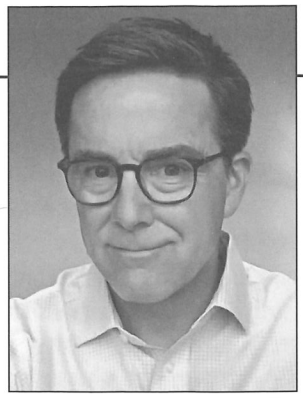
Will the U.S. Supreme Court Finally Fix the Ninth Circuit's Preemption Problem in *California Trucking Association v. Bonta*?

R. Jay Taylor, Jr.*



The rights of motor carriers to do business with independent contractor owner-operator truck drivers in California hang in the balance at the U.S. Supreme Court as the Court considers whether to review the case of *California Trucking Association v. Bonta*.[1] In *Bonta*, the United States Court of Appeals for the Ninth Circuit reversed a district court's ruling that California's statutory ABC employment classification test, known as AB5, is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). This article explains how California enacted AB5 to outlaw owner-operators, how Congress enacted the FAAAA in 1994 to preempt exactly this kind of anticompetitive state regulation, and how the Ninth Circuit's impossibly high bar to preemption frustrates the purpose of the FAAAA and flouts the Supreme Court's precedent on the subject.

California Enacted AB5 to Bar Motor Carriers from Providing Services Through Owner-Operators

In 2018, the California Supreme Court invented a new three-part test–the so-called ABC test–to replace the state's decades-old multi-factor common law employment status test for most wage and hour laws.[2] The California Legislature acted quickly to codify an expanded version of the ABC test by enacting AB5.[3] The second prong of the test, the "B" prong, states that a person providing services for pay will be deemed an employee under California's unemployment insurance and wage orders of the Industrial Welfare Commission (essentially the state's wage and hour laws) unless the "hiring entity" proves that "[t]he person performs work that is outside the usual course of the hiring entity's business."[4]

Because the "usual course" of a motor carrier's business is transporting freight, AB5 effectively declares that all who provide freight transportation services to a motor carrier are employees. If it seems like the B prong is aimed at owner-operator service providers by forcing carriers to only use employee drivers, it is. This is not speculation. AB5's sponsor was clear about the law's purpose, stating that the statute would "get rid of" the supposedly "outdated" owner-operator business model.[5]

Congress Enacted the FAAAA to Bar State Efforts to Dictate Motor Carriers' Services

AB5 is exactly the kind of state regulation Congress had in mind when it enacted the FAAAA's preemption provision in 1994. That provision states:

> A 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.[6]

When Congress decided to bar states from enacting or enforcing laws "related to" motor carrier services, it was acting to prevent states from indirectly reintroducing the kinds of price, route, and service that years of deregulation had finally eliminated.

Federal economic regulation of motor carriers began in 1935 when Congress passed the first Motor Carrier Act, bringing motor carriers under the jurisdiction of the Interstate Commerce Commission ("ICC").[7] Among other things, the ICC precluded carriers from entering the market or serving new routes unless the service was required by "public convenience and necessity," a determination based largely on whether other carriers already provided service.[8] But as time passed, the ICC's restrictive, public utility-like regulations increasingly impeded commerce by protecting established, inefficient carriers and producing artificially inflated prices.[9] For example, route restrictions frequently prevented carriers from "providing service by way of the most direct routes," instead forcing them to "travel circuitous routes," resulting in "operating inefficiencies and wasted fuel," and, ultimately, "inflated transportation costs to the . . . consumer."[10]

Lifting the burden of these counterproductive regulations attracted the attention of policymakers. In 1962, President Kennedy criticized "[a] chaotic patchwork of inconsistent and often obsolete legislation and regulation" that did "not fully reflect . . . the dramatic changes in technology of the past half-century."[11] Congress first moved to deregulate the airline industry, passing the Airline Deregulation Act of 1978 ("ADA") and explaining that "maximum reliance on competitive market forces" would promote,

* Scopelitis, Garvin, Light, Hanson & Feary (Indianapolis, IN)

among other things, "efficiency, innovation, and low prices."[12] To ensure national uniformity in airline deregulation, Congress barred states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."[13]

Deregulation of the motor carrier industry began with passage of a new Motor Carrier Act ("MCA") in 1980. The MCA partially deregulated trucking in several important ways. It made it easier for new carriers to enter the industry and for existing carriers to respond to market demands for services by making the grant of authority under the "public convenience and necessity" test the norm rather than the exception.[14] It limited collective ratemaking, giving carriers more leeway to set rates based on market demands. And it eased restrictions that specified routes carriers had to travel.[15]

Congress's partial deregulation of the trucking industry transformed the business of motor carriage. Increased competition forced inefficient carriers out of the market, driving freight prices down. Carriers could offer more efficient service using the most direct routes, improving service times and service quality. Deregulation saved billions of dollars per year while improving service and spurring innovation.[16]

One of the ways deregulation allowed carriers to respond to market needs came from the elimination of restrictions preventing them from utilizing the most efficient routes between two points. For example, carriers' newfound freedom to ship freight between two points on routes of their choosing, as opposed to inefficient, circuitous routes, helped foster the innovative practice of just-in-time production and inventory management techniques, which allowed manufacturers and suppliers to reduce inventories (and therefore significant expenses) by arranging for the delivery of materials as they are needed in the production process.[17]

The dramatic success of partial deregulation encouraged policymakers to finish the project by eliminating all remaining barriers to an open, market-based system. The DOT summarized the work to be done in a 1990 report:

> Since the late 1970's, transportation providers have been released from many of the hobbles of Federal economic regulation, unleashing creative and competitive energies . . . . In the 1980's, previously regulated transportation companies across all modes have introduced innovations in service, route systems, fares, and operating strategies unprecedented in modern transportation history. . . . That process will continue as Federal, State, and local barriers to more efficient, service-oriented transportation are eliminated. One of the greatest opportunities for improving transportation efficiency and service in the future lies in allowing market forces to work, minimizing government intervention, and increasing flexibility for the private sector.[18]

Congress acted on the DOT's charge to eliminate such "[s]tate, and local barriers" by adding a preemption provision to the FAAAA four years later. As the House Conference Report explained, "preemption legislation is in the public interest as well as necessary to facilitate interstate commerce" because state interference "causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets."[19] The Conference Report recognized that state interference with free and open transportation markets "is a huge problem for national and regional carriers attempting to conduct *a standard way of doing business*," and that preemption of state interference was necessary to ensure that *"[s]ervice options will be dictated by the marketplace, and not by an artificial regulatory structure."*[20] And Congress intended for the FAAAA to preempt more than just traditional economic regulation aimed at motor carriers (price controls and market entry restrictions). Rather, FAAAA was designed to preempt all direct and indirect impediments to commerce posed by state regulatory efforts, particularly those premised on powers the states retained over other, more general matters:

> The conferees do not intend the regulatory authority which the States may continue to exercise . . . to be used . . . to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.[21]

When the FAAAA's congressional conferees stated that FAAAA preemption would prevent state interference with "a standard way of doing business," they understood that the use of owner-operators by motor carriers to deliver freight was a standard "service option" "dictated by the marketplace." Motor carriers have been using the services of owner-operators for as long as the federal government has been regulating interstate trucking.[22] Congress itself authorizes the regulation of the relationship between carriers and owner-operators through rules promulgated at 49 C.F.R. Part 376. The purpose of those congressionally-authorized rules is to "promote the stability and economic welfare of the independent trucker segment of the motor carrier industry."[23] Thus, owner-operators are precisely the kind of market-driven "service option" that Congress sought to protect from state interference when it enacted the FAAAA.

The Supreme Court Interprets FAAAA Preemption Broadly

In the ensuing years, the Supreme Court has had several opportunities to interpret the FAAAA's preemptive reach. Even before Congress enacted the FAAAA, the Supreme Court addressed the scope of the ADA's preemption provision in *Morales v. Trans World Airlines, Inc.*,[24] which addressed perhaps the two most predictable preemption issues: if Congress sought to eliminate economic regulation of the airline industry, which historically took the form of direct price and market entry controls, should ADA preemption be limited to laws explicitly directed to the airline industry as opposed to generally applicable laws? Likewise, should preemption only cover laws actually prescribing carrier prices, routes, and services, as opposed to those merely impacting those subjects indirectly? The answer to both questions was an emphatic "no."

The Supreme Court began by noting that the phrase "relating to" expressed Congress's "broad pre-emptive purpose," and that any state enforcement actions "having a connection with or reference to airline 'rates, routes, or services' are preempted" under the ADA.[25] Given the breadth of the phrase "relating to," *Morales* naturally rejected the contention that "only state laws specifically addressed to the airline industry," as opposed to laws of general applicability, "are pre-empted."[26] This proposed limitation "ignores the sweep of the 'relating to' language." *Morales* stated that exempting generally applicable laws would "creat[e] an utterly irrational loophole," because there was no good reason that "state impairment of the federal scheme" of a deregulated transportation system "should be deemed acceptable" just because the state's interference was effected through "a general statute." As *Morales* recognized, Congress added preemption to the ADA "[t]o ensure that the States would not undo federal deregulation with regulation of their own."[27]

Since *Morales*, the Supreme Court has adhered to Congress's command to measure the limits of preemption against the FAAAA's deregulatory purpose. For example, in *Rowe v. New Hampshire Motor Transport Association*,[28] the Court held Maine regulations preempted where they "produce[d] the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces.'"[29] The state law at issue in *Rowe* dictated that tobacco retailers could only use delivery services that met certain state-set criteria. Even though the regulation was aimed at shippers and only indirectly impacted carriers, the Supreme Court held it preempted because the law required carriers "to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." The Court in *Rowe* went on to explain that, if a state were allowed to substitute its own policy service preferences for what the interstate transportation market supported, the result would be a "state regulatory patchwork . . . inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace."[30] The Supreme Court understands that Congress enacted the FAAAA to prevent states from directly or indirectly dictating the services carriers provide.

The Ninth Circuit Avoided a Preemption Finding in *Bonta* by Applying Its Idiosyncratic "Binds" Test

The preemption question before the Ninth Circuit in *Bonta* was straightforward: does AB5 "relate to" the "services" motor carriers provide to their customers by dictating that motor carriers cannot use owner-operators to provide those services? The answer should have been an easy "yes." Congress enacted the FAAAA because state interference with free and open transportation markets "is a huge problem for national and regional carriers attempting to conduct a standard way of doing business," and to ensure that a motor carrier's *"[s]ervice options* will be *dictated by the marketplace,* and *not by an artificial regulatory structure."*[31] AB5 is an "artificial regulatory structure" enacted to outlaw the "service option" chosen "by the marketplace" as a "standard way of doing business" in the transportation industry.

Supreme Court precedent confirms this. *Rowe* had held a service-dictating rule preempted. And the Ninth Circuit itself said nearly as much in *American Trucking Associations, Inc. v. City of L.A. ("ATA").*[32] In that case, the City of Los Angeles required that motor carriers at the Port of Los Angeles use only employee drivers. The Ninth Circuit stated that the impermissible relationship between the regulation and carriers' services "can hardly be doubted" because the regulation would "force motor carriers to change their . . . services in a way that the market would not otherwise dictate."[33]

But in *Bonta*, the Ninth Circuit distanced itself from *ATA* and avoided finding AB5 preempted by applying a unique preemption test it had developed in several post-*ATA* cases.[34] Under this test, a "generally applicable" state law–i.e., one that does not single out motor carriers–is not related to a motor carrier's prices, routes, or services for purposes of FAAAA preemption unless the state law "binds" the carrier to a particular price, route, or service.[35] And even then, according to *Bonta*, this "binding" is only impermissible if it occurs at the level of the motor carrier's relationship with its customers or consumers.[36] But if a state law impacts a motor carrier's business at the point where the motor carrier interacts with their workers, there can be no impermissible binding, and thus no preemption, regardless of the law's impact on a carrier's prices, routes, or services.[37] Essentially, according to the Ninth Circuit, the FAAAA does not constrain a state from dictating the terms of relationships between carriers and their service providers regardless of the impact on prices, routes, and services.

The court bolstered its reasoning by pointing to what it described as a "presumption" against congressional intent to preempt state law. This was incorrect because the FAAAA is an express preemption provision. Where a "statute 'contains an express pre-emption clause,'" a court may not "invoke any presumption against preemption," but must "instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'"[38]

The Ninth Circuit's approach here is unique. No other circuit court of appeals has adopted the "binds" test. The test finds no support in the text of the FAAAA or in the Supreme Court's FAAAA jurisprudence. To the contrary, the Supreme Court clarified in *Morales* that the ADA's similar preemption provision does not merely bar states from "actually prescribing" rates, routes, or services, because such a limitation would read the words "relating to" out of the statute. As the Court explained, if Congress wanted to limit preemption to state laws that set (or "bind") carriers' rates, routes, or services, it would have simply forbidden the States to "regulate" rates, routes, and services.[39] Indeed, the Ninth Circuit's "binds" test effectively eliminates the possibility that the FAAAA preempts any law of general applicability because no generally applicable law would expressly bind a motor carrier to particular prices, routes, or services. This is an impossibly high bar to preemption and is inconsistent with Congress's express reasons for enacting the FAAAA in the first place.

The text of the FAAAA supports only one preemption test, for all laws: whether the law or regulation in question refers to or has a connection with a carrier's prices, routes, or services. The First Circuit Court of Appeals took this approach in its 2016 decision in *Schwann v. FedEx Ground Package System, Inc.*,[40] holding a similar ABC employment classification law from Massachusetts to be preempted for the same reasons the Ninth Circuit dismissed in *Bonta*.

The Supreme Court Can Fix the Ninth Circuit's Preemption Problem in *Bonta*

The Supreme Court may have already decided whether to accept review of *Bonta* by the time this article is published. While the Supreme Court grants very few certiorari petitions, *Bonta* presents an attractive case for review. It involves FAAAA preemption, an issue the Court has not been reluctant to weigh in on. And the Ninth Circuit's "binds" test is so different than the approach taken by the Supreme Court and other circuits–as evidenced by the Fifth Circuit's opposite decision in *Schwann*–that Supreme Court intervention is required to reestablish uniformity. If the Supreme Court does not weigh in, the Ninth Circuit will continue to apply its homegrown preemption test that virtually guarantees every state law of general applicability will escape preemption. This is not what Congress intended when it passed the FAAAA.

Endnotes

1 By the time you read this, the Supreme Court may have ruled on a pending Petition for a Writ of Certiorari in the case.
2 *See Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018).
3 Cal. Lab. Code § 2775(b)(1).
4 Cal. Lab. Code § 2775(b)(1)(B).
5 Video of Cal. State Assembly Floor Session, at 1:07:12-15, 1:08:20-30 (Sept. 11, 2019) (Statement of Assembly Member Lorena Gonzalez) ("We are . . . getting rid of an outdated broker model that allows companies to basically make money and set rates for people that they called independent contractors."), https://www.assembly.ca.gov/media/assembly-floor-session-20190911/video.
6 49 U.S.C. § 14501(c)(1).
7 Motor Carrier Act, 1935, ch. 498, 49 Stat. 543.
8 *See* The Impact of Deregulation on the Trucking Industry, 47 Admin. L. Rev. 527, 530 (1995).
9 *Id.*; *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.*, 697 F.3d 544, 548 (7th Cir. 2012).
10 H.R. Rep. 96-1069, at 18, 1980 U.S.C.C.A.N. 2283, 2300.
11 Special Message to the Congress on Transportation (April 5, 1962), www.presidency.ucsb.edu/ws/index.php?pid=8587.
12 *See* 49 U.S.C. § 1302(a) (currently codified at 49 U.S.C. § 40101).
13 49 U.S.C. § 41713.
14 H.R. Rep. 96-1069, at 4, reprinted in 1980 U.S.C.C.A.N. 2283, 2291.
15 *See* The Impact of Deregulation on the Trucking Industry, 47 Admin. L. Rev. 527, 536 (1995).
16 Clifford Winston, et al., The Economic Effects of Surface Freight Deregulation 15-42 (1990); Martha M. Hamilton, FTC, ICC Chiefs Back Trucking Industry Deregulation, Wash. Post, May 26, 1988 (citing FTC report that deregulation saved shippers $39 billion to $63 billion per year).
17 *See* Winston, supra, at 12.
18 U.S. Department of Transportation, Moving America: New Directions, New Opportunities, A Statement of National Transportation Policy 19 (February 1990), https://archive.org/details/movingamericanew00unse_0.
19 H.R. Conf. Rep. 103-677, 86-88, 1994 U.S.C.C.A.N. 1715, 1758-60.
20 H.R. Conf. Rep. No. 103–677, p. 87 (1994) (emphasis added).
21 H.R. Conf. Rep. 103-677, 83, 1994 U.S.C.C.A.N. 1715, 1755.
22 *See, e.g., Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 303 (1953) (upholding regulations governing the "wide practice of using non-owned equipment" of "owner-operator truckers to satisfy [carriers'] need for equipment as their service demands").
23 Lease & Interchange of Vehicles, 131 M.C.C. 141 (January 9, 1979).
24 504 U.S. 374 (1992).
25 *Morales*, 504 U.S. 374 at 383-384.
26 *Id.* at 386.
27 *Id.* at 378, 389-90.
28 552 U.S. 364, 370 (2008).
29 *See id.* at 372 (quoting *Morales*, 504 U.S. at 378).
30 *Id.* at 373.
31 H.R. Conf. Rep. No. 103–677, p. 87 (1994) (emphasis added).
32 559 F.3d 1046, 1052 (9th Cir. 2009).
33 *Id.*
34 *E.g., Ridgeway v. Walmart Inc.*, 946 F.3d 1066, 1083 (9th Cir. 2020); *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 966 (9th Cir. 2018); *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647 (9th Cir. 2014).
35 *Dilts*, 769 F.3d at 646.
36 *See id.* at 640, 646.
37 *Id.* at 657.
38 *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce of United States of America v. Whiting*, 563 U.S. 582, 594 (2011)).
39 504 U.S. at 385.
40 813 F.3d 429, 437-40 (1st Cir. 2016).