No. ______

IN THE
Supreme Court of the United States

BEAVEX INCORPORATED,
Petitioner,

v.

THOMAS COSTELLO, ET AL.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

As part of deregulating the trucking industry, in 1994 Congress passed the Federal Aviation Administration Authorization Act (FAAAA). The law preempts all state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

Operating in the open market under the protection of this provision, motor carriers in all 50 States use independent contractors for courier and delivery services. Some States' employment laws attempt to prevent this chosen business model. Those laws define "employee" such that *any* driver working for a delivery company will always be an employee, never an independent contractor. Accordingly, those laws grant drivers the right to "employee" benefits. In short, some States, including Illinois and Massachusetts, force motor carriers to treat and pay their drivers as "employees."

Applying FAAAA preemption, the First Circuit struck down that law in Massachusetts. On the other hand, in this case, the Seventh Circuit upheld a nearly identical law in Illinois.

The question is whether the FAAAA, 49 U.S.C. § 14501(c)(1), preempts generally-applicable State laws that force motor carriers to treat and pay all drivers as "employees" rather than as independent contractors.

Rules 14.1 and 29.6 Statement

In the Seventh Circuit, the appellant was BeavEx, Inc. Appellees were Thomas Costello, Megan Baase Kephart, and Osama Daoud. There were six amicus curiae: Raise the Floor Alliance, Interfaith Worker Justice, Arise Chicago, National Employment Lawyers Association-Illinois, Public Citizen, Inc., and Lisa Madigan, Attorney General of Illinois.

Petitioner BeavEx, Inc. is a private corporation and has no corporate parent. No publicly-held company owns 10 percent or more of the stock of BeavEx, Inc.

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The opinion of the Seventh Circuit is reported at 810 F.3d 1045 (7th Cir. 2016). App. 1-31. The district court denied reconsideration and certified the case for interlocutory appeal in late 2014. App. 32-51. The relevant merits opinion of the district court is available at 303 F.R.D. 295 (N.D. Ill. Mar. 31, 2014). App. 52-87.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Seventh Circuit issued its opinion affirming in relevant part on January 19, 2016. App. 1-31. BeavEx timely sought rehearing, and the court denied rehearing on February 23, 2016. App. 88-89. This petition was timely filed in April 2016.

Constitutional and Statutory Provisions

The relevant portions of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1-2), are printed at App. 92-93. Relevant portions of the Illinois Wage Payment and Collection Act, 820 ILCS 115/1 *et seq.*, are printed at App. 93-94.

STATEMENT

1. Federal Law: the FAAAA

In 1978, Congress passed the Airline Deregulation Act (ADA). Congress aimed to further "efficiency, innovation, and low prices" in the airline industry though "maximum reliance on competitive market forces." 49 U.S.C. § 40101(a)(6), (12)(A). To prevent States from "undo[ing] federal deregulation with regulation of their own," Congress drafted a broad express preemption provision. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). Under that provision, "a State . . . may not enact or enforce a law . . . related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

In 1994, Congress purposefully borrowed the ADA's text to enforce its deregulation of the trucking industry. *See* Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. 103-305, 108 Stat. 1569, 1605-06. The FAAAA states:

> [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.

49 U.S.C. § 14501(c)(1). The FAAAA "copied the language of the air-carrier pre-emption provision" of the ADA. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (holding that the ADA and FAAAA should be applied the same way, and adopting ADA case law in applying the FAAAA). This Court has

recognized, as did Congress, that a "sheer diversity" of State laws pose "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) (quoting H.R. Conf. Rep. No. 103-677, at 87).

Accordingly, State laws "having a connection with, or reference to carrier 'rates, routes, or services' are pre-empted . . . even if a state law's effect on rates, routes, or services is only indirect." *Rowe*, 552 U.S. at 370. The outer bound of preemption falls at laws that have only a "tenuous, remote, or peripheral" effect on prices, routes, and services. *Id.* at 371. Examples given include laws against prostitution, gambling, and smoking. *See Morales*, 504 U.S. at 390; *Rowe*, 552 U.S. at 375. "[P]re-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Rowe*, 552 U.S. at 371.

This Court has addressed the scope of the relevant "related to" clause of the ADA and FAAAA four times.[1] *See Morales v. Trans World Airlines,* 504

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[1] The Court has also addressed other statutory phrases connected to ADA and FAAAA preemption. *E.g., City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 440 (2002) (addressing the "safety regulatory authority" exception); *Dan's City Used Cars, Inc. v. Pelkey,* 133 S. Ct. 1769 (2013) (addressing the "transportation of property" clause); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (addressing what rules "have the force and effect of law" for preemption purposes).

U.S. 374 (1992); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Rowe v. N.H. Motor Transp. Ass'n,* 552 U.S 364 (2008); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014). In each of these cases, this Court found preemption. *See Morales*, 504 U.S. at 391 (holding that the ADA preempted state consumer protection laws applied to airline fare advertising); *Wolens*, 513 U.S. at 227-28 (holding that the ADA preempted ordinary state consumer fraud laws as against infractions by airlines related to frequent flyer miles); *Rowe*, 552 U.S. at 374 (holding that the FAAAA preempts a Maine public health law relating to the sales and trafficking of tobacco products to minors); *Northwest,* 134 S. Ct. at 1429 (holding that common law implied covenant of good faith claims are preempted as against airlines that cannot avoid implied covenants by contract).

2. State Law

This class action seeks damages for Petitioner BeavEx's alleged failure to comply with the Illinois Wage Payment and Collection Act ("wage law"), 820 ILCS 115/1 *et seq*. The wage law exists "to assist employees in seeking redress for an employer's wrongful withholding of employee benefits." *Kim v. CitiGroup*, 856 N.E.2d 639, 646 (Ill. App. Ct. 2006).

Illinois wage law applies to all "employees." 820 ILCS 115/1 (applying to "all employers and employees in this State"). The law then defines "employee" extremely broadly—as "any individual permitted to work by an employer in an occupation." 820 ILCS 115/2. The exceptions to "employee" status, following a form called the "ABC" test, are narrow.

One prong of that ABC test asks whether the worker "performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer." 820 ILCS 115/2(2). Unless this prong is satisfied, the worker is an employee, not an independent contractor. Put differently, under Illinois law, any worker who "performs work" *inside* the "usual course of business" or *inside* any "place of business of the employer" will *always* be an employee. *Id.* This is true regardless of how the company-driver relationship is structured.

Massachusetts law operates the same way. *See* Mass. Gen. Laws ch. 149, § 148B(a)(2) ("an individual performing any service . . . shall be considered to be an employee . . . unless . . . the service is performed outside the usual course of business of the employer"). The Seventh Circuit recognized that Massachusetts law is "substantially similar" to Illinois law on this point. App. 14.

Drivers for delivery services work in "the usual course of business" of their companies, and they work in the companies' "place of business." Illinois and Massachusetts law thus make it impossible for motor carriers to use independent contractors as drivers.

Once they apply, the Illinois and Massachusetts wage laws impose significant burdens on motor carriers. Illinois' wage law requires that motor carriers pay their "employees" at specified intervals, and provides when wages earned must be paid and in what form. 820 ILCS 115/3, 115/4. It defines "final compensation" due to separated

employees, which includes the "monetary equivalent of all earned vacation" time. 820 ILCS 115/5. And it bars employers from taking ordinary deductions from employees' pay unless the employee gives "express written consent . . . freely at the time the deduction is made." 820 ILCS 115/9.

The wage deduction provision in particular poses a problem for motor carriers. National companies like BeavEx and FedEx often contract with their drivers to permit the motor carrier to deduct from agreed fees expenses, including for uniforms, equipment, and insurance. State law overrides these contracts, if it is not preempted.

3. This Litigation

In October 2012, several former BeavEx drivers filed suit against BeavEx in the U.S. District Court for the Northern District of Illinois. They filed an amended complaint in January 2013. App. 132-48. Representing a purported class of more than 800, the BeavEx drivers alleged that Illinois law required BeavEx to treat them as employees, not independent contractors. The drivers alleged that BeavEx violated the Illinois wage law, 820 ILCS 115/1 *et seq.*, by "failing to properly compensate [them] for all hours worked" and by "making unlawful deductions from [their] pay." App. 145, ¶¶ 43-44. The complaint sought in excess of $75,000 for each driver, and over $5,000,000 in total. App. 134.

BeavEx moved for summary judgment, contending that the FAAAA preempts the Illinois wage law. Plaintiffs moved for class certification and

sought partial summary judgment because they clearly qualified as "employees" under State law.

The district court found no preemption. App. 52-70. Next, the court granted partial summary judgment, agreeing that the drivers were "employees" under State law. App. 81-87. The court also denied class certification. App. 70-81 (finding no predominance); App. 40-51 (denying reconsideration).

Jointly recognizing that preemption and class certification posed legal questions that were contestable and controlling, the parties both requested interlocutory review. App. 153-58. The district court granted permission, App. 32-39, and the Seventh Circuit accepted the appeal.

On the merits, the Seventh Circuit held that the FAAAA does not preempt Illinois wage law. The court primarily based its decision on three points. First, the court held that the wage law is a "background labor law" that is "generally applicable," and that these findings cut strongly against preemption. App. 16-19. Second, the court opined that the Illinois wage law and the drivers' claims were narrow. App. 20. Third, in view of the first two, the Court reasoned that BeavEx failed to surmount these hurdles with sufficiently powerful evidence of significant impact. App. 20-21.

The Seventh Circuit also remanded for further consideration of class certification. That aspect of the Seventh Circuit's ruling is not challenged here. BeavEx sought rehearing, which the Seventh Circuit denied on February 23, 2016. App. 88-89.

REASONS FOR GRANTING THE WRIT

The FAAAA expressly preempts all State law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). That provision exists for two purposes: to enforce deregulation of motor carriers by allowing open market competition to govern, and to avoid a patchwork of various state laws hindering efficient national motor carrier service. *Rowe*, 552 U.S. at 368, 371.

Under that free-market system, motor carriers—BeavEx and other national and regional delivery companies—structure their businesses around using independent contractors as drivers. These drivers own their cars and trucks, and collect fees by route or by delivery, not hourly wages. App. 3. The drivers often have flexibility to accept or reject individual delivery jobs, especially unplanned same-day deliveries. App. 20. This system permits carriers like BeavEx to offer reasonably priced same-day delivery services, because the carrier does not pay drivers to wait around for calls that may never come. By contract, the motor carriers deduct expenses for insurance, uniforms, and equipment from the fees they pay the drivers. App. 3-4. Under this system, by contract and by design, drivers are independent contractors, not employees. Some even have subcontractors of their own. App. 3.

A "national wave of litigation" now exists over this practice. App. 120-21 (citing cases in California, Kentucky, Florida, Oregon, Kansas, and elsewhere). These classes can include hundreds or thousands of

drivers and seek many millions of dollars from motor carriers. *See, e.g.,* App. 3 (the class here includes 825 drivers); App. 134, ¶ 10 (asserting damages in excess of $5 million).

Because State law unavoidably deems them "employees," the drivers in cases like this one contend that the deductions from their pay have been illegal. They rely on State wage laws that bar motor carriers from using independent contractors as drivers—or at least bar motor carriers from paying drivers as independent contractors.

Correctly viewed, the FAAAA preempts those State laws. Laws that *force* motor carriers into a certain business model are "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). Such laws go to the heart of the FAAAA. They counter "Congress' directive to immunize motor carriers from state regulations that threaten to unravel Congress's purposeful deregulation in this area." *MDA v. Coakley (MDA I)*, 769 F.3d 11, 21 (1st Cir. 2014). They also vary from State to State, creating the "patchwork" of State laws that Congress aimed to eliminate. *Rowe*, 552 U.S. at 373. In short, these State laws break this Court's preemption rule: they have "significant impact related to Congress' deregulatory and pre-emptive objectives." *Id.* at 371.

The Circuits are split over this question. In both Massachusetts and Illinois, delivery drivers are *always* "employees" because they work within "the usual course of business" of the employer. Mass Gen. Laws ch. 149, § 148B(a)(2); *see also* 820 ILCS 115/2.

The First Circuit has held that Massachusetts' law is preempted. *See MDA I*, 769 F.3d 11 (rejecting anti-preemption arguments and remanding); *Schwann v. FedEx Ground Package Sys.*, 813 F.3d 429 (1st Cir. 2016) (holding that the FAAAA preempts Massachusetts law).

The Seventh Circuit, in this case, has held the opposite. *Costello v. BeavEx, Inc.*, 810 F.3d 1045 (7th Cir. 2016) (holding Illinois' wage law not preempted by the FAAAA). App. 1-31.

So, delivery companies in Massachusetts may use their preferred business model, relying on independent contractors. Those in Illinois cannot. Petitioner BeavEx now faces a multi-million dollar class action because it treated and paid its Illinois drivers exactly the same way as its drivers in all other States. This Court should grant certiorari.

I. The Seventh Circuit erred—the FAAAA *does* preempt State laws governing the structure of motor carriers' business.

1. The FAAAA has a very broad deregulatory preemptive purpose.

The FAAAA preempts all State laws that are "*related to* a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1) (emphasis added). "Related to" is extremely broad language. *Morales v. Trans World Airlines*, 504 U.S. 374, 383-84 (1992) ("The ordinary meaning of these words is a broad one . . . and the words thus express a broad pre-emptive purpose."); *id.* (referring to the "broad scope"

of this "deliberately expansive" provision, "conspicuous for its breadth").

The FAAAA's textual *exceptions* also show broad preemptive intent. The law specifically excludes from preemption State laws regulating vehicle safety, certain highway route limits by vehicles' size or weight, and insurance. 49 U.S.C. § 14501(c)(2). The fact that Congress felt it necessary to stake out those exceptions shows how broadly the preemption provision would otherwise sweep. *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1780 (2013) ("the exceptions to § 14501(c)(1)'s general rule of preemption identify matters a State may regulate when it would otherwise be precluded from doing so").

To craft workable standards to apply this broad preemptive text, this Court has used congressional purpose, which is "the ultimate touchstone in every pre-emption case." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). "Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose." *Id.*

The FAAAA reflects "dual objectives that account for this broad reach." *Schwann*, 813 F.3d at 436. First, Congress intended to "ensure that the States would not undo federal deregulation with regulation of their own." *Rowe*, 552 U.S. at 368. Second, Congress sought to avoid a kaleidoscope of State law affecting motor carrier operations. A "state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions . . . to the competitive marketplace." *Id.* at 373 (citing H.R.

Conf. Rep. No. 103-677, at 87 (1994)). Congress wanted to get rid of the "sheer diversity" of state regulatory schemes that posed "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677, at 87 (quoted in *Ours Garage*, 536 U.S. at 440). Preventing state regulation and a patchwork of different state laws would "help ensure transportation rates, routes, and services . . . reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices." *Rowe*, 552 U.S. at 371.

Following these objectives, the rule is that "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Rowe*, 552 U.S. at 371.

This Court has spent the last 25 years batting down attempts to narrow FAAAA preemption and undercut these congressional purposes. The Seventh Circuit below noted that this Court has "on four occasions elaborated on the scope of the 'related to' clause of the ADA and FAAAA." App. 10. All have a common theme: they find preemption. All attained supermajorities. *See Morales v. Trans World Airlines,* 504 U.S. 374 (1992) (Scalia, J.); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (Ginsburg, J.); *Rowe v. N.H. Motor Transp. Ass'n,* 552 U.S 364 (2008) (Breyer, J.); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014) (Alito, J.).

In *Morales, Wolens, Rowe, and Northwest*, the same preemption language in question here

preempted general state laws with perfectly legitimate purposes. In those cases, applying state law despite the ADA or FAAAA preemption provision would have created the problems Congress sought to avoid. It would have required national motor carriers or airlines to comply with patchworks of varying regulations, prevented them from using a national standard way of operating, and infringed on the open, competitive marketplace Congress aimed to foster. The State law here is the same.

2. Illinois wage law has a significant impact on motor carriers' business model and on the FAAAA's objectives.

On its undisputed impacts alone, the Illinois wage law has a "significant impact related to Congress' deregulatory and pre-emption related objectives." *Rowe*, 552 U.S. at 371.

Congress' first goal was deregulation—"maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices." *Rowe*, 552 U.S. at 371. "Competitive market forces," as well as "efficiency" and "low prices", *id.*, led BeavEx and other motor carriers to use an owner-operator business model nationwide, where drivers use their own vehicles and are paid by route or delivery, not by the hour. This model relies on the drivers being independent contractors.

Illinois law makes motor carriers' independent-contractor model illegal. It defines every driver working for a delivery company as an

"employee." 820 ILCS 115/2 ("the term 'employee' shall include any individual permitted to work by an employer in an occupation . . . [if the person works in] "the usual course of business or [in] the places of business of the employer."). Regardless of their contracts, and regardless of any other arrangements with BeavEx, under Illinois law all of the drivers are unavoidably "employees." App. 83 (noting this was not in dispute).

The undisputed effect of the Illinois law is that BeavEx *cannot be* what it wants to be: a national motor carrier with ten employees and 104 contractor-drivers in Illinois. Instead, it *must be* a motor carrier with 114 Illinois "employees," at least for state wage law purposes. The law creates "a categorical ban on the use of independent contractors by motor carriers." *Sanchez v. Lasership*, 937 F. Supp. 2d 730, 742 (E.D. Va. 2013) (referring to Massachusetts' parallel law). This significantly undermines Congress' deregulatory purpose.

This is true even if the Seventh Circuit is correct that for now, the drivers only claim "employee" status under part of one state wage law. App. 20 ("the only substantive requirement of the IWPCA that Plaintiffs seek to enforce is that BeavEx refrain from making deductions from its' couriers pay"). *See also* 820 ILCS 115/9 (prohibiting deductions from wages except under certain circumstances). This attempt to minimize the impact of the wage law fails, in three ways.

First, BeavEx's contracts with its drivers organize their relationship around independent-

contractor status. The contracts call for deductions from contractors' fees to cover equipment, uniforms, and insurance. App. 3. Plaintiffs' suit here (even viewed very narrowly) asserts that under Illinois law, those contracts cannot be enforced as written. App. 141-42, ¶ 29. The deductions from their fees, Plaintiffs say with the support of the Illinois Attorney General, were illegal. *See* Brief of Amicus Curiae Attorney General Lisa Madigan, *Costello v. BeavEx, Inc.*, 2015 WL 2091856, at *7.

The State law undercuts "competitive market forces." *Wolens*, 513 U.S. at 230. "Market efficiency requires effective means to enforce private agreements." *Id.* (finding consumer protection laws preempted, but allowing the enforcement of private contracts with airlines). Here, Illinois law does exactly the opposite of enforcing private agreements. It "essentially is state regulation on the very business methods that carriers rely upon to efficiently operate and compete." *Sanchez*, 937 F. Supp. 2d at 743.

Second, BeavEx offered evidence that its overhead costs would rise $185,000 per year in human resources costs alone, just to administer the system that Illinois law requires. App. 20. The Seventh Circuit wrongly waved off the $185,000 per year by finding that it could not determine whether that sum was significant to BeavEx. *Id.* (citing no "frame of reference"). But logically, changing a company from ten employees and 104 independent-contractor-drivers to a company with 114 employees is structurally "significant." And it cannot be that $185,000 per year—almost $1,800 per driver in

Illinois—is a meaningless sum. The Seventh Circuit itself even recognized an "increased labor cost." *Id.*

Third, the face of the complaint here demonstrates significant impact on motor carriers like BeavEx. The drivers allege individual claims "in excess of $75,000" and class claims that "exceed $5 million." App. 134, ¶ 10. They allege as "unlawful deductions" under 820 ILCS 115/9 expenses for "Uniforms . . . Cargo insurance . . .Worker's Accident Insurance . . . Administrative fees . . . Scanner fees, and . . . Cellular phone fees." App. 141-42, ¶ 29. They cite the wage law, 820 ILCS 115/1 *et seq.*, specifically as the basis for their claims that BeavEx "fail[ed] to properly compensate Plaintiffs for all hours worked," and for "all unlawful deductions." App. 145, ¶¶ 43-45.

The complaint here alleges that BeavEx's drivers "were deprived of the rights and protections guaranteed by Illinois law to employees." App. 142, ¶ 31. The complaint values those "accoutrements of employment," *id.* ¶ 30, at millions of dollars. Moreover, as a natural part of this lawsuit Plaintiffs seek the right to prevent BeavEx from taking deductions from their fees going forward. The impact of Illinois' wage law on Congress' deregulatory goals and on BeavEx—both on its services through its independent-contractor structure, and on its prices through its finances—is significant.

Congress' second specific objective was to eliminate the "patchwork" of regulations that posed a "huge problem for national and regional carriers attempting to conduct a standard way of doing

business." *Rowe*, 552 U.S. at 373; *Ours Garage*, 536 U.S. at 440. Although the Seventh Circuit seemed to believe that the "different tests for employment status" in "federal employment laws and other state labor statutes" was a solution, App. 21, it is actually part of the problem.

Here, the Illinois wage law and its cousin in Massachusetts are part of a "sheer diversity," H. Conf. Rep. No. 103-677, of state law on this topic. *Schwann*, 813 F.3d at 438 (noting that Massachusetts law required use of employees "even if those persons could be deemed independent contractors under federal law and the law of many states"); *id.* (referring to the "novelty" of the statutory scheme compared to other places). Undisputedly, BeavEx and other motor carriers use independent contractors nationwide, in a "standard way of doing business." *Ours Garage*, 536 U.S. at 440. Requiring BeavEx to follow Illinois wage law would force its model to "differ[] from its relationships with drivers in every other state." App. 113.

The no-preemption holding below thus has it both ways. On one hand, the Seventh Circuit held that applying Illinois law would have minimal impact on motor carriers and on Congress' objectives. On the other hand, the Seventh Circuit held that Plaintiffs could seek millions of dollars from BeavEx because it treated them exactly as it does its drivers in dozens of other States, and as the contracts they signed authorize.

3. The Seventh Circuit erred by relying on the label of "background labor law" to find no preemption.

The Seventh Circuit categorized 820 ILCS 115/1 *et seq.* as a "background labor law." App. 18. The court opined that "there is a relevant distinction for purposes of FAAAA preemption between generally applicable state laws that affect the carrier's relationship with its customers and those that affect the carrier's relationship with its workforce." App. 16. The court attempted to stop just short of adopting a "categorical rule exempting from preemption all generally applicable state labor laws." App. 19. Yet a clear import of its decision is that the FAAAA does not preempt generally applicable state labor laws. This analysis is wrong, for two reasons.

First, no special protection from preemption exists for "generally applicable" laws. In *Morales*, this Court rejected the idea that the ADA and FAAAA preemption language "imposes no constraints on laws of general applicability." 504 U.S. at 386; *id.* at 391 (holding that state guidelines applying general consumer protection laws to airline fare advertising were preempted).

Instead, the *Morales* Court held that excluding generally applicable laws from preemption would "creat[e] an utterly irrational loophole." *Id.* at 386 (adding that "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the

particularized application of a general statute."). Further, the "sweep of the 'relating to' language" also destroys the idea that generally-applicable state laws get a pass. *Id.*

In short, this Court has instructed that a state law may "relate[] to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1), and "thereby be preempted, even if the law is not specifically designed to affect such [things], or the effect is only indirect." *Morales*, 504 U.S. at 386. "Even general statutes, when particularly applied to the industry, are preempted." *Smith v. Comair*, 134 F.3d 254, 257 (4th Cir. 1998).

Second, nor is there any good reason to distinguish categorically between labor laws and other types of laws this Court has held preempted. *See Morales*, 504 U.S. at 378 ("general consumer protection statutes" preempted); *Wolens*, 513 U.S. 227-28 (Illinois Consumer Fraud Act preempted); *Rowe,* 552 U.S. at 373-74 (state public health law aiming to "prevent minors from obtaining cigarettes" preempted); *Northwest*, 134 S. Ct. at 1431-33 (state common-law claim for breach of the implied covenant of good faith and fair dealing preempted). As compared to the public health, consumer fraud, and common-law claims that have been preempted, labor laws have nothing unique. Certainly nothing in the FAAAA's text prevents a labor law from being "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1).

After all, labor laws can undercut Congress' deregulatory and anti-patchwork purposes in the

FAAAA, just as any other State law can. Here, the evidence of financial impact includes $185,000 per year in human resources costs, as well as a multi-million dollar class action lawsuit. Even viewed most narrowly, the claim here is that Illinois law bars BeavEx from taking deductions from its contractors' fees. Those deductions included expenses for "Uniforms . . . Cargo insurance . . . Worker's Accident Insurance . . . Administrative fees . . . Scanner fees, and . . . Cellular phone fees." App. 141-42, ¶ 29.

Equally disruptive and important, the Illinois wage law forces a certain business model on BeavEx and other motor carriers in Illinois. For wage law purposes (at minimum) in Illinois, a motor carrier cannot use independent contractors as drivers. Contracts under which the drivers have agreed to be independent contractors and authorize general deductions for expenses are not valid if the State law stands here. Yet in applying FAAAA preemption, this Court has carefully preserved open-market rights of contract. *See Wolens*, 513 U.S. at 232-33 (holding that courts should be "confine[d] . . . to the parties' bargain, with no enlargement or enhancement based on state laws").

Illinois' wage law, regardless of its title or label, regulates motor carriers' corporate structure, and thus their services and prices.

4. The Seventh Circuit erred by focusing on company-specific evidence of impact.

The Seventh Circuit also opined, essentially, that labeling all drivers "employees" would have minimal impact on BeavEx. Several times, the court cited a lack of evidence of significant impact on BeavEx. App. 20 (holding no significant impact on BeavEx's prices, and "no evidence to persuade us differently"); App. 21 (citing "no specific evidence of the effect of the [Illinois wage law] on its business model"). This line of thinking is wrong.

FAAAA preemption cases should not turn on empirical evidence, particularly of financial impact. As the First Circuit has recognized, the "cases in this area have looked to the logical effect that a particular scheme has on the delivery of services or the setting of rates and have not required the presentation of empirical evidence." *N.H. Motor Transport Ass'n v. Rowe*, 448 F.3d 66, 82 n.14 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008). Courts routinely find preemption without empirical evidence that the state law will seriously injure the motor carrier. *MDA I*, 769 F.3d at 21 ("We have previously rejected the contention that empirical evidence is necessary to warrant FAAAA preemption.").

In *Rowe*, for instance, both the First Circuit and this Court found preemption of Maine's tobacco law under the FAAAA. The motor carrier was UPS. Evidence existed that complying with Maine's law would cost UPS less than one cent per package, plus $66 over a five-month period to deal with the illicit

tobacco-containing packages UPS discovered. *Rowe v. N.H. Motor Transp. Ass'n*, Pet. for Writ of Cert., No. 06-457, 2006 WL 2805042, at *11 (U.S. Aug. 16, 2006). After all, UPS already inspected packages for certain dangerous or illegal items, and the actual financial impact on it of inspecting for tobacco products as well may have been marginal. But this Court did not consider those arguments powerful. 552 U.S. at 372 ("Maine replies that the regulation will impose no significant additional costs upon carriers. But even were that so . . . Maine's reply is off the mark.").

Instead, the *Rowe* Court focused on logical effects and concluded that the laws had "a significant and adverse impact in respect to the federal Act's ability to achieve its pre-emption related objectives." *Id.* at 371-72. The Court observed that the tobacco law had the "patchwork" problem—"allow[ing] Maine to insist that the carriers provide a special checking system would allow other States to do the same." *Id.* at 373. The Court also noted that even though the law was partly directed at *shippers* rather than *carriers*, it still amounted to "direct substitution of [a State's] own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Id.* at 372.

Similarly, the *Morales* Court found preemption without relying on dollar figures or specific impacts proven on any one airline. 504 U.S. at 386. Instead, the Court held as a matter of logic that it was "clear as an economic matter that state restrictions on fare

advertising have the forbidden significant effect on fares." *Id.* at 388.

It makes sense that individualized empirical evidence is not the key to a proper preemption analysis. Preemption is a legal question. After all, "if a state law is preempted as to one carrier, it is preempted as to all carriers." *Rowe,* 448 F.3d at 72. The Illinois wage law cannot be preempted against some carriers and effective against others. Unless this Court acts, the Seventh Circuit's no-preemption finding is the governing precedent for future similar cases in that Circuit. Even so, the Seventh Circuit's decision leans on empirical evidence, or perceived lack thereof, as to BeavEx specifically.

Lastly, to the extent empirical evidence can support logical arguments about preemption, there is plenty of such evidence here. Both the annual $185,000 human resources cost, and the complaint itself—which seeks more than $75,000 per driver and $5,000,000 against BeavEx—provide evidence of the impact this Illinois law has on motor carriers.

II. There is an admitted Circuit split.

Unlike the no-preemption holding below, the First Circuit has held that the FAAAA preempts a Massachusetts law that forces motor carriers to define their drivers as "employees." *See MDA v. Coakley*, 769 F.3d 11 (1st Cir. 2014) (*MDA I*) (reversing a no-preemption ruling and remanding); *MDA v. Healey*, 117 F. Supp. 3d 86 (D. Mass. 2015) (*MDA II*) (on remand, finding preemption); *Schwann v. FedEx Ground Package Sys.*, 813 F.3d 429, 432

(1st Cir. 2016) (holding the Massachusetts law preempted); *reh'g denied*, Apr. 12, 2016.

Thus, in Massachusetts, motor carriers like FedEx and BeavEx may use independent contractors and pay them accordingly—using deductions from pay to cover expenses, including equipment, uniforms, and insurance. In Illinois, however, that is not the case. Without preemption, BeavEx faces an expensive potential class action, and must either restructure its business in Illinois to add more than a hundred new "employees" or leave the state entirely. At the same time, BeavEx locations in Massachusetts may continue to operate as they always have, safe under *MDA I* and *Schwann*.

Others have observed this conflict. Plaintiff's counsel—the same in both cases—has noted that the "Seventh Circuit's holding . . . is directly on point and squarely contradicts with the panel's opinion in [*Schwann*]."). App. 127. *See also Echavarria v. Williams-Sonoma*, 2016 WL 1047225, at *8 (D.N.J. Mar. 16, 2016) (citing both *BeavEx* and *Schwann* and opining that their "conclusion[s] stand[] in tension").

1. The First and Seventh Circuits have reached opposite results in parallel cases.

This case and *Schwann*, in particular, are parallel cases. In both, the plaintiffs are owner-operator drivers for delivery companies. In both, the drivers signed contracts classifying them as independent contractors, not employees. In both cases, however, state law defined the drivers as

employees because they work within "the usual course of business" of the employer. Mass Gen. Laws ch. 149, § 148B(a)(2); *see also* 820 ILCS 115/2.

The governing parts of these state statutes are the same, as the Seventh Circuit and both sides' counsel have all agreed. App. 14 (noting that Massachusetts and Illinois law are "substantially similar"); App. 146 (counsel citing "a nearly identical definition for employees under Massachusetts . . . wage statutes").

In both cases, the drivers brought class actions. They claimed damages based on being paid as independent contractors rather than employees. FAAAA preemption was a key defense in both cases.

In *Schwann*, the First Circuit found preemption. 813 F.3d at 432 ("We find that the express preemption provision of the [FAAAA] preempts the application of [prong two of the Massachusetts' statute] to FedEx."). The court did not see it as a close question. *Id.* at 440 (noting that other statutes may pose "closer [FAAAA preemption] questions than that presented in this case").

In contrast, the Seventh Circuit found no preemption. App. 17 ("the question . . . [is] whether the express-preemption provision of the FAAAA preempts prong two of the definition of employee contained in the [Illinois wage law] . . . . We conclude that it does not.").

2. The Circuits' rationales conflict.

In *Schwann*, the First Circuit noted the "purposefully expansive" scope of FAAAA preemption and Congress' dual deregulatory and anti-patchwork objectives. 813 F.3d at 436. These objectives were central to the court's finding of "significant impact" and thus preemption. *Id.*

First, the First Circuit observed that the state wage law poses a major "patchwork" problem because "federal Fair Labor Standards Act . . . and the law of many states" use a different standard for defining employee status. *Id.* at 438. State law "requires FedEx to use persons who are employees to perform . . . delivery services even if those persons could be deemed independent contractors under federal law and the law of many states." *Id.* That "runs counter to Congress's purpose to avoid 'a patchwork of state service-determining laws . . . that it determined were better left to the competitive marketplace." *Id.* (citing *Rowe*, 552 U.S. at 373).

Second, the *Schwann* court recognized that the Massachusetts law, though generally applicable, would effectively regulate motor carriers by forcing them to structure their business a certain way. "The regulatory interference . . . is not peripheral." 813 F.3d at 438. By barring motor carriers' preferred business model, the state law undermined the deregulatory purpose of the FAAAA. The court noted that this state law essentially governs vertical integration. It "defin[es] the degree of integration that a company may employ by mandating that any services deemed 'usual' to its course of business be

performed by an employee." *Id.* As a result, FedEx's "method of providing delivery services [using independent contractors bearing their own economic risks] would be largely foreclosed." *Id.* at 439. The "significant impact" was clear.

The Seventh Circuit's analysis proceeded differently. The court recognized that the Illinois wage law was "substantially similar" to Massachusetts' law. App. 14. The court further recognized that the First Circuit's "recent opinion in *MDA v. Coakley*, 769 F.3d 11 (1st Cir. 2014) was the "[m]ost relevant" federal appellate decision at the time. *Id.* And the court mentioned the correct rule: that "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption related objectives." App. 9 (quoting *Rowe*, 552 U.S. at 371).

But unlike the First Circuit, the Seventh did not begin with Congress' preemptive intent. The court did not mention Congress' goals of ending state regulation of motor carriers and avoiding carriers needing to comply with a patchwork of state law. *Cf. Schwann*, 813 F.3d at 436.

Instead, Seventh Circuit drew a line between employment laws and consumer laws. App. 16 (finding "a relevant distinction for purposes of FAAAA preemption between generally applicable state laws that affect the carrier's relationship with the its customers and those that affect the carrier's relationship with its workforce."). The court labeled Illinois' wage law "a background labor law . . . that only indirectly affects prices." App. 18.

The First Circuit has rejected this line of thinking. In *MDA I*, the court noted that the First Circuit had never used the "background law" language, and did "not find [it] particularly helpful." 769 F.3d at 19-20. The court stated that "we must carefully evaluate even generally applicable state laws for an impermissible effect . . . rather than simply assigning it a label." *Id.* at 20 (adding that "[w]e refuse . . . to adopt such a categorical rule exempting from preemption all generally applicable state labor laws").

The Seventh Circuit then downplayed the impact of the Illinois wage law on BeavEx. App. 21. The court opined that in the remaining soup of other federal and state employment laws, the new "employees" still may be "independent contractors" for some purposes. *Id.* The court thus used the "patchwork problem" for the opposite of Congress' original goal, and the opposite of the First Circuit—to downplay the importance of any one piece of the patchwork.

The Seventh Circuit's decision boils down to an incorrect focus on upholding "background" state employment laws, combined with misapprehensions about the need for individualized evidence and the scope of the issue. The First Circuit's decision boils down to a proper focus on Congress' preemptive intent and the inherently significant nature of forcing motor carriers to label hundreds of drivers "employees" and pay them accordingly. The combined result is a clear circuit split.

Indistinguishable tests for "employment" status are operable in one state, but not another.

3. Efforts to reconcile the Circuits fail.

In deciding *Schwann*, the First Circuit addressed this case in a single footnote. *Schwann*, 813 F.3d at 440 n. 8. Having "considered" this case, the *Schwann* court did not profess agreement or disagreement. *Id.* Instead, the First Circuit simply concluded that three aspects of the cases differed. *Id.* None of the alleged distinctions work.

First, to separate the two State laws, the court observed "the carrier's ability under Illinois law to contract around the state rule prohibiting deductions from wages." *Schwann*, 813 F.3d at 440, n.8. But there is no way to "contract around" Illinois wage law. *Contra* App. 22. The opposite is true. BeavEx's contracts with its 104 drivers state that deductions will be made for equipment, insurance, and so on. This suit repudiates those contracts by arguing that they cannot stand in the face of Illinois' wage law.

To "contract around" the bar on deductions, BeavEx could seek consent from each driver, for each check, for each specific deduction, "given freely at the time the deduction is made." 820 ILCS 115/9; App. 22. That does not solve the problem. Obtaining such consent would obviously be a significant administrative task. *See* 56 Ill. Admin. Code § 300.720 (listing requirements for any such consent). And after all, the whole point of the Illinois law is that the drivers, as "employees," need not consent to such deductions. *See* § 300.720 (requiring any

written agreement allowing for deductions over time to "allow for voluntary withdrawal" from authorization). A "delivery company cannot be forced to conduct its business in reliance upon finding workers willing to waive their statutorily provided entitlements." *MDA II*, 117 F. Supp. 3d at 92.

Second, the *Schwann* court perceived a difference in the arguments or evidence provided by the motor carriers in each case. 813 F.3d at 440 n.8. It is true that the Seventh Circuit zeroed in on empirical evidence specific to BeavEx, while the First Circuit did not. But that simply shows the opposite reasoning in the two cases. The Seventh Circuit's focus on evidence unique to BeavEx runs directly counter to the First Circuit's focus on the "logical effect that a particular scheme has on the delivery of services." *Schwann*, 813 F.3d at 437 (noting that preemption "need not be proven by empirical evidence"). *See also* App. 124 (*Schwann*'s holding was not "based on any hard evidence, because FedEx did not submit such evidence").

And third, the court observed that Illinois' wage law "implicated" a "lesser scope of [other] laws" than Massachusetts' law. *Schwann*, 813 F.3d at 440, n.8. The Seventh Circuit also embraced this alleged distinction, attempting to distinguish *MDA I* by opining that "the Massachusetts statute . . . triggers far more employment laws" than the Illinois wage law. App. 17.

But as an initial matter, the potential future application of other laws cannot distinguish this case from *Schwann*. In both, the plaintiffs—with the

same counsel—disclaimed any effort to enforce state employment laws beyond the wage laws addressed here. *Compare* App. 20 ("the only substantive requirement of the IWPCA that Plaintiffs seek to enforce is that BeavEx refrain from making deductions from its couriers' pay"), *with Schwann* Reh'g Pet., App. 126 n.5 ("[T]he Plaintiffs only seek to enforce the wage payment law found in M.G.L. c. 149, § 148 . . . and therefore the Court should limit its analysis to the individual law(s) sought to be enforced in a particular case.").

Further, the wage laws affect other statutes in both States. The web of Illinois laws that draw lines between "employees" and "independent contractors" cannot be so easily parsed apart. For instance, the Illinois Attorney General has conceded that the same "employee" test here also applies to unemployment insurance. Madigan Amicus Br., 2015 WL 2091856, at *17 ("To be sure, that same test is used to determine whether an individual is an employee or independent contractor under Illinois's Unemployment Insurance Law, 820 ILCS 405/212."). If the ripple effect matters, it applies in both States.

On top of that, "the logical effect of classification as an employee under [one law] . . . is to increase the likelihood of meeting the 'employee' definition provided in [other] statutes." *MDA II*, 117 F. Supp. 3d at 95. For that reason, a "hybrid model where workers are considered to be employees under some statutes and to be independent contractors under others" has been rejected. *Id.* Such a model would "impose a significant burden on employers who must determine how to classify each worker with

respect to each statute." *Id.* As of mid-2015, the Massachusetts district court had seen "no examples of such an arrangement operating in practice." *Id.*

In short, the two Circuits here have each issued opinions aware of the other's position. They have staked out opposite positions and justified their opposite results only with inaccurate or legally inconsequential differences.

III. Litigation across the country demonstrates that this issue is important and disputed beyond the First and Seventh Circuits.

It is undisputed that the issue presented here is important. App. 127 (Plaintiffs' counsel opining that "this issue [is] of exceptional importance"). Two things make this clear.

1. Disagreement over FAAAA preemption in this area includes other Circuits.

Courts beyond the First and Seventh Circuits have split over when the FAAAA preempts State law affecting motor carriers' ability to consider their drivers independent contractors.

As early as November 2014, the parties here agreed that "recent cases regarding the preemptive effect of the FAAAA, especially as it applies to similar or substantially identical laws or provisions in other jurisdictions, have created a lack of clarity in the law." App. 156. Even before the Seventh

Circuit's ruling, the district court below observed that "the circuits are split" on applying FAAAA preemption to generally applicable employment-type state laws. App. 36.

The Supreme Court of California recently found no preemption of a state unfair competition claim alleging that a motor carrier mislabeled its drivers "independent contractors." *People ex rel. Harris v. PAC Anchor Transp., Inc.*, 329 P.3d 180 (Cal. 2014), *cert. denied*, 135 S. Ct. 1400 (2015). Six times, the court asserted that the relevant state unfair competition laws were "generally applicable" or "of general application." *Id.* at 188-90. The court took it as beyond dispute that "the FAAAA does not preempt generally applicable employment laws that affect prices, routes, and services." *Id.* at 188. Accordingly, the court found no preemption. *Id.* at 190.

Similarly, New Hampshire wage law has been held not preempted. *Gennell v. FedEx Ground Package Sys., Inc.*, 2013 WL 4854362, at *1 (D.N.H. Sept. 10, 2013). In *Gennell*, the plaintiff drivers claimed that "that FedEx improperly treated them as independent contractors rather than employees." *Id.* at *1. The court ruled that "[l]aws of this type . . . are not ordinarily subject to preemption," and concluded that "plaintiffs' claims are not preempted by the FAAAA." *Id.* at *6, *10.

Meanwhile, cases beyond the First Circuit have found similar laws preempted. In *Sanchez*, the Eastern District of Virginia held that the FAAAA preempted Massachusetts' independent contractor

law, even before the First Circuit later reached the same holding. 937 F. Supp. 2d at 743. Similarly, a California rule that trucks operating in the Port of Los Angeles had to be driven by employees, not independent contractors, has been held preempted. *American Trucking Ass'n v. City of L.A.*, 2010 WL 3386436, at *19 (C.D. Cal. Aug. 26, 2010), *aff'd in relevant part*, 660 F.3d 384, 407-08 (9th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 2096 (2013).

2. Numerous motor carriers have been sued over precisely this.

A slew of cases have raised the same issue posed here. Many motor carriers have been sued for considering their drivers independent contractors, despite arguably contrary state wage law.

Against FedEx alone, there is a "national wave of class action lawsuits brought by . . . delivery drivers." App. 120. Consolidated as multi-district litigation in the Northern District of Illinois, that wave of cases has led to two opinions by the Seventh Circuit. *See, e.g., Craig v. FedEx Ground Package Sys.*, 686 F.3d 423, 425 (7th Cir. 2012) (addressing a consolidated 21 cases on appeal, all by drivers against FedEx, all in which the drivers claimed they were misclassified as independent contractors under various different state laws); *Craig v. FedEx Ground Package Sys.*, 792 F.3d 818 (7th Cir. 2015) (remanding to the MDL after concluding that the Kansas drivers were "employees" under state law). As the Seventh Circuit observed in *Craig*, "this case will have far-reaching effects on how FedEx runs its business . . . throughout the United States." 686

F.3d at 431 (noting that other companies "may have similar arrangements with workers," including "FedEx's competitors.").

Nor is FedEx the only motor carrier in this situation. In addition to BeavEx, several others have been sued in recent years. In Virginia, Lasership, Inc. "arranges for the delivery of packages for its customers along the East Coast, servicing major consumer companies such as Amazon.com." *Sanchez*, 937 F. Supp. 2d at 733. In responding to suit under Massachusetts law, Lasership stated that it "would be forced to cease operations in Massachusetts if were no longer able to use independent contractors to make deliveries." *Id.* at 734.

3PD, Inc. is similar. A Georgia corporation, it "provides last-mile delivery and logistics services for large merchants such as General Electric, Home Depot, and Lowe's," and makes "nearly 3 million residential, business, and job site deliveries every year." *Martins v. 3PD, Inc.*, 2013 WL 1320454, at *1, *14 (D. Mass. Mar. 28, 2013). Like Lasership and FedEx, 3PD was sued by drivers claiming they unavoidably qualified as "employees." The problem BeavEx faces here is widespread.

CONCLUSION

For these reasons, certiorari should be granted.

Respectfully submitted,

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April 19, 2016

APPENDIX

APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 15-1109 & 15-1110

[Filed January 19, 2016]

THOMAS COSTELLO, MEGAN BAASE KEPHART, and OSAMA DAOUD, on behalf of themselves and all other persons similarly situated, known and unknown,
Plaintiffs-Appellees / Cross-Appellants,

v.

BEAVEX, INCORPORATED,
Defendant-Appellant / Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12 CV 7843 — **Virginia M. Kendall**, *Judge*.

ARGUED SEPTEMBER 18, 2015 —
DECIDED JANUARY 19, 2016

Before BAUER, KANNE, and ROVNER, *Circuit Judges*.

KANNE, *Circuit Judge*. BeavEx, Inc. is a same-day delivery service that enlists 104 couriers to carry out

its customers' orders throughout the state of Illinois. By classifying its couriers as independent contractors instead of employees, BeavEx is not subject to several state and federal employment laws, including the Illinois Wage Payment and Collection Act ("IWPCA"), 820 ILCS 115, which, among other things, prohibits an employer from taking unauthorized deductions from its employees' wages. Plaintiffs, and the putative class, were or are individual couriers who allege that they should have been classified as employees of BeavEx for purposes of the IWPCA, and accordingly, any deductions taken from their wages were done so illegally. Complicating Plaintiffs' position is the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c)(1), which expressly preempts any state law that is "related to a price, route, or service of any motor carrier." BeavEx contends that the FAAAA preempts the IWPCA, making any deductions it withheld from its couriers' wages valid.

The district court held that the FAAAA does not preempt the IWPCA and so denied BeavEx's motion for summary judgment. At the same time, the district court denied Plaintiffs' motion to certify the class but granted their motion for partial summary judgment, holding that Plaintiffs are employees under the IWPCA. This interlocutory appeal presents for our review the question of whether the FAAAA preempts the IWPCA and whether the district court properly denied class certification. For the following reasons, we affirm the district court's denial of BeavEx's motion for summary judgment, and we vacate its denial of class certification and remand for further proceedings.

I. BACKGROUND

A. Factual Background

BeavEx provides same-day delivery and logistics services to its customers. To perform its services in Illinois, BeavEx engages 104 couriers, which it classifies as independent contractors for all purposes. Plaintiffs, and the class they seek to represent, are approximately 825 individual couriers who performed delivery services for BeavEx in Illinois from October 1, 2002, to the present and were not treated as employees under the IWPCA.

BeavEx classifies its couriers as independent contractors under all state and federal labor laws. Some of BeavEx's couriers are incorporated, while others are not. Some couriers, with BeavEx's approval, use subcontractors to complete deliveries. To become a courier for BeavEx, a driver must sign an Owner/Operator Agreement and a contract with Contract Management Services. Under the agreements, BeavEx has the authority to terminate a courier's contract for improper conduct. BeavEx also may terminate a contract if a customer on the courier's route stops contracting with BeavEx.

BeavEx pays its couriers per route or per delivery, rather than per hour. Couriers drive their own vehicles, which they lease to BeavEx. Couriers must wear uniforms with the BeavEx logo, and their cars must bear the BeavEx logo, phone number, and Illinois Commerce Commission number. BeavEx does not provide health insurance or workers' compensation and does not pay payroll taxes or unemployment contributions for its couriers. In addition, BeavEx

deducts expenses from its couriers' wages for occupational accident insurance, cargo insurance, uniforms, scanners, cellular phone fees, and "chargebacks" for unsatisfactory deliveries.

BeavEx has ten individuals it considers employees who tend to administrative and warehouse duties in Illinois. BeavEx pays these employees a salary or an hourly wage and provides health insurance and other benefits. BeavEx also pays payroll taxes and makes unemployment and workers' compensation insurance contributions for these employees.

B. Procedural Background

Plaintiffs filed suit against BeavEx on October 1, 2012, alleging that BeavEx misclassified its couriers as "independent contractors" instead of "employees" under Illinois statutory and common law. Plaintiffs alleged that the misclassification caused (1) a deprivation of overtime wages in violation of the Illinois Minimum Wage Law; (2) illegal deductions from Plaintiffs' wages in violation of the IWPCA; and (3) unjust enrichment of BeavEx.

On August 13, 2013, BeavEx moved for summary judgment on all of Plaintiffs' claims.[1] With respect to count two, BeavEx argues that the FAAAA expressly preempts the IWPCA's definition of "employee" because it is "related to" a price, route, or service. Plaintiffs, on September 23, 2013, contemporaneously filed a motion

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[1] Because this appeal was certified only on the question of whether prong two of the IWPCA's test for employment is preempted, we do not address counts one and three, which arise under different state laws.

for class certification and a motion for partial summary judgment on count two, arguing that Plaintiffs are "employees" within the meaning of the IWPCA.

The district court disposed of the three motions in one order. The district court denied BeavEx's motion for summary judgment, holding that the FAAAA does not preempt the IWPCA.

The district court then considered and denied Plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23(b)(3). Plaintiffs met the numerosity, typicality, and commonality prerequisites of Rule 23(a), the court decided. The district court held, however, that Plaintiffs did not fulfill the predominance requirement of Rule 23(b)(3) because the first prong of the IWPCA's three-part employee test requires an individualized inquiry to determine if the employer controls the worker "in fact." "Failure to acknowledge the individualized inquiry required by the first prong [of the IWPCA] because the second prong can be decided through common facts," the district court concluded, "would be the same as ruling on the merits," which is improper at the class certification stage. *Costello v. BeavEx, Inc.*, 303 F.R.D. 295, 308 (N.D. Ill. 2014).

Finally, the district court granted Plaintiffs' motion for partial summary judgment, concluding that Plaintiffs are "employees" of BeavEx within the meaning of the IWPCA because BeavEx could not satisfy the second prong of the IWPCA's test for employment.

The district court certified for interlocutory appeal the question of whether the FAAAA preempts the

IWPCA. Plaintiffs filed a cross-appeal contesting the district court's denial of class certification. This court granted leave to appeal.

II. ANALYSIS

BeavEx challenges the district court's determination that the FAAAA does not preempt the IWPCA, arguing that a law that prohibits its use of independent contractors is related to a price, route, or service and is therefore preempted. Plaintiffs' cross-appeal seeks review of the district court's refusal to certify the proposed class. According to Plaintiffs, the district court abused its discretion by finding that common issues did not predominate when common evidence would show that BeavEx cannot satisfy prong two of the IWPCA's employment test. We treat each issue in turn.

A. FAAAA Preemption

We review a district court's federal preemption decision *de novo*. *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1045–46 (7th Cir. 2013). The touchstone of preemption analysis is the intent of Congress. *Id.* at 1046 (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

1. The IWPCA

The Illinois General Assembly passed the IWPCA in 1973 "to provide employees with a cause of action for the timely and complete payment of earned wages or final compensation, without retaliation from employers." *Byung Moo Soh v. Target Mktg. Sys., Inc.*, 817 N.E.2d 1105, 1107 (Ill. App. Ct. 2004) (quotation marks omitted). In particular, the IWPCA prohibits employers from taking deductions from employees'

wages unless the deductions are "(1) required by law; (2) to the benefit of the employee; (3) in response to a valid wage assignment or wage deduction order; [or] (4) made with the express written consent of the employee, given freely at the time the deduction is made." 820 ILCS 115/9.

The IWPCA provides a broad definition of what constitutes an "employee" using a three-prong test commonly referred to as an ABC test. *Id.* 115/2. The test is conjunctive, meaning that if an employer cannot satisfy each of the prongs, then the individual must be classified as an employee for purposes of the IWPCA. *See Novakovic v. Samutin*, 820 N.E.2d 967, 973 (Ill. App. Ct. 2004).

At issue in this case is the second prong of the ABC test. The second prong requires that to treat an individual as an independent contractor, the individual must "perform[] work which is … outside the usual course of business … of the employer." 820 ILCS 115/2. Plaintiffs argued, and the district court found, that because BeavEx is a delivery company, its delivery couriers do not perform work outside the usual course of BeavEx's business. Accordingly, the district court held, BeavEx's couriers must be classified as employees within the meaning of the IWPCA.

2. The FAAAA

The district court's holding that the couriers are "employees" under the IWPCA does not, however, end our analysis of the issue. That is because BeavEx contends that the FAAAA provision that preempts any state law "related to a price, route, or service of any

motor carrier" applies to the IWPCA's definition of employee. 49 U.S.C. § 14501(c)(1).

a. History of the FAAAA

The Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, set into motion nearly a century of federal regulation of the transportation industry. The Interstate Commerce Commission first regulated the railroad industry, then in 1935 Congress added the trucking industry, Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, and in 1938, the airline industry, Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

But by the 1970s, a movement to deregulate the transportation industry was taking off. In 1978, Congress "determin[ed] that 'maximum reliance on competitive market forces'" would better serve the air transportation industry, and so began the process of deregulation. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). Congress enacted the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, which dismantled federal regulation of the airline industry. In addition, the ADA sought to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. To that end, Congress provided in the ADA that "no State … shall enact or enforce any law … relating to rates, routes, or services of any air carrier." 92 Stat. at 1708.

Trucking-industry deregulation was not far behind. In 1980, Congress passed the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, which ended the federal government's management of the trucking industry. Fourteen years later, to complete deregulation of the trucking industry, Congress

enacted a preemption provision in the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569. The FAAAA borrowed the preemptive language of the ADA, providing 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." *Id.* at 1606.

b. The Supreme Court's Interpretation of the FAAAA

The Supreme Court has on several occasions interpreted the "related to" language contained in the FAAAA and the ADA. The Court has interpreted the shared language of the two statutes identically. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008).

The preemptive scope of the FAAAA is broad. *See Morales*, 504 U.S. at 383–84. A state law is preempted if it has a direct connection with or specifically references a carrier's prices, routes, or services. *Id.* at 384. More expansively, a state law may be preempted even if the law's *effect* on prices, routes, or services "is only indirect." *Id.* at 386 (quotation marks omitted). This means "that pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390).

Preemption, however, is not unlimited. The FAAAA does not preempt state laws "that affect fares in only a 'tenuous, remote, or peripheral … manner.'" *Id.* (quoting *Morales*, 504 U.S. at 390). In *Morales*, the Supreme Court explained that laws prohibiting

gambling or prostitution, for example, were beyond the scope of FAAAA preemption. *Morales*, 504 U.S. at 390.

The Supreme Court has on four occasions elaborated on the scope of the "related to" clause of the ADA and FAAAA beginning with *Morales*, 504 U.S. 374.

In *Morales*, the National Association of Attorneys General promulgated "detailed standards governing the content and format of airline advertising, the awarding of premiums to regular customers …, and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights." 504 U.S. at 379. The attorneys general sought to enforce these "guidelines" through their states' generally applicable consumer protection statutes. *Id.* at 383.

The Court rejected the contention that a state law must actually direct the setting of rates, routes, or services or specifically target the airline industry to be preempted. *Id.* at 385–86. Instead, the Court concluded that enforcement of the guidelines through consumer-protection statutes was preempted because it "would give consumers a cause of action … for an airline's failure to provide a particular advertised fare—effectively creating an enforceable right to that fare when the advertisement fails to include the mandated explanations and disclaimers." *Id.* at 388 (citation omitted).

American Airlines, Inc. v. Wolens was the Supreme Court's second foray into interpreting the scope of ADA preemption. 513 U.S. 219 (1995). In *Wolens*, the plaintiffs filed suit against American Airlines under Illinois's Consumer Fraud Act and for breach of

contract because of the airline's retroactive changes in the terms and conditions of its frequent flyer program. *Id.* at 224–25. The Court held that claims under the Consumer Fraud Act were preempted because they "serve[] as a means to guide and police the marketing practices of the airlines." *Id.* at 228–29. The breach-of-contract claims, however, were not preempted because they are "privately ordered obligations" that "simply hold[] parties to their agreements" and "thus do not amount to a State's enact[ment] or enforce[ment] [of] any law" for purposes of ADA preemption. *Id.* (quotation marks omitted).

The scope of the preemption clause in the FAAAA itself first appeared before the Supreme Court in *Rowe*, 552 U.S. 364. In *Rowe*, Maine enacted a statute that required Maine-licensed tobacco retailers to use a delivery service that verified the recipient's identity, legal age, signature, and government-issued photo identification. *Id.* at 368–69. The Court held that the Maine law was preempted because it "will require carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer)." *Id.* at 372. A state law that requires carriers to offer particular services to its customers was precisely the result that the FAAAA was designed to prevent. *Id.*

Finally, the Supreme Court revisited FAAAA preemption in *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014). In *Northwest*, the plaintiff brought a state-law claim for breach of the implied covenant of good faith and fair dealing after Northwest terminated his "Platinum Elite" frequent-flier status. *Id.* at 1426. The Court held that the state common-law claim was

preempted because "it seeks to enlarge the contractual obligations that the parties voluntarily adopt[ed]." *Id.* If, however, the state's common law "permits an airline to contract around those rules," then the state law is not preempted. *Id.* at 1433.

c. Lower Courts' Interpretations of the FAAAA

The various courts of appeal have also grappled with resolving which laws are "related to" a price, route, or service and which laws are too "tenuous, remote, or peripheral" to fall within the ambit of FAAAA preemption.

We gave that question extensive treatment in *S.C. Johnson & Son, Inc. v. Transport Corporation of America, Inc.*, 697 F.3d 544 (7th Cir. 2012). In that case, S.C. Johnson learned that its transportation director, Milton Morris, was receiving cash, goods, travel, and services from certain motor carriers. *Id.* at 546. In exchange, Morris was giving the carriers business they otherwise would not have received or having S.C. Johnson pay above-market rates for the transportation services. *Id.* S.C. Johnson brought five state-law claims against the motor carriers involved in Morris's scheme for: "(1) fraudulent misrepresentation by omission; (2) civil conspiracy to violate the Wisconsin bribery statute; (3) civil conspiracy to commit fraud; (4) violation of the Wisconsin Organized Crime Control Act (WOCCA); and (5) aiding and abetting a breach of fiduciary duty." *Id.* (citations omitted). We held that S.C. Johnson's claims for fraudulent misrepresentation and conspiracy to commit fraud were preempted. *Id.* at 557. S.C. Johnson's

claims of bribery and racketeering, however, we held were not preempted.[2] *Id*. at 560.

The fraud claims we described as "well-meaning but widely varying paternalistic provisions designed to protect *consumers* from the rigors of the market." *Id.* at 557 (emphasis added). Enforcing these laws, therefore, amounts to a state substituting its own policy for the agreement the airline and its customers reached. *Id.*

In contrast, we described the bribery and racketeering claims as "state laws of general application that provide the backdrop for private ordering." *Id.* at 558. We acknowledged that virtually any state law, at some level, has an effect on the market price. *Id.* We used state labor laws as an example, noting that changes to "minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations" affect the cost of labor, and in turn, the price at which a motor carrier offers a service. *Id.* Yet, we concluded:

> [N]o one thinks that the ADA or the FAAAA preempts these and the many comparable state laws because their effect on price is too "remote." Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its *customer* a service for a particular price.

Id. (citations omitted and emphasis added).

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[2] We did not address the breach-of-fiduciary-duty claim because S.C. Johnson had not appealed the district court's dismissal of the claim as time-barred. *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am.*, 697 F.3d 544, 557 (7th Cir. 2012).

We also turn to our sister circuits' treatment of employment laws for additional guidance. Most relevant is the First Circuit's recent opinion in *Massachusetts Delivery Association v. Coakley* ("*MDA I*"), 769 F.3d 11 (1st Cir. 2014). In *MDA I*, the First Circuit addressed a Massachusetts law that used an ABC test for employment that is substantially similar to the IWPCA's. The district court found that the second prong of the ABC test was not preempted because the fact "[t]hat a regulation on wages has the potential to impact costs and therefore prices is insufficient to implicate preemption." *Id* at 21 (alteration in original and quotation marks omitted).

But the First Circuit reversed and remanded for further consideration. *Id.* at 23. The First Circuit declined to adopt a categorical rule exempting all generally applicable employment laws from preemption. *Id.* at 20. Instead, the court highlighted an error in the district court's analysis: when evaluating FAAAA preemption, a court should examine the *potential* impact of the law to determine if the effect of the law could be significant. *Id.* at 21. In addition, the district court only considered the impact of the law on the carriers' *prices,* not their routes and services. *Id.* at 21–22.

After remand, the district court held that the FAAAA did preempt the second prong of the Massachusetts statute's ABC test for employment. *Mass. Delivery Ass'n v. Healey* ("*MDA II*"), No. 10-cv-11521, 2015 WL 4111413, at *10 (D. Mass. July 8, 2015). The court found that the carrier would now have to alter its routes to begin at couriers' homes, pay stem miles, provide meal and rest breaks, maintain a

fleet of delivery vehicles, and eliminate on-demand delivery services or pay employees to be "on call." *Id.* at *4–6. All of these changes, the district concluded, would have a significant impact related to the company's prices, routes, and services, and therefore, the statute was preempted. *Id.* at *10.

No other circuits have addressed the precise question of where to draw the preemption line when state law mandates classification of couriers as employees for particular purposes. What our sister circuits do show is that the effect of a labor law, which regulates the motor carrier *as an employer*, is often too "remote" to warrant FAAAA preemption.

The First Circuit underscored this distinction in *DiFiore v. American Airlines, Inc.*, in which the court held that a Massachusetts law prohibiting an employer from keeping a payment advertised as a "service charge" was preempted. 646 F.3d 81, 88 (1st Cir. 2011). This was so because the law "directly regulates how an airline service is performed and how its price is displayed to customers—not merely how the airline behaves as an employer or proprietor." *Id.*

The effects of generally applicable meal and rest break laws, the Ninth Circuit concluded, are also too remote to warrant preemption. *Dilts v. Penske Logistics, Inc.*, 769 F.3d 637, 650 (9th Cir. 2014). The court explained:

> [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 that they set, the routes that they use, or the services that they provide.

Id. at 646.

Several circuits have held that claims of employment discrimination or retaliatory discharge are not preempted by the FAAAA. For example, in *Branche v. Airtan Airways, Inc.*, the Eleventh Circuit noted that "[i]t is true that an airline's employment decisions may have an incidental effect on its 'services,'" but the court held that the incidental effect of employment-retaliation claims was too remote to warrant preemption. 342 F.3d 1248, 1259–60 (11th Cir. 2003); *see also Wellons v. Nw. Airlines, Inc.*, 165 F.3d 493, 495 (6th Cir. 1999) (holding that race-discrimination claim was not preempted); *Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 597–98 (5th Cir. 1993) (holding that retaliatory-discharge claim was not preempted because its effect on airline services was too remote).

Our opinion in *S.C. Johnson* and the decisions of our sister circuits confirm that there is a relevant distinction for purposes of FAAAA preemption between generally applicable state laws that affect the carrier's relationship with its customers and those that affect the carrier's relationship with its workforce. Laws that affect the way a carrier interacts with its customers fall squarely within the scope of FAAAA preemption. Laws that merely govern a carrier's relationship with its workforce, however, are often too tenuously connected to the carrier's relationship *with its consumers* to warrant preemption. The Supreme Court's preemption decisions do not counsel a different conclusion. *See e.g.*, *Morales*, 504 U.S. at 388 (preempting state-law claim

because "it would give *consumers* a cause of action … for an airline's failure to provide a particular advertised prices" (emphasis added and citation omitted)); *Rowe*, 552 U.S. at 372 (preempting a state law that determined "the services that motor carriers will provide" to their customers).

3. Application of the FAAAA to the IWPCA

With this background in mind, we turn to the question presented for our review: whether the express-preemption provision of the FAAAA preempts prong two of the definition of employee contained in the IWPCA.

There are no bright-line rules to resolve whether a state law is preempted. Instead, we must "decide whether the state law at issue falls on the affirmative or negative side of the preemption line." *S.C. Johnson*, 697 F.3d at 550. Because the IWPCA is not specifically directed to motor carriers, the task before us is to determine whether the IWPCA will have a significant impact on the prices, routes, and services that BeavEx offers to its customers. We conclude that it does not.

BeavEx asks this court to apply the approach articulated by the First Circuit in *MDA I*, which it contends leads to the conclusion that a law that requires a motor carrier to classify its couriers as employees instead of independent contractors is preempted by the FAAAA. BeavEx's reliance on *MDA I* for its conclusion is misplaced, and we conclude that *MDA I* counsels a different result here.

Importantly, the Massachusetts statute at issue in *MDA I* triggers far more employment laws than the employment definition contained in the IWPCA, *MDA*

I, 769 F.3d at 15 n.1; *see also MDA II*, 2015 WL 4111413, at *4–6, which led the district court to hold it preempted. We, however, consider the impact that the *IWPCA* would have on BeavEx's business model. Empirical evidence is not mandatory for this court to conclude that the IWPCA is preempted. *See, e.g. Rowe*, 552 U.S. at 373–74 (not relying on empirical evidence to find FAAAA preemption). Instead, we conduct an individualized inquiry that "engage[s] with the real *and logical* effects of the state statute." *MDA I*, 769 F.3d at 20 (emphasis added).

The scope of the IWPCA is limited, and Plaintiffs are only seeking to enforce the provision prohibiting wage deductions. BeavEx has not cited any authority showing that the IWPCA would trigger state employment laws to the extent of those in *MDA I*. Because the scope of the IWPCA is limited, its logical effect is necessarily more limited than the statute at issue in *MDA I*. We find this distinction relevant and conclude that the impact of the IWPCA is too "tenuous, remote, or peripheral" to warrant FAAAA preemption.

Furthermore, the IWPCA is precisely the type of background labor law that this court alluded to in *S.C. Johnson*—a law that only indirectly affects prices by raising costs. The IWPCA is a law that regulates a labor input and "operate[s] one or more steps away from the moment at which the firm offers its *customers* a service for a particular price." *S.C. Johnson*, 697 F.3d at 558 (emphasis added). In other words, the IWPCA regulates the motor carrier *as an employer*, and any indirect effect on prices is too tenuous, remote, or peripheral. *Cf. DiFiore*, 646 F.3d at 87 ("Importantly, the tips law does more than simply regulate the

employment relationship between the skycaps and the airline."); *Tobin v. Fed. Express Corp.*, 775 F.3d 448, 456 (1st Cir. 2014) (distinguishing between state laws that regulate "how [a] service is performed (preempted) and those that regulate how an airline behaves as an employer or proprietor (not preempted)" (quotation marks omitted)).

That is not to say that we are adopting "a categorical rule exempting from preemption all generally applicable state labor laws," *MDA I*, 769 F.3d at 20, but rather, we conclude that the IWPCA's effect on the cost of labor is too tenuous, remote, or peripheral to have a significant impact on BeavEx's setting of prices for its consumers.

BeavEx asserts that if the IWPCA is not preempted, it would

> be subject to numerous legal obligations toward those couriers that do not currently apply, including minimum wage, maximum hour, and overtime requirements, mandated payroll tax payments and withholding requirements, mandated workers' compensation and medical insurance, and mandated contributions to state unemployment insurance, in addition to remedies specifically requested in Plaintiffs' complaint, which include requirement [sic] BeavEx to purchase or lease, store, and maintain automobiles for its couriers.

(Appellant's Br. at 16.)

Conspicuously absent from BeavEx's parade of horrors is any citation of authority showing that it would be required to comply with this slew of federal

and state laws. We do not accept BeavEx's bare assertion that its couriers will need to be classified as employees for all purposes. Instead, the only substantive requirement of the IWPCA that Plaintiffs seek to enforce is that BeavEx refrain from making deductions from its couriers' pay without "express written consent of the employee, given freely at the time the deduction is made." 820 ILCS 115/9.

As a result of our holding, BeavEx will have to choose whether to absorb the costs it previously deducted or pass them along to its couriers through lower wages or to its customers through higher prices. We do not see, however, how the increased labor cost will have a *significant* impact on the prices that BeavEx offers to its customers. BeavEx has offered no evidence to persuade us differently.

In fact, the only numerical figure BeavEx alleges is that the human resources department would incur an additional cost of $185,000 per year to employ a human resources professional to oversee the Illinois workforce. BeavEx has offered no frame of reference upon which we could conclude that this $185,000 would significantly impact BeavEx's prices.

Even less obvious is any significant impact that prohibiting deductions would have on BeavEx's routes or services. We agree with BeavEx that reclassifying its couriers as employees for all purposes could undermine its ability to continue offering on-demand delivery services. When BeavEx gets on-demand orders from customers, it contacts a courier and offers the delivery. The courier is then free to accept or decline. In order to offer the same on-demand service with an employee workforce, BeavEx would have to pay couriers to be "on

call," and couriers would be unable to pursue other work opportunities during their on-call time. Such a requirement could have a significant impact on the ability of BeavEx to offer on-demand services, which its customers currently desire.

We do not see, however, how ruling that the IWPCA applies to BeavEx's couriers would create that situation. BeavEx has offered no specific evidence of the effect of the *IWPCA* on its business model, instead preferring to rely on conclusory allegations that compliance with the IWCPA will require BeavEx to switch its entire business model from independent-contractor-based to employee-based. We see no basis for concluding that the IWPCA would require that change given that the federal employment laws and other state labor laws have different tests for employment status. *See, e.g.*, 26 U.S.C. § 3121(d)(2) (for purposes of the federal tax code, an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee"); Ill. Admin. Code tit. 56, § 210.110 (providing six factors to determine if an individual is an employee for purposes of the Illinois Minimum Wage Law, 820 ILCS 105).

BeavEx also raises concerns that if we do not hold that the IWPCA is preempted, it will "require motor carriers to change their business practices from state to state to comply with a patchwork of random state-level requirements." (Appellant's Br. at 15.) We find the Supreme Court's decision in *Northwest* instructive. In that case, the petitioners argued that *all* state-law breach-of-implied-covenant claims must be preempted; otherwise, "airlines [would] be faced with

a baffling patchwork of rules, and the deregulatory aim of the ADA will be frustrated." *Northwest*, 134 S. Ct. at 1433. The Court rejected that argument, holding that a State's implied-covenant laws are not preempted if the State's law "permits an airline to contract around those rules." *Id.* The Court added, "[w]hile the inclusion of such a provision may impose transaction costs and presumably would not enhance the attractiveness of the program, an airline can decide whether the benefits of such a provision are worth the potential costs." *Id.*

The IWPCA benefits from this same flexibility—the IWPCA's prohibition on deductions from wages can be contracted around by "express written consent of the employee, given freely at the time the deduction is made." 820 ILCS 115/9. It is up to BeavEx to decide whether to stop making deductions or absorb the transaction costs of acquiring consent. What is clear is that BeavEx has not demonstrated to this court that preventing it from deducting from its couriers' wages or the transaction costs associated with acquiring consent to do so would have a significant impact related to its prices, routes, or services.

Because we hold that the IWPCA is not "related to a price, route, or service of any motor carrier," we decline to address the second prong of the preemption analysis, which requires that the state law be related to a price, route, or service "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1); *see also Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) ("[T]he addition of the words 'with respect to the transportation of property'… massively limits the scope of preemption ordered by the FAAAA." (quotation marks omitted)).

B. Class Certification

We turn now to Plaintiffs' cross-appeal, which seeks review of the district court's refusal to certify the class.

We review a district court's denial of a plaintiff's motion for class certification for an abuse of discretion. *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 811 (7th Cir. 2012). "If, however, the district court bases its discretionary decision on an erroneous view of the law or a clearly erroneous assessment of the evidence, then it has necessarily abused its discretion." *Id.*

1. The Rule Against One-Way Intervention

BeavEx's central contention on appeal is that the relief Plaintiffs request—certification of the class—is barred by the rule against one-way intervention.

The rule against one-way intervention prevents plaintiffs from moving for class certification after acquiring a favorable ruling on the merits of a claim.[3] *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 354 (7th Cir. 1975) ("Inasmuch as the plaintiffs here did not seek

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[3] This is not to say that *defendants* are precluded from seeking a dispositive ruling on the merits prior to class certification, and we have looked upon such a procedure favorably. *See Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995) ('The [defendant] elected to move for summary judgment before the district judge decided whether to certify the suit as a class action. This is a recognized tactic and does not seem to us improper." (citations omitted)); *see also* Fed. R. Civ. P. 23(c)(1) advisory committee's notes to 2003 amendment ("The party *opposing* the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified." (emphasis added)).

certification, and in fact affirmatively sought resolution on the merits prior to certification in the face of objections by the defendants, they have themselves effectively precluded any class certification in this case."); *Wiesmueller v. Kosobucki*, 513 F.3d 784, 787 (7th Cir. 2008) ("[T]he plaintiff, as well as the district judge, put the cart before the horse, by moving for class certification after moving for summary judgment.").

The rule exists because it is "unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). If an individual plaintiff were to get a favorable ruling on the merits prior to certification—and its corresponding notice and opportunity to opt out—then class members are incentivized to remain in the lawsuit to take advantage of the favorable ruling. If an individual plaintiff got an unfavorable ruling on the merits prior to class certification, class members are incentivized to opt out of the class to avoid application of the unfavorable ruling. Allowing class members to decide whether or not to be bound by a judgment depending on whether it is favorable or unfavorable is "strikingly unfair" to the defendant. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1207 (7th Cir. 1971) (Stevens, J., dissenting).

In this case, Plaintiffs filed for partial summary judgment and class certification contemporaneously. In one order, the district court first denied class certification and then granted Plaintiffs' motion for partial summary judgment. Therefore, the rule against one-way intervention does not preclude class

certification in this case because the district court properly ruled on class certification before granting partial summary judgment in Plaintiffs' favor.

It bears noting, however, that Plaintiffs, by moving for class certification and partial summary judgment at the same time, came dangerously close to precluding review of the class certification decision. Had the district court chosen to decide Plaintiffs' motion for partial summary judgment prior to deciding class certification, the rule against one-way intervention may have precluded certification.

We urge plaintiffs to exercise caution when seeking a ruling on the merits of an individual plaintiff's claim before the district court has ruled on class certification and given notice of the ruling to absent class members. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 299 n.7 (1st Cir. 2000) ("[W]e do not pass upon the appropriateness of delaying a class certification ruling until after acting upon an individual plaintiff's summary judgment motion. We note, however, that this sequencing raises serious questions, and we urge district courts to exercise caution before deciding to embrace it." (citations omitted)).

2. Merits of Class Certification

Because the rule against one-way intervention does not apply to preclude class certification, we turn now to the merits of the district court's certification ruling. Plaintiffs argue that the district court abused its discretion in finding that common issues did not "predominate." We agree.

To be certified as a class action, the putative class must first meet the four requirements of Federal Rule

of Civil Procedure 23(a): numerosity, typicality, commonality, and adequacy. *Messner*, 669 F.3d at 811. The district court found that Plaintiffs satisfied the requirements of numerosity, typicality, and commonality, and we agree with its assessment.

In addition, the class must satisfy the requirements of one of the three alternatives contained in Federal Rule of Civil Procedure 23(b). In this case, Plaintiffs have chosen to proceed with a class action pursuant to Rule 23(b)(3), which requires that they show "that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3) (emphasis added); *Messner*, 669 F.3d at 811.

Predominance is satisfied when "common questions represent a significant aspect of [a] case and … can be resolved for all members of [a] class in a single adjudication." *Messner*, 669 F.3d at 815 (quotation marks omitted and alterations in original). We have said that "[t]he court should evaluate the evidence pragmatically … [to] decide whether classwide resolution would substantially advance the case." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 761 (7th Cir. 2014). This pragmatic review may warrant the court "tak[ing] a peek at the merits." *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010). In other words, "a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Mowbray*, 208 F.3d at 298. Predominance analysis "begins, of course, with the

elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011).

Under the IWPCA, all individuals are considered to be employees of an employer, unless the employer can prove *all three* prongs of the independent-contractor exemption. To satisfy the exemption, the employer must show that the worker is an individual:

> (1) who has been and will continue to be free from control and direction over the performance of his work, both under his contract … and in fact; and
>
> (2) who performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer …; and
>
> (3) who is in an independently established trade, occupation, profession or business.

820 ILCS 115/2. Because the test is conjunctive, if BeavEx cannot satisfy just one prong of the test, its couriers must be treated as employees. *Novakovic*, 820 N.E.2d at 973–74; *cf. Carpetland U.S.A., Inc. v. Ill. Dep't of Emp't Sec.*, 776 N.E.2d 166, 169–70 (Ill. 2002) (noting the conjunctive nature of the same independent-contractor exemption contained in the Unemployment Insurance Act, 820 ILCS 405/212).

There is no doubt that common evidence will satisfy the second prong of the test—whether the individuals "perform[ed] work which is … outside the usual course of business … of the employer." 820 ILCS 115/2. Prong two only requires common evidence about BeavEx's

business model, which is applicable to all class members. BeavEx argues, and the district court found, however, that because individualized inquiries would be necessary to resolve prongs one and three of the IWPCA's test for employment, common issues cannot predominate.

The district court committed a legal error when it concluded that "[f]ailure to acknowledge the individualized inquiry required by the first prong because the second prong can be decided through common facts would be the same as a ruling on the merits." *Costello v. BeavEx, Inc.*, 303 F.R.D. 295, 308 (N.D. Ill. 2014). The district court thought that it *could not* find that common questions predominate because the first prong contemplates individualized factfinding. That is incorrect.

There is no requirement that the district court blind itself to the conjunctive structure of the IWPCA's test for employment. Rather, "[i]n conducting this preliminary [predominance] inquiry … the court must look only so far as to determine whether, given the factual setting of the case, if the [plaintiff's] general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). Under the IWPCA, if the employer cannot satisfy *just one prong* of the test, the inquiry into employment status ends. Because Plaintiffs have shown that common evidence will resolve prong two, they have made a prima facie showing that they *can* win their case based on evidence common to the class. That conclusion is not the same as saying, as the district court thought, that Plaintiffs *do* win their case, which is the merits

determination. Plaintiffs have demonstrated that common questions predominate by making out a prima facie claim under the IWPCA based on evidence common to the class. Because the district court based its certification ruling on the erroneous assumption that the hypothetical individualized inquiry of prong one precluded a finding of predominance, it abused its discretion in denying class certification.

Moreover, certifying the class for purposes of prong two would substantially advance the litigation, regardless of whether the common evidence on prong two turns out in Plaintiffs' *or* BeavEx's favor. If answered in Plaintiffs' favor, all of BeavEx's couriers would have to be classified as employees under the IWPCA, eliminating the need for any individualized factfinding. If answered in BeavEx's favor, BeavEx would not have to litigate its satisfaction of prong two against every individual plaintiff, promoting efficiency. We have looked favorably upon the use of such a hybrid procedure. *See, e.g.*, *In Re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) (approving a procedure where the district court would decide whether a company-wide policy exists and then conduct individual hearings to determine whether an employee was affected by that policy as a "more efficient procedure than litigating the class-wide issue of [the defendant's] policy anew in more than a thousand separate lawsuits"). Regardless of which party wins, the common answer on prong two "represent[s] a significant aspect of [a] case and … can be resolved for all members of [a] class in a single adjudication." *Messner*, 669 F.3d at 815 (quotation marks omitted and alterations in original).

The district court also mistakenly found that prong one could not be decided by common evidence. The district court thought that the first prong "so clearly requires a factual inquiry into the circumstances of each driver." That is not true. The independent-contractor exemption requires that the individual be free from control "in fact," which is evaluated by looking at twenty-five factors. *See Carpetland*, 776 N.E.2d at 374–83 (evaluating the same employment test under the Unemployment Insurance Act). The existence of factors to evaluate, however, does not defeat the ability of Plaintiffs to satisfy those factors by offering common evidence.[4] In fact, the Illinois Supreme Court in *Carpetland* evaluated the twenty-five factors as they applied to "measurers" and "installers" based on common evidence, not to each individual measurer or installer. *Id.*; *see also Cohen Furniture Co. v. Ill. Dep't Emp't Sec.*, 718 N.E.2d 1058, 1062–63 (Ill. App. Ct. (evaluating control under same employment test of "carpet installers," not each individual carpet installer).

Finally, we find it telling that there is an inherent tension in BeavEx's position on class certification and its position on the merits of preemption. On one hand, BeavEx argues that class treatment is not warranted

[4] Plaintiffs attempt to "concede that control 'in fact' may require individualized assessments, and therefore waive any argument for class certification as to BeavEx's control 'in fact.'" (Appellee's Br. at 52.) "[A] court is not bound to accept a concession when the point at issue is a question of law." *Deen v. Darosa*, 414 F.3d 731, 734 (7th Cir. 2005). Because the question of whether common evidence could ever satisfy an inquiry "in fact" is a question of law, we reject Plaintiffs' concession. An inquiry as to control in fact could still be satisfied by the presentation of common evidence.

for its couriers because it must individually evaluate and classify each courier as an independent contractor "in fact." On the other hand, for purposes of preemption, BeavEx takes the position that every single courier would have to be reclassified from independent contractor to employee, revealing the more likely proposition that BeavEx thinks that uniform treatment of its couriers is appropriate. *See Norris-Wilson v. Delta-T Grp., Inc.*, 270 F.R.D. 596, 602 (S.D. Cal. 2010) ("[I]t may be that [the defendant] believes its workers are in fact independent contractors *for reasons unique to each individual*, but it's more likely the case [the defendant] believes the independent contractor classification is universally appropriate. That runs at cross-purposes with the reason for objecting to class certification, which is that it's impossible to reach general conclusions about the putative class as a whole.").

Because the district court committed legal error when it thought that finding that prong two could be decided by common evidence was an improper decision on the merits, it abused its discretion in denying class certification on those grounds. Accordingly, we vacate the district court's denial of class certification and remand for further consideration.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of BeavEx's motion for summary judgment. We VACATE the district court's order denying class certification and REMAND for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 12 c 7843

Judge Virginia M. Kendall

[Filed December 1, 2014]

Costello et al	)
	)
Plaintiff(s),	)
	)
v.	)
	)
Beavex, Inc.	)
	)
Defendant(s).	)
	)

ORDER

The Parties' Joint Motion for Certification of Interlocutory Appeal, for Recommendation of Interlocutory Appeal, and for Stay (Dkt. 141) is granted.

STATEMENT

Background

On March 31, 2014, the Court entered a Memorandum Opinion and Order denying BeavEx's motion for summary judgment, granting the Plaintiffs' partial motion for summary judgment, and denying the

Plaintiffs' motion for class certification. In so holding, the Court found that (1) the IWPCA was not preempted by the FAAAA; (2) the named Plaintiffs were employees of BeavEx, not independent contractors; and (3) class certification was not appropriate for the Plaintiffs' IWPCA claim. (Dkt. No. 95). On October 29, 2014, the Court entered an order denying both the Plaintiffs' and the Defendant's respective motions for reconsideration. BeavEx requested reconsideration of the Court's finding that the FAAAA did not preempt the IWPCA while the Plaintiffs sought reconsideration of the Court's denial of class certification. The parties intend to cross-appeal and seek a certificate of appealability from the Court. BeavEx requests the Court grant a petition under 28 U.S.C. § 1292(b) certifying its interlocutory appeal regarding preemption. The Plaintiffs move for the Court to recommend that the Seventh Circuit accept their interlocutory appeal challenging the denial of class certification under Fed. R. Civ. P. 23(f), although the Plaintiffs' appeal does not require certification by this Court. The parties additionally seek a stay during the appeal. For the following reasons, the parties' motion is granted.

Discussion

BeavEx seeks certification of this Court's prior ruling in denying BeavEx's motion for reconsideration on one question of law:

1. Does the FAAAA's preemption provision, 49 U.S.C. § 14501(c)(1), preempt the definition of "employee" as set forth at Section 2 of the IWPCA, 820 ILCS 115/2, to the extent that definition imposes limitations upon the use of independent contractors by Illinois employers?

The Plaintiffs intend to submit a Rule 23(f) Petition to the Seventh Circuit asking the following question:

I. Did the District Court err in denying class certification to the Plaintiffs based on the reasons described by the District Court in its opinion?

A. BeavEx's Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)

A district court order not otherwise appealable may be reviewed by the Court of Appeals in those cases where there exists "a controlling question of law as to which there is substantial ground for difference of opinion and [where] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). A district court may certify an order for interlocutory appeal at its discretion, if a request for review of this kind has been brought within a reasonable time following the entrance of the order. *Id.*; *see also Richardson Elecs., Ltd. v. Panach Broad. of Pa., Inc.*, 202 F.3d 957, 958 (7th Cir. 2000). In order for the Court to certify a question for interlocutory appeal under 28 U.S.C. § 1292(b), four statutory criteria must be present: "there must be a question of *law*, it must be *controlling*, it must be *contested*, and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000) (emphasis in original). The promise to speed up the litigation does not require that the interlocutory appeal resolve the matter in its entirety; it is sufficient that an interlocutory appeal would remove uncertainty about the status of a claim that might delay settlement or resolution. *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012). The Seventh Circuit

has instructed district courts not to certify interlocutory orders under § 1292(b) "[u]nless *all* these criteria are satisfied . . ." *Ahrenholz*, 219 F.3d at 676. Doing so without satisfying all criteria "is merely to waste [the appellate court's] time and delay the litigation in the district court, since the proceeding in that court normally grinds to a halt as soon as the judge certifies an order in the case for an immediate appeal." *Id.* For the following reasons, all four criteria are satisfied in this case.

1. Question of Law

A district court may certify an interlocutory order for appeal only if the appeal concerns a "question of law." *Calvin v. Sherriff of Will County*, No. 03 C 3086, 2006 WL 1005141, at *3 (N.D. Ill. Apr. 14, 2006) (Kendall, J.) (quoting *Ahrenholz*, 219 F.3d at 677). A "question of law" means an "abstract legal issue." *Ahrenholz*, 219 F.3d at 677. In order to be a "question of law" meriting certification, the issue should be a "reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine" that "the court of appeals could decide quickly and cleanly without having to study the record . . ." *Id.* at 676-77. Here, because BeavEx's position is based solely on preemption by the FAAAA, the appeal concerns a question of law.

2. Controlling

A question of law is controlling "if its resolution is quite likely to affect the further course of litigation, even if not certain to do so." *F.D.I.C. v. Mahajan*, No. 11 C 7590, 2013 WL 3771419, at *3 (N.D. Ill. July 16, 2013) (Kendall, J.) (quoting *Sokaogon Gaming Enter. Corp. v.*

Tushie-Montgomery Assocs., Inc., 86 F.3d 656, 659 (7th Cir. 1996)). Rulings that have substantially reduced the amount of damages a plaintiff could have recovered have been held by other district courts to present controlling issues. *See, e.g., Hollinger Int'l Inc. v. Hollinger, Inc.*, No. 04 C 698, 2005 WL 327058, at *2 (N.D. Ill. Feb. 3, 2005) (ruling that reduced liability by two thirds constituted a controlling questions; *In re Brand Name Prescription Drugs Antitrust Lit.*, No. 94 C 897, 1998 WL 808992, at *5 (N.D. Ill. Nov. 17, 1998) (in orders disposing of a large percentage of recoverable damages, "the proper measure of damages is always a controlling question of law."). This factor is satisfied because resolution of the issue has the potential to be dispositive of the Plaintiffs' IWPCA claim. *See Sterk*, 672 F.3d at 536.

3. Contestability of the Question

"A question of law is contestable if there are substantial conflicting decisions regarding the claimed controlling issue of law, or the question is not settled by controlling authority and there is a substantial likelihood that the district court ruling will be reversed on appeal." *LG Elecs. v. Whirlpool Corp.*, No. 08 C 242, 2009 WL 5579006, at *6 (N.D. Ill. Nov. 23, 2009); *Calvin*, 2006 WL 1005141 at *4. "Questions of first impression . . . [are] certainly contestable." *Boim v. Quranic Literacy Inst. and Holy Land Found. For Relief and Dev.*, 291 F.3d 1000, 1007-08 (7th Cir. 2002). In this case, the question for certification is contestable not only because the circuits are split on the issue of whether the FAAAA preempts generally-applicable state employment statutes, but also because the

Seventh Circuit has never directly addressed the IWPCA in the FAAAA preemption context.

4. Speed Up of Litigation

Finally, the interlocutory appeal also has the potential to speed up the litigation. "[A]ll that section 1292(b) requires as a precondition to an interlocutory appeal, once it is determined that the appeal presents a controlling question of law on which there is a substantial ground for a difference of opinion, is that an immediate appeal *may* materially advance the ultimate termination of the litigation." *Sterk*, 672 F.3d at 536. Questions of law regarding preemption are particularly appropriate for immediate appeal because they can prevent unnecessary litigation. *See Ahrenholz*, 219 F.3d at 677 (whether a federal law preempted a state business-tort law in suits between air carriers over routes and rates of service was an abstract issue of law that could be determined by an appellate court without a trial record, resolution of which could head off protracted, costly litigation). Because all four criteria are satisfied, the Court finds that the preemption issue can be appealed.

B. The Plaintiffs' Interlocutory Appeal Pursuant to Fed. R. Civ. P. 23(f)

Rule 23(f) provides that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under [Rule 23] is a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered." The rule permits appeals from class certification orders despite the general policy against allowing interlocutory appeals. *McReynolds v. Merrill Lynch, Pierce, Fenner*

& Smith, Inc., 672 F.3d 482, 484 (7th Cir. 2012). Because "a denial of class certification often dooms the suit . . . [or] because a grant of certification may place enormous pressure on the defendant to settle . . . [a]nd because class actions are cumbersome and protracted, an early appellate decision on whether a suit can be maintained as a class action can speed the way to termination of the litigation by abandonment, summary judgment, or settlement. *Id.* (internal citations omitted). Of particular pertinence to this case, "a recognized ground for granting a Rule 23(f) petition is that deciding the appeal would clarify class action law." *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1076 (7th Cir. 2014). Rule 23(f) requires that leave to appeal be sought from the court of appeals. *McReynolds*, 672 F.3d at 484.

While the Plaintiffs do not need a certificate of appealability to appeal the Court's denial of class certification under Rule 23(f), the decision appears to be a prime candidate for appeal because the district courts are split on the issue of whether IWPCA claims are suitable for class resolution. Resolution through an appeal would clarify class action law on the subject. The Court additionally stays the proceedings during the pendency of the interlocutory appeals because both parties agree to the appealable issues and intend to cross-appeal.

Conclusion

For the foregoing reasons, the Court grants the Parties' Joint Motion for Certification of Interlocutory Appeal, for Recommendation of Interlocutory Appeal, and for Stay.

Date: 12/1/2014 /s/___________________________

Virginia M. Kendall
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 12 c 7843

Judge Virginia M. Kendall

[Filed October 29, 2014]

Costello)
Plaintiff(s),)
v.)
Beavex)
Defendant(s).)

ORDER

The Plaintiffs' Motion for Reconsideration (Dkt. 98) and the Defendant's Motion for Reconsideration (Dkt. 104) are denied. The Plaintiffs' Motion to Grant Notice of the Denial of Class Certification (Dkt. 96) is dismissed without prejudice.

STATEMENT

Plaintiffs Thomas Costello, Megan Baase Kephart, and Osama Daoud worked as courier drivers for Defendant BeavEx Inc. The Plaintiffs filed a Complaint individually and on behalf of all others similarly situated against BeavEx, alleging that they and the

putative class members were misclassified as independent contractors when they were actually employees. The parties cross-moved for summary judgment and the Plaintiffs concurrently moved for class certification. The Court denied BeavEx's motion for summary judgment and the Plaintiffs' motion for class certification but granted partial summary judgment as to the named Plaintiffs. *See Costello v. BeavEx Inc.*, No. 12 C 7843, 2014 WL 1289612 (N.D. Ill. Mar. 31, 2014). The Plaintiffs now move the Court to (1) reconsider its denial of class certification and (2) grant notice to putative class members that class certification was denied. BeavEx seeks reconsideration on its motion for summary judgment regarding preemption. For the reasons set forth below, both motions for reconsideration are denied and the Plaintiffs' motion to grant notice of the denial of class certification is dismissed without prejudice.

BACKGROUND

The facts of this case are described in detail in the Court's March 31, 2014 opinion and are incorporated herein by reference. *See Costello*, 2014 WL 1289612, at *1-3. The Court assumes familiarity with those facts. On March 31, 2014, the Court issued a Memorandum Opinion and Order. Pertinent to the instant discussion, the Court (1) denied BeavEx's motion for summary judgment because the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") did not preempt the Illinois Wage Payment and Collection Act ("IWPCA"); (2) denied the Plaintiffs' motion for class certification because common questions of fact did not predominate the Plaintiffs' claim for employment misclassification under the IWPCA; and (3) granted the

named Plaintiffs' motion for summary judgment because they performed work in the usual course of BeavEx's business, thereby establishing themselves as employees of BeavEx.

LEGAL STANDARD

As a threshold matter, the Plaintiffs move for reconsideration under Fed. R. Civ. P. 59(e). But Rule 59(e) applies only to motions seeking relief from final judgments or orders. *See, e.g., Duffin v. Exelon Corp.*, No. 06 C 1382, 2007 WL 1385369, at *2 (N.D. Ill. May 4, 2007). Rule 54(b) of the Federal Rules of Civil Procedure is more properly invoked; it provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." Courts in this District have construed motions to reconsider interlocutory orders as arising under Rule 54(b) in addition to the Court's inherent authority to do so. *See F.D.I.C. v. Mahajan*, No. 11 C 7590, 2013 WL 3771419, at *1 (N.D. Ill. July 16, 2013) (Kendall, J.).

Motions for reconsideration are extraordinary in nature and are viewed with disfavor. *See, e.g., Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990); *see also In re Abbott Depakote S'holder Derivative Litig.*, No. 11 C 8114, 2013 WL 4953686, at *1 (N.D. Ill. Sept. 12, 2013) (Kendall, J). A motion for reconsideration is not an appropriate vehicle for relitigating previously rejected arguments or introducing evidence or legal theories

that could have been presented earlier. *See Sigsworth v. City of Aurora, Ill.*, 487 F.3d 506, 511-12 (7th Cir. 2007); *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996). Instead, motions for reconsideration may only be brought "to correct manifest errors of law or fact or to present newly discovered evidence." *Caisse Nationale*, 90 F.3d at 1269. As a result, they are only appropriate where: (1) the court has misunderstood a party; (2) the court has made a decision outside the adversarial issues presented; (3) the court has made an error of apprehension; (4) a significant change in the law has occurred; or (5) significant new facts have been discovered. *Bank of Waunakee*, 906 F.2d at 1191. Given their limited purpose, courts rarely grant motions to reconsider. *Id*.

DISCUSSION

A. The Plaintiffs' Motion for Reconsideration

The Plaintiffs' original motion for class certification and motion for reconsideration contend that common questions of fact predominate over any questions affecting only individual members. The Plaintiffs maintain that the Court's decision to the contrary was error, primarily arguing that the Court refused to make a preliminary inquiry into the merits when deciding whether to certify the class. In essence, the Plaintiffs believe that the Court found it was prohibited from taking a "peek" or "glimpse" into the merits when considering class certification. The Plaintiffs' belief is incorrect.

The Plaintiffs' argument misconstrues the Court's March 31st Order. The Court readily agreed that "the

Plaintiffs are correct in stating that an inquiry into the merits may be made at the class certification stage" and that "merits questions may be considered only to the extent that they are necessary." *Costello*, 2014 WL 1289612 at *10 (citing *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct 1184, 1194-95 (2013)). The Court did not hold that it could not look at the merits at the class certification stage; instead, it deemed such an inquiry unnecessary.

Pursuant to the IWPCA, an individual providing services for another is presumed to be an employee unless the putative employer can demonstrate: (1) the individual is "free from control and direction over the performance of his work, both under his contract of service with his employer, and in fact;" and (2) the individual performs work either outside the usual course of business of outside all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees; and (3) the employee is in an independently established trade, occupation, profession, or business. 820 ILCS 115/2; *Novakovic v. Samutin*, 354 Ill. App.3d 660, 667-68 (1st Dist. 2004). This "independent contractor test" is conjunctive, meaning the putative employer must demonstrate each element of the exemption in order to demonstrate that the service provider is an independent contractor. *Id*. at 668. Here, there was "really no dispute that the second prong of the independent contractor test can be satisfied by common evidence." *Costello*, 2014 WL 1289612 at *20. In fact, BeavEx recognized as much. *See id.* at *19 ("BeavEx acknowledges that the second prong of the test does not require individualized proof"). With that, the Court's inquiry into the second

prong was complete and a merits review was entirely unnecessary. This case does not present disputed legal or factual premises requiring an examination of the merits at the class certification stage. Making a determination that common questions of fact would dictate whether the performance of courier drivers is in the usual course of business of a courier company required no merits inquiry; the answer was not only in the affirmative, but also undisputed by the parties. This quickly-reached conclusion made any survey of the merits gratuitous:

> Although we have cautioned that a court's class-certification analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.

Amgen, 133 S. Ct. at 1194-95 (internal citations and quotation marks omitted). Both parties and the Court agreed that the second prong of the test did not require individualized evidence. Accordingly, an inquiry into the merits of the second prong was not warranted.

If this were the end of the class certification analysis, this Court would agree with the conclusion reached in *Brandon, et al. v. 3PD, Inc.*, No. 13 C 3745, Dkt. No. 76 at 30 (certifying a class only on the single issue of the second prong of the independent contractor exemption

"because the single issue of prong two can determine the putative class's claim and can be determined by common evidence about [the Defendant's] business practices"). But at the class certification stage, the Court must look at the IWPCA test in its entirety to determine if common evidence will predominate the resolution of its analysis. Because the first prong necessitates a factual inquiry into the circumstances of each driver, the denial of class certification was appropriate. Even though the Plaintiffs' conclusion regarding the second prong ultimately proved correct at summary judgment, making that same determination at class certification would have been premature. *See Amgen*, 133 S. Ct. at 1195 (quoting Fed. R. Civ. P. 23 Advisory Committee's 2003 note ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision.") (internal quotation marks omitted)). The Plaintiffs' motion to reconsider is therefore denied.

The Plaintiffs' remaining arguments that (1) the Court should readdress the class certification motion now that it found for the named Plaintiffs at the summary judgment stage and (2) that the Plaintiffs' concession that individual questions predominate the first prong of the independent contractor test's requirement for freedom from control "in fact" means the Court can now solely examine the universal contract signed by all BeavEx drivers are similarly unavailing. First, the fact that the common evidence utilized under the second prong of the independent contractor test leads to the conclusion that BeavEx is unable to demonstrate that its drivers were properly classified as independent contractors is not dispositive of the appropriateness of class certification in this case. At the class certification

stage, the Plaintiffs' cause of action, as a whole, must satisfy the predominance requirement of Rule 23(b)(3). The IWPCA's requirement of freedom from control "in fact" makes a class action inherently unsustainable. Second, the Plaintiffs' assertion that by conceding the fact that they cannot show that they were free from control in fact, thereby mooting the issue and leaving only a determination of whether they were free under their contracts, is an attempt "to advance arguments or theories that could and should have been made before" this Court issued its judgment. *See Sigsworth*, 487 F.3d at 512. A motion to reconsider is not properly utilized for this purpose. Although BeavEx has the ultimate burden of showing that the Plaintiffs are independent contractors, the Plaintiffs have the burden on their motion for class certification of showing that the issue can be determined by common proof. This they did not do.

B. BeavEx's Motion for Reconsideration

BeavEx's motion for reconsideration contends that (1) a significant change in the law occurred subsequent to the Court's finding that the IWPCA was not preempted by the FAAAA and (2) the Court erred by misapplying the standard of proof required for BeavEx to demonstrate preemption. Specifically, BeavEx contends that the Supreme Court's decision in *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014) makes clear that the IWPCA is preempted by the FAAAA. BeavEx additionally argues that the Court improperly required BeavEx to show that the IWPCA will have a significant economic impact upon it. Neither of BeavEx's arguments warrant reconsideration. Because *Ginsberg* did not alter the requirement that a challenged law be

related to rates, routes, or services in order to be preempted, BeavEx's motion is denied.

1. *Ginsberg* Did Not Eliminate the Requirement that a State Law be "Related to" Routes or Services

BeavEx maintains that *Ginsberg* established a new, bright-line rule for when a state law claim is preempted by the Airline Deregulation Act ("ADA") (and correspondingly, the FAAAA): where the claim seeks to enforce the existing rights voluntarily undertaken by the parties, it is not preempted; but when the claim is based on a state-imposed obligation, then it is preempted. In *Ginsberg*, the Supreme Court held that an airline customer's claim against the airline for breach of an implied covenant, stemming from the termination of his membership in the airline's frequent flyer program, was "related to" the airline's prices, routes, and services. *Ginsberg*, 134 S. Ct. at 1431. The Supreme Court concluded that, because frequent flyer mileage credits could be redeemed for tickets, upgrades, and services, the breach claim met the "related" to test, *id*., and, because the breach claim sought to enlarge the contractual relationship that the airline and the customer had voluntarily undertaken, was preempted under the ADA. *Id*. at 1433

But BeavEx's argument falls because it fails to recognize that *Ginsberg* did not disrupt the requirement for FAAAA preemption that the state law be "relate[d] to rates, routes, or services." *Id*. at 1430. The *Ginsberg* Court only reached the "central issue" of whether the claim before it was based on a state-imposed obligation or was simply one that the parties voluntarily undertook by first finding that the

claim "related to" Northwest's rates, routes, and services. *Id*. at 1431. Here, the analysis never gets that far because the IWPCA is not "related to" motor carriers' rates, routes, or services. Generally applicable background laws that are several steps removed from prices, routes, or services are not preempted, even if employers must consider those regulations when deciding the prices they set, the routes they use, or the services they provide. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 375 (FAAAA does not generally preempt state regulation that broadly prohibits certain forms of conduct and affects motor carriers only in their capacity as members of the public); *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012) (changes to background laws, including labor laws and minimum wage laws, "ultimately affect the costs of [labor] inputs, and thus, in turn, the 'price … or service' of the outputs. Yet no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws … because their effect on price is too 'remote.') (citing *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 390 (1992). "A state law does not meet the 'related to' test for FAAAA preemption just because it shifts incentives and makes it more costly for motor carriers to choose some routes or services *relative* to others, leading the carriers to reallocate resources or make different business decisions." *Dilts v. Penske Logistics, LLC*, No. 12-55705, 2014 WL 4401243, at *7 (9th Cir. Sept. 8, 2014).

The IWPCA's effect on prices is too remote to be "related to" motor carriers' prices, routes, and services because it affects motor carriers "one or more steps away from the moment at which the firm offers its customer a service for a particular price." *S.C. Johnson*,

697 F.3d at 558. Even though imposition of the IWPCA may increase BeavEx's operating costs, it affects BeavEx only as a member of the public. Any impact on BeavEx's rates, routes, or services is therefore peripheral to the actual focus of the law: to regulate the employer-employee relationship in Illinois generally. The IWPCA therefore is a broad law with no "forbidden connection with prices[, routes,] and services." *See Air Transp. Ass'n of Am. v. City & Cnty. of S.F.*, 266 F.3d 1064, 1072 (9th Cir. 2001). Nor does it "freeze into place" prices, routes, or services that motor carriers provide. *Rowe*, 552 U.S. at 372. The IWPCA is accordingly not preempted by the FAAAA and BeavEx's motion for reconsideration is denied.

2. The Court Did Not Err When it Required BeavEx to Demonstrate a Significant Economic Impact

BeavEx argues that the Court, after concluding that the IWPCA was a "background law" outside the ambit of FAAAA preemption, improperly held it to a heightened standard requiring BeavEx to demonstrate that the IWPCA would have a significant economic effect upon its rates, routes, or services. BeavEx's argument summarily ignores the Seventh Circuit's direction that "a claim is preempted if either the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have 'a significant economic effect upon them.'" *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000) (quoting *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996)).

Nevertheless, BeavEx's lack of evidence demonstrating a significant economic impact of the IWPCA was merely additional support for the Court's ultimate conclusion that the IWPCA is not preempted by the FAAAA. The crux of this Court's Opinion was that because the IWPCA simply standardizes the employment arena within Illinois and operates at least a step away from the point where BeavEx offers services to its customers, it does not meet the "related to" test necessary for FAAAA preemption. This remains true today. BeavEx's motion for reconsideration is denied.

C. The Plaintiffs' Motion to Grant Notice of the Denial of Class Certification

The Plaintiffs' stated that if they were unsuccessful in moving this Court to reconsider its denial of class certification, "they will be seeking an interlocutory appeal" of the ruling. Dkt. No. 96 at 2 n.1. Accordingly, a ruling ordering notice now would be premature. In the interests of judicial economy, this Court dismisses the Plaintiffs' motion to grant notice of the denial of class certification without prejudice. The Plaintiffs are free to re-file the motion after the Seventh Circuit rules on the interlocutory appeal. *See, e.g., Puffer v. Allstate Ins. Co.*, 614 F. Supp.2d 905, 918 n.8 (N.D. Ill. 2009) (while finding that notice of denial of class certification was warranted, court declined to order notice be given until after the Seventh Circuit ruled on a pending petition for permission to take an interlocutory appeal of the court's denial of class certification).

Date: October 29, 2014 /s/______________________
Virginia M. Kendall
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 12 C 7843

Judge Virginia M. Kendall

[Filed March 31, 2014]

THOMAS COSTELLO, MEGAN BAASE KEPHART, AND OSAMA DAOUD, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,)
)
Plaintiffs,)
v.)
)
BEAVEX INC.,)
)
Defendant.)

<u>MEMORANDUM OPINION AND ORDER</u>

Plaintiffs Thomas Costello, Megan Baase Kephart, Osama Daoud, and the class they seek to represent, worked for Defendant BeavEx, Inc., a courier company, as delivery drivers. The Plaintiffs brought the instant three-count Complaint on January 11, 2013 alleging that BeavEx unlawfully classified its delivery drivers as "independent contractors" when they should have been deemed "employees" under both Illinois statutory

and common law. (Dkt. No. 34). This misclassification allegedly resulted in (1) deprivation of overtime wages in violation of the Illinois Minimum Wage Law ("IMWL"); (2) illegal deductions taken from the Plaintiffs' wages in violation of the Illinois Wage Payment and Collection Act ("IWPCA"); and (3) unjust enrichment of BeavEx. Specifically in Count II, the Plaintiffs allege that BeavEx unlawfully took deductions from their pay in order to fund uniforms, cargo insurance, workers' accident insurance, administrative fees, scanner fees, and cellular phone fees in violation of the IWPCA that would not have occurred were the Plaintiffs properly classified as "employees." *See* 820 ILCS 115/9. BeavEx moves for summary judgment claiming that the Federal Aviation Administration Authorization Act of 1994 ("FAA") preempts the IWPCA because the FAA expressly preempts a State from enacting or enforcing a law related to a price, route, or service of any motor carrier. *See* 49 U.S.C. § 14501(c)(1). The Plaintiffs filed for summary judgment on Count II claiming that BeavEx cannot satisfy the IWPCA independent contractor exception to wage deductions based on the undisputed facts while concurrently moving the Court to certify this case as a class action pursuant to Fed. R. Civ. Pro. 23. For the reasons set forth below, BeavEx's motion for summary judgment and the Plaintiffs' motion for class certification are denied, and the Plaintiffs' motion for summary judgment on Count II is granted as to the named plaintiffs.

STATEMENT OF MATERIAL UNDISPUTED FACTS[1]

Each of the parties to the present dispute has moved for summary judgment in their respective favor. Therefore, the Plaintiffs submitted a statement of undisputed material facts in support of their partial motion for summary judgment as well as a response to BeavEx's statement of undisputed material facts. Further, a majority of the undisputed material facts submitted by BeavEx are supported solely by the Declaration of Sandra Foster, the Senior Vice President for BeavEx. There are numerous statements throughout Foster's declaration that constitute statements of opinion and arguments, not statements of fact, contrary to Local Rule 56(a)(3). *See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 382 (7th Cir. 2008). ("It is inappropriate to make legal arguments in a Rule 56.1 statement of facts.") (internal citations omitted); *Cady v. Sheahan*, 467 F.3d 1057, 1060 (7th Cir. 2006) (a party's statement of material facts submitted pursuant to Local Rule 56.1 is improper where it fails to cite to the record and is "filled with irrelevant information, legal arguments, and conjecture"). The purpose of Local Rule 56.1 statements of facts is to identify the relevant

[1] Throughout this Opinion, the Court refers to the Parties' Local Rule 56.1 Statements of Undisputed Material Facts as follows: citations to BeavEx's Statement of Material Facts (Dkt. 63) have been abbreviated to "Def. 56.1 St. ¶ __"; citations to the Plaintiffs' Response to Defendant's Statement of Material Facts (Dkt. 68) have been abbreviated to "Pl. Resp. 56.1 St. ¶ __"; and citations to the Plaintiffs' Statement of Material Facts (Dkt. 77) have been abbreviated to " Pl. 56.1 St. ¶ __."

admissible evidence supporting the material facts that each party contends require either the granting or the denial of summary judgment. *See Markham v. White*, 172 F.3d 486, 490 (7th Cir. 1999) (the local rules governing summary judgment "assist the court by organizing the evidence, identifying undisputed facts, and demonstrating precisely how each side proposes to prove a disputed fact with admissible evidence."). It is improper for a litigant to include legal or factual conclusions, arguments, or conjecture in a statement of material facts and accordingly, statements constituting such will be ignored by the Court.[2]

Background

BeavEx is one of the largest courier companies in the nation and its primary function is to perform same-day delivery service for clients across the country including in Illinois. (Pl. 56.1 St. ¶ 1, Ex. A; Def. 56.1 St. ¶ 1). BeavEx provides these delivery services for compensation through drivers classified as independent contractors by BeavEx, who drive their own vehicles. (Def. 56.1 St. ¶ 3, Pl. 56.1 St. ¶ 6). Plaintiffs and the class they seek to represent comprise a group of approximately 825 courier drivers who performed delivery services for BeavEx in Illinois from October 1, 2002 to the present. (Pl. 56.1 St. ¶ 3). BeavEx offers its clients both scheduled-route and on-demand delivery services. (Def. 56.1 St. ¶ 4). With regard to scheduled-

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[2] While self-serving statements can be used to create disputes of fact, that is not what BeavEx attempts here. In this case, BeavEx utilizes self-serving statements as legal conclusions, arguing that summary judgment is proper. The Court is not convinced without more.

route services, BeavEx clients dictate regular times and locations that pick-ups and drop-offs must be made, which are communicated to drivers through a manifest listing that day's delivery route information, including customer names, locations, order of deliveries, and a specified time for each delivery. (*Id.* at ¶ 5; Pl. 56.1 St. ¶ 11). At this time, BeavEx has approximately 280 scheduled routes in Illinois that it coordinates on a regular basis. (Def. 56.1 St. ¶ 7). With regard to on-demand delivery services, BeavEx often receives calls from clients for rush deliveries which tend to be variable and unpredictable. (*Id.* at ¶ 9-10).

BeavEx currently employs nine full-time employees and one part-time employee in Illinois to handle administrative and warehouse duties. (*Id.* at ¶ 16). The employees are paid on an hourly or salary basis and receive health insurance and other benefits. (Def. 56.1 St. ¶ 17). BeavEx also provides workers' compensation insurance, pays payroll taxes, and makes unemployment insurance contributions for its employees. (*Id.* at ¶ 18). BeavEx classifies its drivers as independent contractors as opposed to employees. (Pl. 56.1 St. ¶ 6). The drivers are paid by route for each delivery completed, instead of by hours or weeks worked, and do not receive benefits such as health insurance or workers' compensation. (Def. 56.1 St. ¶ 19-20). Nor does BeavEx pay drivers' payroll or unemployment insurance taxes. (*Id.* at ¶ 21). BeavEx uses drivers who are incorporated and others who are not, and some who utilize subcontractors to complete scheduled routes which are bid on and accepted by the driver. (*Id.* at ¶ 39). BeavEx does not prohibit or discourage its drivers from utilizing subcontractors, but drivers cannot engage a subcontractor or replacement

driver without approval from BeavEx. (Def. 56.1 St. ¶ 40; Pl. 56.1 St. ¶ 31, Ex. E, F, and G).

Drivers' Operations

BeavEx drivers generally begin their shift by reporting to one of BeavEx's office locations. (Pl. 56.1 St. ¶ 8). Drivers use their own vehicles to provide the delivery service. (Def. 56.1 St. ¶ 29). Drivers are required to wear apparel with the BeavEx logo when performing deliveries and their cars are required to have the BeavEx name, logo, phone number, and Illinois Commerce Commission number on both sides. (Pl. 56.1 St. ¶14-15, Ex. D, E, F, and G). BeavEx drivers operate their assigned routes under BeavEx's Illinois motor carrier number, and in order to utilize this number, drivers are required to lease their personal vehicles to BeavEx. (*Id.* at ¶ 32-33). Further, drivers are required to use scanners and record logs to make a record upon delivery of a package. (*Id.* at ¶ 16). BeavEx manages all communications with customers, however. (*Id.* at ¶ 20). BeavEx also has authority to discipline or terminate drivers who violate its policies through either an accumulation of minor breaches or one major breach. (*Id.* at ¶ 38-41).

Owner/Operator Agreement and Contract Management Services Contract

As a precondition of employment, all BeavEx drivers are required to sign both an Owner/Operator Agreement, which classifies drivers as independent contractors, and a contract with Contract Management Services ("CMS"). (*Id.* at ¶ 7 and 46). Under the owner/operator agreements, a driver can be terminated any time for any improper conduct. (*Id.* at ¶ 42).

Further, if a customer stops contracting with BeavEx, BeavEx may terminate the driver's contract assigned to that customer's route. (*Id.* at ¶ 44, Ex. E, F, and G). Under the CMS agreements, BeavEx takes various deductions from drivers' pay, including deductions for occupational accident insurance, cargo insurance, uniforms, scanners, and "chargebacks." (*Id.* at ¶ 45, Ex. P, Q, and R). The drivers purchase both the occupational accident insurance and cargo insurance through BeavEx and CMS. (*Id.* at ¶ 48-49). BeavEx also takes deductions from drivers' pay for scanners, uniforms, phone chargers, CMS processing fees, and "chargebacks" if BeavEx determines a driver failed to satisfactorily complete a delivery. (*Id.* at ¶ 50-53).

The IWPCA and the FAAAA

The Plaintiffs bring their claim under Count II relying on the language of the IWPCA. The IWPCA provides that:

> deductions by employers from wages or final compensation are prohibited unless such deductions are (1) required by law; (2) to the benefit of the employee; (3) in response to a valid wage assignment or wage deduction order; (4) made with the express written consent of the employee, given freely at the time the deduction is made; (5) made by a municipality with a population of 500,000 or more…or (6) made by a housing authority in a municipality with a population of 500,000 or more…

820 ILCS 115/9. The IWPCA applies to all employers and employees in Illinois. *See* 820 ILCS 115/1. The term "employee" does not include any individual:

> (1) who has been and will continue to be free from control and direction over the performance of his work, both under his contract of service with his employer and in fact; and (2) who performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees; and (3) who is in an independently established trade, occupation, profession or business.

820 ILCS 115/2. This is commonly referred to as the independent contractor exception. The Defendants, on the other hand, base their motion for summary judgment on the preemption clause found in the FAAAA. Congress enacted the FAAAA in 1994 to address deregulation of the trucking industry. The FAAAA provides, in part:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier…with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

STANDARD OF REVIEW

"Summary judgment is proper when, viewing all facts and inferences in favor of the nonmoving party, no genuine dispute as to material fact exists, and the moving party is entitled to judgment as a matter of law." *Carroll v. Lynch*, 698 F.3d 561, 564 (7th Cir. 2012). Whether a fact is material depends on the underlying substantive law that governs the dispute. *Id.* And a genuine dispute is one where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (citation omitted). Summary judgment is appropriate where the moving party shows that the nonmoving party cannot prove an element essential to its case. *Parent v. Home Depot U.S.A., Inc.*, 694 F.3d 919, 922 (7th Cir. 2012). Where the moving party has properly supported its motion, the nonmoving party must come forward with facts that show there is a genuine issue for trial. *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 951 (7th Cir. 2013).

DISCUSSION

I. BeavEx's Motion for Summary Judgment

A. Preemption

BeavEx's motion for summary judgment claims there is preemption of the IWPCA based on FAAAA section 14501. If this federal statute preempts the Plaintiffs' unlawful deduction claim, then Count II of the Complaint must fail and summary judgment is proper.

The constitutional basis for federal preemption is the Supremacy clause, which states, "[The Laws of the United States…shall be the supreme Law of the

Land[.]" U.S. Const. Art. VI, Cl. 2. When considering preemption, a court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Accordingly, the "purpose of Congress" is the ultimate touchstone of preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

To understand Congress' purpose, the first consideration is the text of the federal law, in this case, § 14501(c). In relevant part, it states:

> (1) General rule.—Except as provided in paragraphs (2) and (3), as State…may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service of any motor carrier…with respect to the transportation of property.*

49 U.S.C. § 14501(c) (emphasis added). Section 14501 had its genesis in the Airline Deregulation Act of 1978 (ADA), 92 Stat. 1705, which "largely deregulated the domestic airline industry." *See Dan's City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769, 1775 (2013). The ADA aimed to "ensure that states would not undo federal deregulation with regulation of their own." *Id.* (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)). To safeguard this, the ADA included a preemption provision which prohibited states from enacting or enforcing any law "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). Two years later, Congress deregulated the trucking industry using largely the same language as the ADA.

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

Congress additionally limited the states' ability to regulate trucking by enacting the FAAAA of 1994 (addressing air and motor carriers). "Borrowing from the ADA's preemption clause, but adding a new qualification,…the FAAAA supersedes state laws 'related to a price route, or service of any motor carrier…*with respect to the transportation of property*.'" *Dan's City*, 133 S.Ct. at 1774 (quoting 49 U.S.C. § 14501(c) and adding emphasis). That added phrase "'massively limits the scope of preemption' ordered by the FAAAA.'" *Id.* at 1778 (quoting *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J. dissenting)). Under this restriction, "it is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property.'" *Id.* Because of the similarity of the preemption provisions contained in the FAAAA and ADA, cases interpreting the ADA will be equally instructive and controlling here. *See Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364, 370 (2008) (*quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006) ("when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates as a general matter, the intent to incorporate its judicial interpretations as well")).

The FAAAA preempts a state law (1) whenever the state law actually references the rates, routes, or services of carriers or (2) if it has a "significant impact"

on Congress' deregulatory objectives. *See Morales*, 504 U.S. at 384 (the critical phrase, "relating to," expresses "a broad pre-emptive purpose"); *Rowe*, 552 U.S. at 371 (preemption occurs at least where state laws have significant impact related to Congress' deregulatory and preemption-related objectives); *see also Travel All Over the World, Inc. v. Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996) (state law is preempted by FAAAA whenever that law expressly refers to rates or has a significant impact on them). Conversely, a state law will not be preempted if it affects federal goals "in only a tenuous, remote, or peripheral…manner." *Dan's City*, 133 S. Ct. at 1778 (*quoting Morales*, 504 U.S. at 390); *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.*, 697 F.3d 544, 550 (7th Cir. 2012) (discussing *Morales* and its lesson that preemption is not "a simple all-or-nothing question").

B. Application

BeavEx can therefore show preemption is warranted either by pointing to an explicit reference to rates, routes, or services of motor carriers in the language of the IWPCA or by showing the IWPCA will have a significant economic effect upon them. *See United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000). Neither the Supreme Court nor the Seventh Circuit has ever held that a state employee compensation statute is preempted by either the ADA or the FAAAA. Moreover, nearly all of the cases relied upon by BeavEx in its memorandum in support of its motion involve laws and provisions either directly aimed at airline and motor carriers or directly related to airline or motor carrier activity. *See generally Rowe*, 552 U.S. at 367 (law regulated the

delivery of tobacco to customers within the state); *Morales*, 504 U.S. at 374 (guidelines contained detailed standards governing the content and format of airline fare advertising); *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1048 (9th Cir. 2009) (mandatory concession agreements specifically for drayage trucking services); *Missing Link Jewelers, Inc. v. United Parcel Service, Inc.*, No. 09 C 3539, 2009 WL 5065682 at *1 (N.D. Ill. Dec. 16, 2009) (challenge of late fees assessed). In this case, the IWPCA does not reference motor carriers and therefore has no direct connection to BeavEx's rates, routes, or services. In order to succeed with its preemption defense, BeavEx must demonstrate that the Plaintiffs' claim has a sufficient economic effect on its prices, routes, or services to warrant its preemption. *See Travel All Over the World*, 73 F.3d at 1432 (claim is preempted if *either* the state rule expressly refers to rates, routes, or services, or application of the state's rule would have significant economic effect upon them).

BeavEx contends that, as applied, the IWPCA claim is preempted because "if [drivers] are engaged as employees and given an hourly rate, benefits and mileage, the cost of labor would increase substantially." BeavEx correctly states that the FAAAA may preempt the Plaintiffs' claims even if the "state law's effects on rates, routes or services 'is only indirect.'" *Rowe*, 552 U.S. at 370 (*quoting Morales*, 504 U.S. at 386). However, the FAAAA's preemption provision does not have infinite reach.

BeavEx's argument that the FAAAA preempts an Illinois wage law because it might indirectly impact BeavEx's prices and rates is tantamount to arguing

immunity from all state economic regulation. *See Rowe*, 552 U.S. at 375 (FAAAA does not generally preempt state regulation that broadly prohibits certain forms of conduct and affects motor carriers only in their capacity as members of the public); *see also S.C. Johnson*, 697 F.3d at 558 ("Changes to these background laws will ultimately affect the costs of labor inputs and in turn, the 'price…or service' of the outputs yet no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws because their effect on price is too 'remote.' Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its customer a service for a particular price."); *see, e.g., Difiore v. American Airlines, Inc.*, 646 F.3d 81, 89 (1st Cir. 2011) (state regulation is not preempted wherever it imposes costs on carriers and therefore affects rates because costs "must be made up elsewhere, *i.e.*, other prices raised or charges imposed" as that would effectively exempt carriers from state taxes, state lawsuits, and most state regulation of any consequence).

Without controlling law in this Circuit, the Court looks elsewhere for illustrations and finds the First Circuit's reasoning in *DiFiore* persuasive. A class of skycaps challenged American Airlines' curbside baggage check fee, claiming that it violated the Massachusetts Tip Law. *DiFiore*, 646 F.3d at 81. The statute provided, in pertinent part, that "[n]o employer or other person shall demand…or accept from any…service employee…any payment or deduction from a tip or service charge given to such…service employee…by a patron." *Id.* at 84; Mass. Gen. Laws ch. 149, § 152A(b). In concluding that the Tips Law claim

was preempted by the ADA, the court distinguished the Tips Law from other employee compensation laws:

> The dividing line turns on the statutory language "related to a price, route, or service." Importantly, the tips law does more than simply regulate the employment relationship between the skycaps and the airline…the tips law has a *direct connection* to air carrier prices and services and can fairly be said to regulate both. As to the latter, American's conduct in arranging for transportation of bags at curbside into the airline terminal en route to the loading facilities is itself a part of the "service" referred to in the federal statute, and the airline's "price" includes charges for such ancillary services as well as the flight itself.

Id. at 87. The court noted that the Supreme Court would be unlikely to free carriers from most conventional common law claims for tort, from prevailing wage laws, and ordinary taxes applicable to other businesses, even though such measures necessarily affect fares and services. *Id.* Because the Tip law directly regulated how an airline service was performed and how price was displayed, it went beyond regulating the airline as an employer or proprietor. *Id.* at 88.

The IWPCA is easily distinguishable from the Massachusetts Tip Law and instead fits the mold of a "background law." The law applies to all employers and employees in Illinois and lays out guidelines for, among other things, pay periods, deductions from wages, and avenues to pursue in the event of employment disputes. *See generally* 820 ILCS 115. Not only does the law

avoid targeting motor carriers, it only applies to the employment relationship between employers and employees in general, therefore operating at least a step away from the point that BeavEx offers services to customers. The IWPCA regulates the operation of the underlying employment relationship which plays a role in setting the market price, like all economic regulation necessarily does. This is not sufficient to support preemption. *See S.C. Johnson*, 697 F.3d at 558. The IWPCA simply standardizes the employment arena within Illinois. Considering its purpose and procedures, the IWPCA affects BeavEx only as a member of the public and the Court finds no evidence that Congress set out to preempt these generic prevailing wage laws.

Moreover, even if the IWPCA were not a "background law" outside the ambit of the FAAAA, BeavEx has failed to demonstrate the significant impact the law would have due to the vagueness with which it describes its potential increased costs. BeavEx's reliance on *Sanchez v. Lasership*, 937 F. Supp.2d 730 (E.D. Va. 2013) exemplifies the absolute dearth of evidentiary support BeavEx has provided regarding a significant impact finding. In *Sanchez*, the court found a Massachusetts wage statute was preempted by the FAAAA because of the impact compliance would have on the defendant's courier prices. *Sanchez*, 937 F. Supp.2d at 747. In support of its argument, the defendant provided voluminous evidence of actual economic changes that would occur were the Massachusetts wage law enforced:

> Lasership reports that its 2012 operating profit for its Massachusetts operations was $140,000. To offer health insurance to its employee-

> drivers, Lasership's costs would increase by $193,200 per ear. Providing workers' compensation insurance will cost Lasership up to $11.00 per $100.000 in earnings, ranging from $3,510 to $4,290 per driver each year. Thus, to provide workers' compensation insurance for all seventy of Lasership's current drivers, Lasership would incur costs ranging from $245,700 to $300,000. Additionally, independent contractors pay their own liability insurance, a cost that will be transferred to Lasership if it converts to an employee-based model. That cost alone is $196,000 per year. By the Court's estimation, Lasership's costs would increase by up to $689,200. This figure is nearly five times Lasership's profit margin for 2012.

Id. at 747-48.

Here, BeavEx has offered no numerical calculations of the effect enforcement of the IWPCA would have on its business other than a claim that the creation of a human resources department would incur $185,000 per year in labor costs. (Def. Rule 56.1 St. ¶ 33). As a preliminary matter, the relevance of this number to the IWPCA inquiry is unknown as the law imposes no such requirement on an Illinois employer. Even accepting that number as a legitimate incurred cost, BeavEx offers no evidence other than unabashed conclusory statements that compliance with the IWPCA will increase costs. BeavEx claims that if its drivers are engaged as employees and given an hourly rate, benefits, and mileage, its costs of labor would increase

substantially.[3](Def. Rule 56.1 St. ¶ 27). BeavEx offers zero facts in support of this conclusion. It further asserts that converting couriers from independent contractors to employees would dramatically increase its costs, "inescapably affecting its prices, routes and/or services." BeavEx similarly leaves this contention unsubstantiated. In fact, BeavEx's entire argument regarding significant impact is a regurgitation of the conclusory statements offered in the affidavit of Sandra Foster, the Senior Vice President for the company, and these opinions do not persuade the Court that summary judgment is proper. *See Diadenko v. Folino*, 741 F.3d 751, 757-58 (7th Cir. 2013) ("summary judgment is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events"); *Stein v. Ashcroft*, 284 F.3d 721, 726 (7th Cir. 2002) (summary judgment requires more than vague, unsupported speculation and generalized allegations).

BeavEx had an opportunity to show the Court its operating profits utilizing its drivers as independent contractors and an estimation of these numbers were the drivers deemed employees. BeavEx could have offered its estimated change in customer rates due to increased costs. Instead, the company appears to attempt to meet its challenge of demonstrating a significant impact by relying on logic alone. Almost all

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[3] The Plaintiffs partially undermine this contention by offering a concrete example. In one week of work in 2011, Plaintiff Daoud received a total pay of $1,202.50 for approximately 66 hours of work. Were he treated as an employee and given minimum wage as required by Illinois law, he would have received a total pay of $651.75.

state laws that affect a motor carrier's transportation business will have the kind of logical relation to its prices or services that BeavEx contends here. Wage and hour laws clearly have a logical relation to a carrier's prices and services because they necessarily affect the costs a motor carrier incurs. Laws of this type, however, are not ordinarily subject to preemption. *See Rowe*, 552 U.S. at 375. It is entirely plausible that imposition of the IWPCA will alter BeavEx's costs, but without any evidence whatsoever of what that alteration will constitute, it is impossible for this Court to make a determination of significant impact. Because no evidence has been introduced to confirm BeavEx's argument that the IWPCA will significantly impact its pricing and services, and for the reasons mentioned above, this Court finds that the IWPCA is not preempted by the FAAAA as it applies to BeavEx, and its motion for summary judgment is denied.

II. Plaintiffs' Motion for Class Certification

The decision to certify a class action rests within the discretion of the district court. *See Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 471 (7th Cir. 1997). "[T]he party seeking class certification assumes the burden of demonstrating that certification is appropriate." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). Whether a plaintiff has met his burden is measured by the "preponderance of the evidence" standard. *See Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 811 (7th Cir. 2012).

A party may pursue its claim on behalf of a class only if it can establish that the four threshold requirements of Federal Rule of Civil Procedure 23 are

met: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). Fed. R. Civ.P. 23(a).

If the Plaintiffs meet this initial burden, they must then show that the proposed class satisfies one of the three requirements set forth in Rule 23(b). *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). Where, as here, the Plaintiffs seek certification pursuant to Rule 23(b)(3), the Plaintiffs must show that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members (predominance), and that a class action is superior to other available methods for fair and efficient adjudication of the controversy (superiority)." Fed. R. Civ.P. 23(b)(3); *see also Messner*, 669 F.3d at 808, 814 n. 5. In addition to the Rule 23 requirements, the Plaintiffs must also provide a workable class definition by demonstrating that the members of the class are identifiable. *See Oshana*, 472 F.3d at 513.

A. The Proposed Class

The Plaintiffs seek to certify a class comprising those who provided delivery driver services for BeavEx in Illinois and were not treated as employees. Perhaps realizing that there are certain deficiencies in the definition of the class proposed in the Complaint, the Plaintiffs offer an alternative class definition in their

reply in support of their motion for class certification. The class defined in the complaint consists of "all persons who have provided delivery driver services directly to BeavEx in the State of Illinois at any time during the relevant statutory period, who were not treated as employees of BeavEx." (Dkt. No. 34 at ¶ 33).

In their reply in support of their motion for class certification, the Plaintiffs proposed the following alternative class definition: "All delivery drivers who contracted with BeavEx directly to perform deliveries who did so on a full time basis, and who had amounts deducted by BeavEx from their compensation checks." (Dkt. No. 93 at 15).

The Seventh Circuit has not addressed the scope of the Court's discretion to modify a class definition at the certification stage. Although a district court has the authority to modify a class definition at different stages in litigation, *see In re Motorola Securities Litigation*, 644 F.3d 511, 518 (7th Cir. 2011), district courts appear to be split on whether to hold a plaintiff to the class defined in the complaint. *Compare, e.g., Savanna Group, Inc. v. Trynex, Inc.*, No. 10 C 7995, 2013 WL 66181, at *2-3 (N.D. Ill. Jan. 4, 2013) (allowing amendment during certification proceedings and finding it consistent with Rule 23); *Bridgeview Health Care Ctr. Ltd. v. Clark*, 09 C 5601, 2011 WL 4628744, at *2 (N.D. Ill. Sept. 30, 2011) (allowing amendment during certification proceedings); *with Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 672 n. 3, 680 n. 10 (N.D. Ill. 1989) ("As the Court observed earlier, the class definition proposed in [plaintiff's] motion for class certification differs from that set forth in her complaint. The Court has certified

the class as originally proposed, but [plaintiff] may file an appropriate motion to amend both her complaint and the class definitions we have set forth here...”). In this case, the Court does not need to decide whether the amendment to the class definition is proper because the Plaintiffs fail to meet the standards of Rule 23 under either definition.

B. The Plaintiffs Satisfy the Numerosity Requirement

Federal Rule of Civil Procedure 23(a)(1) requires that a class be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). A class consisting of more than 40 members generally satisfies the numerosity requirement of certifying a class action. *See, e.g., Chavez v. Don Stolzner Mason Contractor, Inc.*, 272 F.R.D. 450, 454 (N.D. Ill. 2011); *cf Pruitt v. City of Chicago*, 472 F.3d 925, 926 (7th Cir. 2006). In an interrogatory response, BeavEx stated that during the relevant time period, there have been approximately 825 individuals who have provided courier services for BeavEx. BeavEx does not dispute, and thus concedes, that it would be impracticable to join this number of plaintiffs in the present action. Consequently, the Plaintiffs have met their burden regarding numerosity.

C. The Plaintiffs Satisfy the Commonality and Typicality Requirements

Federal Rule of Civil Procedure 23(a)(2) requires that “questions of law or fact common to the class” exist. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). “A common nucleus of operative fact is

usually enough to satisfy" this requirement. *Id.* Typicality is closely related to commonality. *See id.* at 594. It requires "that the claims or defenses of the representative party be typical of the claims or defenses of the class." *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009) (quoting *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000)). This means the claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and…[the] claims are based on the same legal theory." *Oshana*, 472 F.3d at 514 (quoting *Rosario*, 963 F.2d at 1018).

The Plaintiffs have satisfied both the commonality and typicality requirements. Their claim arises from the same course of conduct that gives rise to the claims of the other class members and their claims are based on the same legal theory. Specifically, BeavEx classified the Plaintiffs and all other putative class members as independent contractors instead of employees in alleged violation of the IWPCA. The entire class consists of drivers who provided services to BeavEx subject to "Owner/Operator" agreements which classified them as independent contractors. This type of formulaic behavior is sufficient for a finding of commonality. *See Keele*, 149 F.3d at 594 (commonality is satisfied where defendant engaged in standardized conduct towards members of the proposed class). There are also two common questions for the class: (1) whether the drivers were employees or independent contractors; and (2) whether BeavEx made improper deductions from the drivers' pay.

D. The Plaintiffs do not Satisfy the Predominance Requirement of Rule 23(b)(3)

The real issue is whether common questions and evidence predominate a claim for employment misclassification under the IWPCA such that it is properly suited to a class action. Federal Rule of Civil Procedure Rule 23(b)(3) requires the Plaintiffs to demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In applying these standards, courts focus on "the substantive elements of plaintiffs' cause of action and inquire into the proof necessary for the various elements." *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981). The Supreme Court has held that "the predominance criterion is far more demanding" than "Rule 23(a)'s commonality requirement." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). At its hub, the Plaintiffs' claim focuses on the alleged misclassification of drivers by BeavEx in violation of the IWPCA. The determinant issue for class certification thus becomes whether IWPCA independent contractor analysis can be satisfied by evidence common to the class.

The independent contractor exception to the IWPCA's requirements provides that an individual is not an employee if that individual is someone:

> (1) who has been and will continue to be free from control and direction over the performance of his work, both under his contract of service

> with his employer and in fact; and (2) who performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees; and (3) who is in an independently established trade, occupation, profession or business.

820 ILCS 115/2. The test is conjunctive, meaning the putative employer must demonstrate each element of the exemption in order to demonstrate that the service provider is an independent contractor. *See Novakovic v. Samutin*, 354 Ill. App.3d 660, 668 (1st Dist. 2004). Because the onus is on the putative employer, the IWPCA creates a near-presumption that a worker is an employee rather than an independent contractor. *See Adams v. Catrambone*, 359 F.3d 858, 864 (7th Cir. 2004).

The Plaintiffs have argued that the second and third prongs of the test may be resolved through common evidence. BeavEx acknowledges that the second prong of the test does not require individualized proof but, on the other hand, maintains that it must be allowed to present individualized evidence regarding the first and third prongs of the independent contractor test. It contends that because the IWPCA specifically requires the fact-finder to go beyond the owner/operator agreements in this case and consider the actual relationship between the parties "in fact," IWPCA independent contractor analysis is inherently incompatible with a class action. Moreover, BeavEx claims that certifying the class based only on common evidence pertinent to the second prong of the test

would be equivalent to a decision on the merits. The Plaintiffs state that to the extent that glossing over the first prong would constitute a decision on the merits, the modern trend is for courts to consider the merits when granting class certification. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (a judge may make a preliminary inquiry into the merits under Rule 23).

There is really no dispute that the second prong of the independent contractor test can be satisfied by common evidence. BeavEx has admitted that its sole business is the delivery and pick-up of packages and that the Plaintiffs and putative class members worked as delivery drivers. The problem presents itself when looking at the first and third prongs, specifically, the first prong's requirement of freedom from "control and direction…**in fact**." *See* 820 ILCS 115/2 (emphasis added). Neither the Supreme Court nor any of the Circuits have provided guidance in this department, and the district courts are split on the issue. *Compare In re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, 273 F.R.D. 424, 489 (N.D. In. 2008) ("*In re FedEx I*") (the IWPCA poses questions upon which FedEx must be allowed to present driver-by-driver evidence); *In re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, 273 F.R.D. 516, 523 (N.D. In. 2010) ("*In re FedEx II*") ("Even though the second prong of the [IWPCA] test can be decided on common evidence, a determination that FedEx can't rebut this prong of the test, obviating the need to determine the other two elements, would be a decision on the merits, which is improper at the class certification stage."); *Schwann v. FedEx Ground Package Sys., Inc.*, No. 11-11094-RGS, 2013 WL 1292432, at *3 (D. Ma. Apr. 4,

2013) (the first and third prongs of a nearly identical Massachusetts independent contractor statute require individualized factual inquiries); *with De Giovanni v. Jani-King Intern., Inc.*, 262 F.R.D. 71, 85 (D. Ma. 2009) (finding that employment classification dispute under Massachusetts independent contractor statute could be resolved by common evidence); *Martins v. 3PD, Inc.*, No. 11-11313-DPW, 2013 WL 1320454 at *6 (D. Ma. Mar. 28, 2013) (all three prongs of Massachusetts independent contractor statute could be resolved through common evidence).

The Court finds the reasoning in both *In re Fedex* actions to be persuasive and directly on point. The *In re FedEx* court dealt with the same independent contractor test at issue here and this Court agrees with its conclusion. In the multi-district litigation *In re FedEx*, a group of Illinois plaintiffs asserted a claim for a violation of the IWPCA, among other things. *In re FedEx II*, 273 F.R.D. at 520. Specifically, the plaintiffs challenged FedEx's practice of labeling its delivery drivers as independent contractors instead of employees. *In re FedEx I*, 273 F.R.D. at 434. The plaintiffs contended that because FedEx maintained a categorical policy of classifying its drivers as independent contractors, a class action was appropriate because common evidence could resolve all claims. *Id.*

The court disagreed, finding that the IWPCA "seems to contemplate that even when the 'employment' agreement vests enough control in the hiring party to create an employment relationship, the inquiry still must extend into the parties' extracontractual relationship." *Id.* at 489. Because the IWPCA broadens the scope of relevant evidence by placing the burden on

the hiring party, that party must be able to present individualized evidence of each worker. *Id.* In conclusion, the court held that the effect of the contracts entered into did not predominate over the individual circumstances. *Id.* at 490.

The Plaintiffs here are requesting the same thing that was refused in *In re FedEx*. First, although the Plaintiffs are correct in stating that an inquiry into the merits may be made at the class certification stage, merits questions may be considered only to the extent that they are necessary. *See Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013); *see also Messner*, 669 F.3d at 811 (a district court should not turn class certification proceedings into a dress rehearsal for a trial on the merits). Yet this is precisely what the Court would be doing were it to ignore the first prong of the independent contractor test's requirement of freedom from control "in fact." It is irrelevant that common evidence will show that BeavEx is unable to satisfy the second prong of the test. *See In re FedEx II*, 273 F.R.D. at 523 ("a determination that FedEx can't rebut this prong of the test, obviating the need to determine the other two elements, would be a decision on the merits, which is improper at the class certification stage"). At the class certification stage, the Court must look at the IWPCA test in its entirety to determine if common evidence will predominate the resolution of its analysis. It is not enough that the second prong can be decided utilizing common evidence when the first prong so clearly requires a factual inquiry into the circumstances of each driver. *See Carpetland U.S.A., Inc. v. Illinois Dep't of Employment Security*, 201 Ill.2d 351, 374-383 (2002) (listing 25 factors to examine

whether direction or control exists beyond the contract under the same test used for the Unemployment Insurance Act). Because a finding of independent contractor status requires the Court to examine each prong of the IWPCA test, including a requirement to probe beyond the Operating Agreements in this case and into the actual practicing relationship between the parties, BeavEx must be given the opportunity to rebut the control factor by presenting individualized evidence pertaining to each driver, even if it will ultimately fail under the second prong.

Moreover, the disparity in the testimony found in the parties' respective declarations of numerous past and present drivers supports BeavEx's contention that differing factual backgrounds will be found throughout the class. In their depositions, the Plaintiffs stated that BeavEx does not permit drivers to take breaks, run personal errands, or even stop to use a bathroom during routes. On the contrary, declarations filed by other drivers include statements evidencing that personal breaks and errands could be completed during a route as long as the delivery was completed within the timeframe agreed to. Also regarding control "in fact," the Plaintiffs stated that they did not engage in any other work during the time they provided delivery services for BeavEx. Other drivers stated that they currently perform courier services for other companies in addition to BeavEx. There are similar disparities regarding the ability to negotiate price terms for routes, required cell phone usage, and ability to turn down on-demand work. These variations in details concerning the control BeavEx maintained over the putative class members supports the notion that

individual facts and evidence are abound in an analysis under the IWPCA independent contractor test.

At the class certification stage, the Court must examine the IWPCA test in its entirety. Failure to acknowledge the individualized inquiry required by the first prong because the second prong can be decided through common facts would be the same as ruling on the merits. Since there is no way to employ generalized proof to prove control "in fact," or lack thereof, under the first prong of the IWPCA test, the Plaintiffs have failed to meet their burden under Rule 23(b)(3) because common facts do not predominate. Accordingly, the motion for class certification is denied.

III. The Plaintiffs' Motion for Summary Judgment

Although the motion for class certification is denied, the summary judgment motion as to the named Plaintiffs is ripe and they are entitled to a ruling on their claim without additional delay. Finding no disputed issue of material fact that the Plaintiffs were working within the usual course and place of business of BeavEx when making deliveries, the Court grants the named Plaintiffs' partial motion for summary judgment on their IWPCA claim.

A. Employment Misclassification

The Court integrates the common undisputed facts from above and in so doing, views the facts in the light most favorable to BeavEx. *See McCann v. Iroquois Memorial Hosp.*, 622 F.3d 745, 752 (7th Cir. 2010) (in determining whether an issue of material fact exists, the court views the facts in the light most favorable to the non-moving party, and draws all reasonable

inferences in that party's favor). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment…against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The IWPCA defines an "employee" as "any individual permitted to work by an employer in an occupation," but excludes any individual:

> (1) who has been and will continue to be free from control and direction over the performance of his work, both under his contract of service with his employer and in fact; and (2) who performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees; and (3) who is in an independently established trade, occupation, profession or business.

820 ILCS §115/2. The alleged employer must demonstrate the exemption's applicability and each element of the exemption must be present for the service provider to be an independent contractor. *See Adams*, 359 F.3d at 864 (IWPCA independent contractor test is written in the conjunctive); *see also Novakovic*, 354 Ill. App.3d at 668 (same).

In this case, the Court need only address the second prong of the test: whether the Plaintiffs' performed work outside the usual course of BeavEx's business or outside of BeavEx's places of business. BeavEx can

satisfy this prong through evidence of either condition. *See id.* at 669. Regarding the first condition, "when considering the employer's usual course of business, Illinois courts focus on whether the individual performs services that are necessary to the business of the employer or merely incidental." *Carpetland*, 201 Ill.2d at 386. The second condition is not limited only to its own home offices, but can extend to any location where workers regularly represent an employer's interest. *Id.* at 389-91.

The Plaintiffs have argued that it is undisputed that they were operating within the usual course of BeavEx's business because BeavEx is a delivery service and the Plaintiffs were working as delivery drivers. Further, the Plaintiffs contend that they performed work within BeavEx's places of business, maintaining that the delivery routes were BeavEx's places of business. BeavEx's only argument is that ruling on the Plaintiffs' motion for summary judgment before deciding on class certification violates the rule against one-way intervention.

The rule against one-way intervention "bars potential class members from waiting on the sidelines to see how the lawsuit turns out and, if a judgment for the class is entered, intervening to take advantage of the judgment." *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999). The apprehension is that a "victory by the plaintiff [on the merits] would be followed by an opportunity for other members of the class to intervene and claim the spoils; a loss by the plaintiff would not bind the other members of the class." *Premier Elec. Const. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 362 (7th Cir.

1987). Clearly, BeavEx's concerns are assuaged here as the Court has denied the Plaintiffs' motion for class certification in this very opinion. *See Amati*, 176 F.3d at 957. ("The rule does not appear to be addressed to the case in which class certification is denied").

Additionally, there is no problem with the Court determining both of Plaintiffs' motions at the same time. Although normally, the issue of class certification should be resolved before determination of an action on the merits, *see Thomas v. UBS AG*, 706 F.3d 846, 849 (7th Cir. 2013), cases exist where it is appropriate to defer class certification until after a decision on the merits. *See Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001). In this case, the Plaintiffs filed both their motions for class certification and partial summary judgment at the same time. In the interest of judicial efficiency, the Court has simply examined both concurrently, and this is not a unique stance. *See generally, Smith v. Short Term Loans*, No. 99 C 1288, 2001 WL 127303 (N.D. Ill. Feb. 14, 2001) (court looked at nine different motions at the same time, including cross-motions for summary judgment and a motion to certify class); *Allen v. Aronson Furniture Co.*, 971 F. Supp. 1259 (N.D. Ill. 1997) (court ruled on cross-motions for summary judgment before class certification); *Hakim v. Accenture U.S. Pension Plan*, 735 F. Supp.2d 939 (N.D. Ill. 2010) (cross-motions for summary judgment made class certification motion moot).

BeavEx only contended that ruling on the Plaintiffs' motion for summary judgment before ruling on the motion for class certification would be improper. This issue is now resolved. BeavEx chose not to respond to

the merits of the Plaintiffs' motion for summary judgment in any way, therefore waiving any argument against the merits it may have had. *See Roe-Midgett v. CC Services, Inc.*, 512 F.3d 865, 876 (7th Cir. 2008) (arguments not made in responsive briefs to summary judgment are waived); *Laborers' Intern. Union of North America v. Caruso*, 197 F.3d 1195, 1197 (7th Cir. 1999) (arguments not presented to the district court in response to summary judgment motions are waived); *see, e.g., De v. City of Chicago*, 912 F. Supp.2d 709, 733 (N.D. Ill. 2012) (if party opposing summary judgment fails to present reasons why summary judgment should not be entered, the claim is waived and the nonmoving party will lose the motion) (citing *Reklau v. Merch. Nat'l Corp.*, 808 F.2d 628, 630 n. 4 (7th Cir. 1986)). Nevertheless, the Court will provide a brief synopsis of the appropriateness of summary judgment in this case. *See King v. Schieferdecker*, 498 Fed. Appx. 576, 580 (7th Cir. 2012) (courts can consider materials not cited by either party in a ruling on summary judgment).

Any potential argument BeavEx could have made would fail even if properly stated. BeavEx is a same-day delivery service company, and its primary function is to provide motor vehicle transportation of property for compensation. The Plaintiffs were courier drivers who performed delivery services for BeavEx. It is undisputed and beyond doubt that BeavEx's delivery drivers performed work in the usual course of BeavEx's package and delivery business. *See AFM Messenger Service, Inc. v. Department of Employment Sec.*, 198 Ill.2d 380, 406 (2001) (courier companies' usual course of business is delivery of packages); *Chicago Messenger Service v. Jordan*, 356 Ill. App.3d 101, 107 (1st Dist. 2005) (undisputed that couriers performed services

that were integral to and within the usual course of courier company's business).

Moreover, the Plaintiffs were providing this work within BeavEx's places of business. BeavEx does not dispute that the Plaintiffs reported to BeavEx office locations to pick up route manifests and materials. Even if the time spent at these office locations was minor, a courier company's "place of business" is not limited to its own offices. *See AFM*, 315 Ill. App.3d at 315 (the roadways were the usual place of business for a package delivery company); *Jordan*, 356 Ill. App.3d at 115 (couriers represent the company's interests when making deliveries); *see, e.g., In re FedEx Ground Package System, Inc. Employment Practices Litig.*, No. MDL-1700, 2010 WL 2243246 (N.D. In. May 28, 2010) (roadways, delivery routes, sales territories, and customer premises constitute a company's place of business when the worker is representing the company's interest).

BeavEx provides package pick-up and delivery services through a network of drivers. BeavEx required the Plaintiffs to provide these services for BeavEx which were necessary to its business of courier services. The Plaintiffs had to wear apparel with the BeavEx logo and a BeavEx identification badge when performing deliveries. Although the Plaintiffs' supplied their own vehicles, they were required to have the BeavEx name, logo, phone number, and Illinois Commerce Commission number on both sides. The Plaintiffs were required to use scanners and record logs when delivering packages, and BeavEx would occasionally perform audits on the Plaintiffs to ensure they were complying with the rules and policies. Even

if the audits were not applied uniformly, BeavEx's policies underlying the audits show that BeavEx attempts to maintain its image and reputation by reviewing its drivers' performance while on route.

Even when the Court considers all the facts in BeavEx's favor, BeavEx cannot satisfy its burden of showing that the Plaintiffs' work was outside all the places of its business. The undisputed evidence shows that BeavEx drivers represent BeavEx's interest when delivering and picking up packages. As such, BeavEx is unable to show that the Plaintiffs were independent contractors under the IWPCA test. Because there is no genuine issue of material fact that BeavEx is unable to demonstrate the second prong of the exemption under the IWPCA, the Court grants the named Plaintiffs' motion for summary judgment as to Count II of their complaint.

CONCLUSION

For the foregoing reasons, BeavEx's motion for summary judgment and the Plaintiffs' motion for class certification are denied, and the Plaintiffs' motion for partial summary judgment is granted as to the named plaintiffs.

/s/________________________

Date: March 31, 2014

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Nos. 15-1109 & 15-1110

[Filed February 23, 2016]

THOMAS COSTELLO, MEGAN BAASE KEPHART, OSAMA DAOUD, on behalf of themselves and all other persons similarly situated, known and unknown,
Plaintiffs-Appellees / Cross-Appellants,

v.

BEAVEX, INCORPORATED,
Defendant-Appellant / Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12 CV 7843

Virginia M. Kendall, *Judge*.

Before

WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

ORDER

On consideration of the petition for rehearing and rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and the judges on the panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing en banc are **DENIED**.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 15-1109 and 15-1110

[Filed January 20, 2016]

THOMAS COSTELLO, MEGAN BAASE KEPHART, OSAMA DAOUD, on behalf of themselves and all other persons similarly situated, known and unknown, Plaintiffs-Appellees, Cross-Appellants, v. BEAVEX, INCORPORATED, Defendant-Appellant, Cross-Appellee.	)))))))))))

Before: WILLIAM J. BAUER, Circuit Judge
MICHAEL S. KANNE, Circuit Judge
ILANA DIAMOND ROVNER, Circuit Judge

FINAL JUDGMENT

The District Court's denial of BeavEx's motion for summary judgment is **AFFIRMED**. The District Court's order denying class certification is **VACATED** and **REMANDED** for further proceedings consistent with this opinion.

The above is in accordance with the decision of this court entered on January 19, 2016. The Defendant-Appellant/Cross-Appellee, BeavEx, Inc., will bear all costs.

APPENDIX X

<u>49 U.S.C. § 14501(c):</u>

(c) Motor carriers of property.—

(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.--Paragraph (1)--

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

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the

regulation of tow truck operations performed without the prior consent or authorization of the owner or operator of the motor vehicle.

. . .

820 ILCS 115/2

§ **2.** For all employees, other than separated employees, "wages" shall be defined as any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties, whether the amount is determined on a time, task, piece, or any other basis of calculation. Payments to separated employees shall be termed "final compensation" and shall be defined as wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the 2 parties. Where an employer is legally committed through a collective bargaining agreement or otherwise to make contributions to an employee benefit, trust or fund on the basis of a certain amount per hour, day, week or other period of time, the amount due from the employer to such employee benefit, trust, or fund shall be defined as "wage supplements", subject to the wage collection provisions of this Act.

As used in this Act, the term "employer" shall include any individual, partnership, association, corporation, limited liability company, business trust, employment and labor placement agencies where wage payments are made directly or indirectly by the agency or

business for work undertaken by employees under hire to a third party pursuant to a contract between the business or agency with the third party, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is gainfully employed.

As used in this Act, the term "employee" shall include any individual permitted to work by an employer in an occupation, but shall not include any individual:

(1) who has been and will continue to be free from control and direction over the performance of his work, both under his contract of service with his employer and in fact; and

(2) who performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees; and

(3) who is in an independently established trade, occupation, profession or business.

<u>820 ILCS 115/9</u>

§ **9.** Except as hereinafter provided, deductions by employers from wages or final compensation are prohibited unless such deductions are (1) required by law; (2) to the benefit of the employee; (3) in response to a valid wage assignment or wage deduction order; (4) made with the express written consent of the employee, given freely at the time the deduction is made; . . . .

APPENDIX H

No. 15-1110, -1109

IN THE
United States Court of Appeals
for the Seventh Circuit

[Filed February 2, 2016]

THOMAS COSTELLO, MEGAN BAASE KEPHART, OSAMA DAOUD, *et al.*, individually and on behalf of all others similarly situated,	)
Plaintiffs-Appellees,	)
v.	)
BEAVEX, INC.	)
Defendant-Appellant.	)

On Petition for Interlocutory Appeal from an
Order of the United States
District Court for the Northern District of Illinois

Case No. 12-cv-7843
The Honorable Judge Virginia M. Kendall
Magistrate Judge Mary M. Rowland

DEFENDANT/APPELLANT BEAVEX'S PETITION FOR REHEARING AND REHEARING EN BANC

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[*Appearance & Circuit Rule 26.1 Disclosure Statements, Table of Contents, and Table of Authorities Omitted in Printing of this Appendix.*]

FED. R. APP. P. 35(B) STATEMENT

With its opinion in this case, the panel has not only created a circuit split on an important question regarding federal preemption of state law, but has also set a dangerous precedent that undermines the

Seventh Circuit's rule against one-way intervention and thereby creates a profoundly unfair playing field for defendants in class-action litigation.

En banc rehearing is therefore necessary under FED. R. APP. P 35(b)(1)(A), "to secure and maintain uniformity of the court's decisions," because the panel's opinion reversing and remanding the District Court's denial of class certification creates a direct violation of the rule against one-way intervention, a rule this Court has long recognized and honored, *see e.g. Isaacs v. Sprint Corp.*, 261 F.3d 679, 681-82 (7th Cir. 2001). The panel recognized that rule as well, but then crafted a result that not only conflicts with the Court's prior opinions, but also creates the exact situation that rule was intended to prevent. If left intact, the panel's ruling will nullify that rule, and in doing so will hand would-be class action plaintiffs a grossly unfair advantage over defendants.

En banc rehearing is also merited under FED. R. APP. P 35(b)(1)(B), because this case "involves one or more questions of exceptional importance." Specifically, the panel's holding that the Federal Aviation Administration Arbitration Act, 49 U.S.C. §14501(c) (the "FAAAA") does not preempt the so-called "B Prong" of the Illinois Wage Payment and Collection Act, 820 ILCS 115/1 *et seq*. (the "IWPCA") directly conflicts with the First Circuit's ruling in in *Massachusetts Delivery Ass'n. v. Coakley*, 769 F.3d 11 (1st Cir. 2014) that the FAAAA does preempt a substantially identical portion of a Massachusetts statute. By treating the IWPCA as a statute that merely governs employment relationships, rather than one that *mandates the creation of* such relationships

and bars the use of owner-operator drivers by Illinois motor carriers, the panel decision is at odds with Supreme Court and Seventh Circuit precedent, in direct conflict with the First Circuit's *Massachusetts Delivery Ass'n.* ruling, and authorizes the very sort of state-by-state regulatory variance of motor carriers that Congress intended the FAAAA to prevent.

ARGUMENT

This appeal presents two separate but equally important questions to the Court, each of which has important consequences for companies doing business within this Circuit. As explained more fully below, the panel's opinion as to both of those questions merits further and immediate review. Otherwise, the result will be an opinion that not only conflicts with this Court's own well-established authority, but also creates an unmerited split with a sister circuit.

1. The Panel's Opinion Violates the Rule Against One-Way Intervention, in Direct Contravention of Prevailing Seventh Circuit And Supreme Court Law.

In its opinion remanding the matter to the District Court for class certification, the panel found that that Plaintiffs came "dangerously close" to precluding review of the class certification decision, and went on to create an odd exception to the rule against one-way intervention, by suggesting that filing contemporaneous (presumably, rather than consecutive) motions seeking a merits ruling and class certification did not implicate the one-way intervention rule.

By the panel's standard, the RMS Titanic only came "dangerously close" to hitting an iceberg. There is no precedent (and the panel cites none) nor any logical reason (and the panel offers none) why the timing or sequencing of the ***filing*** of the motions has any bearing on the outcome or the application of the rule barring one-way intervention. For purposes of that rule, the timing and sequencing of ***the court's rulings*** on class certification and merits is what matters. The Titanic was doomed because of the iceberg collision; Plaintiffs ability to pursue the asserted claims on a class basis was equally doomed the moment they obtained a merits ruling on the IWPCA claim. The issue of "when" motion was filed, and that it was granted "contemporaneous" with the class ruling (which was, not coincidentally, overturned by the panel) is merely an exercise in rearranging the deck chairs, to use an overused, but very apt, cliché. Plaintiff's ability to pursue class claims was doomed the moment the District Court granted their partial summary judgment motion, ***regardless*** of when it was ruled upon as long as that ruling was issued before the class was, ***or would be***, certified.

The rule against one-way intervention requires trial courts to decide class certification issues before they address the substantive merits. The rule is grounded in due process principles and is designed to ensure that, before the merits of a would-be class action lawsuit are decided, the affected parties are bound by their decision to join—or not join—the class. As this Court has aptly and vividly described it, the rule protects defendants from "being pecked to death by ducks. One plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then

everyone else would ride on that single success." *Premier Electrical Construction Co. v. National Electrical Contractors Assn., Inc.*, 814 F.2d 358, 362 (7th Cir. 1987). The policy underlying the rule is one of fairness. Putative class members shouldn't benefit from a favorable merits decision without being equally bound to the effect of an unfavorable one. Without the rule, class members could reserve their decisions to become (or not become) part of the class until the validity of the cause asserted by the named plaintiffs has been determined. The unfairness of such a result is obvious.

The rule against one-way intervention arose out of what were referred to as "spurious" class actions. *See* FED. R. CIV. P. 23, Adv. Comm. Notes to 1966 Amendments. A "spurious" class action is one "for damages in which a decision for or against one member of the class did not inevitably entail the same result for all." *Premier Elec. Constr. Co.*, 814 F.2d at 362. Or, put another way, a class action in which the named plaintiff obtains judgment on the merits through summary judgment before a class is certified. In that situation, "members of the claimed class" would be permitted "to await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974).

The panel's decision to remand this case to the District Court for a class to be certified, ***after*** the favorable merits ruling sought by Plaintiffs and granted by the District Court, plainly violates the rule against one-way intervention. There is no question that

the rule is prevailing law in this circuit; the panel says as much. Yet the panel avoided the rule by introducing a false and meaningless distinction—namely, finding that since the named plaintiffs' dispositive motion and class certification motion were filed "contemporaneously," the rule therefore should not apply. That finding defies all logic. The rule against one-way intervention has no concern with the timing of the filing of motions; it is solely concerned with the practical impact of a favorable merits ruling made before prospective class members have locked themselves into the decision whether to opt into the class. While the panel acknowledged the rule and its importance, it insufficiently considered the unavoidable result of its ruling and mandate—namely, that potential class members will now be able to consider the merits decision procured by the named plaintiffs before deciding whether to join the case.

As if it realized the calamity it was unleashing, the panel admonished plaintiffs to tread carefully. But such a warning is no substitute for adherence to the rule, just as yelling "stay" to an angry dog is no substitute for a strong leash. Well-intentioned caveat or no, the panel's ruling eviscerates the one-way intervention rule in this circuit, opening the door to the exact injustice the rule arose to prevent.

The District Court got this part of its ruling correct. In fact, Judge Kendall declined to address the application of the one-way intervention rule to deny plaintiff's motion for partial summary judgment, because the class motion was denied on other grounds. The District Court did not invoke the rule to deny the class certification motion, or to abate plaintiff's motion

for partial summary judgment. But Judge Kendall never suggested that the rule against one-way intervention was not prevailing law in this Circuit. What Judge Kendall ***did*** do was deny the class certification motion, and then proceed to grant plaintiffs' motion for partial summary judgment, since the one-way intervention rule was not applicable. Procedurally, the District Court's ruling was fully compliant with the rule against one-way intervention. On the flip side, the panel's reversal of that ruling fails to sufficiently account that the merits ruling is now the law of this case and that, by remanding for class certification, it is mandating a result that would not (and ***could*** not, under the law) exist—namely, a class may be certified after a favorable merits ruling is already on the books, with the size of the class informed by that ruling. That result directly contravenes the rule against one-way intervention, and was clear error.

Seventh Circuit decisions have made clear that the law prohibits precisely what the Plaintiffs are attempting, and the panel is effecting, in this case. In *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 354-55 (7th Cir. 1975), the court held that the district court's ruling on plaintiff's motion for summary judgment before ruling on class certification violated rule against one way intervention. In *Arreola v. Godinez*, 546 F.3d 788, 800 (7th Cir. 2008), the Court held that Rule 23 does not create, and was not intended to create, a type of one-way intervention "under which class issues need not be reached unless or until the plaintiff has won or almost won." "Treatment of plaintiffs and defendants is supposed to be symmetric, which is possible only if a class is certified (or not) before ***decision*** on the

merits." *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 455 (7th Cir.2007) (emphasis added). *See also, Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306 (7th Cir. 1991) ("[T]he Federal Rules of Civil Procedure require that a class action seeking damages must be certified before a ***determination*** on the merits in order to prevent the inequitable practice of 'one-way intervention.'") (emphasis added); *Nagel v. ADM Investor Servs., Inc.*, 65 F.Supp.2d 740, 747 (N.D. Ill. 2009) ("Identification of those who will be bound by the outcome precedes any ***decision*** on the merits.") (emphasis added). Importantly, these decisions focus on the timing of the merits ***determinations***—not the timing of the ***filing*** of the underlying motions, which somehow informed the panel's erroneous determination that the Plaintiffs had navigated their way around the one-way intervention rule.

This rule is not some quirk local to the Seventh Circuit. The Supreme Court explained:

> "A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. . . . ***The 1966 amendments were designed, in part, specifically to mend***

> ***this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments***."

Am. Pipe (*emphasis added*). And "trial on the merits" does not mean a full and final adjudication is necessary before class certification becomes a one-way street. The bar against one-way intervention applies whenever absent class members have enough of an advance look at the merits to understand that their "prospective position as actual class members" is either especially weak or especially strong. *Am. Pipe*, 414 U.S. at 547; *see also Arreola*, 546 F.3d at 800 (one-way intervention exists if the class has already "won or almost won").

BeavEx does not fear of a fight on the remaining merits issues. But like any class action litigant, BeavEx is entitled to a ***fair*** fight, decided within the rules. That necessarily means BeavEx should not be subjected to class intervention by individuals whose decisions to become or remain part of the class will necessarily be informed by an existing merits ruling in favor of the named plaintiffs. The panel's decision mandates just such an unfair result. The District Court has ruled on the merits, and that ruling will unavoidably influence prospective class members' decisions—a possibility that was not in play when the District Court granted the named plaintiffs' partial summary judgment motion and denied their attempt to certify a class. If it is not reviewed *en banc* and reversed, the panel's decision will tilt the table unfairly and drastically in the plaintiffs' favor, just as Supreme Court and Seventh Circuit precedent plainly prohibit.

Am. Pipe & Constr. Co., 414 U.S. at 547; *Premier Elec. Constr. Co.*, 814 F.2d at 362.

The named plaintiffs' decision to seek partial summary judgment on the merits this case before obtaining a ruling on class certification, and the District Court's grant of that motion, permanently and significantly altered the landscape of this case. Those events will unavoidably influence potential class members' decisions whether to participate in any class litigation. The named plaintiffs made an affirmative, knowing decision to proceed in this manner, with full awareness (and certainly constructive awareness) of the rule against one-way intervention. These plaintiffs sought a merits ruling and class certification at the same time and, in doing so, invited the District Court to commit plain error. The District Court correctly declined to do so. Undeterred, and now with a favorable ruling on the merits (which BeavEx has not challenged on this interlocutory appeal) neatly secured, Plaintiffs then offered the same invitation to error to this Court. Unlike the District Court, the panel here did not make the right decision. For the one-way intervention rule to retain any meaning at all, the panel's incorrect decision must be reconsidered and reversed as a clear violation of well-established law.

2. The Panel's Opinion Directly Conflicts With First Circuit Precedent on a Nearly Identical Statute.

No less important, and just as unfair, is the panel's ruling that the FAAAA does not preempt the Illinois Wage Payment and Collection Act's sweeping definition of the term "employee." What's more, that ruling directly conflicts with the First Circuit's ruling in

Massachusetts Delivery Ass'n. v. Coakley ("*MDA*") holding that identical language in Massachusetts's wage law ***is*** preempted by the FAAAA.

In its opinion affirming the District Court's denial of BeavEx's motion for summary judgment on FAAAA preemption, the panel discusses *MDA* at some length. And as shown in BeavEx's briefing, the applicable language of both statutes is identical. *Compare* M.G.L. ch. 149, §148B (excepting individuals performing services that "outside the usual course of the business of the employer") *with* 820 ILCS 115/2 (excepting individuals performing services that are "outside the usual course of business … of the employer").[1] In both *MDA* and this case, the relevant statutory language prohibits motor carriers from using owner-operators as drivers (since it is unquestionable that, in both cases, making deliveries falls squarely *within* a courier service's "usual course of business"), and requires motor carriers to employ drivers.

Under facts substantially identical to those at issue here, the First Circuit in *MDA* reversed the District Court's denial of summary judgment to the motor carrier, and remanded the case to the District Court for reconsideration. On remand, the District Court followed the First Circuit's guidance, finding that the FAAAA preempts the Massachusetts statute as applied to motor carriers. *See Massachusetts Delivery Ass'n. v. Healey*, 2015 WL 4111413 (D. Mass. July 8, 2015). In so ruling, the District Court found that the "practical and

[1] The Illinois provision contains additional language the applicability of which is not at issue here, and that is not relevant to the Court's determination of this issue.

significant, if indirect, effect of an employee classification under" the Massachusetts law would be to require compliance with a number of state and federal states applicable to employees (but not general contractors), *id.* at **8-9, which would "at least force [the motor carrier] to charge higher prices that allow it to recoup" its costs associated with compliance with those laws, *Id.* at **4-5, and which "has the potential to require [the motor carrier] to change its routes," *Id.* at *4, and that the Massachusetts law therefore has a "forbidden significant effect" upon the motor carrier's prices, routes, and services, *id.* at **6-7, sufficient to trigger FAAAA preemption.

Unfortunately, the panel in this case drew a number of false distinctions between *MDA* and the present case. As explained below, those distinctions are based on a misapplication of the law and an incomplete assessment of the facts in the appellate record.

First, the panel found that the Massachusetts statute as "triggers far more employment laws than the employment definition contained in the IWPCA." Panel Op. at 17. The panel described the IWPCA as "limited," and stated that "Plaintiffs are only seeking to enforce the provision prohibiting wage deductions." *Id.* Those statements are incorrect. The First Circuit did not base its holding regarding preemption of the Massachusetts statute on the number of other employment laws it expressly triggered. On the contrary, the First Circuit directed the District Court to look to the "logical effect" of the law upon motor carrier's business and, following that direction, the District Court concluded that "the practical and significant, if indirect, effect of an employee classification under the [Massachusetts] law

is to require adherence to a host of other laws," both state and federal, including the so-called employer mandate under the Patient Protection and Affordable Care Act, despite the lack of express language anywhere in the Massachusetts law that those other laws would apply. *Healey*, 2015 WL 4111413 at *8. But given substantially identical facts and statutory language, the panel in this case reached the opposite conclusion. The panel's observation that "BeavEx has not cited any authority showing that the IWPCA would trigger state employment laws to the extent of those in [*Massachusetts Delivery Ass'n.*]" might explain the source of its error; nowhere in the First Circuit's opinion does the Court require or reference any such authority, nor did the motor carrier offer such authority. Instead, as noted above, the District Court found that the "practical and significant, if indirect, effect" of classifying an independent contractor as an employee under the Massachusetts statute would be to require the motor carrier's compliance with all laws governing employees. The district court's only rationale for distinguishing the IWPCA is its erroneous conclusion that that statute is "limited."

That first error ties into the panel's second major error, which was its conclusion that "the only substantive IWPCA requirement that Plaintiffs seek to enforce is that BeavEx refrain from making deductions from its couriers' pay without 'express written consent of the employee, given freely at the time the deduction is made.'" Panel Op. at 19 (quoting 820 ILCS 115/9). The panel's statement ignores two crucial undisputed facts raised in BeavEx's briefing. First, Plaintiffs do ***not*** only seek to have BeavEx stop making deductions from their paychecks. On the contrary, Plaintiffs'

pleadings specifically allege that BeavEx "violated the IWPCA … by failing to properly compensate Plaintiffs for all hours worked," *see* Docket Entry ("DE") 34 at ¶ 43[2], and seek a sum of compensation Plaintiffs allege includes not just "overtime pay," *id*. at ¶27, but also the costs of leasing or purchasing their vehicles; auto, cargo, and accident insurance; vehicle maintenance and repairs; fuel; and several additional categories of expenses. *Id*. at ¶ 28. Second, it is undisputed that Plaintiffs **did**, in fact, give "express written consent" for all deductions BeavEx made from amounts it paid to them. *See* DE 77, p. 8, ¶¶ 45-53.

Nor did the panel's analysis account for the full scope of what the IWPCA requires. The IWPCA is not so "limited" as to merely regulate when paycheck deductions may be taken. It also requires the provision of wage notices (820 ILCS 115/10), sets rules governing payment of wages in the event of a dispute between the parties and requiring certain payments by employers (820 ILCS 115/9), strictly governs the timing of wage payments (820 ILCS 115/3-115/4), and defines "wages" to require payout of earned vacation and holiday time upon termination (820 ILCS 115/2, 115/5). Under the statute, independent contractors are not entitled to any of these protections. To enforce these provisions, the IWPCA empowers the Illinois Department of Labor to "inquire diligently for violations of this act" and, among other things, conduct workplace investigations, subpoena documents, depose witnesses, and bring lawsuits (820 ILCS 115/11), and also gives a private cause of action to affected employees (820 ILCS 115/14)

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[2] Each Docket Entry or other record citation in this Petition was cited to in BeavEx's opening and reply briefing to this Court.

against both the company and individual corporate officers (820 ILCS 115/13). Fines for violation of the statute can run well into the thousands of dollars per violation, and include costs and attorneys' fees (820 ILCS 115/14). Again, independent contractors are not entitled to any of these benefits or protections. As the First Circuit in *MDA* made manifest, the "logical effect" of compliance with these IWPCA provisions alone, let alone the other state and federal laws the IWPCA logically triggers, would be an increase in the cost and burden of BeavEx's Illinois operations—an increase not applicable to BeavEx's operations in other states.

Therefore, the panel's suggestion that BeavEx can somehow control or mitigate the effects of the IWPCA merely by "decid[ing] whether to stop making deductions or absorb the transaction costs of acquiring consent" (Panel Op. at 21) is demonstrably false. The IWPCA governs much more than deductions, and requires much more than written consent. And again, it is not disputed that BeavEx ***did*** obtain the Plaintiffs' express written consent to for the deductions at issue here, via the drivers' owner-operator agreements. Even though BeavEx made its decision regarding deductions long ago, this litigation still goes on. Which raises a key point: Plaintiffs admit that they do not seek to enforce their owner-operator agreements, in which they consented to the contested deductions. Plaintiffs instead seek to break those agreements, and supplant them with the much broader protections afforded to "employees" under Illinois law—a term not applicable to them under their agreements, but under the IWPCA. This case is about independent contractors seeking to break their lawful contractual promises, wrap themselves in the cocoon of state-law litigation, and

emerge anew as employees. Preemption of the IWPCA in this case is warranted not only for the reasons set out by the First Circuit in *Massachusetts Delivery Ass'n.*, but also by the Supreme Court's reasoning in *Northwest, Inc. v. Ginsberg*, 134 S.Ct. 1422 (2014), which the panel actually cited. There, the Supreme Court held that the plaintiff's state common-law claim for breach of the duty of good faith and fair dealing was preempted by the FAAAA's sister statute, the Airline Deregulation Act (ADA), in part because it sought "to enlarge the contractual obligations that the parties voluntarily adopted," and because state law did not "permit[] [the defendant] to contract around" such a claim. Panel Op. at 11. Likewise, Plaintiffs here seek to replace their contractual agreements with BeavEx—which include their express written consent to the deductions complained of in this lawsuit—with the more expansive rights and benefits given to employees under the IWPCA.[3]

The panel's third major error was to embrace the rubric, rejected by the First Circuit, that state laws governing and limiting the use of independent contractor/owner-operator drivers to perform their core services are mere "background laws" that only "regulate[] a labor input and operate[] one or more steps away from the moment at which the [company] offers its *customers* a service for a particular price." Panel Op. at 17 (citing *S.C. Johnson & Son, Inc. v. Transport Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012)) (emphasis added in panel op.). The First Circuit expressly rejected the "background law" rubric and its

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[3] It is undisputed that parties cannot "contract around" compliance with the IWPCA.

notion of "a categorical rule exempting from preemption all generally applicable state labor laws," 769 F.3d at 20, and rejected the idea that the Massachusetts B Prong was in fact such a law. On remand, the District Court explained that laws governing the employment status of a courier service's drivers are, if anything, *foreground* laws, since "[t]he courier is both the face of the company and the ultimate provider of the core service offered by" the company. 2015 WL 4111413 at *10.

Put simply, the IWPCA is not a background law as it applies to BeavEx and the Plaintiffs. The panel attempted to draw the additional (yet false) distinction as being one "between generally applicable state laws that affect the carrier's relationship with its *customers* and those that affect the carrier's relationship with its *workforce*," Panel Op. at 15 (emphasis added), and held that the IWPCA falls into the latter category, as a law that "regulates the motor carrier *as an employer*," and thus has "too tenuous, remote, or peripheral" effect of BeavEx's prices, routes, or services to be preempted. Panel Op. at 17-18 (emphasis in original). But the panel's distinction is based on false premises. The IWPCA does not merely *affect* or *regulate* an employment relationship between BeavEx and its drivers. Instead, it ***creates*** an employment relationship between them, even though the market does not dictate one, and even though the parties specifically chose a contractor relationship rather than an employment relationship. Applying the IWPCA to BeavEx will convert BeavEx's contractual partners—many of whom subcontract their work to other parties—into BeavEx's workforce. Compliance with the IWPCA will force BeavEx to adopt an employee-based

driver model in Illinois, one that differs from its relationships with drivers in every other state. This regulation of the very business model by which BeavEx provides services to its customers is precisely the sort of state-level regulation Congress intended the FAAAA to prevent. *See N.H. Motor Transp. Ass'n. v. Rowe*, 448 F.3d 66, 80 (1st Cir. 2006), *aff'd.*, 552 U.S. 364 (2008) (FAAAA's intent is to "creat[e] an environment in which service options will be dictated by the marketplace, and not by state regulatory regimes.") (internal citations omitted). And as the record evidence shows, BeavEx's compliance with the IWPCA's B Prong would have the logical effect of imposing substantial additional expenses, including: (1) compliance with the numerous regulatory steps imposed by the language of the IWPCA itself, under the threat of thousands of dollars of state-enforced penalties; (2) compensation for the full raft of expenses demanded by Plaintiffs, including the costs of purchasing, fueling, maintaining, and ensuring a fleet of automobiles; (3) compliance with the universe of other state and federal laws that do not apply to BeavEx's courier drivers as owner-operators, but would apply to them as employees, including laws governing leave, medical insurance, and wage payment; and (4) other structural changes to BeavEx, including without limitations the need to hire dedicated human resources personnel to administer a workforce that would have now increased tenfold. Although the panel agreed with the First Circuit that "[e]mpirical evidence is not mandatory" to show FAAAA preemption (Panel Op. at 17), BeavEx has also offered undisputed evidence that this third expense alone would cost the company roughly $185,000 in additional costs.

The logical effect of compliance with these numerous new regulatory burdens would be to force BeavEx to alter its routes and services (especially its on-demand delivery service, the provision of which would be unfeasible if BeavEx were required to pay on-call time to its roster of on-demand drivers) and to increase its prices to account for those expenses, but only within Illinois. As the Supreme Court has explained in a number of cases (see Panel Op. at 9-11), and the First Circuit made clear in *MDA*, that result is ***precisely*** what Congress intended the FAAAA to forbid.

A final word is appropriate with regard to Plaintiffs' argument, endorsed by the panel (*see* Panel Op. at 20), that BeavEx's reclassification of its drivers as employees under the IWPCA B Prong would not require reclassification of its drivers under any other statutes. As shown above and in BeavEx's appellate briefing, the burden of reclassification under the IWPCA itself would be substantial. Regardless, the District Court on remand in *MDA* laid waste to the idea that a motor carrier may be required to reclassify its owner-operator drivers for purposes of a wage statute, but not for other statutes. In that case, the District Court dismissed the notion of "a hybrid model where workers are considered to be employees under some statutes and independent contractors under others" as one that would itself "impose[] a serious burden on employers who must determine how to classify each worker with respect to each statute." *Healey*, 2015 WL 4111413 at *7. The Court's conclusion is apt, since the payment of wages—and particularly the amount, manner, and timing of such payment, all of which are regulated by the IWPCA—goes to the very

heart of the employment relationship. One cannot be "kind of" an employee any more than one can be "kind of" pregnant or "kind of" dead. The panel's suggestion to the contrary is, as the District Court in *MDA* explained and the First Circuit's ruling compelled, an erroneous one.

CONCLUSION

The panel's January 19, 2016 opinion sets a precedent that not only creates a circuit split but also effectively and dangerously ignores the well-established law of this circuit. For that reason, Defendant-Appellant BeavEx, Inc. respectfully requests that the panel's opinion be reheard or reheard en banc, the District Court's ruling denying class certification be affirmed, and the District Court's ruling denying BeavEx's motion for summary judgment as to FAAAA preemption be reversed, and judgment entered in favor of BeavEx.

Dated this 2nd day of February, 2016

Respectfully submitted,

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[*Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX I

No. 15-1214

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed March 7, 2016]

CLAYTON SCHWANN, individually and on behalf of a class of all others similarly situated; THOMAS LEDUC, individually and on behalf of a class of all others similarly situated; RAMON HELEODORO, individually and on behalf of a class of all others similarly situated; JAMES E. DUGGAN, individually and on behalf of a class of all others similarly situated; ERIC VITALE, individually and on behalf of a class of all others similarly situated; MUCHIRAHONDO PHINNIAS, individually and on behalf of a class of all others similarly situated; TEMISTOCLES SANTOS, individually and on behalf of a class of all others similarly situated; ROBERT SANGSTER, individually and on behalf of a class of all others similarly situated; JEFF BAYLIES; LAWRENCE ADAMS)
)
Plaintiffs-Appellants)
)
MARVIN SANTIAGO, individually and on behalf of a class of all others similarly situated; MANUEL MONTROND, individually and on behalf of a class of all others similarly situated; SERRULO FERNANDEX DEJESUS, individually and on behalf of a class of all others similarly situated;)

WAN PYO CONG, individually and on behalf of a class of all others similarly situated; LEON HECTOR	))))
Plaintiffs	))
v.	))
FEDEX GROUND PACKAGE SYSTEM, INC.	))
Defendant-Appellee	))

On Appeal from a Judgment of the United States District Court of Massachusetts

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PLAINTIFF-APPELLANTS' PETITION FOR REHEARING EN BANC

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DATED: March 7, 2016

[*Table of Contents Omitted in Printing of this Appendix.*]

FED. R. APP. P. 35(b) STATEMENT

Rehearing *en banc* is necessary under Fed. R. App. P. 35(b)(1)(B), because the panel's opinion conflicts with the Seventh, Ninth, and Eleventh Circuits, all of which have uniformly held that the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. § 14501(c)(1), does not preempt state wage and employment laws. In particular, the panel's opinion directly conflicts with the Seventh Circuit's holding in Costello v. BeavEx, Inc., 810 F.3d 1045, 1055-56 (7th Cir. 2016), that the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. § 14501(c)(1), does not preempt a materially identical "prong two" employment test found in the Illinois wage law.

Similarly, the Ninth and Eleventh Circuits have rejected the argument that the FAAAA preempts state wage and other employment laws. Amerijet Int'l Inc. v. Miami-Dade County, --- Fed. App'x ----, 2015 WL 5515343, *6-7 (11th Cir. Sept. 21, 2015)(state law increasing the minimum wage and imposing recordkeeping requirements on air carriers not preempted by the FAAAA); Dilts v. Penske Logistics, LLC, 769 F.3d 637, 646 (9th Cir. 2014)(state meal and rest break law not preempted by the FAAAA "even if employers must factor [the meal break law] into their decisions about the prices that they set, the routes that they use, or the services that they provide."), cert. denied, 135 S.Ct. 2049; Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184 (9th Cir. 1998) (holding that the FAAAA does not preempt a state prevailing wage law), cert. denied, 526 U.S. 160.

For these reasons, as set forth more fully below, a rehearing *en banc* is necessary to evaluate the important question of whether the FAAAA preempts prong two of the Massachusetts wage law's definition of employment, given the direct conflict between the panel's opinion and the decisions by the United States Supreme Court and the Seventh, Ninth, and Eleventh Circuits.

BACKGROUND

The Plaintiffs in this case are individuals who worked as package pick-up and delivery drivers for FedEx in Massachusetts who allege that FedEx misclassified them as independent contractors under M.G.L. c. 149, § 148B, and that as a result they suffered improper deductions and expenses taken out of their wages in violation of the Massachusetts Wage Act, M.G.L. c. 149, § 148. The Plaintiffs' wage claims in this case are part of a national wave of class action lawsuits brought by FedEx delivery drivers around the country, alleging that FedEx misclassified its drivers as independent contractors in violation of their respective states' wage laws. Many courts have already held that FedEx misclassified its drivers as independent contractors when they were actually employees for wage law purposes. See Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66 (Kan. 2014)(FedEx misclassified its drivers in Kansas as independent contractors); Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033 (9th Cir. 2014)(same, for FedEx drivers in Oregon); Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981 (9th Cir. 2014)(same, for FedEx drivers in California); Gennell v. FedEx Ground Package Sys., Inc., No. 05-601, as

decided in In re FedEx Ground Package Sys., Inc., Employ. Prac. Litig., 758 F.Supp.2d 638 (N.D. Ind. 2010)(same, for FedEx drivers in New Hampshire); Coleman v. FedEx Ground Package Sys., Inc., No. 05-599, as decided in In re FedEx, 758 F.Supp.2d 638 (same, for FedEx drivers in Kentucky); see also Wells v. FedEx Ground Package Sys., Inc., 799 F.3d 995 (8th Cir. 2015)(finding genuine issue of material fact on whether FedEx misclassified a class of Missouri drivers as independent contractors); Carlson v. FedEx Ground Package Sys., Inc., 787 F.3d 1313 (11th Cir. 2015)(same, for a class of FedEx drivers in Florida).

Here, as in many other cases cited above, the Plaintiffs were FedEx's employees in any sense of the word. For example, the Plaintiffs delivered packages full-time for FedEx, five or more days each week, while wearing FedEx uniforms and driving trucks bearing FedEx's colors and logos. Plaintiffs' Brief, pp. 9-11. FedEx had complete control over the volume of the Plaintiffs' workload and their compensation, and the Plaintiffs were prohibited from delivering packages for any other delivery company while carrying FedEx's packages, such that the Plaintiffs depended upon FedEx for their livelihood. Id.

The district court previously ruled in this case that the Plaintiffs qualified as FedEx's employees under the second prong of M.G.L. c. 149, § 148B(a), which provides that an individual who performs services within "the usual course of the business of the employer" is a covered employee under the Massachusetts wage law. Schwann v. FedEx Ground Package Sys., Inc., 2013 WL 3353776 (D.Mass. July 3,

2013).[1] The district court later retracted its decision in light of MDA v. Coakley, 769 F.3d 11 (1st Cir. 2014), and then issued a decision granting summary judgment in FedEx's favor on all of the Plaintiffs' claims, holding that the FAAAA preempted prong two, that prong two was not severable from prongs one and three, and that prongs one and three were also preempted by the FAAAA. Schwann v. FedEx Ground Package Sys., Inc., 2015 WL 501512 (D. Mass. Feb. 5, 2015). On appeal, the First Circuit panel affirmed the district court's holding that that prong two of section 148B was preempted by the FAAAA, but reversed the district court's holding that prong two was not severable from prongs one and three, and that prongs one and three were preempted by the FAAAA. Schwann v. FedEx Ground Package Sys., Inc., --- F.3d ----, 2016 WL 697121 (1st Cir. Feb. 22, 2016).

ARGUMENT

1. The Panel's Opinion Directly Conflicts with the Seventh Circuit's Decision in BeavEx.

The panel held in this case that prong two of the definition of employment for the Plaintiffs' wage claims – which defines the term "employee" as an individual who performs services within "the usual course of the business of the employer"[2] – was preempted by the FAAAA as applied to FedEx. In contrast, the Seventh

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[1] Plaintiffs also moved for summary judgment under the third prong of section 148B, but the district court found it unnecessary at the time to rule on prong three since the Plaintiffs already qualified as employees under prong two. Id., *6.

[2] See M.G.L. c. 149, § 148B(a)(2).

Circuit held that "prong two" of the Illinois wage law's materially identical employment test was not preempted by the FAAAA as applied to a nation-wide courier company called BeavEx. BeavEx, 810 F.3d at 1054-56 (citing 820 Ill. Comp. Stat. 115/2).[3] There are numerous contradictions between the panel's opinion and the Seventh Circuit's decision in BeavEx. The panel's opinion departs from the Seventh Circuit's holding in BeavEx in several key respects.

First, the panel held that prong two "expressly references" FedEx's services because it "requires a judicial determination of the extent and types of motor carrier services that FedEx provides." 2016 WL 697121, *6; see MDA v. Coakley, 769 F.3d 11, 17-18 (1st Cir. 2014)(state statute preempted if it "expressly references" carrier prices, routes, or services). In contrast, the Seventh Circuit held in BeavEx that the Illinois wage law's materially identical prong two test did not expressly reference the defendant motor carrier's prices, routes, or services. Indeed, applying prong two only requires a determination of the employer's "usual course of business," and does not actually mandate, prohibit, or influence what service FedEx or another motor carrier may offer its

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[3] Although prong two of the Illinois wage law's definition of employment contained additional language which would allow a valid independent contractor relationship to exist if the service is "performed outside all of the places of business of the employer," that extra language does not distinguish prong two of the Illinois law from section 148B, because the "place of business" for a delivery company also includes "the delivery route itself." Carpetland U.S.A., Inc. v. Illinois Dept. of Employ. Sec., 201 Ill.2d 351, 390, 776 N.E.2d 166, 188 (Ill. 2002)(cited in BeavEx, 810 F.3d at 1059).

customers.[4] A rehearing *en banc* is necessary to resolve this central conflict between the panel's opinion and the Seventh Circuit's holding in BeavEx.

Second, in contrast to BeavEx, the panel held that prong two "could" have an indirect but significant impact on FedEx's services and routes. 2016 WL 697121, *6-8. The panel held there was a prohibited impact on FedEx's routes because "[i]t is reasonable to conclude that employees would have a different array of incentives that could render their selection of routes less efficient...." Id., *8. Notably, the panel did not make this summary judgment finding based on any hard evidence, because FedEx did not submit any such evidence. Similarly, the panel assumed, without the benefit of evidence, that since the Plaintiffs would qualify as employees under prong two, prong two could indirectly have a significant impact on FedEx's "decision ... to provide a service directly, with [FedEx]'s own employee, or to procure the services of an independent contractor...." 2016 WL 697121, *7 ("that decision implicates the way in which a company chooses to allocate its resources and incentivize those persons providing the service."). The panel reasoned that prong two would "mandat[e] that any service deemed 'usual' to [a company's] course of business be performed by an employee," and that this "would ultimately determine what services that company provides and how it chooses to provide them." Id.

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[4] Moreover, the "usual course" inquiry is a long-standing factor in traditional employment classification tests. See, e.g., Restatement (Second) of Agency § 220(2)(a)(1958).

In sharp contrast, the Seventh Circuit found that the closest thing to a prohibited impact that prong two of the Illinois wage law could have on BeavEx was to potentially increase prices as an indirect result of increased labor costs, but that this alone was not sufficient to cause preemption. BeavEx, 810 F.3d at 1055 (the Illinois wage law merely "regulates the motor carrier as an employer, and any indirect effect on prices is too tenuous, remote, or peripheral.")(emphasis in original)(citing S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc., 697 F.3d 544, 558 (7th Cir. 2012)(laws that "operate one or more steps away from the moment at which the firm offers its *customers* a service for a particular price" are not preempted); see Tobin v. Federal Express Corp., 775 F.3d 448, 456 (1st Cir. 2014)(laws that "regulate how [a carrier] behaves as an employer" are not preempted).

"Even less obvious" to the Seventh Circuit was any way that prong two of the Illinois wage law could possibly have a significant impact on a motor carrier's routes or services. Id., 1056. BeavEx had argued that it relied on a flexible workforce of "on demand" couriers who can either accept or decline delivery assignments, and that reclassifying its couriers as employees for all purposes would have a significant impact on its services. Id., 1056. The Seventh Circuit rejected that argument because there was no evidence that complying with the Illinois wage law would require BeavEx "to switch its entire business model from independent-contractor-based to employee-based," "given that the federal employment laws and other state labor laws have different tests for employment status." Id. Instead, the Seventh Circuit looked to the actual potential effect of the Illinois wage law on

BeavEx's routes and services, and found no prohibited impact. Id. Here, there is arguably even less of an effect on FedEx's routes and services than in BeavEx, because the Plaintiffs were not "on demand" drivers, but rather they were fixed-route drivers who picked up their daily load of packages each morning from FedEx's terminal. Moreover, like the wage law definition in BeavEx, prong two of the Massachusetts wage law's definition of employment is limited in its reach, and does not affect FedEx's ability to classify its drivers as employees for purposes state laws governing workers' compensation, unemployment insurance, or payroll taxes, as well as every federal employment law, because these laws have their own definitions of employment. Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321, 337-38 & fn.12-14, 28 N.E.3d 1139, 1153-54 & fn. 12-14 (2015).[5]

Indeed, as discussed above, supra at pp. 2-3, FedEx drivers around the country have been held to be misclassified as independent contractors under state laws across the country, and so there is no conceivable way that prong two of the Massachusetts wage law's definition of employment could affect FedEx's ability to use independent contractors in this case. Nor is it true

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[5] While prong two of the Massachusetts wage law's definition of employment also triggers certain other employment laws found in M.G.L. Chapters 149 and 151, those laws are not at issue here because the Plaintiffs only seek to enforce the wage payment law found in M.G.L. c. 149, § 148. The United States Supreme Court has cautioned courts to "not nullify more of a legislature's work than is necessary…," Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329 (2006), and therefore the Court should limit its analysis to the individual law(s) sought to be enforced in a particular case.

that prong two of the Massachusetts wage law's definition of employment prohibit FedEx from using bona fide independent contractors. See, e.g., Debnam v. FedEx Home Delivery, 2013 WL 5434142 (D.Mass. Sept. 27, 2013)(FedEx driver who also employed other drivers to service up to nine FedEx routes at a time was an independent contractor engaged in a "legitimate … business to business relationship" with FedEx); Gennell v. FedEx Ground Package Sys., Inc., 2103 WL 4854362, *7 n.5 (D.N.H. Sept. 10, 2013)(discussing FedEx's "Independent Service Providers" model in New Hampshire, where FedEx contracts with ISPs who in turn hire their own drivers to perform the deliveries).

For these reasons, the panel's decision in this case contradicts with the central holdings by the Seventh Circuit in BeavEx concerning whether federal law preempts a state wage law's definition of employment, and a rehearing *en banc* is required to resolve this issue of exceptional importance.

2. The Panel's Opinion Also Conflicts with FAAAA Decisions by the Ninth and Eleventh Circuits.

In addition to the Seventh Circuit's holding in BeavEx, 810 F.3d at 1054-57, which is directly on point and squarely contradicts with the panel's opinion in this case, the Ninth and Eleventh Circuits have also reached contradictory decisions in cases examining whether the FAAAA preempts state wage laws and a state meal and rest break law.

In Dilts v. Penske Logistics, LLC, 769 F.3d 637, 646 (9th Cir. 2014), cert. denied, 135 S.Ct. 2049, the Ninth Circuit held that a state's meal and rest break laws

were not preempted by the FAAAA because "[t]hey do not set prices, mandate or prohibit certain routes, or tell motor carrier what services they may or may not provide, either directly or indirectly." The Ninth Circuit held that the FAAAA did not preempt the meal and rest break law "even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide," because any such effect is too tenuous to cause preemption. Id. Similarly, in Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1187 (9th Cir. 1998), cert. denied, 526 U.S. 160 (1999), the Ninth Circuit rejected a motor carrier's argument that the FAAAA preempted a prevailing wage law that would allegedly increase the motor carrier's prices by 25% and cause it to "re-route equipment to compensate for lost revenue," because even though the wage law was "in a certain sense 'related to' [the motor carrier's] prices, routes and services," it had no more than an "indirect, remote, and tenuous" impact.

In Amerijet Int'l Inc. v. Miami-Dade County, the Eleventh Circuit held that a state law which increased the minimum wage and imposed heightened record-keeping requirements on a carrier was not preempted because it did not "dictat[e] the types of services [a carrier] must provide" or "prevent a carrier from providing [particular] services," but "merely 'alters the incentives' facing an air carrier," and "[i]n this regard, 'it is no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate.'" Amerijet Int'l Inc. v. Miami-Dade County, -- Fed. App'x --, 2015 WL 5515343, *6-7 (11th Cir. Sept.

21, 2015)(quoting Cal. Div. of Labor Stds. Enf. v. Dillingham Constr., 519 U.S. 316, 334 (1997));[6] see also Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1259 (11th Cir. 2009)("It is true that [a carrier's] employment decisions may have an incidental effect on its 'services,'" but any such effect is too remote to be preempted by the FAAAA).

Here, the panel's opinion diverged from the reasoning and analysis by the Ninth and Eleventh Circuits when it found that prong two of the Massachusetts wage law's definition of employment was preempted by the FAAAA based on the effect prong two could have on the "economic incentive" for FedEx and its drivers to select routes and services. 2016 WL 697121, *7; see id., *8 ("It is reasonable to conclude that employees would have a different array of incentives that could render their selection of routes less efficient...."). Both the Ninth and Eleventh Circuits have properly recognized that a state law which only affects a motor carrier's prices, routes, or

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[6] The Supreme Court's holding in Dillingham, that ERISA's "relate to" preemption clause does not preempt a state wage law, is instructive here because the Supreme Court has referenced its ERISA decisions to define the outer limits of FAAAA preemption. Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1778 (2013)(citing New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)). The decision in Dillingham illustrates the importance of the presumption that must be applied against the preemption of traditional state regulation such as employment laws. See Wyeth v. Levine, 555 U.S. 555, 566 (2009)("In all pre-emption cases ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.")(internal quotation omitted).

services indirectly by affecting the motor carrier's incentives, is not preempted by the FAAAA because any such effect is too remote, tenuous, and peripheral.

CONCLUSION

A rehearing *en banc* is necessary to address the conflict between the panel's holding in this case that the FAAAA preempts prong two of M.G.L. c. 149, § 148B(a), and the Seventh Circuit's holding that a materially identical "prong two" in an Illinois wage law is not preempted by the FAAAA, especially given that the Ninth and Eleventh Circuits have likewise applied the same analysis as the Seventh Circuit to hold that wage laws and meal and rest break laws are also not preempted by the FAAAA, because those laws have only a remote, tenuous, and peripheral effect on a motor carrier's prices, routes, and services.

Respectfully submitted,
CLAYTON SCHWANN, et al.

By their attorneys

/s/ Harold Lichten

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Dated: March 7, 2016

[*Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 12-cv-7843

[Filed January 11, 2013]

THOMAS COSTELLO, MEGAN BAASE KEPHART, OSAMA DAOUD, *et al.*, individually and on behalf of all others similarly situated, Plaintiffs, v. BEAVEX INC., Defendant.	))))))))))))))

Judge Virginia M. Kendall

Magistrate Judge Nan R. Nolan

AMENDED CLASS ACTION COMPLAINT,
COMPENSATORY AND INJUNCTIVE
RELIEF REQUESTED

I. Introduction

1. Plaintiffs bring this class action on behalf of themselves and others similarly situated to challenge Defendant's unlawful practice of misclassifying its delivery drivers as "independent contractors" when they are properly classified as employees under both statutory and common law.

2. Plaintiffs allege that as a result of Defendant's misclassification, they were deprived of overtime wages in violation of the Illinois Minimum Wage Law, 820 Ill. Comp. Stat. 105/1, *et seq.*, that illegal deductions were taken from their wages in violation of the Illinois Wage Payment and Collection Act, 820 Ill. Com. Stat. 115/9, and that Defendant was unjustly enriched.

3. This action is brought on behalf of a class of persons currently and formerly employed by Defendant as employees within the definition of "employee" in the common and statutory law, but who, similar to the named Plaintiffs, are or were erroneously classified as "independent contractors."

II. Parties

4. Plaintiff Thomas Costello resides in Illinois and worked for Defendant BeavEx as a courier from 2008 until 2010, primarily out of Defendant's offices in Des Plaines, IL.

5. Plaintiff Megan Baase Kephart resides in Illinois and worked for Defendant BeavEx as a courier from 2006 until 2011, primarily out of the Des Plaines, IL terminal.

6. Plaintiff Osama Daoud resides in Illinois and worked for Defendant BeavEx as a courier from 2009 until 2012, primarily out of the Des Plaines, IL terminal.

7. Defendant BeavEx Incorporated ("BeavEx") is a Connecticut corporation with its corporate headquarters located at 3715 Northside Parkway, North Creek Building 200, Suite 300, Atlanta, Georgia 30327. BeavEx is a courier company. BeavEx formerly operated a terminal at 268 Howard Avenue, Des Plaines, IL, 60018. Currently, BeavEx operates a terminal located at 787 Industrial Drive, Elmhurst, IL 60126.

III. <u>Jurisdiction</u>

8. The Court has personal jurisdiction over Plaintiffs and the class they seek to represent because they are citizens of the State of Illinois and/or work in the State of Illinois.

9. The Court has personal jurisdiction over Defendant BeavEx because they do business in the State of Illinois. The Defendant's conduct in the State of Illinois underlies all claims in this suit.

10. The Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. 1332(d)(2). Taken individually Plaintiffs' claims exceed $75,000, additionally in total Plaintiffs' class claims exceed $5 million.

11. The unlawful employment practices described herein were committed within the State of Illinois, at Defendant's facilities located in Cook

County. Therefore, venue in the Northern District of Illinois is proper pursuant to 28 U.S.C. § 1391(b).

IV. Factual Allegations

12. BeavEx is a corporation whose business consists entirely of package delivery and pick up services for its clients. Plaintiffs were employed by BeavEx to provide package delivery and pick up services to its clients.

13. As a condition of employment BeavEx requires its Illinois delivery drivers to sign a contract with Contractor Management Services Inc. ("CMS"), that mischaracterizes each driver as an "independent contractor" (the "contract"). These contracts are designed to conceal the true nature of the relationship between BeavEx and its Illinois delivery drivers – that of employer and employee.

14. These contracts, produced and administered by CMS on BeavEx's behalf, are contracts of adhesion. Drivers have no ability to negotiate the terms of the contracts.

15. Despite using the label of "independent contractor," BeavEx retains the absolute right to control and direct the work of its delivery drivers.

16. BeavEx hired Plaintiffs to deliver and pick up packages based on times, locations, and prices determined solely by BeavEx.

17. BeavEx controls the manner in which delivery drivers perform their job. For example:

a. All BeavEx drivers are required to complete a qualification process as a

precondition of employment, including a detailed background check and a drug screen;

b. BeavEx unilaterally assigns drivers routes; drivers have no authority to refuse or negotiate their route assignment;

c. BeavEx coordinates with their clients to determine the pick-up and drop-off locations and times for each route, drivers must adhere to the route that they have been assigned, drivers have no authority to refuse or negotiate over pickups or deliveries on their assigned routes;

d. BeavEx dispatchers issue drivers the manifests for their assigned routes;

e. If a driver fails to complete a stop on their pre-assigned route they are subject to discipline up to and including termination;

f. BeavEx requires drivers to arrive at pick-up and drop-off locations at precise times;

g. If a driver is unable to drive a pre-assigned route on a particular day, they are required to find a replacement or substitute who is approved by BeavEx;

h. Although delivery drivers use their own vehicles while delivering packages on behalf of BeavEx, all passengers must be pre-approved by BeavEx;

i. BeavEx does not allow drivers to make deliveries or pick-ups according to their own schedule;

j. BeavEx requires drivers to scan packages at the time of delivery and transmit that information electronically to BeavEx, failure to scan a package, or failure to transmit a scan due to malfunctioning equipment will result in a pay deduction;

k. BeavEx requires drivers to turn-in daily reports of their deliveries, failure to turn-in such a report may result in discipline up to and including termination;

l. BeavEx requires drivers to wear uniforms at all times, drivers who fail to wear the BeavEx uniform may be disciplined up to and including termination;

m. BeavEx requires drivers to carry badges which identify them as BeavEx drivers, failure to carry a BeavEx badge may result in discipline up to and including termination;

n. BeavEx often contacts drivers during their shift to check on their location or the status of deliveries;

o. Clients's questions and complaints are communicated through BeavEx rather than directly to drivers.

18. BeavEx requires its drivers to use specific equipment while delivering and picking up packages for its clients, for example:

a. BeavEx requires drivers to use a scanner, issued by BeavEx, to transmit information regarding package deliveries;

b. BeavEx provides drivers with cellular telephones that drivers must use in conjunction with the scanner to transmit information regarding package deliveries;

c. BeavEx requires drivers to provide their own vehicles for deliveries, drivers' vehicles must have low mileage and may not be older than a few years;

d. BeavEx requires drivers to use lockboxes and chains that are provided by BeavEx to secure packages.

19. BeavEx retains the right to discipline or terminate couriers at will, as would an employer. BeavEx routinely imposed new rules and policies

governing its employment relationship with Plaintiffs, including, for example:

a. Drivers are required wear BeavEx uniforms and carry BeavEx identification badges; failure to wear the BeavEx uniform or carry the BeavEx identification badge may result in discipline;

b. Drivers are required to turn in paperwork confirming their deliveries at the end of their route; failure to turn in paperwork may result in discipline;

c. Drivers are required to scan packages upon delivery; failure to scan a package may result in discipline;

d. Drivers are required to bring a pen when they report to work; failure to bring a pen may result in discipline;

e. Drivers are required to report to work with a working cellphone; failure to report to work with a working cellphone may result in discipline;

f. Drivers are required to answer cellphone calls from BeavEx during their route; failure to answer their phone may result in discipline.

20. BeavEx's rules and policies are communicated to drivers orally by BeavEx supervisors,

and are also posted throughout BeavEx offices and terminals in prominent locations.

21. Plaintiffs had no authority to refuse or negotiate over BeavEx's rules and policies; they were forced to comply or risk discipline up to and including termination.

22. All office personnel have the authority to issue write-ups to drivers that violate rules and policies set forth by BeavEx.

23. BeavEx performs surprise "audits" of drivers. During such audits, drivers are evaluated based on the cleanliness of their vehicle, their vehicle's tire tread and the security of their vehicle, among other things. Drivers may receive discipline as a result of an audit. A driver that receives several disciplines may be subject to termination.

24. BeavEx negotiates the price of routes directly with its clients. Drivers are not involved in negotiating the price of routes and have no authority over the price of routes.

25. BeavEx unilaterally determines drivers' rate of pay for each route. Drivers have no authority to negotiate over their rate of pay.

26. Although drivers are required to return to BeavEx facilities at the end of a route to turn in paperwork, they are not compensated for the time it takes to return to the BeavEx facility after their last stop. The return trip to the BeavEx facilities may take up to several hours depending on the route.

27. Drivers regularly work in excess of forty (40) hours per week. Drivers are not compensated at an overtime rate of pay for work in excess of forty (40) hours per week.

28. Plaintiffs were required to pay Defendant's operating expenses, all of which should have been paid by Defendant, including, but not limited to:

a. delivery vehicle purchase or lease;

b. various insurances, including vehicle insurance and work accident insurance;

c. delivery vehicle maintenance and repairs;

d. purchase of uniforms;

e. fuel;

f. cargo insurance, and

g. scanners and cellular telephones.

29. Defendant took unlawful deductions from Plaintiffs' pay in order to pay its own operating expenses, including, but not limited to:

a. Uniforms;

b. Cargo Insurance;

c. Workers' Accident Insurance;

d. Administrative Fees;

e. Scanner fees, and

f. Cellular phone fees.

30. Plaintiffs were denied the accoutrements of employment, including, but not limited to:

a. wages;

b. overtime pay;

c. workers' compensation;

d. unemployment insurance;

e. income tax withholding;

f. meal, break and rest periods.

31. As a result of Defendant's misclassification of Plaintiffs as "independent contractors," Plaintiffs were deprived of the rights and protections guaranteed by Illinois law to employees, they were deprived of employer-financed workers compensation coverage and unemployment insurance benefits. Furthermore, Plaintiffs were forced to provide, operate and maintain the cost of delivery vehicles for Defendant's benefit.

32. Defendant's mischaracterization of its drivers as independent contractors, the concealment and/or non-disclosure of the true nature of the relationship between Defendant and its drivers and the attendant deprivation of substantial rights and benefits of employment are part of an on-going unlawful and fraudulent business practice by Defendant.

V. Class Allegations

33. Plaintiffs bring this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure for the following class:

> all persons who have provided delivery driver services directly to BeavEx in the State of Illinois at any time during the relevant statutory period, who were not treated as employees of BeavEx

34. The members of the class are so numerous that joinder of all members of the Class is impracticable. Plaintiffs believe that the Class numbers in the hundreds.

35. Common issues of law and fact predominate the claims of the entire Plaintiff Class. Specifically, all claims are predicated on a finding that Defendant misclassified its drivers as independent contractors when they were in fact employees. In short, the claims of the named Plaintiffs are identical to the claims of the class members.

36. The named Plaintiffs are adequate representatives of the class because all potential plaintiffs were subject to Defendant's uniform practices and policies. Further, the named Plaintiffs and the potential class plaintiffs have suffered the same type of economic damages as a result of Defendant's practices and policies.

37. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiffs' counsel is competent and experienced in

litigating large wage and hour class and collective actions.

38. Finally, a class action is the only realistic method available for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation makes it impractical for members of the Class to seek redress individually for the wrongful conduct alleged herein. Were each individual member required to bring a separate lawsuit, the resulting multiplicity of proceedings would cause undue hardship and expense for the litigants and the Court and create the risk of inconsistent rulings which would be contrary to the interest of justice and equity.

Count I – Illinois Minimum Wage Law (Class Action)

39. Plaintiffs incorporate Paragraphs 1- 38 herein.

40. This Count arises from Defendant's violations of the IMWL, 820 Ill. Comp. Stat. 105/1 *et seq*. for its failure to compensate Plaintiffs at the required minimum wage, and for its failure to pay named Plaintiffs at the overtime rate for all hours worked in excess of forty (40) per workweek.

41. Plaintiffs seek all overtime and other wages due, liquidated damages, statutory damages, prejudgment interest and any other damages due.

Count 2 – Illinois Wage Payment and Collection Act (Class Action)

42. Plaintiffs incorporate Paragraphs 1-38 herein.

43. Defendant violated the IWPCA, 820 Ill. Comp. Stat. 115/1 *et seq.*, by failing to properly compensate Plaintiffs for all hours worked.

44. Additionally, Defendants violated the IWPCA, 820 Ill. Comp. Stat. 115/1 *et seq.*, by making unlawful deductions from Plaintiffs' pay.

45. Plaintiffs seek all unpaid wages as well as reimbursement for all unlawful deductions taken by Defendant from their pay.

Count 3 – Unjust Enrichment (Class Action)

46. Plaintiffs incorporate Paragraphs 1-38 herein.

47. As a result of Defendant's mischaracterization of Plaintiffs as "independent contractors," Plaintiffs are forced to pay substantial sums of money for work-related expenses, including but not limited to the purchase or lease of vehicles meeting BeavEx's specifications, and all costs of operating, insuring and maintaining those vehicles.

48. Further, by mischaracterizing Plaintiffs as "independent contractors" Defendant evades employment related obligations, such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation.

Defendant illegally shifts these costs, including workers compensation insurance and other expenses, to Plaintiffs.

49. By misclassifying its employees as "independent contractors," and further by requiring those employees to pay Defendant's own expenses, Defendant has been unjustly enriched.

Prayer for Relief

WHEREFORE, Plaintiffs request that the Court enter the following relief:

1. Certification of this case as a class action pursuant to Rule 23 of the Federal Rule of Civil Procedure;
2. Restitution for all wages and overtime payments that are due to Plaintiffs and the Class because of their misclassification as independent contractors;
3. Restitution for all other benefits due to Plaintiffs and the Class to which they are entitled as employees;
4. Restitution for all deductions taken from Plaintiffs' and the Class's pay;
5. Restitution for all of Defendant's operating expenses that Plaintiffs and the Class were forced to bear;
6. Attorney's fees and costs;
7. Any other relief to which the Plaintiffs and the Class members may be entitled.

Date: January 11, 2013

Respectfully submitted,
THOMAS COSTELLO, MEGAN BAASE KEPHART, and OSAMA DAOUD

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[*Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No.: 1:12-CV-07843

[Filed September 3, 2013]

THOMAS COSTELLO, MEGAN BAASE KEPHART, *et al.*, individually and on behalf of all others similarly situated, Plaintiffs, v. BEAVEX INC. Defendant.	)))))))))))))

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[pp.1-3]

Plaintiffs brought this action against Defendant BeavEx Inc., challenging Defendant's unlawful practice of misclassifying Plaintiff courier drivers as independent contractors for the purposes of coverage under the Illinois Wage Payment and Collection Act

("IWPCA"), 820 Ill. Comp. Stat. 115/2.[1] (Doc. 34 at 1). Plaintiffs further allege that unlawful deductions were taken from their wages in violation of the IWPCA, 820 Ill. Comp. Stat. 115/8. (Doc. 34 at 1). In its Motion for Summary Judgment BeavEx wrongly argues that Plaintiffs' claims under the IWPCA are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501.

As set forth below, courts have routinely rejected such arguments and found that state wage laws of general applicability – such as the IWPCA– are not preempted by the FAAAA. Such wage statutes do not "relate to" the "transportation of goods" but rather serve as "background" employment laws which are applicable to all businesses regardless of industry. They are not the type of targeted statutes, aimed at reversing federal deregulation of motor carriers that the FAAAA preemption provision was designed to address.

Notably, three federal courts recently interpreting a nearly identical definition for "employees" under

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[1] Plaintiffs also challenge BeavEx's unlawful practice of misclassifying Plaintiffs as independent contractors for the purposes of coverage under the Illinois Minimum Wage Law ("IMWL"), 820 Ill. Comp. Stat. 105/1, *et seq*., and allege that they were deprived overtime owed to them pursuant to the IWML. (Doc. 34 at 2). Plaintiffs further claim that BeavEx is unjustly enriched by its practice of unlawfully shifting its business costs onto Plaintiff courier drivers. (Doc. 34 at 10-11). However, BeavEx does not move for summary judgment on Plaintiffs' claims under the IMWL or on Plaintiffs' claims of unjust enrichment. Accordingly, Plaintiffs do not address those claims in their opposition.

Massachusetts and New Hampshire wage statues[2] found that the state wage laws at issue were not preempted by the FAAAA. See Gennell v. FedEx Ground Inc., 05-cv-145, Op. No. 2013 DNH 110, at 9-19 (D.N.H., Aug. 21, 2013), attached hereto as Exhibit A, (finding claims brought by drivers under New Hampshire's deductions and reimbursement statutes were not preempted by the FAAAA); Schwann v. FedEx Ground, Inc., 2013 WL 3353776, at *3 (D. Mass. July 3, 2013) (finding claims brought by drivers under Massachusetts Wage Act were not preempted by the FAAAA); Martins v. 3PD, Inc., 2013 WL 1320454, *12 (D. Mass. Mar. 28, 2013) (same). Similarly, the IWPCA, which contains a virtually identical definition for "employees" is not the type of wage statute of general applicability which the FAAAA was designed to preempt.

Indeed, in two recent, significant cases, Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1778 (2013), and S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc., 697 F.3d 544, 558 (7th Cir. 2012), both of which BeavEx fails to address in its memorandum, the Supreme Court and the Seventh Circuit have reiterated that the scope of FAAAA preemption to statutes of general applicability, like the IWPCA, is "massively limited." Standing together, these cases make clear that Congress never intended to preempt state wage statutes of general applicability simply because they may increase operating costs of companies covered by the FAAAA. To rule otherwise

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[2] Compare, the Massachusetts Independent Contractor Law M.G.L. c. 149 § 148B with the definitional section of the IWPCA, 820 Ill. Comp. Stat. 115/2.

would relieve courier, package delivery, and trucking companies from any obligations to comply with state wage statutes.

Further, BeavEx's entire argument turns on the false assertion that compliance with the IWPCA would require it to reclassify its courier drivers as "employees" for all purposes. BeavEx grossly misstates the practical implications of Plaintiffs' claims. The IWPCA merely governs which Illinois workers are protected from unauthorized deductions from their pay[3]; it does not, as BeavEx wrongly argues, dictate other aspects of motor carriers' employment relationships.

Moreover, as set forth below, even if BeavEx's argument had any traction (which it does not), its motion must still fail. It is not enough for BeavEx to baldly allege an impermissible effect on its prices, routes, and services; rather, it must prove such burdens, and this it has utterly failed, or even attempted, to do. Even in the even that BeavEx were required to entirely change to an employee based model, the legal obligations incurred in such a shift, as

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[3] The IWPCA also governs the timeframe within which covered workers must be paid, (820 Ill. Comp. Stat. 115/3-5) and notification given to covered workers regarding wage rates, (820 Ill. Comp. Stat. 115/10). However, Plaintiffs do not allege that Defendant has violated these provisions of the IWPCA, nor does Defendant assert any arguments with regard to these provisions. Therefore, Plaintiffs will limit its discussion to the provisions of the IWPCA at issue here, namely the definitions section setting forth which workers are covered by the IWPCA (820 Ill. Comp. Stat. 115/2), and the section prohibiting certain deductions from covered workers' wages, (820 Ill. Comp. Stat. 115/9).

discussed in detail below, would not significantly impact its labor costs. For these reasons, as set forth more fully below, BeavEx's motion for summary judgment should be DENIED.

I. The Purpose and History of the FAAAA Indicate that Plaintiffs' Claims Under the IWPCA are not Preempted.

* * *

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No.: 1:12-CV-07843

[Filed November 11, 2014]

THOMAS COSTELLO,)
MEGAN BAASE KEPHART, *et al.*,)
individually and on behalf of all)
others similarly situated,)
)
Plaintiffs,)
)
v.)
)
BEAVEX INC., *et al*.)
)
Defendants.)
)

JOINT MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b), FOR RECOMMENDATION OF INTERLOCUTORY APPEAL PURSUANT TO FED. R. CIV. P. 23(f), AND FOR A STAY DURING THE PENDENCY OF THE INTERLOCUTORY APPEALS

[pp.1-4]

All parties in this case jointly file this motion requesting this Court to (1) grant a petition under 28 U.S.C. § 1292(b) to certify for interlocutory appeal its October 29, 2014, Order denying the Defendant's Motion for Reconsideration; (2) recommend that the Seventh Circuit, accept the Plaintiffs' petition for a FED. R. CIV. P. 23(f) interlocutory appeal of this Court's October 29, 2014, Order denying Plaintiffs' Motion for Reconsideration; (3) grant a stay of this matter during the pendency of the §1292(b) interlocutory appeal and the Rule 23(f) appeal. While the Defendant strongly believes that the Court was incorrect in its determination of the FAAAA issue, and correct with respect to class certification, and the Plaintiffs strongly believe that the Court was correct in its FAAAA decision, and wrong with respect to class certification, and although the Court has denied each party's motion for reconsideration, all parties, and presumably the Court, recognize that there are legal issues posed by both issues that are not free from doubt based upon recent case law. Therefore, the parties and the Court would be best served by having these issues resolved by the Seventh Circuit before the parties proceed with further costly and time-consuming litigation in the District Court. As further grounds for this motion, the parties state the following:

A. <u>Defendant's Motion for Summary Judgment Regarding FAAAA Preemption</u>

1. On October 29, 2014, the Court denied the Defendant's Motion for Reconsideration of April 28, 2014, which requested the Court to reconsider its denial of Defendant's Motion for Summary Judgment.

Pursuant to 28 U.S.C. § 1292(b), the parties respectfully request that this Court certify the Court's October 29, 2014, Order for interlocutory review on the following question: Does the Federal Aviation Administration Authorization Act of 1994 ("FAAAA")'s preemption provision, 49 U.S.C. § 14501(c)(1), preempt the definition of "employee" as set forth at Section 2 of the Illinois Wage Payment and Collection Act, 820 ILCS 115/2 (the "IWPCA"), to the extent that definition imposes limitations upon the use of independent contractors by Illinois employers?

2. This interlocutory appeal is appropriate because it meets all statutory and non-statutory requirements under 28 U.S.C. § 1292(b) and as enunciated by the Seventh Circuit. See Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1007 (7th Cir. 2002). The four statutory requirements are as follows: "(1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation." Boim, 291 F.3d at 1007 (quoting Ahrenholz v. Board of Trustees of the University of Illinois, 219 F.3d 674, 675 (7th Cir. 2000). The remaining non-statutory requirement is that "the petition is filed in the district court within a reasonable time after entry of the order sought to be appealed."

3. The appeal presents a controlling question of law. A question of law is controlling "if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." Leff v. Deutsche Bank AG, No. 08-733, 2009 WL 4043375, at *3 (N.D. Ill. Nov. 20, 2009) (quoting In re Brand Name Prescription Drugs Antitrust Litig., 878 F. Supp. 1078, 1081 (N.D. Ill. 1995)). The question of whether FAAAA preempts the

Plaintiffs' IWPCA claims is a pure question of law that is potentially dispositive to the outcome of this case, and therefore statutory requirements (1) and (2) are satisfied.

4. The question of whether the FAAAA preempts the Plaintiffs' IWPCA claims is contestable and has not been specifically addressed by the Seventh Circuit. Boim, 291 F.3d at 1007 (holding that a question of first impression is "certainly contestable"). The parties recognize that recent cases regarding the preemptive effect of the FAAAA, especially as it applies to similar or substantially identical laws or provisions in other jurisdictions, have created a lack of clarity in the law. Compare People ex rel Harris v. Pac Anchor Transportation, Inc., -- P.3d --, 2014 WL 3702674, at *7 (Cal., July 28, 2014) (holding that the FAAAA does not preempt California's Unfair Competition Law to the extent it governs classification of California workers as independent contractors) and Gennell v. FedEx Ground Package System, Inc., 2013 WL 4478026 (D.N.H., August 21, 2013) (holding that the FAAAA does not preempt New Hampshire statute defining the term "employee" to contain strict limits on use of independent contractors), with Massachusetts Delivery Association v. Coakley, --- F.3d ---, 2014 WL 4828976 (1st Cir. September 30, 2014) (holding that the second prong of a Massachusetts independent contractor law similar to the IWPCA may be preempted by the FAAAA if its impact on carriers' prices, routes, and services, is sufficiently significant), and American Trucking Ass'ns., Inc. v. City of Los Angeles., 660 F.3d 384, 408 (9th Cir. 2011) (holding that the FAAAA preempts Port of Los Angeles requirement that motor carriers switch from using independent owner-operator

drivers to employees). Thus, statutory requirement (3) is satisfied.

5. Allowing interlocutory appeal will "expedite the resolution of the litigation" because of the dispositive nature of the question of FAAAA preemption. See Boim, 291 F.3d, at 1007. If the Seventh Circuit holds that the FAAAA preempts the Plaintiffs' IWPCA claims, the class action claims in this litigation will be resolved.[2] If the Seventh Circuit holds that the FAAAA does not preempt the Plaintiffs' IWPCA claims, the interlocutory appeal will obviate the need for an appeal on that issue by the Defendant after final judgment, thus making a speedy resolution more likely. Thus, statutory requirement (4) is satisfied. Lastly, statutory requirement (5) is satisfied, because the parties are filing the joint motion on November 11, 2014, thirteen days after the October 29, 2014, Order was filed, which is manifestly reasonable.

B. Plaintiff's Motion for Rule 23(f) Class Certification

6. The parties further move for the Court to recommend that the Seventh Circuit should accept, under FED. R. CIV. P. 23(f), Plaintiffs' anticipated petition for interlocutory appeal of the Court's Order of October 29, 2014, denying the Plaintiffs' Motion for Reconsideration. The Plaintiffs' Motion for Reconsideration asked the Court to reconsider its March 31, 2014, denial of the Plaintiffs' motion for class certification. The Plaintiffs intend to submit a

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[2] The named Plaintiffs also brought individual claims of minimum wage and overtime violations, Count I,

Rule 23(f) Petition to the Seventh Circuit asking the Court to address the following question: Did the District Court err in denying class certification to the Plaintiffs, based on the reasons described by the District Court in its opinion?

7. Unlike the procedure for an interlocutory appeal under 28 U.S.C. § 1292(b), an interlocutory appeal under FED. R. CIV. P. 23(f) does not require certification by the District Court. See Reliable Money Order, Inc. v. McKnight Sales Co., Inc., 704 F.3d 489, 497 (7th Cir.

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