No. 13-2307

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MASSACHUSETTS DELIVERY ASSOCIATION,

Plaintiff-Appellant,

v.

MARTHA COAKLEY, in her official capacity as
Attorney General of the Commonwealth of Massachusetts,

Defendant-Appellee.

Appeal from the United States District Court for the District of Massachusetts
Case No. 10-CV-11521, Hon. Denise J. Casper

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING APPELLANT AND REVERSAL OF THE DECISION OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29, the undersigned counsel certifies that amicus curiae Chamber of Commerce of the United States of America has no parent corporation and that no publicly traded corporation owns 10% or more of its stock.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Its members include motor carriers as well as customers of motor carriers, beneficiaries of the nationwide market that Congress deregulated in the motor-carrier provisions of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), now codified at 49 U.S.C. § 14501.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. The correct application of a federal preemption clause is just such an issue. Many of the Chamber's members transact business on a nationwide scale and benefit from the nationwide market that Congress has protected through express preemption clauses: not only in the FAAAA, but also in other statutes such as the Airline Deregulation Act of 1978 (ADA). The Chamber accordingly has submitted amicus briefs in numerous ex-

[1] Both parties have consented to the filing of this brief. No party's counsel authored any part of this brief. No party and no party's counsel contributed money intended to fund this brief. No person other than the Chamber, its members, and

press-preemption cases, both in the Supreme Court of the United States and in the courts of appeals. *See, e.g.*, *Northwest, Inc. v. Ginsberg*, No. 12-464 (U.S. argued Dec. 3, 2013) (ADA preemption); *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (FAAAA preemption); *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008) (same). In the particular preemption context at issue in this case, the Chamber is well suited to provide the Court with the benefit of its members' experience dealing with state laws attempting to regulate in the areas that Congress, through the FAAAA and similar legislation, has reserved to the national government.

SUMMARY OF ARGUMENT

Massachusetts's drastic restriction on independent contracting, Mass. Gen. Laws ch. 149, § 148B, is precisely the type of regulation that the FAAAA preempts, and the District Court's reasons for allowing Section 148B to remain in effect misapply both the text of the FAAAA and binding precedent interpreting it. Unless the decision below is reversed, Massachusetts will have successfully erected a new and anticompetitive barrier to the interstate transportation of property—precisely the type of rule that Congress abolished twenty years ago.

I. After Congress decided to abandon federal control of motor carriers' "prices, routes, and services," it wanted to ensure that the result would be a single,

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its counsel has made such a monetary contribution.

deregulated, competitive national market—not 50 States seeking to move in and impose their own new, conflicting regulations. To that end, Congress enacted the FAAAA's preemption clause, which forecloses any state regulation "related to a price, route, or service"—whether the state law nakedly focuses on motor carriers or instead seeks to regulate them "through the guise of some form of unaffected authority." H.R. Conf. Rep. No. 103-677, at 84 (1994). As the Supreme Court has made clear in interpreting the materially identical preemption clause in the ADA, a "general statute" with substantial but "indirect" effects on a "price, route, or service" is preempted just as a statute expressly targeting motor carriers would be. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992).

II. The District Court fundamentally misapplied the FAAAA's preemption clause and the controlling precedent interpreting that clause. The District Court concluded that Section 148B is exempt from preemption because it does not facially and exclusively target the "transportation of property." That conclusion dramatically over-reads the Supreme Court's decision in *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013). Under that decision, the MDA need only show that Section 148B "relate[s] to services . . . with respect to transportation of property," "routes . . . with respect to transportation of property," or "prices . . . with respect to transportation of property." 49 U.S.C. § 14501(c)(1). The Supreme Court in *Dan's City* did not depart from the principle that even "indirect"

regulations, in the "guise" of general law, are still preempted if they "relate[] to" a price, route, or service for transporting property. Indeed, this Court has already recognized that *Dan's City* "in no way retreated from existing precedent." *Brown v. United Airlines, Inc.*, 720 F.3d 60, 71 (1st Cir. 2013).

III. Section 148B presents a direct and substantial challenge to the competitive nationwide market that the FAAAA protects. Massachusetts substantially impedes a nationwide or regional carrier's ability to adopt a uniform way of providing "services" to transport property. If every State can adopt its own variation of Section 148B, *no* multistate uniformity is possible.

Section 148B strikes at the heart of the area protected by federal law. It specifies *who* must perform a delivery service—an employee of the motor carrier, not an independent contractor. And it targets a relationship—between carriers and independent contractors—that was for many years a central concern of the federal regulatory scheme. Massachusetts's attempt to regulate that area for itself is preempted.

Section 148B further impedes the nationwide market in delivery services by precluding carriers from making a central and basic economic choice: what structure allows the carrier to do business most efficiently and to compete most effectively. By categorically precluding carriers from reaping the benefits of an independent-contractor relationship, Massachusetts plainly has a substantial effect on

the prices, routes, and services that those carriers can offer. That interference is forbidden, and Section 148B is preempted.

ARGUMENT

I. The FAAAA Preemption Clause Broadly Preempts Any State Law, Whether General Or Specific, That Substantially Affects The Prices, Routes, Or Services Of A Motor Carrier Transporting Property

The FAAAA's preemption clause made deregulation of the motor-carrier industry real. Congress had already abolished the old regime, in which a federal agency superintended motor carriers' "prices, routes, and services." But Congress recognized the need to ensure that individual States did not try to re-impose something like the old regime—not only because Congress favored deregulation as a policy matter, but because motor-carrier regulation should be uniform nationwide (with specified exceptions not relevant here) to facilitate interstate commerce, efficiency, and competition. The Supreme Court and this Court have followed Congress's directive, repeatedly holding state laws invalid where those laws "relate[] to" a protected "price, route, or service," 49 U.S.C. § 14501(c)(1), even if they travel in "the guise of some form of unaffected regulatory authority," H.R. Conf. Rep. No. 103-677, at 84. This Court should follow that well-worn path in this case.

A. Congress Adopted The FAAAA Preemption Clause To Effectuate Its Successful Deregulation Of The Motor-Carrier Industry

1. *The Deregulatory Background:* Congress enacted the FAAAA's preemption clause as an integral part—indeed, the culmination—of a long-term effort to deregulate air and motor carriage. Congress recognized that, if individual States remained free to impose regulations like those that federal and state agencies had imposed under the regulatory system that Congress abolished, the benefits of deregulation would be lost. Indeed, state regulation was in one key respect *worse* that the federal regulation Congress did away with: "[t]he sheer diversity of [state] regulatory schemes" was itself "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.

Congress's deregulatory effort began in 1978 with the Airline Deregulation Act (ADA), which deregulated domestic air transportation. "'To ensure that the States would not undo federal deregulation with regulation of their own,' the ADA included a preemption clause" materially identical to the one at issue in this case. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995) (quoting *Morales*, 504 U.S. at 378).

In 1980, two years after its successful airline deregulation, "Congress deregulated trucking." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). Congress did not adopt a preemption clause in the 1980 legislation, but it was well

aware that certain "individual State regulations and requirements . . . [we]re in many instances confusing, lacking in uniformity, unnecessarily duplicative, and burdensome." Motor Carrier Act of 1980, Pub. L. No. 96-296, § 19, 94 Stat. 811. Congress directed the relevant federal agencies to conduct a study and develop legislative recommendations. *Id.*

2. *The FAAAA Preemption Clause:* Based on 14 years' experience with non-uniform state regulation, Congress finally decided in 1994 to make a clean break. In enacting the FAAAA, Congress adopted a preemption rule for trucking modeled on the successful preemption clause for air carriers.

While it made narrow, specified exceptions tailored to the motor-carrier industry,[2] Congress drew the "[*g*]*eneral* rule" of preemption in the FAAAA very broadly, exactly as it had in the ADA. 49 U.S.C. § 14501(c)(1) (emphasis added). It did so to forestall States' "attempt[s] to de facto regulate prices, routes or services of intrastate trucking *through the guise of some form of unaffected regulatory authority*." H.R. Conf. Rep. No. 103-677, at 84 (emphasis added).

Thus, in both the ADA and the FAAAA, Congress specified that States may not adopt laws or regulations "related to" the deregulated aspects of the air and motor-carrier industries. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). In the case of

[2] None of those exceptions is even arguably at issue in this case. The statutory exceptions include provisions for continued state regulation of "safety . . . with respect to motor vehicles," vehicle weight limits on particular roads, or carriers'

motor carriers, the preemption clause specifies that state law may not relate to "a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Id.* § 14501(c)(1).

The phrase "related to," which requires only a connection between the state law and a motor carrier's transportation of property, deliberately echoes the broad preemption clause of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a). *See Morales*, 504 U.S. at 383-84 (using ERISA to interpret the ADA's preemption clause); *see also* H.R. Conf. Rep. No. 103-677, at 85 (the FAAAA's preemption clause is "intended to function in the exact same manner" as the ADA's). "The breadth of [the ERISA provision's] pre-emptive reach is apparent from [its] language." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983).

Even if there were some ambiguity about Congress's intent to adopt a sweeping preemption provision in ERISA or in the ADA, there could be no such ambiguity with respect to the FAAAA. Congress enacted the FAAAA after the Supreme Court had interpreted both the ADA provision *and* the ERISA provision broadly, and the contemporaneous legislative materials note the authors' agreement with "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83. "[R]epetition of

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responsibility to maintain insurance coverage. 49 U.S.C. § 14501(c)(2), (3).

the same language in [the] new statute" showed Congress's "intent to incorporate its judicial interpretations as well." *Rowe*, 552 U.S. at 370. The phrase "related to" in the FAAAA preemption clause therefore must be interpreted *at least* as expansively as the ADA and ERISA analogues.

B. The FAAA Preemption Clause Clearly Preserves Congress's Policy Of Deregulation Against State Interference, However Labeled

This Court and the Supreme Court have recognized that a state law is prohibited if it has a "connection with" transportation of property by motor carrier, *whether or not* the state law makes any explicit "reference to" motor carriers. *Rowe*, 522 U.S. at 371; *see Morales*, 504 U.S. at 384 (holding that "State enforcement actions" are pre-empted if they have *either* "a connection with, or reference to, airline '[prices], routes, or services'"); *cf. DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 86 (1st Cir. 2011) (explaining that the Supreme Court has "twice rejected" the notion that the ADA "target[s] only state enactments focusing solely on airlines"). Even an "'indirect'" effect on "prices, routes, or services" is enough to trigger preemption, so long as that effect is not "too tenuous, remote, or peripheral." *Morales*, 504 U.S. at 386, 390 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)) (some internal quotation marks and citation omitted); *see Rowe*, 552 U.S. at 375.

The text of the preemption provision itself, together with the interpretation that had been given the materially identical ADA and ERISA provisions at the time

Congress enacted the FAAAA, shows that the FAAAA preempts laws and regulations even if they do not, on their face, target motor carriers. Congress placed "broadly worded" and "expansive" language in the preemption clause, *Morales*, 504 U.S. at 384 (citations omitted), precisely because it intended to preempt more than just laws that *expressly* regulate prices, routes, or services. "Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes, and services.'" *Id.* at 385; *accord N.H. Motor Transp. Ass'n*, 448 F.3d at 79. The sheer "sweep" of the broad words "relating to" makes clear that a state law is preempted whether or not it is "specifically addressed to the airline [or trucking] industry." 504 U.S. at 386. Indeed, the Supreme Court noted, "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," rather than by a specific statute targeting carrier prices, routes, or services. *Id.* Thus, just as ERISA preempts a worker's compensation law to the extent it relates to employee benefit plans, *id.* (citing *Alessi v. Raybestos Manhattan, Inc.*, 451 U. S. 504, 525 (1981)), so too the ADA and FAAAA preempt a state law to the extent it relates to prices, routes, or services for air carriage or the transportation of property. For example, the Supreme Court held preempted a claim under a *general* state consumer-fraud statute, which made no reference to airlines, because the statute was being *applied* to prices, routes, or ser-

vices (there, how frequent-flyer miles could be redeemed). *Am. Airlines*, 513 U.S. at 225, 226-28.

In the District Court, the Attorney General suggested applying a presumption against displacement of "traditional" state authority. ECF No. 80, at 17 nn.25-26. This Court has repeatedly rejected attempts to use such a presumption to narrow the express preemptive language Congress used in the FAAAA and ADA. *See, e.g.*, *N.H. Motor Transp. Ass'n*, 448 F.3d at 78. As the Court has held, Congress spoke with more than sufficient clarity in the ADA to dispel any presumption against preemption, *Brown*, 720 F.3d at 68 (citing cases repeatedly holding that "the presumption against preemption does not apply"), and the FAAAA consciously used the same language as the ADA. *See N.H. Motor Transp. Ass'n*, 448 F.3d at 75-76, 77 ("[T]he scope of FAAAA and [ADA] preemption [were] to be coterminous."). Accordingly, it is well settled that this Court simply applies the "exceedingly broad" language of the FAAAA, as written, whether to "police-power enactments" or any other enactments. *Id.* at 78.

C. Congress Preempted Threats To Nationwide Uniformity

Congress preempted laws that would interfere—even only modestly—with motor carriers' ability to operate in the single, largely deregulated nationwide market under common rules. Tearing up the "patchwork of regulation" was the purpose of the FAAAA's preemption provision. H.R. Conf. Rep. No. 103-677, at 87.

Indeed, Congress emphasized that it sought to "facilitate interstate commerce" and ensure that intrastate commerce was not placed on a different footing through protectionist, anticompetitive, or other state regulation. *Id.* at 87-88.

Any law that interferes with that nationwide market is preempted, whether or not the law itself has a "substantial" effect on prices or services. *See*, *e.g.*, *Rowe*, 552 U.S. at 373 (holding law preempted despite State's argument that "the regulation will impose no significant additional costs upon [motor] carriers"); *DiFiore*, 646 F.3d at 88 (holding law preempted despite plaintiffs' argument that airlines could comply with law "without incurring great expense or substantially altering the gist of curbside check-in service"). That is because even modest interference by one State opens the door to interference by 50 States in 50 different, purportedly minor ways, which would "severely undermine the effectiveness of Congress' pre-emptive provision." *Rowe*, 552 U.S. at 376.

That principle is familiar from the ERISA context as well, in which the Supreme Court has emphasized that a state law "has a prohibited connection with ERISA plans," and thus is preempted as "relating to" such plans, if "it interferes with nationally uniform plan administration." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001). Nationally uniform plan administration is so central to ERISA that even modest and indirect interferences with that policy are preempted; so too with the system of nationally uniform motor-carrier regulation—or deregulation.

II. The District Court's New Test Is Contrary To Settled Precedent

The District Court's primary holding was that it did not need to look *at all* at Section 148B's substantial effect on motor carriers, or at the impediments that Section 148B creates to a national market. The District Court based that new test entirely on the Supreme Court's decision in *Dan's City*: the District Court read that decision as holding that the only state laws that are preempted are laws that *on their face* regulate *only* the transportation of property. *See* Addendum to Brief of Plaintiff-Appellant ("ADD") 10-11. And this reading of *Dan's City* was the sole reason the District Court gave for rejecting MDA's as-applied challenge, which demonstrated that Section 148B substantially affects motor carriers' prices, routes, or services with respect to transportation of property. *See* ADD 17-18.

The District Court held in essence that the Supreme Court had overruled, *sub silentio*, its own holding in *Rowe*. That conclusion misreads *Dan's City*, the statute, and the entire body of law applying the FAAAA and its predecessor statutes. As this Court has already held, *Dan's City* "in no way retreated from existing precedent." *Brown*, 720 F.3d at 71.

As stated above, the holding of *Rowe* is that the FAAAA forbids States from adopting laws "whose 'effect' . . . [has] a '*significant* impact' on carrier rates, routes, or services." 552 U.S. at 375 (quoting *Morales*, 504 U.S. at 388, 390). The District Court here wrote that the Supreme Court in *Dan's City* "foreclosed" read-

ing the FAAAA to "preempt state statutes where they had a significant effect on the prices, routes or services of those entities that transport property." ADD 10-11. In other words, the District Court thought that the holding of *Rowe* itself is now "foreclosed." ADD 11. The new rule, in the District Court's view, is that a law is not preempted if it "has nothing to do with the regulation of the carriage of property," and that Section 148B survives under that test because it covers not just motor carriers that transport property, but also janitors, heating-oil truck drivers, and municipal employees. ADD 11 (quoting *Schwann v. FedEx Ground Package Sys.*, No. 11-11094, 2013 WL 3353776, at *3 (D. Mass. July 3, 2013)) (internal quotation marks omitted).

That was error. For one thing, the Supreme Court has admonished that federal district courts and courts of appeals are *not* to treat Supreme Court decisions as having been impliedly overruled. *See, e.g., Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see also United States v. Symonevich*, 688 F.3d 12, 19 n.4 (1st Cir. 2012) ("As a general proposition, an argument that the Supreme Court has implicitly overruled one of its earlier decisions is suspect."). Yet that is what the District Court did here, because its reasoning—*e.g.*, that a law can be saved from preemption because it applies to janitors as well as to truck drivers, ADD 11—cannot be reconciled with the holdings of *Rowe* and other cases. As the Supreme Court has noted, "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." *Morales*, 504 U.S. at 386. But the argument that the Supreme Court in *Morales* rejected—indeed, derided—as "an utterly irrational loophole" that cannot be squared with the statutory text, *id.*, is just what the District Court has now wrongly adopted.

Even setting aside whether the Supreme Court *could have* silently overruled its own prior holdings in *Dan's City*, the plain fact is that it *did not do so*; the District Court simply misread the Court's decision.[3] *Dan's City* involved a New Hampshire statute that regulated what happened *after* the plaintiff's car was towed, *i.e.*, its storage and sale at auction. But the Supreme Court did not simply look at what the statute regulated and stop there, which would apparently suffice under the District Court's analysis. To the contrary, the Court recognized that the defendant towing company offered both property-transportation services *and* other services (such as storage), and it looked at whether the state towing law had "a direct [or] an indirect connection to any transportation services a motor carrier offers its customers." 133 S. Ct. at 1779. The Court held that the law did not have the requisite connection.

To be sure, as the Court recognized, the "service" (or "price" or "route") to which the state law "relat[es]" must be "with respect to the transportation of prop-

[3] The District Court relied on *Schwann*, which made a similar error.

erty." 49 U.S.C. 14501(c)(1). But that does not create a new requirement that the law *independently* and *exclusively* "relate to the transportation of property," as the District Court would have it. *See, e.g.*, ADD 10 (stating that "FAAAA preemption applies only reaches [*sic*] to state statutes regulating the 'transportation of property'"). That is not what the preemption clause says, and it is not what the Supreme Court said in *Dan's City*.

The statutory phrase "with respect to the transportation of property" does not modify "law" or "regulation"; it modifies "price, route, or service." The reason is simple: because the price (and other aspects) of transportation *of passengers* is addressed by a separate preemption clause. *Compare* 49 U.S.C. § 14501(a) ("Motor Carriers of Passengers"), *with id.* § 14501(c) ("Motor Carriers of Property"). The "property" limitation affects the scope of preemption under subsection (c) only by harmonizing it with preemption under subsection (a);[4] it does not alter the proposition that, *for "[m]otor [c]arriers of [p]roperty*," States may not make regulations "related to a price, route, or service" of such a carrier. If the District Court were right that preempted laws must satisfy two criteria—being "related to a price,

[4] To the extent "property" constitutes a limitation, it is a narrow one. The FAAAA's authors used the term "property" (rather than, say, "cargo" or "freight") to make sure that States could still regulate a very specific set of motor-carrier prices, routes, and services: those that involve hauling garbage. Because garbage was not deemed "property" under then-prevailing interpretations of federal law, "garbage collectors are not considered 'motor carriers of property' and are thus unaffected by [the preemption] provision." H.R. Conf. Rep. No. 103-677, at 85.

route, or service" *and* regulating "the transportation of property"—then the word "*and*" would appear in the preemption clause somewhere in between the two prepositional phrases. It does not.

Hence, as the Supreme Court explained, "Pelkey's claims escape[d] preemption . . . because they are not 'related to' the service of a motor carrier 'with respect to the transportation of property.'" *Dan's City*, 133 S. Ct. at 1778. Indeed, Pelkey's claims were unrelated to *any* "'service a motor carrier renders its customers." *Id.* at 1779. Here, by contrast, it is undisputed that MDA's members are engaged in the transportation of property and not passengers. Thus, if Section 148B relates to "price[s], route[s], or service[s]" that MDA's members offer—and it does, as discussed below—then the "transportation of property" element is satisfied as well.

For those reasons, this Court was entirely justified in holding that the "nuanced reading" of the preemption clause in *Dan's City* "in no way retreated from existing precedent." *Brown*, 720 F.3d at 71. Both before and after *Dan's City*, the FAAAA protects the nationally uniform regime of motor-carrier regulation from interference by state enactments, whether those enactments baldly refer to motor carriers transporting property or instead adopt more subtle tactics, such as "shifting their regulatory focus from one company to another in the same supply chain." *Am. Trucking Ass'ns*, 133 S. Ct. at 2104 (holding that such a shift in focus is insuf-

ficient to defeat preemption). Nothing in *Dan's City* authorizes a court to ignore Section 148B's substantial effect on the "prices, routes, [and] services" that motor carriers offer.

III. Section 148B Is Preempted Because It Substantially Affects "Prices, Routes, Or Services . . . With Respect To The Transportation Of Property"

Rather than undertake the necessary examination of Section 148B's substantial effect on "prices, routes, or services," the District Court accepted a straw-man argument: the FAAAA does not immunize motor carriers from *all* economic regulation, the court reasoned, so *this* economic regulation survives. ADD 15-16. But this case presents no such sweeping claim for exemption from local regulation. Rather, Section 148B in particular, because of the widespread and economically significant use of independent contractors in the motor-carrier industry, is preempted as applied to the motor-carrier industry. Had the District Court properly analyzed that argument, it would have been compelled to hold Section 148B preempted, because its substantial effect on both services and prices is exactly the sort of local regulation that would frustrate Congress's intent to preserve a competitive national market for motor-carrier services.

A. Section 148B Substantially Affects Motor-Carrier Services

The District Court focused on price because it thought that Section 148B has no effect on the services motor carriers offer. But what the District Court missed is

that Section 148B *requires* the carrier itself, and not some other entity, to send its own employee up the customer's front steps to deliver a package. In other words, it forecloses a carrier from focusing on providing nationwide logistics services and leaving the ultimate last-mile service of delivery to others. This circuit has long given a broad scope to the statutory preemption of laws "related to a . . . service" in the FAAAA and ADA preemption clauses, and the Supreme Court's "expansive treatment" of that term in the FAAAA preemption clause has confirmed that interpretation. *DiFiore*, 646 F.3d at 88; *see Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 94 (1st Cir. 2013) (adhering to "[t]he broader view of 'service'"). A state law specifying who must provide the service—an employee of the carrier—is no different from regulating the service itself. *Cf. DiFiore*, 646 F.3d at 88 (holding a regulation of "how [a] . . . service is performed" preempted). And even if *some* aspects of who provides a service might be beyond the scope of preemption, the particular relationship *between carriers and independent contractors* has *always* been singled out for federal regulatory attention. Accordingly, that relationship necessarily is one of the areas that Congress intended to leave free from state regulation.

1. Section 148B Requires Motor Carriers To Offer Services

As the Attorney General would have it, Section 148B does not regulate "services" because motor carriers still deliver packages both before and after the adop-

tion of the new, extreme version of Section 148B. That fundamentally misses the point. Before Section 148B was amended, motor carriers were free *not* to have their employees deliver packages, and to rely instead on individual independent contractors, perhaps even using a different individual contractor each time. As one motor carrier explained in another case presenting an FAAAA preemption issue, "rather than being in the package delivery business, its real business is logistics, more specifically, the operating of 'a sophisticated information and distribution network *for* the pickup and delivery of small packages.'" *Schwann*, 2013 WL 3353776, at *4 (quoting a motion filed by FedEx Ground).

Moreover, whether a particular motor carrier such as Xpressman currently engages in delivery services (rather than focusing on logistics) is irrelevant to the preemption question. "[I]f a state law is preempted as to one carrier, it is preempted as to all carriers." *N.H. Motor Transp. Ass'n*, 448 F.3d at 72. The Supreme Court emphasized in *Rowe* that the preemption problem arises when a state regulation "would *freeze in place* and immunize from competition" the current system. 552 U.S. at 373; *id.* at 372 ("freeze into place"). Although it is doubly objectionable to force carriers to offer "services that the market does not now provide (and which the carriers would prefer not to offer)," the preemption problem would persist even if the carriers currently *did* offer the required services, because the "carriers might prefer to discontinue [them] in the future." *Id.* at 372; *see id.* at 373

(States may not mandate services "that carriers do not (*or in the future might not*) wish to provide") (emphasis added). More generally, the Supreme Court has made clear that the mere fact that a state law imposes a regulation that is not currently disruptive—*e.g.*, one that mandates the same result as federal law—does not insulate it from preemption under statutes like the FAAAA, ADA, or ERISA, because the state law still "relates to" the subject matter that is off-limits to state regulation. *Morales*, 504 U.S. at 386-87 (explaining that "[n]othing in the language of [the ADA] suggests that its 'relating to' pre-emption is limited to *inconsistent* state regulation") (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988)).

The reason is the effect on the nationwide market. As explained above, the major thrust of the FAAAA was "to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, 552 U.S. at 373. State-by-state service requirements—whether they mandate new services, or just the current ones—will hinder carriers in responding and adapting to what the competitive *national* market demands. That is why those requirements are preempted even if they "impose no significant additional costs upon carriers," *id.*—which, as explained below, is not the case here. A law regulating *who will transport the property* over the last mile to the destination—the motor carrier, through an employee, or someone else doing business with the motor carrier—is not "remote [from] the transportation

function" in the way that "limitations on gambling, prostitution, or smoking in public places" are. *DiFiore*, 646 F.3d at 89. Rather, such a law has a direct connection with motor carriers' "services," and it is preempted.

2. The Historic Federal Role In Regulating The Carrier-Contractor Relationship Refutes The Attorney General's Attempt To Separate The Service Carriers Provide From Who Provides It

Congress chose to preclude the States from imposing regulations that relate to "prices, routes, or services" precisely because "prices, routes, [and] services" were the areas that federal agencies used to regulate extensively, but that Congress had largely deregulated. And tellingly, under that same statutory framework, those same agencies regulated relations between motor carriers and independent contractors. The history of federal regulation in this area demonstrates the close connection between motor carriers' treatment of independent-contractor drivers and the motor carriers' "prices, routes, [and] services."

Nearly from the beginning of price, route, and service regulation, the Interstate Commerce Commission (ICC) regulated motor carriers' relationships with independent contractors. Those leasing regulations had multiple purposes:

> [T]o assure continued participation by owner-operators in the trucking industry; to promote full disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of the lease; to eliminate or reduce opportunities for illegal or inequitable practices; and to protect the public from uninsured drivers and vehicles by requiring that a motor carrier's insurance extends to its owner-operators.

ICC, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994*, 1994 WL 639996, at *53 (Oct. 25, 1994) (ICC Study). Congress had delegated to the ICC the authority to prescribe regulations requiring motor carriers to provide independent contractors with certain contractual terms and guarantees. *See* 49 U.S.C. § 11107 (1994). And the ICC had acted to protect independent contractors "against possible abuses by carriers." ICC Study, 1994 WL 639996, at *54. Some of those same provisions remain in force today, overseen by the Secretary of Transportation. *See* 49 U.S.C. § 14102; 49 C.F.R. pt. 376 (2013).

Thus, far from being "peripheral" to the federal regulatory framework, as the Attorney General argued below, *see, e.g.*, ECF No. 80, at 14-23, the relationship between motor carriers and independent contractors is a subject explicitly addressed by federal law. And while that federal law does not impose the kind of regulation that Massachusetts has adopted, that is precisely the point of the preemption clause: to ensure that such subjects face *at most one* set of rules—the federal ones.

B. Section 148B Impedes National Uniformity By Seeking To Hold Back Competitive Market Forces

Section 148B creates a substantial impediment to the deregulated national market in delivery services that Congress sought to protect by adopting the FAAAA. The potential benefits of an independent-contractor relationship, as op-

posed to an employer-employee relationship, are substantial. That is why "competitive market forces"—which Congress wanted to be the primary factor in "determining . . . the services that motor carriers will provide," *Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378)—have led numerous delivery businesses in Massachusetts, in other States, and in the nationwide market to adopt independent-contractor models. It is often simply more efficient for a logistics company, like Xpressman or Lasership, not to be in the business of delivering packages over the "last mile" from distribution center to doorstep. Yet Massachusetts now asserts the right to preclude carriers from choosing to contract with individual delivery drivers. Sustaining Massachusetts's position not only would require carriers to adopt Massachusetts's preferred business model even when it artificially increases the price that those carriers must charge, but also would permit the re-emergence of just the kind of inconsistent, economically disruptive "patchwork of state service-determining laws, rules and regulations" that Congress sought to eradicate in enacting the FAAAA. *Rowe*, 552 U.S. at 373.

An independent-contracting model can offer both economic and organizational-efficiency gains for many businesses, including many in the motor-carrier industry. These benefits are best exploited in industries where workers need to "move frequently from project to project, or work multiple projects at once," and where employers "need to be able to respond to short-run changes in demand, or

make up for gaps in supply, by calling on more workers than they could economically maintain as traditional employees." Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy* at i, 29 (Dec. 2010) ("Eisenach Study"), http://www.aei.org/files/2012/08/22/-the-role-of-independent-contractors-in-the-us-economy_123302207143.pdf. The motor-carrier industry is just such a field: demand is seasonal and at times unpredictable, easily affected by such phenomena as the annual fluctuations in holiday shopping on the Internet.

Independent contracting often can also improve efficiency by decreasing or eliminating the management and oversight costs that an employee model requires. A model that uses employees rather than independent contractors is efficient only when "it is difficult or impossible for the employer to describe in advance specifically what activities workers are expected to perform, or to place a value on workers' output." *Id.* at 31-32. But where output *can* be valued, switching to an independent-contractor model can yield gains in efficiency, because it allows efficiency to be rewarded. *See* Stephen Cohen & William B. Eimicke, *Independent Contracting: Policy and Management Analysis* 15 (Aug. 2013) ("Columbia Study"), http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf ("Paying for performance can be a highly efficient method of incentive when the type of service allows for it."). For that reason, "independent contracting is especially commonplace in occupations and industries where output is relatively easily measured and

workers can thus be compensated directly for their performance: *A trucker may be compensated by the mile, a courier by the package* . . . and so forth." Eisenach Study 32 (emphasis added).

By effectively foreclosing businesses from using independent contractors to perform functions in the same line of work, Section 148B not only forecloses the MDA's members from reaping these benefits, it also creates significant macroeconomic costs, including "higher labor costs in key sectors of the economy, higher unemployment, reduced rates of job creation, a slower pace of new business formation, and, overall, a less flexible and dynamic U.S. workforce." *Id.* at 29. The "net result" of such government-mandated distortions in the market is "to artificially reduce reliance on independent contractor arrangements to below the economically efficient level—that is, to prevent workers and firms from capturing the benefits of independent contracting." *Id.* at 36. The resulting inflexibility correlates with "slower growth" in the economy and higher unemployment. *Id.* at 39.

Restrictions on contracting also reduce competition. One of the critical economic benefits of independent contracting is that, because it "reduces the importance of economies of scale, it allows small businesses to compete with larger ones, thereby increasing competition and lowering prices for all consumers." Columbia Study at 17. Foreclosing use of independent contractors through restrictive regulations therefore results in "reduced competition and higher prices." Eisenach

Study at 36. And here the consequences of that reduced competition are geographically quite stark: to avoid losing their competitive footing in the 49 States where independent contracting remains a permissible model, interstate carriers may avoid the Massachusetts market. That will further reduce competition for delivery services in Massachusetts itself—precisely the problem Congress sought to combat through the FAAAA. Congress recognized that burdensome state regulation made carriers adjust their business models to avoid those burdens (*e.g.*, avoiding making intrastate shipments, sometimes even taking an interstate route to deliver a package between two points in a single State). H.R. Conf. Rep. No. 103-677, at 87-88. Preempting those state regulations allowed carriers "to freely compete more efficiently and provide quality service to their customers," with "[s]ervice options . . . dictated by the marketplace." *Id.* at 88.

A recent study focusing specifically on the impact of Section 148B found that it "suppresses the creation of more than 43,300 new self-employment jobs each year" just in Massachusetts. New Jobs for Mass., Inc., *Re-Opening the Main Road to Self-Employment in Massachusetts: A New-Jobs Report on the Independent Contractor Law* 9-10, 12 (June 2013) ("New Jobs Report"), http://www.newmassjobs.com/News_files/MICL_FINAL_REPORT-25.pdf. Moreover, this study found that Section 148B "impedes economic diversification" by suppressing "[e]mployment growth in 400 wide-ranging professions, trades, and

crafts—each of which includes sub-specialties."[5] The effect on income is also potentially significant, because contractors "can—and often do—earn much more money as contractors than they could as employees," and contracting "is a proven route to higher income and faster career advancement." *Id.* at 7, 11.

Furthermore, Section 148B currently is an extreme outlier—the only state law that bars independent contracting between businesses and individuals who are in the same general line of work, *see* MDA Br. 18, 25-27—but the preemption analysis requires this Court to examine what would happen if not only Massachusetts but other States adopted such restrictions. *See Rowe*, 552 U.S. at 373. That analysis underscores the potential impact of laws like Section 148B. Independent contracting is a robust sector of the U.S. economy. In 2010, the Bureau of Labor Statistics classified 7.4% of the U.S. workforce as independent contractors, comprising a total of 10 million workers. Eisenach Study at i. Moreover, an additional 4 million workers not accounted for by this BLS data were likely to be legally classified as independent contractors in 2010. *Id.* All told, these workers accounted for an estimated $473 billion in personal income in 2010. *Id.* at 35.

[5] The report arrived at this number by reviewing Massachusetts's "739 occupational classification categories to identify those that lend themselves to contracting," and considered "whether work in a given service occupation could be contracted and self-managed, or turned into defined projects, or has other contracting-favorable characteristics." New Jobs Report 4-5.

Changing the definition of "employee" does not mean that those independent contractors will keep doing the same work, just with a new title and new benefits. Cost is one reason, but another, equally important reason is "the well-documented fact that independent contractors *prefer* their jobs to an employment arrangement." *Id*. at 33 (emphasis in original). Indeed, simple worker satisfaction is "one of the most powerful economic explanations for the widespread use of independent contractor relationships." *Id.* One example among many comes from the survey of Contingent and Alternative Work Arrangements conducted by the Census Bureau's Current Population Survey, which "found that 82.3 percent of independent contractors prefer an independent or alternative work arrangement to employment, compared with only 9.1 percent who would prefer an employment arrangement." *Id.* at 14 n.28, 33-34 (citing February 2005 Bureau of Labor Statistics data). A wealth of statistical data, in multiple studies, corroborates this conclusion. *See generally*, *e.g.*, *id.* at 33-34 (citing studies); Columbia Study at 17.

In short, both economic principles and empirical evidence show that allowing States to transform independent contractors into employees by legislative fiat will significantly affect *how work is done*, *by whom*, and *at what cost*. And the problems motor carriers face from such legislation will be compounded as different States adopt different variants, directly contrary to Congress's intent to preserve a deregulated national market for motor-carrier services. The FAAAA does not

permit state legislation to work such a substantial impact on motor carriers' "price[s], route[s], [and] service[s]." For all of these reasons, Section 148B is preempted.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B)(i) because this brief contains 6,937 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I hereby certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 29(c), 32(a)(5), and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, Times New Roman 14 point font, using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2014, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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