No. 15-1305

IN THE

Supreme Court of the United States

BEAVEX INCORPORATED,

Petitioner,

v.

THOMAS COSTELLO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS BRIEF OF WASHINGTON TRUCKING ASSOCIATIONS IN SUPPORT OF CERTIORARI

PHILIP A. TALMADGE, WSBA #6973
Counsel of Record
TALMADGE/FITZPATRICK/TRIBE
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661
phil@tal-fitzlaw.com

Attorneys for Washington Trucking Associations

265864

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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A. INTRODUCTION[1]

Since the dawn of the motor age, the trucking industry has relied on independent truck owners, commonly called "owner/operators," particularly in long-haul interstate trucking, to flexibly supply trucking equipment in an industry with erratic demand for services. Jessica Goldstein, *The Lease and Interchange of Vehicles in the Motor Carrier Industry,* 32 Transp. L.J. 131 (Spring 2005). Consistent with federal law, Washington State has a long history of treating owner/operators as independent contractors for purposes of state taxation generally and specifically for unemployment compensation or worker compensation.[2]

As independent contractors have become more prominent in other sectors of the economy, political pressure has been exerted upon state officials to prohibit this type of business model. During the economic downturn of the last decade, Washington State's political leadership identified the trucking industry as a convenient

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have received appropriate notice and have consented to the filing of this brief. Such consents are being lodged herewith.

2. Washington specifically exempts carriers from providing coverage for owner/operators under its worker compensation act, RCW 51.08.180, and it has deemed true owner/operators independent contractors for unemployment compensation tax purposes. *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 39, 917 P.2d 136, *review denied,* 130 Wn.2d 1004 (1996).

target, both to generate revenue and to show political supporters that the state is cracking down on the use of independent contractors.[3]

This Court should grant review of the decision of the Seventh Circuit Court of Appeals. *Costello v. BeavEx, Inc.*, 810 F.3d 1045 (7th Cir. 2016). For the reasons herein and those expressed in BeavEx, Inc.'s ("BeavEx") petition, the Court should reaffirm the principles of the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c) ("FAAAA"), whose express preemption of State and local laws on routes, prices, and services in the industry was designed to forestall re-regulation of a national industry deregulated by Congressional action in 1980 and again in 1994, or the creation of a patchwork of local and state laws regulating a mobile, interstate industry.

B. INTEREST OF *AMICUS CURIAE*

The Washington Trucking Associations ("WTA") is an organization concerned with issues pertaining to the trucking industry. It is a local affiliate of the American Trucking Associations ("ATA"). A significant number of WTA's members utilize owner/operators who drive in Washington and in other states in the course of their contractual responsibilities. The WTA is vitally interested in the issue of federal preemption presented to the Court for review, given its role in addressing similar issues in Washington State's courts.

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3. Organized labor groups, such as the Teamsters, have a strong interest in converting owner/operators to employees because it is much easier to organize larger companies than to pursue small businesses with one or two drivers.

The WTA is a nonprofit corporation established in 1922 by a group of truck owners for the purpose of protecting and promoting the interests of all segments of Washington's trucking industry. Members are arranged by conferences such as common carriers, private carriers, Washington movers, log truckers, dump trucks, and suppliers. WTA's goal is to serve its members by promoting business practices aimed at providing all Washington citizens with safe, efficient, and cost-effective movement of goods, encouraging legislation which allows the motor carrier industry to remain competitive, striving to make Washington's roads safe for all drivers through education and legislation, and supporting technology and programs which advance operational, safety and environmental concerns.

The WTA cooperates, and maintains regular contact, with departments of city, county, state and federal governments, including the Washington Utilities and Transportation Commission, the Washington State Patrol, the Washington State Department of Labor and Industries, the state Department of Licensing, Revenue and Transportation, and federal agencies like the United States Department of Transportation. WTA interacts with various state and federal legislative and executive committees and commissions. WTA has appeared as amicus curiae in numerous court decisions.

C. FACTUAL BACKGROUND

Owner/operators have long been important in the trucking industry. They are used in most, if not all, of its sectors, including long-haul trucking, household-goods moving, and intermodal operations. Because demand for

cargo-carrying services in the contemporary American trucking industry fluctuates dramatically, particularly in long-haul trucking, the industry is structured around independent owner/operators, who provide federally-licensed motor carriers with a flexible supply of trucking equipment. For owner/operators, an independent-contractor relationship is similarly beneficial.[4]

Federal law not only allows, but expressly condones, the use of owner/operators. In 49 U.S.C. § 14102, Congress authorized the United States Department of Transportation to regulate the lease agreements between carriers and owner/operators. An extensive set of regulations prescribe the actual form of the written lease agreement for the equipment. 49 C.F.R. Part 376. *See Owner-Operator Independent Drivers Ass'n v. Mayflower Transit, Inc.*, 161 F.Supp.2d 948, 953 n.2 (S.D. Ind. 2001). These regulations not only require a written lease contract, but also specify required lease terms. 49 C.F.R. §§ 376.11, 376.12.

As graphically documented in *Washington Trucking Associations v. Employment Security Department*, 192 Wn. App. 621, 369 P.3d 170 (2016), Washington State government deliberately sought to undermine the use of

4. Owner/operators have a national trade association, the Owner-Operator Independent Drivers Association ("OOIDA"), with more than 150,000 members, dedicated to protecting owner/operators' interests as small businesses. *See* www.ooida.com/WhoWeAre/. According to a former OOIDA officer, Joe Rajkovacz testifying in Washington State court proceedings, OOIDA members prefer to be owner/operators because this business model provides greater earning potential than driving as carrier employees.

owner/operators. An Underground Economy[5] Task Force of the Employment Security Department (unemployment compensation) ("ESD"), the Department of Revenue (state taxes), and the Department of Labor & Industries (worker compensation),[6] has aggressively sought to eliminate the industry's use of owner/operators. That "task force" is nowhere authorized in statute or regulation. It targeted the industry, conducting at least 284 trucking company audits, whose results were a foregone conclusion. ESD's ill-qualified auditors took the lead in this effort. They had quotas: minimum amounts of taxes and new employee wages that had to be generated every quarter and a 98%-100% ratio of audits with changes to payroll. These mandates destroyed any sense of objectivity, to the point that one auditor even proposed to the Governor that she should be paid a commission on audit dollars assessed and collected.[7] Moreover, ESD deliberately imposed taxes on equipment leased by Washington motor carriers, an illegal assessment (Washington's unemployment compensation statute confines taxes to wages). It delayed resolution of the cases on the merits for years by dragging its feet in the administrative process. 369 P.3d at 176-77.

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5. Far from being "underground," the trucking industry operates openly on Washington's streets, roads, and highways. Motor carriers pay state and federal taxes. They also pay unemployment taxes and worker compensation premiums for company employees and drivers.

6. This Task Force works closely with the United States Department of Labor and the Internal Revenue Service.

7. The egregious impropriety in ESD's audits prompted Washington State's former elected State Auditor, Brian Sonntag, to observe that ESD's system "compels ESD auditors to act arbitrarily and capriciously to impose a tax assessment on a taxpayer."

Ultimately, the position taken by ESD in interpreting its statute relating to independent contractors, RCW 50.04.180, is functionally the equivalent of the position taken by Illinois and Massachusetts authorities with regard to their classification statutes. Under no conceivable grounds can owner/operators in Washington state ever be independent contractors under RCW 50.04.180. Moreover, ESD even concluded that the federally-mandated terms of 49 C.F.R. § 376.12 could be used to document the existence of motor carrier "control" over owner/operators, despite a specific federal regulation prohibiting such a result.[8]

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8. A federal regulation states that whatever requirements are mandated by 49 C.F.R. § 376.12 are *not* intended to affect "whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee." 49 C.F.R. § 376.12(c)(4)). Other states have had no difficulty in understanding that ESD's actions were an overreach. *See Hernandez v. Triple Ell Transp., Inc.*, 175 P.3d 199, 205 (Idaho 2007) ("adherence to federal law" was not evidence of a carrier's control over an owner/operator); *Ruiz v. Affinity Logistics Corp.*, 887 F.Supp.2d 1034 (S.D. Cal. 2012) (under California law, certain furniture delivery drivers were independent contractors); (citing *Sida of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975)) ("fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship."). *See also, Lease & Interchange of Vehicles – Declaratory Order*, 1994 Fed. Carrier Cases ¶ 38, 121, 1994 WL 70557 *6 (I.C.C. March 8, 1994) ("regulations should have no bearing" on the subject of state tort, contract, and agency law and must not "create carrier liability where none would otherwise exist"); *Pouliot v. Paul Arpin Van Lines, Inc.*, 292 F. Supp.2d 374, 383 (D. Conn. 2003) (lease regulations have no impact on the type of relationship between owner/operator and trucking firm); *Wilkinson v. Palmetto State Transp. Co.*, 676 S.E.2d 700, 705 (S.C. 2009), *cert. denied*, 558 U.S. 1048 (2009) (federal regulation "is not intended to affect" the independent contractor determination under state law).

D. SUMMARY OF ARGUMENT

Review by this Court of the Seventh Circuit opinion in *Costello* is critical because that court's interpretation of FAAAA preemption is at odds with this Court's FAAAA preemption jurisprudence that applies such preemption broadly to enforce Congressional intent that market forces control the national trucking industry and a patchwork of state and local laws regulating that industry is avoided. Further, the Seventh Circuit's *Costello* decision contradicts decisions on FAAAA preemption of the First Circuit, inviting the very kind of patchwork of laws Congress intended to avoid in enacting FAAAA preemption.

This problem of state and local laws seeking to regulate the organization of the trucking industry, thereby affecting routes, prices, and services in that industry, is particularly acute in the long-haul trucking sector where interstate operations are the norm. For politically-motivated purposes, local jurisdictions like Washington State are attempting to restructure the trucking industry by eliminating motor carriers' utilization of owner-operators, a vital part of the trucking industry since its inception. Such local activities fly in the face of federal law approving use of owner-operators in the industry.

E. ARGUMENT

BeavEx is a courier service that performs local deliveries in the state of Illinois through independent contractors. *Costello*, 810 F.3d at 1048. BeavEx's articulation of the implications of the FAAAA for the treatment of its independent contractors as employees

under the Illinois Wage Payment and Collection Act, 820 ILCS 115/1 *et seq.* ("IWPCA") in its petition for a writ of certiorari is compelling.

However, an even more compelling reason for this Court to grant the petition for a writ of certiorari is the effect on long-haul trucking of the split in the Circuits on the interpretation of FAAAA preemption. By its nature, long-haul trucking involves interstate commerce and presents the opportunity for the development of a patchwork of conflicting state regulations of a mobile industry.

As documented in ESD's efforts to alter the organization of Washington State's trucking industry, state officials are deliberately flauting the preemptive purpose of the FAAAA in the trucking industry and ignoring the lessons of this Court's FAAAA jurisprudence. Courts, both state and federal, are arriving at strikingly different interpretations of the FAAAA preemption, confirming the fears expressed by BeavEx and herein that a patchwork of state and local regulations is the inevitable result.

When Congress deregulated the trucking industry, it expressly preempted state and local laws in the FAAAA and the Motor Carrier Act, 49 U.S.C. § 10101, *et seq.* Congress prohibited states from "enacting or enforcing a law, regulation, or other provision . . . *related to a price, route, or service*" of any carrier with respect to the transportation of property. 49 U.S.C. § 14501(c)(1) (emphasis added). Congress intended to remove obstacles to "national and regional carriers attempting to conduct a standard way of doing business." *Cole v. City of Dallas*, 314 F.3d 730, 734 (5th Cir. 2002) (quoting H.R. Conf.

REP. No. 103–677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759). In other words, Congress intended to preserve the national prominence of the trucking industry from a patchwork of state and local regulations defeating the national scope of the industry and to allow *the market* to control the trucking industry.

This Court has construed FAAAA preemption *broadly*, analogizing its preemptive effect to that of the preemptive provision in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 ("ADA"). Preemption may occur even if a state law has only an *indirect* effect on a carrier's prices, routes, or services. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 391 (1992) (holding federal law preempted state enforcement of consumer fraud statutes against deceptive airline-fare advertisements given Congress's goal to assure transportation rates, routes, and services that reflect "maximum reliance on competitive market forces," thereby stimulating "efficiency, innovation, and low prices"); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (preemption does not turn on whether the matter is essential to airline operations, and may apply to a statute of general applicability, here, a consumer protection statute)*; Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008) (holding that even laws with indirect effects on prices, routes, or services are preempted because Congress did not want "a patchwork of state service-determining laws, rules, and regulations"); *Northwest, Inc. v. Ginsberg,* 134 S. Ct. 1422 (2014) (ADA preemption of state common law claims).

ESD argued throughout the Washington State owner-operator litigation that the FAAAA does not preempt

statutes of "general applicability." Not only is such an exception to FAAAA preemption nowhere to be found in the plain text of the FAAAA itself, that position is belied by *Wolens* where a general consumer protection statute was held to be preempted by the FAAAA, or *Northwest, Inc.*, where state common law remedies, again policies of general applicability, were preempted.

A close cousin of the "laws of general applicability" putative exception to the FAAAA's preemption is the assertion that preemption does not occur if the state or local provisions regulates a carrier's relationship with its workforce. In theory, such a statute's connection with routes, prices, and services of the carrier is too tenuous to be preempted. *Costello*, 810 F.3d at 1054. The Ninth Circuit concluded in *Dilts v. Penske Logistics LLC*, 769 F.3d 637 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015), for example, that California's statute on meals and rest breaks was not preempted because Congress did not intend preemption of such a "background regulation." *Id.* at 646. Again, nothing in the text of the FAAAA creates an exemption for labor laws, background or otherwise, from its preemptive effect where the local statute or provision adversely impacts routes, prices, or services in a substantial fashion. This is particularly true where the intended effect of the local statute or provision is to alter a business model long-utilized in the trucking industry.

The First Circuit applied FAAAA preemption to a Massachusetts statute that purported to address the misclassification of workers as independent contractors in *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11 (1st Cir. 2014). The Massachusetts statute is remarkably similar to the IWPCA that, in turn, bears a remarkable resemblance to RCW 50.04.180.

The motor carrier in *Coakley* argued that reclassification of its independent contractors as employees would change the routes offered to customers, preclude on-demand delivery services, and drastically increase the carrier's costs and thus its prices. 769 F.3d at 21. Reversing the district court's dismissal order, the First Circuit held that such "potential" impacts could trigger preemption, that empirical evidence is not necessary, and that courts can look to "the logical effect that a particular scheme has on the delivery of services or the setting of rates." *Id.* (quoting *Rowe*, 448 F.3d at 82 n.14). "Far from immunizing motor carriers from all state economic regulations," the court explained, "we are following Congress's directive to immunize motor carriers from state regulations that threaten to unravel Congress's purposeful deregulation in this area." *Id.*[9]

The Seventh Circuit's analysis of the IWPCA in *Costello* is contrary to the First Circuit's analysis of a similar Massachusetts law affecting owner/operators in *Coakley*. It will invite the type of situation now being experienced by Washington State trucking carriers where no owner/operator will ever qualify as an independent

9. On remand, the district court granted summary judgment in the carrier's favor, finding that the Massachusetts statute related to carriers' prices, routes, and/or services as a matter of law. *Massachusetts Delivery Ass'n v. Healey*, 117 F.Supp.3d at 86, 97–98 (D. Mass. 2015). The First Circuit weighed in on this topic again this year in *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016), preempting application of a Massachusetts statute that is similar to RCW 50.04.140(1). Recently, on May 11, 2016, the First Circuit affirmed the district court decision in *Healey. Mass. Delivery Ass'n v. Healey*, ___ F.3d ___, 2016 WL 2732054 (1st Cir. 2016).

contractor, forcing carriers to treat owner/operators as employees, essentially restructuring Washington State's trucking industry.[10]

In the absence of review by this Court and the reaffirmation of its FAAAA jurisprudence, states and local governments will continue to utilize their laws to effectively re-regulate the trucking industry despite the contrary Congressional intent. As an example, in Washington State, ESD's interpretation of that state's unemployment tax will necessarily increase carriers' operating costs, penalizing Washington motor carriers for utilizing owner/operators, thereby directly affecting prices, routes, and/or services. Long-haul carriers will re-route drivers to avoid the potential application of Washington law. This is not an academic concern where neighboring states do not necessarily share Washington State's enthusiasm for eliminating owner/operators.

Washington State's attack on the owner/operator business model is a per se interference with services, particularly in long-haul trucking with its interstate operations. Direct interference with the owner/operator business model is preempted under FAAAA. *See*

10. Larry Pursley, WTA's Executive Vice President, who has 33 years of experience in the trucking industry, opined in the Washington State litigation that "ESD's assessments imperil the structure of Washington's trucking industry." Joe Rajkovacz, former Director of Regulatory Affairs for OOIDA, agreed, testifying, that ESD's attempt to reclassify owner/operators will undoubtedly lead to diminished economic choices and reduced income for owner/operators. He also testified that owner/operators located outside Washington who lease equipment to carriers in Washington will enjoy a competitive edge in the marketplace.

Schwann, *supra* (Massachusetts statute preempted to the extent it made it impossible for owner/operators to be independent contractors for purposes of two titles of the state code); *Healey*, *supra* (Massachusetts independent contractor statute preempted as applied to owner/operators); *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) (local regulation prohibiting use of independent contractor drivers at port was preempted);[11] *In re Federal Preemption of Provisions of the Motor Carrier Act*, 566 N.W.2d 299, 308–09 (Mich. App. 1997), *review denied*, 587 N.W.2d 632 (Mich. 1998), *cert. denied,* 525 U.S. 1018 (1998) (striking down as preempted a regulation mandating that a truck be operated only by persons who were employees of the trucking carrier). *See also*, *Sanchez v. Lasership, Inc.*, 937 F. Supp. 2d 730, 743 (E.D. Va. 2013). Actions like those of Washington State's Underground Economy Task Force in attacking the owner/operator business model are no different; it is just more subtle in using audits and program-by-program reclassification to reshape the trucking industry.

11. The Port of Los Angeles imposed mandatory concession agreements for trucking services, which required carriers to transition from independent owner/operators to employee drivers. The ATA challenged the concession agreements as preempted by the FAAAA. Reviewing an early ruling on injunctive relief, the Ninth Circuit observed that "the independent contractor phase-out provision is one highly likely to be shown to be preempted." *Id.* at 1055. On remand, the district court concluded that the owner/operator phase-out was preempted, and the Ninth Circuit affirmed. *American Trucking Ass'ns*, 2009 WL 1160212 at *7, *affirmed*, 596 F.3d at 604–05.

F. CONCLUSION

This Court should grant review for two clear reasons. First, state regulations that make it impossible for a motor carrier to utilize owner-operators are effectively a per se ban on owner/operators, a business model used by motor carriers for more than a century, plainly implicating trucking industry "services" for FAAAA preemption purposes. Second, the Seventh Circuit's decision in *Costello* is contrary to decisions of other Circuits, particularly the First in *Coakley*, *Schwann*, and *Healey*. The scope of FAAAA preemption is determined not by whether the statute at issue is a "background law" (*Dilts*) or a general workplace statute (*Costello*) but whether its enforcement substantially affects trucking routes, prices, or services, as this Court instructed in its FAAAA and ADA jurisprudence. Absent a reaffirmation of the preemptive effect of the FAAAA as to the long haul trucking industry, a patchwork of local laws shackling the long-haul trucking industry, feared by Congress in 1994 when it enacted the FAAAA's preemption, will become a reality.

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

DATED this 19th day of May, 2016.

Respectfully submitted,

PHILIP A. TALMADGE, WSBA #6973
Counsel of Record
TALMADGE/FITZPATRICK/TRIBE
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661
phil@tal-fitzlaw.com

Attorneys for Washington Trucking Associations