In *American Trucking Associations, Inc. v. City of Los Angeles*, the Court focused its FAAAA preemption analysis on whether the local rules at issue on appeal had “the force and effect of law.”⁹⁰ In the Supreme Court phase of this lengthy case, described in Part I, the Court was specifically asked to review the Los Angeles Board of Harbor Commission’s Clean Truck Program, which modified municipal law governing operation of the port to require terminal operators to deny drayage trucking firms access unless they had entered concession agreements that, among other things, required compliance with placard and off-street parking rules. Violations of these rules were a misdemeanor “punishable by a fine of up to \$500 or a prison sentence of up to six months.”⁹¹ These criminal penalties proved to be dispositive. The Court concluded that in wielding “the hammer of the criminal law,” the government had acted “with the force and effect of law.”⁹² Although this decision did not specifically address whether the municipal rules “related to” carrier price, route,

84. *Id.* at 375.

85. *Id.*

86. *Id.*

87. 569 U.S. 251, 255 (2013).

88. *Id.* (emphasis omitted).

89. *Id.* at 261–62.

90. 569 U.S. 641, 649–52 (2013).

91. *Id.* at 645.

92. *Id.* at 651–52.

or service, in finding that the placard and parking rules were preempted, the Court presumed them to be so. The Court also presumed that the Clean Truck Program regulated interstate trucking and thus came within the FAAAA's scope. However, in his concurring opinion, Justice Clarence Thomas raised a question about whether drayage trucks, once they left the port (where they were "undoubtedly" within the "channels of interstate commerce"—for that is what a port is), would even be covered by the FAAAA, stating that it was "doubtful whether Congress has the power to decide where a drayage truck should park once it has left the port or what kind of placard the truck should display while offsite."⁹³

While *Dan's City* and *American Trucking Associations* further defined the scope of FAAAA preemption, they did not grapple with the most challenging boundary question: whether federal deregulation preempted state and local labor laws of general applicability. In the Ninth Circuit, however, this question has received fuller treatment. Accordingly, the next Subpart explains how the Ninth Circuit has navigated ADA and FAAAA precedents, before and after *Rowe*, to distinguish prevailing wage, antidiscrimination, and meal and rest break laws from the state laws held preempted by the Supreme Court.

B. "Related to" Test in the Ninth Circuit

The Ninth Circuit has had more occasions to consider FAAAA preemption than the Supreme Court, and has done so in the context of the trucking industry's employment practices. Trucking is an important industry within the vast Circuit, which contains commercially robust states like California; the drayage trucking sector is particularly significant given the scale of operations at the Ports of Los Angeles and Long Beach, as well as at major ports in Oakland and Seattle-Tacoma. Ten years before *Rowe*, the Ninth Circuit began building a doctrinal framework for analyzing state and local laws under the "related to" provision of the FAAAA that limited industry efforts to mobilize preemption to undermine the employment rights of truck drivers.⁹⁴ As this Subpart demonstrates, from that initial precedent (and a subsequent case under the ADA), the Ninth Circuit has sought to delineate stronger limits on preemption by focusing more closely on "the nuances of congressional intent."⁹⁵

93. *Id.* at 656–67.

94. *Cal. for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998).

95. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014).

Three cases, two decided before *Rowe* and one decided after *Rowe*, illustrate how the Ninth Circuit has distinguished Supreme Court precedent to uphold state and local labor and employment laws. As we show, although the outcomes are the same—in each case, courts exempt state and local laws from preemption—the legal theory justifying the outcomes changes perceptibly after *Rowe*. In the two pre-*Rowe* cases, the Ninth Circuit rejected preemption by emphasizing the presumptive validity of laws passed pursuant to traditional state police powers and the tenuous connection between the protections at issue and company price, route, or service. In the case after *Rowe*, the Ninth Circuit shifted away from a traditional police powers analysis, upholding a state law understood as a “general background regulation” falling outside the scope of the FAAAA. These three cases, as we shall see, are critical precedents for *California Trucking Association*—which extends their logic even further.

1. Before *Rowe*: Traditional Police Powers and Tenuous Effects

The Ninth Circuit’s first opportunity to consider whether the FAAAA preempted state employment law came just four years after federal trucking deregulation was passed. In *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, the Ninth Circuit held that the California Prevailing Wage Law (CPWL) was not “related to” motor carrier price, route, or service, and thus not preempted by the FAAAA.⁹⁶ Motor carriers and an association of contractors that provided trucking services to the State of California challenged the CPWL, which required government contractors to pay employees the general prevailing wage, set by the state for employees on public works projects; the state assessed penalties against contractors that failed to do so.⁹⁷

In its ruling, the Ninth Circuit emphasized the presumption against preemption when the law in question fell within an area of state police power. Rejecting the plaintiffs’ argument that the Supreme Court’s “broad interpretation” of “related to” would “compel a conclusion” of preemption, the Ninth Circuit asserted that “matters traditionally within a state’s police powers are not to be preempted unless Congress’s intent to do so is clear and manifest.”⁹⁸ Next, citing a Supreme Court case from the previous year, which had held that the Employee Retirement Income Security Act of 1974 (ERISA) did not preempt the CPWL, the Ninth Circuit panel stressed that “[t]he Supreme Court has

96. *Mendonca*, 152 F.3d at 1189.

97. *Id.* at 1186.

98. *Id.*

indicated that CPWL is an example of state action in a field long regulated by the states.”⁹⁹ Turning to the question of congressional intent, the court identified two primary goals behind the FAAAA’s passage. First, Congress aimed to promote “across-the-board deregulation” and “eliminate non-uniform state regulations of motor carriers.”¹⁰⁰ Second, Congress sought to “even the playing field” between air carriers and motor carriers.¹⁰¹ In this analysis of congressional intent, the court concluded that there was indirect evidence that Congress did not intend to preempt CPWL. Specifically, the FAAAA’s legislative history revealed that Congress had identified ten jurisdictions that were deemed *not* to regulate the trucking industry’s price, route, or service—seven of which had general prevailing wage laws substantially similar to the CPWL.¹⁰² On this basis, the court suggested that Congress must not have considered prevailing wage laws to be the type of state regulation the FAAAA sought to preempt.

Having established indirect evidence against preemption, the court turned to ADA and ERISA precedents—including *Morales* and *Wolens*—for additional support, arguing that these cases “instruct that state regulation in an area of traditional state power having no more than an indirect, remote, or tenuous effect on a motor carriers’ prices, routes, and services are not preempted.”¹⁰³ Applying this rule, the court rejected the plaintiffs’ argument that the CPWL was preempted because it forced trucking firms to increase prices, shift to owner-operators, and reroute equipment to compensate for lost revenue.¹⁰⁴ Instead, the court concluded (without elaboration) that the CPWL only had an “indirect, remote, and tenuous effect” on trucking price, route, and service and thus did not “frustrate[] the purpose of deregulation by *acutely* interfering with the forces of

99. *Id.* at 1186–87 (citing *Cal. Div. of Lab. Standards Enft v. Dillingham Constr., Inc.*, 519 U.S. 316 (1997)). In *Dillingham Construction*, the Court held that, though “ERISA certainly contemplated the pre-emption of substantial areas of traditional state regulation,” the “wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs are . . . quite remote from the areas with which ERISA is expressly concerned—reporting, disclosure, fiduciary responsibility, and the like.” *Dillingham Constr.*, 519 U.S. at 330 (quoting *N.Y. St. Conf. of Blue Cross & Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995)).

100. *Mendonca*, 152 F.3d at 1187.

101. *Id.*

102. *Id.*

103. *Id.* at 1188.

104. *Id.* at 1189.

competition.”¹⁰⁵ Accordingly, the court held that the CPWL was not preempted by the FAAAA.

In a second pre-*Rowe* case decided in 2001, *Air Transport Association v. City and County of San Francisco*, the Ninth Circuit upheld a San Francisco antidiscrimination ordinance against an ADA preemption challenge.¹⁰⁶ In 1997, San Francisco amended its antidiscrimination ordinance to prohibit any city agency from contracting with a company that discriminated against employees with domestic partners in the provision of a range of employee benefits—including “travel benefits” and “membership discounts.”¹⁰⁷ The requirements of the ordinance extended to a city contractor’s operations on real property owned by the city, including the airport.¹⁰⁸ As a result, the Air Transport Association, the Airline Industrial Relations Conference, Federal Express, and United Air Lines sued, arguing that the application of the ordinance to airlines was preempted by the ADA for two reasons. First, the plaintiffs argued that the provision of travel benefits and employee discounts to domestic partners was “related to” air carriers’ price and service.¹⁰⁹ Second, they argued that conditioning future airport property leases on compliance with the ordinance was related to services and routes because the increased cost of operating out of San Francisco Airport would force airlines to change their routes and services, potentially ceasing operations.¹¹⁰

Following precedent, the *Air Transport Association* court asserted that the historic police powers of the states were not to be superseded by the ADA unless preemption was the clear and manifest purpose of Congress, and reiterated the *Morales* test, which rejected preemption of a state law when its effect on price, route, or service was too tenuous, remote, or peripheral.¹¹¹ Echoing *Mendonca*, the court emphasized that the ADA preempts any law that “binds” an air carrier to a particular price, route, or service, “thereby [interfering] with competitive market forces.”¹¹² The court, however, held that the San Francisco ordinance’s prohibition against discrimination did not fall into this category because it had

105. *Id.*

106. *Air Transp. Ass’n of America v. City & Cty. of San Francisco*, 266 F.3d 1064, 1075 (9th Cir. 2001).

107. *Id.* at 1069.

108. *Id.*

109. *Id.* at 1072.

110. *Id.* at 1073.

111. *Id.* at 1071–72.

112. *Id.* at 1072.

“no forbidden connection with prices or services.”¹¹³ Specifically, the ordinance did not “bind the Airlines to provide free or discounted tickets to anyone The Airlines are free to set whatever terms, conditions and prices they want on the travel benefits and discounts they do decide to provide, as long as they do not discriminate.”¹¹⁴ Raising a theme that would become more important in the post-*Rowe* jurisprudence, the court also stressed that the ordinance was not a rule or regulation targeted at the airline industry, but rather a general antidiscrimination statute that applied “to the majority of City contractors in countless industries.”¹¹⁵ Accordingly, the court held that the San Francisco antidiscrimination ordinance was not preempted by the ADA.

These two cases—*Mendonca* and *Air Transport Association*—illustrate the Ninth Circuit’s general approach to ADA and FAAAA prior to *Rowe*. In each, the Ninth Circuit emphasized the high burden placed on challengers to prove that Congress intended to preempt state and local laws in areas of traditional police power, while also applying *Morales*’s “tenuous, remote, or peripheral” test. This approach served to limit the scope of FAAAA preemption and protect critical wage and antidiscrimination laws.

2. After *Rowe*: Generally Applicable Background Regulations

After *Rowe*, the Ninth Circuit continued to stress the *Morales* test, but also began to shift away from the traditional police power rationale used to exempt the CPWL in *Mendonca*, instead focusing more directly on the validity of generally applicable background rules that did not bind trucking firms to any specific price, route, or service. In 2014, sixteen years after *Mendonca*, the Ninth Circuit issued its second groundbreaking FAAAA opinion. In *Dilts v. Penske Logistics, LLC*, the Ninth Circuit applied the exceptions to FAAAA preemption established in *Rowe* to uphold California’s meal and rest break laws. Truck drivers brought a class action lawsuit against motor carriers for violations of California’s laws requiring employers to provide thirty-minute meal breaks and ten-minute rest breaks to transportation employees who worked a minimum number of hours.¹¹⁶ In defense, the motor carriers argued that state meal and rest break laws “related to” motor carriers’ price, route, and service, and were therefore preempted by the FAAAA. The district court sided with the

113. *Id.*

114. *Id.*

115. *Id.* at 1073.

116. *Dilts v. Penske Logistics LLC*, 769 F.3d 637, 640–42 (9th Cir. 2014).

trucking companies, finding that California laws “impose ‘fairly rigid’ timing requirements, dictating ‘exactly when’ and ‘for exactly how long’ drivers must take breaks, and restricting the routes that a motor carrier may select.”¹¹⁷

The Ninth Circuit reversed, rejecting the defendants’ argument that *Rowe* represented a significant shift in FAAAAA jurisprudence. Rather, the court reasoned that “*Rowe* instructs us to apply to our FAAAAA cases the settled preemption principles developed in Airline Deregulation Act cases, including the rule articulated in *Morales* that . . . a state law connected to prices, routes, or services in ‘too tenuous, remote, or peripheral a manner’ is not preempted.”¹¹⁸ The court noted that it applied “precisely” this rule in *Mendonca*, underlining the fact that its FAAAAA precedents remained good law.¹¹⁹ The court also emphasized *Rowe*’s two additional exceptions: first, that preemption only applied to state laws with a “significant impact on carrier rates, routes, or services,” and second that “generally applicable background regulations that are several steps removed from prices, routes, or services . . . are not preempted.”¹²⁰ Under this logic, a law survived preemption so long as it did not bind the carrier to a particular price, route, or service, even if it increased operating costs or incentivized some routes or services relative to others.

With this framework established, the *Dilts* court held that California’s meal and rest break laws were “generally applicable” employment laws that “plainly are not the sorts of laws ‘related to’ prices, routes, or services that Congress intended to preempt.”¹²¹ Rather, the meal and rest break laws were “broad law[s] applying to hundreds of different industries” and “normal background rules for almost *all* employers doing business in the state of California.”¹²² In this regard, they were akin to general wage laws, speed limits, and weight restrictions, which were several steps removed from motor carrier price, route, or service. Echoing language from *Morales* and *Rowe*, the court stated that California’s laws did not “defeat[] Congress’s deregulatory objectives” because they did not bind carriers to specific prices, routes, or services.¹²³ Carriers were still “at liberty to schedule service whenever they choose.”¹²⁴ Similarly, the state laws did not bind carriers’ routes, as drivers “mak[ing] minor deviations from their routes” for breaks did

117. *Id.* (citation omitted).

118. *Id.* at 645.

119. *Id.*

120. *Id.* at 645–46.

121. *Id.* at 647.

122. *Id.*

123. *Id.* at 647–48.

124. *Id.* at 648.

“not meaningfully interfere with a motor carrier’s ability to select its starting points, destinations, and routes.”¹²⁵

In applying the FAAAA, the court stressed that “preemption analysis begins with the presumption that Congress does not intend to supplant state law.”¹²⁶ While it ultimately rested on the fact that meal and rest break laws were “generally applicable background regulations,” the court sought to add weight to its no-preemption conclusion by referring to an amicus brief filed by the U.S. Secretary of Transportation, which restated the “presumption against preemption in areas of traditional state police power, including employment.”¹²⁷ Although this statement made clear that the police power presumption was still an element of FAAAA analysis, its position in the opinion suggested that the police power was viewed as less important in supporting the result. One reason for this pivot away from the police power logic might have been that, in *Rowe*, the Supreme Court held that the FAAAA preempted a state public health law—protecting against the underage use of tobacco—which fit squarely within the bounds of traditional exercises of the police power. Accordingly, the message the Ninth Circuit may have taken from the *Rowe* ruling was that an exercise of traditional police powers was not enough to save a state law too narrowly targeting the trucking industry. Stressing the importance of general background rules, in this light, was a stronger basis for saving state labor and employment law from FAAAA preemption. The Ninth Circuit in *Dilts* can therefore be seen as reconciling its own precedent in *Mendonca* with the *Rowe* standard, building on the exceptions identified in *Rowe* to clearly distinguish California’s meal and rest break laws from Maine’s recipient-verification requirements. Upholding California meal and rest break laws as general background rules, *Dilts* led to an even more sweeping industry challenge to the state’s authority to determine whether employment law applies to truck drivers at all, presenting a fundamental question: Does the FAAAA preempt the state’s power to determine whether port truck drivers are misclassified employees?

III. THE CASE AGAINST PREEMPTION: *CALIFORNIA TRUCKING ASSOCIATION V. SU*

Whether the FAAAA preempted port truck driver misclassification claims was the precise question taken up in *California Trucking Association v. Su*, which

125. *Id.* at 649.

126. *Id.* at 642–43 (quoting *Tillison v. Gregoire*, 424 F.3d 1093, 1098 (9th Cir.2005)).

127. *Id.* at 650.

was decided in 2018 by a panel of the Ninth Circuit Court of Appeals, in an opinion written by Judge A. Wallace Tashima.¹²⁸ As mentioned above, this case represented the first affirmative challenge by the trucking industry to the application of state employment law to port truck drivers misclassified as independent contractors. Unlike *Mendonca* and *Dilts*, the *California Trucking Association* case involved drivers who had not been classified by their firms as employees. (The *American Trucking Associations* case involved misclassified drivers, but the posture was different—an industry challenge to the port Clean Truck Program—and thus the question of the state’s power to decide whether state employment law applied to drivers was not at issue.) This Part provides background on the *California Trucking Association* case, analyzes its holding, and discusses its outcome.

A. Origins

The case arose as a challenge by the California Trucking Association (CTA), a state industry trade group representing trucking firms, to the DLSE’s use of the state common law test—called the *Borello* test after the legal case establishing it¹²⁹—to determine the employment status of port truck drivers.¹³⁰ According to the CTA, based on “factors such as efficiency and market demand,” its members used independent “owner-operator” drivers, entering contracts requiring that owner-operators: “(1) must provide the truck and a qualified driver to haul the freight; (2) must be responsible for operating expenses like truck maintenance, repair, and refueling; (3) will, in turn, have control over whether and how to perform a haul; and (4) will then be paid at an agreed-upon rate.”¹³¹ When owner-operators brought wage claims against trucking firms at the DLSE, they argued that such contracts were null and void because their basic premise—that the owner-operators were in fact independent—was false. Drivers claimed to be misclassified employees as a basis for making a range of underlying employment claims, such as failure to pay minimum wage and overtime, and illegal business deductions.¹³² In adjudicating the wage claims in “Berman hearings” before the Industrial Relations Commission, the Labor Commissioner was therefore required to determine, as a threshold matter, whether drivers were

128. 903 F.3d 953 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1331 (2019).

129. *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Rel.*, 48 Cal.3d 341 (1989).

130. *Cal. Trucking Ass’n*, 903 F.3d at 957.

131. *Id.*

132. CAL. LABOR CODE § 98(a) (2016).

in fact employees under the *Borello* test.¹³³ In the *California Trucking Association* case, the CTA sought declaratory and injunctive relief, asking the court to hold that the FAAAA preempted the Labor Commissioner's use of the *Borello* standard to "disrupt these contracts" and to enjoin the application of *Borello* to motor carriers.¹³⁴ The Labor Commissioner filed a motion to dismiss the case, which the district court granted. The CTA appealed.¹³⁵

B. Analysis

As Judge Tashima's opinion put it, the "case involves a purported clash between a common law test used to enforce California's labor laws and a federal statute aimed at preventing States from undermining federal deregulation of interstate transport."¹³⁶ That common law test, derived from *Borello*, focused on the issue of employer control. Under *Borello*, "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."¹³⁷ In addition to control, courts have also looked at secondary factors, drawn from the *Restatement Second of Agency*, which include whether a worker is "engaged in a distinct occupation or business," and "whether or not the work is a part of the regular business of the principal."¹³⁸ On the basis of these factors, courts and agencies, like the DLSE, determine the existence of an employment relationship. In that determination, the formal classification by the principal "is not dispositive, and subterfuges are not countenanced."¹³⁹ *Borello* was used for determining employment status across all industries, including the motor carrier industry. Under the test, if the Labor Commissioner concluded that a driver was in fact an employee, trucking firms would be held to state labor and employment standards, such as reimbursing truck maintenance expenses, despite the language of owner-operator contracts.¹⁴⁰ Because of this, the CTA argued that the Labor

133. See CAL. LABOR CODE § 226.8(g)(1) (2013); see also *Cuadra v. Millan*, 17 Cal. 4th 855, 858 (1998) ("Or the employee may seek administrative relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8. The latter option . . . is commonly known as the 'Berman' hearing procedure after the name of its sponsor.").

134. *Cal. Trucking Ass'n*, 903 F.3d at 958.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (citation omitted).

139. *Id.* at 959 (citation omitted).

140. *Id.*

Commissioner's use of *Borello* "related to" a motor carrier's "price, route, or service" by replacing "freely-bargained, efficiency-driven contract terms with California's policy judgment about what those terms ought to be."¹⁴¹

Harkening back to ADA and FAAAA precedent, Judge Tashima noted that although state laws "having a connection with or reference to" rates, routes, or services (directly or indirectly) are preempted, "this does not mean the sky is the limit," and there is no preemption of state laws with only a "tenuous, remote, or peripheral" impact.¹⁴² In construing the FAAAA, Judge Tashima emphasized the importance of the legislative history, which demonstrated that the Act was meant primarily to "address the inefficiencies, lack of innovation, and lack of competition caused by non-uniform state regulations of motor carriers," specifically preventing states from undermining federal deregulation with a "patchwork of state regulations."¹⁴³ Judge Tashima also stressed what was "*not* intended by the FAAAA"—specifically, the preemption of "generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services."¹⁴⁴ With that background, Judge Tashima framed the question as "whether the Commissioner's use of the *Borello* standard has a significant, and therefore preempted, impact, or only a tenuous impact on a carrier's prices, routes, or services."¹⁴⁵

C. Outcome

In strong language, the court stated that precedent "made clear" that "no preemption occurs, when the law is a generally applicable background regulation in an area of traditional state power that has no significant impact on a carrier's prices, routes, or services."¹⁴⁶ Accordingly, Judge Tashima ruled that case law "compel[s] us to conclude that the *Borello* standard is not preempted."¹⁴⁷ In issuing this ruling, Judge Tashima distinguished two ADA cases, including *Wolens*,¹⁴⁸ stating that they related to state law interference with a firm's contractual relationship with its *customers*.¹⁴⁹ Those cases dealt with preemption

141. *Id.* at 961.

142. *Id.* at 960 (citation omitted).

143. *Id.*

144. *Id.* at 961.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). The other case was *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014).

149. *Cal. Trucking Ass'n*, 903 F.3d at 962.

of state rules claimed by customers to require air carriers to provide certain benefits under frequent flyer programs. Rejecting customer objections to airline alterations of the programs that diminished benefits, the Supreme Court in both cases held that the ADA preempted customers' state law claims "because they would have resulted in a State's normative policies dictating what prices and services an airline had to offer to its customers."¹⁵⁰ The CTA urged the Ninth Circuit to follow this line of cases, which the CTA claimed blocked the state from ever interfering in contacts that "the [carrier] itself undertakes."¹⁵¹

Judge Tashima began by agreeing that it made sense to protect a motor carrier's freedom of contract on efficiency grounds when freely bargained-for contracts compelled "a carrier to offer *certain services or prices*," which a consumer could then enforce.¹⁵² However, he emphasized that it "does not follow that a state law will be preempted in every instance where it defeats any term in any carrier contract."¹⁵³ Accusing the CTA of missing "the trees for the forest," Judge Tashima concluded that even if there were a line between carrier contracts and state policy that required preemption of the latter, "that line does not control when the contractual relationship is between a carrier and its *workforce*, and the impact is on the *protections* afforded to that workforce."¹⁵⁴

Citing *Mendonca* and *Dilts*, the court took the position that the FAAAA was not intended to limit a state's power to regulate motor carriers as *employers*, noting that both of those decisions upheld the state's power to apply prevailing wage and meal and rest break laws to motor carriers. Although those cases did not deal with independent contractors, the *Dilts* court made clear that:

[G]enerally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices they set, the routes that they use, or the services that they provide Nearly every form of state regulation carries some cost.¹⁵⁵

Agreeing with the Labor Commissioner, Judge Tashima opined that the CTA's position "defies logic" and warned that "generally applicable labor laws could be nullified if motor carriers have the unchecked ability to contract around

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (2014).

these laws simply by obtaining owner-operators' consent to label them as independent contractors and thus exclude them from such protections."¹⁵⁶ Although not explicitly stated in Judge Tashima's opinion, the court appeared to question the authenticity of "consent" gained under conditions in which drivers with little or no bargaining power were offered take-it-or-leave-it contracts.

Further, Judge Tashima rejected the CTA's argument that its members were being compelled to adopt a particular business model (i.e., employee drivers), holding that they were not being forced to hire employees—but rather to simply follow the rules for independent contractors if that was the model they chose. In this regard, Judge Tashima distinguished the *American Trucking Associations* case, in which the Ninth Circuit held the Los Angeles Clean Truck Program preempted on the ground that it forced carriers to hire employee drivers, and thus related to price, route, and service without being saved by the market participant exception. Here, in contrast, nothing prevented firms from hiring independent contractors so long as they followed the rules. Judge Tashima similarly rejected the CTA's claim that application of *Borello*, by potentially requiring firms to pay for maintenance and fueling expenses contractually allocated to drivers, would increase firms' costs—and therefore prices—thus implicating FAAAA preemption. Using *Mendonca* and *Dilts* as guides, the court concluded that "[t]he specific [financial] effects CTA discusses—such as reallocation of truck maintenance costs and a potential change in who sets drivers' hours—are indistinguishable from those recognized as permissible in *Dilts* and *Mendonca*."¹⁵⁷ Rather than precluding carriers from providing services, compliance with *Borello* would, at most, mean that "carriers will face modest increases in business costs, or will have to take the *Borello* standard and its impact on labor laws into account when arranging operations."¹⁵⁸ In other words, if carriers did not want to be bound by *Borello*, they should ensure that they did not exercise the degree of control over driver activities requiring its application.

Judge Tashima also focused attention on the fact that *Borello* reflected a generally applicable labor standard, covering motor carriers and non-motor carriers alike, again distinguishing *Rowe*, in which the Maine law preempted by the FAAAA targeted trucking firms by requiring drivers to verify that tobacco was being sent by and delivered to legally authorized entities and individuals. Unlike *Rowe*, which reflected a "straightforward application" of the FAAAA

156. *Cal. Trucking Ass'n*, 903 F.3d at 963.

157. *Id.* at 965.

158. *Id.*

given the Maine law's *specific focus* on enlisting motor carriers to enforce the state public health scheme, the Commissioner's application of *Borello* did not single out trucking and thus did not seek an "exception" to preemption. Judge Tashima noted that whether the law was generally applicable was not dispositive but was a "relevant consideration because it will likely influence whether the effect on prices, routes, and services is tenuous or significant."¹⁵⁹

Finally, Judge Tashima reached back to *Mendonca* and *Pac Anchor* for their analysis of the FAAAA's legislative history to bolster his conclusion. As discussed above, in *Mendonca* the court found "indirect evidence" of the CPWL's validity in the fact that, when the FAAAA was enacted, seven states identified by Congress as *not* regulating trucking did, in fact, have prevailing wage laws.¹⁶⁰ Similarly, in *Pac Anchor*, the California Supreme Court found that eight of the nonregulating jurisdictions had generally applicable laws governing when a worker was deemed to be an employee versus an independent contractor.¹⁶¹ Because there was no "positive indication" that Congress intended to preempt such laws with the FAAAA, the courts in both cases held that they would not read the FAAAA to do so.¹⁶² Following this line of reasoning, Judge Tashima concluded that "[t]his indirect evidence provides further support that Congress did not intend to foreclose States from applying common law tests to discern who is entitled to generally applicable labor protections."¹⁶³

With that, the *California Trucking Association* court roundly rejected the CTA's lawsuit, holding that the FAAAA did not preempt *Borello* because, as a generally applicable common law employment test, it was not "related to" the price, route, or service of motor carriers.¹⁶⁴ A petition for certiorari was filed in this case on January 9, 2019, and was denied without comment on March 18, 2019.¹⁶⁵

IV. CONTESTING THE NEW PREEMPTION

This last Part explores implications of *California Trucking Association v. Su*, revealing important doctrinal lessons for understanding the scope of FAAAA preemption, while also situating the case within the broader struggle against

159. *Id.* at 966.

160. *Cal. for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998).

161. *People ex rel. Harris v. Pac Anchor Trans., Inc.*, 59 Cal. 4th 772, 786 (2014).

162. *Mendonca*, 152 F.3d at 1187; *Pac Anchor*, 59 Cal. 4th at 786.

163. *Cal. Trucking Ass'n*, 903 F.3d at 967.

164. *Id.*

165. *Cal. Trucking Ass'n v. Su*, 139 S. Ct. 1331 (2019).

industry efforts to redefine the free market to undermine labor protection. As we suggest, the *California Trucking Association* case is not merely a technical resolution of an esoteric statute, but a rigorous example of how legal analysis can be mobilized to contest corporate efforts to advance a “new preemption” movement: one defined by the use of federal laws like the FAAAA and others (particularly the Federal Arbitration Act) to supplant state and local protective worker regimes with extreme anticonsumer and antilabor contracts imposed on parties with no effective bargaining power.¹⁶⁶

A. Clarifying the Scope of Preemption

Although presented as a straightforward application of precedent, upon close reading, the *California Trucking Association* case extends and deepens FAAAA jurisprudence in two critical ways. First, Judge Tashima’s analysis underscores the crucial importance of legal targeting in the application of the FAAAA’s “related to” test. Specifically, the opinion clarifies that the nature of the state law and its regulatory purpose play an important part in determining whether it “relates to” trucking industry “price, route, or service.” Judge Tashima does not simply rely on the blunt instrument of “traditional police power” to protect state law against preemption. Instead, he differentiates background legal rules based on their intended targets—suggesting the presumptive validity of rules designed to protect workers as opposed to consumers—and elevates the goals of state regulation (what type of behavior it is designed to produce) as an independent factor for evaluation. In this regard, Judge Tashima adds a crucial new dimension to FAAAA doctrine:

What matters is not solely that the law is generally applicable, but where in the chain of a motor carrier’s business it is acting to compel a certain result (e.g., consumer or workforce) and what result it is compelling (e.g., a certain wage, non-discrimination, a specific system of delivery, a specific person to perform the delivery).¹⁶⁷

Second, *California Trucking Association* extends prior case law to create a presumptive definition of baseline state market regulation that operates as part of extant background rules of the game that the FAAAA may not preclude. Rejecting the idea that compliance with worker protective regulation necessarily increases carrier price, Judge Tashima stresses that industry’s baseline cost

166. See generally Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISC. 164 (2013).

167. *Cal. Trucking Ass’n*, 903 F.3d at 966.

calculation includes compliance with background labor and employment law. As in *Mendonca*'s analysis of the CPWL, Judge Tashima notes that when the FAAAA was passed, several jurisdictions already used the *Borello* test for determining employment status and Congress did not indicate that the FAAAA was intended to preempt the law of these jurisdictions. This point about legislative history conveys a broader message: The FAAAA's deregulatory language did not wipe out any and all state law, reverting trucking to a "state of nature," but rather incorporated preexisting state law rules. To be clear, Judge Tashima does not promote a sort of originalism that freezes law in place as of the date of FAAAA enactment, but rather stresses that Congress intended the FAAAA to respect state law judgments about reasonable regulation of trucking operations so long as they do not single out the trucking industry in ways that undermine the FAAAA's deregulatory goals. The FAAAA's main thrust was to prevent states from restoring route and rate fixing that had occurred under the pre-1980 version of the Motor Carrier Act, not to eviscerate state labor and employment law altogether.

B. Strengthening the Struggle for Workers' Rights

As the *California Trucking Association* case highlights, defining the baseline conditions of the "free market" under a regime of "deregulation" is an issue with increasing importance in a trucking industry that has exploded in significance with the advent of global trade, online shopping, and just-in-time delivery. With industry groups using the FAAAA in an effort to maintain labor flexibility, the jurisprudence around the Act has emerged at the center of battles over the power of states to address misclassification in the gig economy. Indeed, the nature and scope of misclassification, and who gets to regulate it, are among the most critical issues confronting contemporary labor and employment law.

In the age of Amazon, truck driving has become more integral to the economy. As of 2018, there were three and a half million truck drivers operating in the United States.¹⁶⁸ The industry is organized around long-haul, short-haul, and delivery drivers. The former two are considered to be operating in interstate commerce, and thus subject to the force and effect of the FAAAA and other federal laws. Although the Teamsters report more than a million members,¹⁶⁹ only about 12 percent of truckers were covered by collective bargaining

168. *Reports, Trends & Statistics*, AM. TRUCKING ASS'N, https://www.trucking.org/News_and_Information_Reports_Industry_Data.aspx [<https://perma.cc/F6N8-JJEF>].

169. *Fast Facts*, TEAMSTERS, <https://teamster.org/content/fast-facts> [<https://perma.cc/6KRB-J7H6>].

agreements in 2018.¹⁷⁰ This low union density stems, in part, from the industry's increasing use of independent contractor drivers, reflecting broader trends in the economy.¹⁷¹ A central thrust of industry strategy has been to legalize the independent contracting model and protect it from attack.¹⁷² This industry strategy has shifted the legal battleground from the federal government to the states, where truck drivers have sought to challenge misclassification.

California is at the forefront of the conflict over independent contractor status and events in that state have outrun the specific facts of the *California Trucking Association* case—albeit in ways that have made its holding more important than ever. After *California Trucking Association*, the California Supreme Court issued a transformative decision, *Dynamex v. Superior Court*,¹⁷³ in which the court replaced the *Borello* standard with the “ABC” test for determining whether a worker is an employee for the purposes of enforcing rights set forth in California wage orders (covering the right to minimum wage and meal and rest breaks). In contrast to *Borello*—which set forth a multifactor test that gave primary weight to a hiring firm's control over the manner and means of work—the ABC test *presumes* employee status *unless* the hiring firm can prove lack of control *and* that the worker provides services *outside the firm's normal business activity*. In response to *Dynamex*, the trucking industry, in *Alvarez v. XPO Logistics Cartage LLC*, has defended against misclassification claims by arguing that the FAAAA preempts application of the ABC test to determine employee status in relation to wage orders.¹⁷⁴ The preemption issue in *Alvarez*, which is currently pending, was not specifically addressed in *California Trucking Association*. In *California Trucking Association*, Judge Tashima distinguished cases, like *Schwann v. FedEx*¹⁷⁵ (from Massachusetts), which held that the FAAAA preempted the ABC test on the ground that its presumption in favor of employment status for workers engaged in providing a service within the employer's normal course of business could effectively compel firms to hire

170. Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density, and Employment by Occupation, 2018*, UNION STATS (Feb. 4, 2019) <http://www.unionstats.com> (under “Index of Tables,” follow “2018” hyperlink under “V. Occupation”).

171. See generally CUMMINGS, *supra* note 31, at 290–91.

172. See V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739 (2017).

173. *Dynamex Operations W., Inc. v. Super. Ct.*, 4 Cal. 5th 903 (2018).

174. *Alvarez v. XPO Logistics Cartage LLC.*, No. CV 18-03736, 2018 WL 6271965, at *5 (C.D. Cal. Nov. 15, 2018).

175. 813 F.3d 429 (1st Cir. 2016).

employee drivers.¹⁷⁶ Judge Tashima did not agree with *Schwann*'s holding, but simply noted it presented a different issue.

Although the facts of *California Trucking Association* have been effectively mooted, the issue raised by the case has become even more important with the passage of Assembly Bill (A.B.) 5, which codifies the ABC test articulated in *Dynamex* for all work laws in California. A.B. 5 shifts the burden of proving that a worker is an independent contractor to hiring firms, providing that a worker "shall be considered an employee rather than an independent contractor" unless the firm "demonstrates that the [worker] is free from the control and direction of the hiring entity in the performance of the work . . . performs work . . . outside the usual course of business, and . . . is customarily engaged in an independently established trade, occupation, or business."¹⁷⁷ A.B. 5 has also been challenged by the trucking industry on the ground that it violates the FAAAA by directly impacting "price, route, or service." In *California Trucking Association v. Becerra*, the trucking industry recently won a preliminary injunction barring enforcement of A.B. 5 against motor carriers on the ground that the state law "categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees."¹⁷⁸ As that case goes up on appeal, the question of state authority to set the terms of labor and employment law for its workers in the trucking industry seems destined to end up being resolved in federal court. In that event, Judge Tashima's ruling in *California Trucking Association* gives ample support for a resolution in favor of state authority given that A.B. 5 sets baseline employment conditions for all workers in the state, rather than singling out truck drivers for disparate treatment that would bind trucking firms to a different set of rules.

C. Defining the Nature of the "Free Market"

The trucking industry's invocation of the FAAAA to attempt to squelch the assertion of port truck drivers' state-level labor and employment rights echoes Gilded Age corporate legal mobilization resulting in *Lochner v. New York*¹⁷⁹— and in this regard reprises "deregulation" and "freedom of contract" as concepts used to undermine legitimate state regulation of basic workplace standards. In

176. Cal. Trucking Ass'n v. Su, 903 F.3d 953, 964 (9th Cir. 2018).

177. 2019 Cal. Stat. ch. 296.

178. See Cal. Trucking Ass'n v. Becerra, No. 3:18-cv-02458-BEN-BLM, 20 WL 248993, at *7 (S.D. Cal. Nov. 12, 2019).

179. 198 U.S. 45 (1905).

Lochner, the Supreme Court upheld a challenge to New York's minimum hour law for bakers on the ground that it interfered with employers' liberty of contract.¹⁸⁰ That opinion was later roundly criticized, leading to the demise of substantive due process as a tool of deregulation and ushering in the era of pro-worker reform that culminated in the New Deal.

The trucking industry's argument in favor of preemption summons *Lochner* by suggesting that the FAAAA demarcates an unassailable "dividing line" between state regulation and private contract, which industry claims is entirely exempted from state law. Rather than relying on the constitutional concept of substantive due process to make this argument, trucking firms are using the FAAAA to advance a new preemption movement. Through this movement, industry seeks to systematically opt out of important state and local regulation under the false theory that workers have voluntarily agreed to sign away their labor and employment rights in taking jobs, like port truck driving, when in reality, workers have very little—if any—bargaining power to influence the terms of employment. Deregulation under the FAAAA has thus become an important feature of a broader corporate strategy to undercut labor and employment (as well as consumer protection) law through contract, seen most visibly in the successful strategy to enforce mandatory arbitration and limit access to courts through employment and consumer contracts.¹⁸¹ In *California Trucking Association*, Judge Tashima pushes back against this strategy by spotlighting the massive power disparity between trucking firms and drivers, and thus calling into question whether their contracts can be freely bargained for.

Ultimately, the battle in these new preemption cases is over how to define the free market. Is it built on a set of state law rules setting a baseline of fair process and minimal protections, which parties can contract on top of but not around? Or do companies get to dictate when state law applies to them by opting out of minimal protections through contracts that are forced upon drivers who have little power to negotiate or reject (without losing their livelihood)? What is fundamentally at stake in the FAAAA cases is a contest over the meaning of deregulation: whether it stands for noninterference with carrier contracts above state law minimums, or whether it means conferring on trucking firms the power to create no-law zones in which they can set terms to their economic advantage no matter what the cost to drivers. In this contest, we believe that Judge Tashima not only got it right on the specific facts of the *California Trucking Association*

180. *Id.* at 64.

181. See generally Stone, *supra* note 166.

case, but set forth a broader principle—that deregulation under the FAAAA is predicated upon respect for basic state law worker protections—that should guide analysis as industry preemption claims against California’s ABC test make their way through the courts.

CONCLUSION

This symposium has offered an opportunity to reflect on the legacy of Judge A. Wallace Tashima. In conclusion, we submit that Judge Tashima’s analysis in *California Trucking Association* reflects important aspects of his broader jurisprudential philosophy and personal character. Judge Tashima’s opinion in the case does not reveal any preference for labor rights or laissez faire, but rather offers a carefully worded defense of the Rule of Law. It says, quite plainly, that the federal government should respect the independent regulatory authority of the states, which is a fundamental part of the Founders’ vision of American democracy. In Judge Tashima’s view, absent a clear statement of intent, broad federal deregulatory language cannot be used as a cudgel to dismantle the considered regulatory judgments of state and local governments without doing considerable violence to the basic compact of federalism. We have chosen to elevate this case because we believe it also reflects Judge Tashima’s judicial temperament: revealing the judge’s humility in presenting legal analysis that is, in fact, groundbreaking. At first glance, the opinion reads like a mundane and technical analysis of an esoteric statute—which in many respects it is. But, as we have argued, the opinion is much more than that. In the end, *California Trucking Association* is a roadmap for understanding and balancing federal and state interests in economic regulation that transcends the facts of the case and offers a vision of regulatory cogovernance of the trucking industry—and the gig economy more broadly—that courts would do well to follow.