Nos. 19-1075 & 19-1292

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

E.F. TRANSIT, INC.,
***Appellant*,**

v.

INDIANA ALCOHOL AND TOBACCO COMMISSION, *ET AL.*,
***Appellees*.**

On appeal from the United States District Court for the Southern District of Indiana, Nos. 13-1927 & 15-940

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE BY THE CENTER FOR ALCOHOL POLICY

John C. Neiman, Jr.
Brandt P. Hill
MAYNARD COOPER & GALE P.C.
1901 Sixth Ave. N, Ste. 2400
Birmingham, Alabama 35203
(205) 254-1000

Attorneys for Amicus Curiae
Center for Alcohol Policy

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Center for Alcohol Policy moves this Court for leave to file the attached brief as amicus curiae in support of the Appellees, the Indiana Alcohol and Tobacco Commission and its members. In support of this motion, the Center for Alcohol Policy states as follows:

1. Federal Rule of Appellate Procedure 29(a)(3) provides that a motion for leave to file an amicus brief must "state the movant's interest" as well as "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. 29(a)(3)(A)-(B).

2. The Center for Alcohol Policy has an interest in this case because the result could adversely impact the ability of states to effectively regulate the consumption of alcohol within their borders. The Center's longstanding mission has been to educate policymakers, regulators, courts and the public about alcohol, its uniqueness, and its regulation. Among other things, the Center teaches the public about the societal effects of alcohol consumption and helps promote safe consumption. The issue presented by this case is precisely the type with which Center

is concerned. That is, does a federal statute designed to deregulate the trucking industry preempt state alcohol laws prohibiting wholesalers of beer, wine, and liquor from having business interests in one another? In the Center's view, a ruling by the Court that Indiana's laws are preempted could weaken states' authority to regulate alcohol consumption, and might even lead to some of the problems associated with over-consumption that arose during Prohibition.

3. The Center for Alcohol Policy's proposed amicus brief is both "desirable" and "relevant to the disposition of this case." While it addresses the issue before the Court—namely, whether the FAAAA preempts the Commission's application of Indiana's alcohol regulations to E.F. Transit—the Center's brief focuses on the threshold question, essential to the resolution of the issue presented, of whether the FAAAA's text conflicts with the Indiana laws. The parties, in contrast, focus more on the question whether the State's Twenty-first Amendment interests in the laws outweigh the federal interest in deregulating the trucking industry. In its proposed brief, the Center contends that this Court can affirm by focusing on the threshold textual inquiry,

without the need to balance the interests, since Indiana's statutes do not conflict with the FAAAA in the first place. While the FAAAA preempts state laws that "relate to a price, route, or service of any motor carrier … with respect to the transportation of property," Indiana's statutes relate only to beer, liquor, and wine wholesalers, and thus fall outside the scope of the statute's preemption clause.

4. For the foregoing reasons, the Center for Alcohol Policy respectfully requests leave to file the attached brief as amicus curiae in support of Appellees.

Respectfully submitted,

s/ John C. Neiman, Jr.

One of the Attorneys for Amicus Curiae

OF COUNSEL:

John C. Neiman, Jr.
Brandt P. Hill
MAYNARD COOPER & GALE P.C.
1901 Sixth Ave. N, Ste. 2400
Birmingham, Alabama 35203
(205) 254-1000
jneiman@maynardcooper.com
bhill@maynardcooper.com

CERTIFICATE OF SERVICE

On June 14, 2019, I, John C. Neiman, Jr., member of the Bar of this Court and counsel for the Center for Alcohol Policy, e-filed this Motion for Leave to File Brief as Amicus Curiae by the Center for Alcohol Policy, with the Clerk of the Court via CM-ECF, which will serve the following attorneys for the parties:

A. Scott Chinn
Brian J. Paul
FAEGRE BAKER DANIELS LLP
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204
(317) 237-0300

Amy Mason Saharia
Katherine Moran Meeks
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Counsel for Appellant

Aaron T. Craft
OFFICE OF THE ATTORNEY GENERAL
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204
Telephone: (317) 232-4774
Fax: (317) 232-7979
Aaron.Craft@atg.in.gov

Counsel for Appellees

s/ John C. Neiman, Jr.
OF COUNSEL

Nos. 19-1075 & 19-1292

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

E.F. TRANSIT, INC.,
***Appellant*,**

v.

INDIANA ALCOHOL AND TOBACCO COMMISSION, *ET AL.*,
***Appellees*.**

On appeal from the United States District Court for the Southern District of Indiana, Nos. 13-1927 & 15-940

BRIEF OF THE CENTER FOR ALCOHOL POLICY AS AMICUS CURIAE IN SUPPORT OF APPELLEES

John C. Neiman, Jr.
Brandt P. Hill
MAYNARD COOPER & GALE P.C.
1901 Sixth Ave. N, Ste. 2400
Birmingham, Alabama 35203
(205) 254-1000

Attorneys for Amicus Curiae
Center for Alcohol Policy

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, amicus curiae the Center for Alcohol Policy states that it is not owned by any public or private corporation, and that no publicly-held company owns ten percent or more of its stock. The Center for Alcohol Policy is a 501(c)(3) non-profit educational foundation that is affiliated with the National Beer Wholesalers Association.

The Center for Alcohol Policy further states that Maynard, Cooper, & Gale, P.C., is the only law firm whose partners or associates have appeared for it in this case or are expected to appear for it in this case.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

ARGUMENT 4

I. The FAAAA's text does not conflict with the prohibited-interest statutes. 5

A. Ordinary preemption principles lay the groundwork for a conclusion that the FAAAA does not conflict with Indiana's prohibited interest statutes. 7

B. The FAAAA does not conflict with Indiana's statutes because they do not "reference" or "have a connection with" the services of motor carriers with respect to the transportation of property. 12

C. The FAAAA does not conflict with the prohibited-interested statutes because they do not "significantly impact" federal deregulatory and preemption related objectives. 23

D. Constitutional principles counsel in favor of reading the FAAAA as not conflicting with Indiana's prohibited-interest statutes. 26

CONCLUSION 32

CERTIFICATE OF COMPLIANCE 33

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

CASES

Altria Grp., Inc. v. Good,
555 U.S. 70 (2008) 8

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 28

Baker v. Gen. Motors Corp.,
478 U.S. 621 (1986) 25

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 8

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum,
445 U.S. 97 (1980) 27

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 8

City of Columbus v. Ours Garage & Wrecker Serv.,
536 U.S. 424 (2002) 11

Costello v. BeavEx, Inc.,
810 F.3d 1045 (7th Cir. 2016) 22

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 9

Dan's City Used Cars, Inc. v. Pelkey,
569 U.S. 251 (2013) 8, 9, 10, 11, 13, 20, 25

Ind. Alcohol & Tobacco Comm'n v. Spirited Sales, LLC,
79 N.E.3d 371 (Ind. 2017) 13, 15, 16

Kroog v. Mait,
712 F.2d 1148 (7th Cir. 1983) 6

Lebamoff Enters., Inc. v. Huskey,
666 F.3d 455 (7th Cir. 2012) 17, 18, 19, 25, 30

Lebamoff Enters., Inc. v. Snow,
757 F. Supp. 2d 811 (S.D. Ind. 2010) 18

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 8

Mass. Delivery Ass'n v. Coakley,
769 F.3d 11 (1st Cir. 2014) 21, 22

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 8, 9

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 21, 23, 25

N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 12, 22

Nationwide Freight Sys., Inc. v. Ill. Commerce Comm'n,
784 F.3d 367 (7th Cir. 2015) 10, 16, 21, 22, 23

North Dakota v. United States,
495 U.S. 423 (1990) 29

Raygor v. Regents of Univ. of Minn.,
534 U.S. 533 (2002) 28

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 7, 12

Rowe v. N.H. Motor Transp. Ass'n,
552 U.S. 364 (2008) 9, 10, 17, 19, 21, 23, 25

S.C. Johnson & Son, Inc. v. Transp. Corp. of Am.,
697 F.3d 544 (7th Cir. 2012) 20, 21, 26

Warth v. Seldin,
422 U.S. 490 (1975) 20

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989) 28

Wisconsin Pub. Intervenor v. Mortier,
501 U.S. 597 (1991) 7

Wyeth v. Levine,
555 U.S. 555 (2009) 8

STATUTES

49 U.S.C. § 13102 11

49 U.S.C. § 14501 ..... 2, 4, 6, 7, 9, 10, 17, 20

IND. CODE § 35-48-4-1 22

IND. CODE § 7.1-1-1-1 13

IND. CODE § 7.1-3-18-2 ..... 19, 25

IND. CODE § 7.1-3-18-3 19

IND. CODE § 7.1-3-5-3 ..... 17, 18

IND. CODE § 7.1-5-9-3 ..... 6, 12, 13, 15, 18

IND. CODE § 7.1-5-9-6 ..... 6, 12, 13

LEGISLATIVE HISTORY

H.R. Conf. Rep. No. 103-677 (1994) 23, 24

OTHER AUTHORITIES

Jim Petro *et al.*,
Introduction to TOWARD LIQUOR CONTROL (Ctr. for Alcohol Policy 2011) (1933) 31

RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL (Ctr. for Alcohol Policy 2011) (1933) 27

STATEMENT OF INTEREST[1]

The Center for Alcohol Policy files this amicus brief in support of the Appellees: the Indiana Alcohol and Tobacco Commission and its individual commissioners. The Center for Alcohol Policy is a 501(c)(3) entity with a mission to educate policymakers and regulators like the Commission—as well as courts and the public—about the unique considerations that factor into the government's regulation of alcohol. By conducting research and highlighting initiatives that maintain the appropriate state-based regulation of alcohol, the Center promotes safe and responsible consumption, fights underage drinking and drunk driving, and informs key entities and the public about the personal and societal effects of alcohol consumption.

The Center for Alcohol Policy has produced considerable research about the effectiveness of state laws designed to combat the alcohol problem, but the Center is filing this particular brief to focus on the language of the federal statute that is at issue here. E.F. Transit is trying to use

---

[1] Amicus states that no party's counsel authored this brief or whole or in part, and no person, party or party's counsel contributed money intended to fund the preparation or submission of this brief.

the Federal Aviation Administration Authorization Act in a manner that its text does not support and that Congress never would have contemplated: as a tool to dismantle the diverse and effective systems States have adopted for regulating alcohol ever since the Twenty-first Amendment was adopted in 1933.

E.F. Transit's attempt to commandeer the FAAAA for these purposes is misguided. Indiana is right to argue that its interests under the Twenty-first Amendment should shield these state laws from preemption in any event. But there is an even more fundamental reason why these state laws, which are not directed at motor carriers, must stand: they do not even conflict with the FAAAA's text, which preempts only those 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). Even though this Court could affirm Indiana's laws based on the Twenty-first Amendment considerations the State addresses in its brief, the Court ought to hold, as a threshold matter, that no Twenty-first Amendment balancing is necessary because the FAAAA's proscription on laws directed at motor carriers does not conflict with these Indiana laws in the first place.

That result is compelled by the language and purpose of the FAAAA, and it is consistent with the Center for Alcohol Policy's goals of fostering effective state alcohol regulation. The system for regulating alcohol works best when the officials tasked with its administration are focused on their jobs: regulating producers, wholesalers, and retailers, and ensuring that state alcohol laws are properly enforced. The system does not work best when these officials are distracted by litigation like this case, in which E.F. Transit forced various officials into depositions for the sake of applying a balancing test Congress never meant the courts to undertake. This Court should head off further wasteful litigation, and leave these officials free to perform their essential functions, by holding that the FAAAA's text does not conflict with state alcohol laws, like Indiana's prohibited-interest laws, that are not directed at motor carriers' prices, routes, or services with respect to the transportation of property.

ARGUMENT

The district court was right when it found that prohibited-interest laws are the kinds of alcohol-control measures the Twenty-first Amendment affirmatively authorizes States to undertake. But the district court did not need to reach that constitutional conclusion to sustain these particular laws against this particular preemption-based challenge.

That is so because E.F. Transit is trying to transform the federal statute on which it has premised this challenge, the FAAAA, into a tool whose preemptive reach is fundamentally inconsistent with its text and its underlying purposes. This statute does not purport to preempt state laws aimed at combating the problems alcohol can cause. It purports to preempt only those laws that are "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). Supreme Court precedent—as well as common sense—shows that this language cannot have the effect E.F. Transit wishes to foist upon it. It does not preempt generally applicable laws merely because, as applied in particular cases, they happen to have an effect on certain isolated motor carriers. It instead preempts only those laws that are directed at the services of motor carriers *as motor carriers*,

and *with respect to their transportation of property*. That is why the FAAAA does not preempt state laws making the marijuana and cocaine trade illegal, even though such laws will affect certain motor carriers in certain ways. And that is why the FAAAA does not preempt state laws that, like the Indiana laws at issue here, simply prohibit beer wholesalers from having business interests in liquor wholesalers. The result reached below is thus correct, regardless of the results of the balancing process E.F. Transit is asking this Court to undertake.

I. The FAAAA's text does not conflict with the prohibited-interest statutes.

In the proceedings below, E.F. Transit argued that the FAAAA preempted the Indiana statutes because as applied by the Commission they happened to restrict it, a motor carrier, from providing certain "service[s]" to a liquor wholesaler. *See, e.g.*, R. 162 at 28–34. Indiana disputed that the statutes were preempted, persuasively and correctly arguing, as it does once again on appeal, that (a) the statutes were an exercise of Indiana's "core powers" under the Twenty-first Amendment; and (b) Indiana's interests in its statutes outweighed the federal interest in deregulating the trucking industry under the FAAAA. *See, e.g.*, R. 166 at 20–

27. The district court understandably agreed with the cogent arguments Indiana had made. The district court thus, for the most part, did not focus on the threshold question in any preemption case: whether the federal and state laws actually conflict. *See Kroog v. Mait*, 712 F.2d 1148, 1152 (7th Cir. 1983) (stating that "the assessment of 'actual' or 'facial' conflict is a threshold inquiry").

But the district court just as easily could have rested its judgment on that threshold issue. The challenged Indiana statutes provide that "[i]t is unlawful for the holder of a brewer's or beer wholesaler's permit to have an interest in a liquor permit of any type under this title." IND. CODE § 7.1-5-9-3(b); *see also* IND. CODE § 7.1-5-9-6 (same prohibition on holder of liquor's permit with respect to interest in beer permit). The FAAAA, on the other hand, preempts only those state laws that are "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). And as the district court suggested when conducting its balancing of Twenty-first Amendment interests, the language of those state statutes does not conflict with the language of the federal one. Specifically, the district court observed that "these statutes are not directed at price, route, or service

of interstate motor carriers." App. 10 (citing 49 U.S.C. § 14501(c)(1) (preemption)).

That conclusion, as explained below, can and should end this Court's analysis of the preemption questions—without requiring any resort to the balancing inquiry conducted by the district court. Because Indiana's statutes are not "directed at" the "price, route, or service of interstate motor carriers," they necessarily do not conflict with the FAAAA. That means that there is simply no preemption here—and that there is no federal interest at all in invalidating these Indiana alcohol regulations.

A. Ordinary preemption principles lay the groundwork for a conclusion that the FAAAA does not conflict with Indiana's prohibited interest statutes.

The analysis on this front should start with the presumption against preemption. The Supreme Court has explained that "[w]hen considering preemption, '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.'" *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (quoting *Rice v.*

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (noting that the presumption against preemption applies "in all pre-emption cases" and is especially strong in areas of traditional state regulation (alteration adopted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))). "Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

With that presumption in mind, the analysis should next turn to the text. E.F. Transit's relied-upon theory of preemption in this case, express preemption, occurs only "when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984). If a federal law contains an express preemption clause, the court's task is to "identify the domain expressly pre-empted." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001)). The court does so by "focus[ing] first on the statutory language, 'which necessarily contains the best evidence of Congress' pre-emptive

intent.'" *Id.* (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Courts also consider a statute's legislative history and broader statutory framework in determining whether Congress intended to preempt state laws. *See Medtronic*, 518 U.S. at 486.

The text, in turn, should resolve this case. The FAAAA's express-preemption clause provides that a state "may not enact or enforce a law" that is "related to" the "price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Two phrases in that language limit the clause's preemptive scope in critical respects.

The first is the requirement that the state law be "related to" the motor carrier's "price[s], route[s], or service[s]." The Supreme Court has interpreted the phrase "related to" as encompassing state laws "having a connection with or reference to" motor carrier prices, routes, or services, whether direct or indirect, as well as those laws having a "significant impact" related to Congress' deregulatory and preemption-related objectives. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370–71 (2008) (emphasis, citations, and quotation marks omitted). It also has explained, however, that "the breadth of the words 'related to' does not mean the sky

is the limit." *Dan's City*, 569 U.S. at 260. "Rather, state action must have a substantial economic effect on carrier rates, routes, or services in order to be subject to preemption." *Nationwide Freight Sys., Inc. v. Ill. Commerce Comm'n*, 784 F.3d 367, 373 (7th Cir. 2015). In particular, the Supreme Court has "cautioned that § 14501(c)(1) does not preempt state laws affecting carrier prices, routes, and services in only a tenuous, remote, or peripheral manner." *Dan's City*, 569 U.S. at 261 (alteration adopted) (citation and internal quotation marks omitted). One example of state laws with such a "tenuous, remote, or peripheral" connection to motor-carrier services would be those "forbidding gambling." *Rowe*, 552 U.S. at 371 (citation and quotation marks omitted). Another example is any law that "broadly prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public (*e.g.*, a prohibition on smoking in certain public places)." *Id.* at 375.

The statute's second critical phase for present purposes is "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The Supreme Court has explained that "[t]hat phrase 'massively limits the scope of preemption' ordered by the FAAAA." *Dan's City*, 569 U.S. at 261 (quoting *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 449

(2002) (Scalia, J., dissenting)). It therefore "is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in *any* capacity." *Id.* (emphasis added) (citation omitted). "[T]he law" instead "must also concern a motor carrier's *transportation* of property." *Id.* (emphasis added) (internal quotation marks and citation omitted). This means that for the FAAAA to preempt a state law, that state law must "'relate[] to the movement' of property." *Id.* (quoting 49 U.S.C. § 13102(23)(B)). On that basis the Court in *Dan's City* held that the FAAAA did not preempt a New Hampshire law addressing the disposal of abandoned vehicles, even though it had the effect of regulating the way a motor carrier could perform services. The Court explained that the law did "not limit when, where, or how tow trucks may be operated," but instead regulated "the disposal of vehicles once their transportation—here, by towing—has ended." *Id.* at 262.

As explained below, these principles, and this text, means that the FAAAA does not preempt Indiana's prohibited-interest statutes. Neither the FAAAA's text, nor its legislative history or broader statutory framework, reveal that it was the "clear and manifest" purpose of Congress to preempt laws like Indiana's statutes. *N.Y. State Conference of Blue Cross*

& Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (quoting *Rice*, 331 U.S. at 230). These statutes on their face apply solely to wholesalers of beer, wine, and liquor. They are not directed to motor carriers' services—and certainly not directed to their services with respect to the transportation of property. The Commission's use of these laws to prevent E.F. Transit from providing these services was, in actuality, an application of the statutes to prevent Monarch, a beer wholesaler, from having a prohibited interest in a liquor wholesaler.

B. The FAAAA does not conflict with Indiana's statutes because they do not "reference" or "have a connection with" the services of motor carriers with respect to the transportation of property.

There is no dispute that the prohibited-interest statutes on their face do not expressly reference or have a connection with the "price, route, or service" of a motor carrier "with respect to the transportation of property." The statutes do not mention "motor carrier[s]," their "price[s]," "route[s]," or any of the "service[s]" they typically provide, such as delivering and warehousing goods. *See* IND. CODE §§ 7.1-5-9-3 (b), -6. Nor do these Indiana statutes address the "transportation" of "property" itself,

in the sense that none addresses how goods may be "moved." *Dan's City*, 569 U.S. at 262 (citation and quotation marks omitted).

What these state statutes "relate to," instead, is Indiana's system for regulating alcohol, and its requirements that manufacturers, wholesalers, and retailers remain separate in various ways. *See Ind. Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 377 (Ind. 2017) (discussing Indiana's three-tier system). This system aims "[t]o protect the economic welfare, health, peace, and morals of the people" and "[t]o regulate and limit the manufacture, sale, possession, and use of alcohol and alcoholic beverages." IND. CODE § 7.1-1-1-1. These statutes seek to achieve that goal by prohibiting beer and wine wholesalers from maintaining an "interest" in a liquor wholesaler's permit, and vice versa. *Id.* §§ 7.1-5-9-3, -6. In relevant part, one of the challenged statutes provides that "[i]t is unlawful for the holder of a brewer's or beer wholesaler's permit to have an interest in a liquor permit of any type under this title." *Id.* § 7.1-5-9-3(b). Another one provides that "[i]t is unlawful for the holder of a distiller's, rectifier's, or liquor wholesaler's permit to have an interest in a beer permit of any type under this title." *Id.* § 7.1-5-9-6. So there is

no language in the statutes that even addresses motor carriers—much less the manner in which they transport property.

E.F. Transit's arguments underscore the point. It claims that it "is not challenging Indiana's three-tier system in its entirety, or even its horizontal prohibition on wholesaling both beer and liquor." EFT Br. at 40. Instead, according to its opening brief, "[t]he only aspect of the State's scheme that E.F. Transit opposes here is defendants' application of the prohibited-interest statutes—*which are designed to regulate wholesalers*—to a federally licensed motor carrier that wishes to provide services that Congress expressly exempted from state oversight." *Id.* (emphasis changed). By framing its challenge in this way—and acknowledging that the prohibited-interest statutes on their face do not implicate the FAAAA—E.F. Transit is effectively conceding that these Indiana statutes do not relate to the services of motor carriers with respect to the transportation of property.

That reality is underscored by the reasons the Commission applied the statutes as it did. In contrast to the way E.F. Transit frames the issue, the Commission did not view itself as "appl[ying] the prohibited-interest statutes" to "a federally licensed motor carrier." *Id.* (emphasis

omitted). The Commission understood itself to be applying the statutes to Monarch, a beer wholesaler, to prevent *Monarch* from having a prohibited interest in a liquor wholesaler's permit by providing delivery services to that liquor wholesaler (either itself, or through E.F. Transit). The Commissioners thus explained in their testimony that their "only issue" with E.F. Transit was that it is "owned by the same entities that own Monarch" and thus that they are "are basically the same company" for these purposes. App. 84 (tr. 195:19–23); App. 61 (tr. 185:16–21). In other words, the Commission applied these statutes in this way because of E.F. Transit's relationship with Monarch—and not because of E.F. Transit's status as a motor carrier.

Significantly, the Indiana Supreme Court endorsed the Commission's view that E.F. Transit and Monarch are a single entity for these state-law purposes, finding them "practically one in the same." *Spirited Sales*, 79 N.E.3d at 379. In *Spirited Sales*, E.F. Transit's wholly-owned subsidiary, Spirited Sales, applied for a liquor wholesaler's permit but saw it denied by the Commission on grounds that it violated Indiana Code § 7.1-5-9-3(b), which makes it "unlawful for the holder of a brewer's or beer wholesaler's permit to have any interest in a liquor permit of any

type." *See Spirited Sales*, 79 N.E.3d at 374–75, 377. The Indiana Supreme Court upheld the denial because the arrangement would have given Monarch (the beer wholesaler that was owned by the same shareholders who own E.F. Transit) a prohibited interest in the permit of Spirited Sales (the proposed liquor wholesaler that E.F. Transit owned). *Id.* at 377–79. The Indiana Supreme Court made clear that the entity that would have the prohibited interest was *Monarch* because it was "the entity to whom the [beer wholesaler's] permit is directly issued." *Id.* at 378. On the other hand, it explained, "EFT and its shareholders would not be deemed holders of a permit." *Id.* at 378.

So the Indiana statutes do not "relate to" E.F. Transit's motor-carrier services with respect to the "transportation of property" in any meaningful way. "[S]imply because a carrier can show some link between the state action it challenges and its rates, routes, or services does not invariably mean that the challenged action is preempted as one 'related to' those rates, routes, or services." *Nationwide Freight*, 784 F.3d at 376. The statutes "relate to" permitted wholesalers of beer, wine, and liquor by limiting interests between them. They are laws that, like anti-smoking laws or laws forbidding gambling, "broadly prohibit[] certain forms of

conduct and affect" motor carriers "only in their capacity as members of the public." *Rowe*, 552 U.S. at 375. They are thus the sorts of laws the Supreme Court has held to have "too tenuous, remote, or peripheral" a connection to motor-carrier services to be preempted under the FAAAA. *Id.*

The lack of any connection between Indiana's prohibited-interest statutes and motor carriers is evident when compared with the Indiana law this Court found to conflict with the FAAAA's text in *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455 (7th Cir. 2012). The statute there forbade retailers from shipping wine products to customers using motor carriers. *See id.* at 457. Referencing the way retailers could deliver wine, the statute provided that "[t]his *delivery* may only be performed by the permit holder or an employee who holds an employee permit." IND. CODE § 7.1-3-5-3(d) (emphasis added). A retailer sued the Commission to challenge the statute's constitutionality, arguing that the FAAAA preempted it since it "related to" a "service" of a motor carrier with respect to the transportation of property. *Huskey*, 666 F.3d at 457 (quoting 49 U.S.C. § 14501(c)(1)). The district court disagreed, finding that the statute was not preempted because it "regulate[d] the *method* of wine delivery, not

the common carriers themselves." *Lebamoff Enters., Inc. v. Snow*, 757 F. Supp. 2d 811, 827 (S.D. Ind. 2010) (emphasis in original). This Court agreed that the statute was not preempted, but did not agree with the district court's reasoning, instead finding that Indiana's statute conflicted with the FAAAA because its "effect is to prohibit motor carriers from offering a service they'd like to offer." *Huskey*, 666 F.3d at 457.

The prohibited-interest statutes are different from the *Huskey* statute in critical respects for the purposes of the FAAAA-conflict analysis. The statute in *Huskey* expressly referenced a traditional motor-carrier service with respect to the transportation of property: "delivery" of goods. IND. CODE § 7.1-3-5-3(d). The prohibited-interest statutes, in contrast, do not refer to delivery services or any other traditional service motor carriers provide with respect to the transportation of property. *Compare* IND. CODE § 7.1-3-5-3(d) *with* IND. CODE §§ 7.1-5-9-3(b), -6. They simply forbid cross-ownership of businesses, and—unlike the *Huskey* statute—do not speak to the manner in which alcohol is transported. The prohibited-interested statutes are also different from the one in *Huskey* because their effect is not "to prohibit motor carriers," as a class, "from offering a ser-

vice they'd like to offer." *Huskey*, 666 F.3d at 457. To the contrary, another section of the Indiana Code provides that motor carriers like E.F. Transit *can* provide delivery services to wholesalers of all different types of alcoholic beverages so long as they obtain a motor carrier's permit. *See* IND. CODE § 7.1-3-18-2; *see also* IND. CODE § 7.1-3-18-3 (motor carriers seeking to "haul, convey, transport, or import alcoholic beverages" on state highways must obtain carrier's permit). The only reason E.F. Transit cannot provide such services is one unique to E.F. Transit and arises from its unique association with a beer wholesaler.

Nor are Indiana's prohibited-interest statutes comparable to the provisions the Supreme Court struck down, as state laws related to the services of motor carriers with respect to the transportation of property, in *Rowe v. New Hampshire Motor Transportation Association*, 552 U.S. 364 (2008). Those Maine laws forbade certain retailers from employing "delivery services" for tobacco unless they "follow[ed] particular delivery procedures," thus "focus[ing] on trucking and other motor carrier services." *Id.* at 370–71 (citation and quotation marks omitted). As this Court later commented, the preempted *Rowe* provisions were "expressly directed at the method of delivery—arguably the critical moment in a

shipment." *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am.*, 697 F.3d 544, 552 (7th Cir. 2012).

The prohibited-interest statutes, in contrast, are laws of general application "that affect transportation companies . . . only in their capacity as members of the public." *Id.* at 558. In *Dan's City*, the Supreme Court explained that certain state laws impacting motor carriers may be outside the FAAAA's preemptive scope because they "are peculiarly within the province of state and local legislative authorities." 569 U.S. at 264 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975)). As one example, the Supreme Court observed that zoning regulations might impact where motor carriers can do business, but that "[i]t is hardly doubtful that state or local regulation of the physical location of motor-carrier operations falls outside the preemptive sweep of § 14501(c)(1)." *Id.* "That is so because zoning ordinances ordinarily are not 'related to a price, route, or service of any motor carrier with respect to the transportation of property.'" *Id.* (alteration adopted) (citation omitted). That logic applies with full force to the state laws at issue here.

Courts on other occasions have pointed to other generally applicable laws that do not relate to motor carriers, such as gambling and prostitution laws (*see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)), anti-public-smoking laws that would affect truckers (*see Rowe*, 552 U.S. at 375), and certain banking and labor laws (*see S.C. Johnson*, 697 F.3d at 559). As this Court observed, such "background laws will ultimately affect" motor carriers, "[y]et no one thinks that the ADA or FAAAA preempts these and the many comparable state laws because their effect . . . is too 'remote.'" *Id.* at 550 (citations omitted). "Motor carriers, as members of the public, remain subject to the civil and criminal constraints that 'set basic rules for a civil society.'" *Nationwide Freight*, 784 F.3d at 377 (citations omitted).

Indiana's prohibited-interest statutes are those types of laws. They happen to impact E.F. Transit due to its cross-ownership with Monarch, but "[c]ountless state laws have some relation to the operations of motor carriers and thus *some* potential effect on the prices charged or services provided." *Id.* at 376 (alterations adopted) (quoting *Mass. Delivery Ass'n v. Coakley*, 769 F.3d 11, 18 (1st Cir. 2014)). If the FAAAA preempts state

laws anytime a motor carrier is affected, then state laws would be constantly struck down—or at the very least motor carriers would constantly seek individualized exceptions from generally applicable laws—and "for all practical purposes pre-emption would never run its course." *N.Y. State Conference*, 514 U.S. at 655.

Consider, for example, what impact E.F. Transit's argument would have on state laws prohibiting drug distribution. Like every other State, Indiana makes it a felony to "knowingly or intentionally . . . deliver . . . cocaine." IND. CODE § 35-48-4-1. That law on its face is not designed to regulate motor carriers. *See id.* Nor is such a law's "purpose to interfere with the competitive forces of the free market." *Nationwide Freight*, 784 F.3d at 377. But if E.F. Transit's sweeping interpretation is the right one, that law would be preempted by the FAAAA if Indiana prosecutors "applied" it to a trucking company that wanted to ship cocaine to its customers. That cannot be the law. This Court has explained in a prior preemption case that it "conduct[s] an individualized inquiry that 'engages with the real and logical effects of the state statute.'" *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1055 (7th Cir. 2016) (alteration adopted) (emphasis omitted) (quoting *Mass. Delivery Ass'n*, 769 F.3d at 21). Like the laws in this

case, state laws of general applicability that are unrelated to these deregulatory purposes of the FAAAA and merely have a "*de minimis*," "incidental," and "insignificant" connection to motor carriers do not sufficiently "relate to" the services motor carriers provide with respect to the transportation of property. *Nationwide Freight*, 784 F.3d at 375–76.

C. The FAAAA does not conflict with the prohibited-interested statutes because they do not "significantly impact" federal deregulatory and preemption related objectives.

Indiana's prohibited-interest statutes also do not implicate the other test the Supreme Court has used to assess FAAAA preemption because they do not 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). State laws separating wholesalers of different alcoholic products were not the type of laws the FAAAA was meant to supersede. Rather, the FAAAA's primary objective was to prevent states from undermining federal regulation of interstate trucking through inconsistent state economic regulations. *See generally* H.R. Conf. Rep. No. 103-677, at 84–86 (1994), reprinted in 1994 U.S.C.C.A.N. at 1756–58. In describing the problem Congress sought to remedy, the House Conference Report explained how "[s]tate economic regulation of

motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets." *Id.* at 87. Congress believed these inefficiencies were caused by inconsistent state laws governing motor carriers. "The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Id.* The Report found: "[c]urrently, 41 jurisdictions regulate, in varying degrees, intrastate prices, routes and services of motor carriers. . . . Not all 41 States regulate each of these aspects nor do they all regulate them in the same manner or to the same degree. . . . The need for [the FAAAA] has arisen from this patchwork of regulation . . . ." *Id.* at 86.

Notably absent from the FAAAA's legislative history is anything to suggest there is a federal interest in the preemption of state alcohol laws, let alone a clear statement that Congress intended to displace alcohol laws that do not directly address motor carriers or the transportation of goods. Indeed, alcohol is not even mentioned in the House Conference Report or in any other legislative history. E.F. Transit points to a single, out-of-context quote from President Carter's press memo on a draft of a

different federal statute that did not even purport to preempt any state law. *See* EFT Br. at 6. "[I]t is highly unusual to interpret one law by reference to the legislative history of a different law." *Baker v. Gen. Motors Corp.*, 478 U.S. 621, 641 (1986) (Brennan, J., dissenting). That quote tells us nothing about the preemptive motivations of Congress nearly fifteen years later when drafting the FAAAA.

Nor do Indiana's statutes "significant[ly] impact" motor carriers and the services they provide. *Rowe*, 552 U.S. at 375 (emphasis omitted) (quoting *Morales*, 504 U.S. at 390). The statute in *Huskey* may have satisfied that standard because it completely foreclosed *all* motor carriers from providing *any* delivery services to retailers who wanted to ship wine to customers. *See Huskey*, 666 F.3d at 457–59. In contrast, Indiana's statutes have an insignificant effect on motor carriers at most. Other Indiana statutes expressly permit motor carriers to provide delivery and other logistical services to beer, liquor, and wine wholesalers. *See supra* at p. 20 (citing IND. CODE § 7.1-3-18-2). The challenged statutes thus "hardly constrain participation in interstate commerce." *Dan's City*, 569 U.S. at 263. This Court has instructed that in any preemption case, "[i]t is important in this connection to consider whether enforcement of a state law

has a generalized effect on transactions in the economy as a whole, or if it affects only particular arrangements." *S.C. Johnson*, 697 F.3d at 559. And any economic effect flowing from the Commission's application of the statutes appears to have been limited to a single motor carrier, due solely to its common ownership with a beer wholesaler.

D. Constitutional principles counsel in favor of reading the FAAAA as not conflicting with Indiana's prohibited-interest statutes.

Even if the law E.F. Transit were challenging in this case did not regulate alcohol—if it were a law, say, prohibiting shared interests for wholesalers of two other types of goods, such as cigarettes and soda, or apples and oranges—the considerations discussed above still would mean that the FAAAA did not preempt that law. But it is not at all insignificant, for present purposes, that the laws E.F. Transit is challenging here do, in fact, regulate alcohol. The Center for Alcohol Policy has filed this brief precisely because it wants to preserve the strong system of state-based alcohol regulation that has existed ever since the Twenty-first Amendment freed states to undertake the task. And these realities, and the constitutional principles at stake, make it all the more imperative to reject the expansive reading of the FAAAA that E.F. Transit advocates.

State laws regulating alcohol are different from state laws regulating almost any other product. They have their own constitutional amendment. *See* U.S. CONST. XXI. Section 2 of the Twenty-first Amendment not only shields these laws from certain challenges under the Commerce Clause, but also affirmatively prohibits, as a matter of federal law, anyone from violating them. When the American people adopted this Amendment, they did so in part based on their conclusion—memorialized in an influential contemporary study—that Prohibition's chief failure was "regard[ing] the United States as a single community in which a uniform policy of liquor control could be enforced." RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 6 (Ctr. for Alcohol Policy 2011) (1933). The solution the Twenty-first Amendment adopted was one that eliminated the national prohibition on alcohol but freed individual States to use a wide array of laws and "many types of experiment" to achieve the end of achieving temperance. *Id.* at 97. The Supreme Court therefore has held that the Twenty-first Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980).

These constitutional considerations should mean that if E.F. Transit wishes to argue that Congress has used its Commerce Clause power to preempt a state alcohol regulation, it should at least be required to point to some clear statement Congress has made, in the statute's language, showing that it wished to achieve this particular end. That is how statutory interpretation works when Congress legislates against the backdrop of other state interests the Constitution recognizes and protects. The courts will not read a federal statute as abrogating a State's Eleventh Amendment immunity, for example, unless Congress "make[s] its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Requiring a clear statement of this intention, the Supreme Court has explained, helps "'assure that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543–44 (2002) (alteration adopted) (quoting *Will*, 491 U.S. at 65). This rule "is obviously important when the underlying issue raises a serious constitutional doubt or problem." *Id.*

The plurality opinion for the Supreme Court in *North Dakota v. United States*, 495 U.S. 423 (1990), shows that these considerations also should govern in cases, like the one at hand, where a party claims that Congress has preempted a state alcohol law that was enacted against the backdrop of the Twenty-first Amendment. The plurality in *North Dakota* reasoned that when a state law exercises a "core" power relating to alcohol regulation, the resulting state law is "supported by a strong presumption of validity and should not be set aside lightly." 495 U.S. at 433. The plurality explained that "when the Court is asked to set aside," under preemption doctrine, "a regulation at the core of the State's powers under the Twenty-first Amendment . . . it must proceed with particular care." *Id.* at 439–40 (citation omitted). Thus, the Court will not hold that a federal statute preempts such a state law unless Congress has "spoken with sufficient clarity." *Id.* at 440. In concluding that the state law at issue in *North Dakota* was not preempted, the plurality rested on the lack of a clear statement from Congress alone, and did not proceed to balance state and federal interests.

As Judge Hamilton has suggested, the *North Dakota* plurality's reasoning is sound, and the lack of a "clear statement of intent" to preempt

Indiana's prohibited-interest law ought to similarly save it "from preemption without further inquiry into its effectiveness" in achieving the State's regulatory goals. *Huskey*, 666 F.3d at 465 (Hamilton, J., concurring in the judgment). Laws like Indiana's prohibited-interest statutes exercise core powers under the Twenty-first Amendment insofar as they regulate the "times, places, and manner under which liquor may be imported and sold." *Capital Cities*, 467 U.S. at 716. And nothing in the FAAAA's text—or even its legislative history—effectuates a statement, much less a clear one, that Congress intended to displace these alcohol-specific laws. Indeed, E.F. Transit cannot point to a single piece of evidence suggesting there is a federal interest in preempting state alcohol laws. Those conclusions ought to end the case, as a matter of statutory interpretation, without reference to the inquiry that Judge Hamilton rightly characterized as a "quasi-legislative form of interest-balancing." *Huskey*, 666 F.3d at 462 (Hamilton, J., concurring in the judgment).

The benefits of avoiding that balancing process, to both the courts and the federal system alike, are substantial. The point of the Twenty-first Amendment was to leave it to the States to develop a vast array of diverse solutions to what was one of the most vexing social problems of

the time. If the magnitude and complexity of the alcohol-related problems Americans were grappling with in 1933 are difficult to comprehend now, it is only because the experiment in democracy and federalism the Twenty-first Amendment effectuated, to stem the problems alcohol can cause, turned out to be remarkably "successful." Jim Petro *et al.*, *Introduction* to TOWARD LIQUOR CONTROL, *supra*, at x. This success will be compromised if the decades-old legal system that has brought alcohol under control is constantly subject to as-applied preemption challenges, whenever a particular state law that is part of the system happens to have an incidental effect on a motor carrier. The success will be even further compromised if States that otherwise could focus on the regulatory task at hand are forced to devote their limited time and financial resources to litigation of this sort—and to the costs, in state funds and otherwise, of building evidentiary records, retaining expert witnesses, and preparing state officials for depositions like the ones E.F. Transit conducted below.

None of those costs, and none of the balancing inquiries that created them, should have been necessary in this case. The FAAAA on its face preempts state laws relating to the services that motor carriers provide

with respect to the transportation of goods. The FAAAA does not preempt, much less clearly preempt, laws that make no mention of motor carriers or their services. The Indiana laws at issue here fit that bill, for they simply prohibit beer, wine, and liquor wholesalers from maintaining an interest in one another, without any directive towards the services that motor carriers may provide. That conclusion should end this case.

CONCLUSION

This Court should affirm the District Court's judgment.

Respectfully submitted,

s/ John C. Neiman, Jr.

One of the Attorneys for Amicus Curiae

OF COUNSEL:

John C. Neiman, Jr.
Brandt P. Hill
MAYNARD COOPER & GALE P.C.
1901 Sixth Ave. N, Ste. 2400
Birmingham, Alabama 35203
(205) 254-1000
jneiman@maynardcooper.com
bhill@maynardcooper.com

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable type-volume limitation under Rule 32(a)(7) of the Federal Rules of Appellate Procedure and 7th Circuit Rules 29 and 32. According to the word count in Microsoft Word 2010, the relevant parts of this brief contain 6,395 words.

This brief complies with the applicable type-style requirements limitation under Rule 32 of the Federal Rules of Appellate Procedure and 7th Circuit Rule 32(b). I prepared this brief in a proportionally spaced Century Schoolbook font sized 14 point or, for headings, with a larger point size.

s/ John C. Neiman, Jr.
OF COUNSEL

CERTIFICATE OF SERVICE

On June 14, 2019, I, John C. Neiman, Jr., member of the Bar of this Court and counsel for the Center for Alcohol Policy, e-filed this Brief for Amicus Curiae the Center for Alcohol Policy, with the Clerk of the Court via CM-ECF, which will serve the following attorneys for the parties:

A. Scott Chinn
Brian J. Paul
FAEGRE BAKER DANIELS LLP
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204
(317) 237-0300

Amy Mason Saharia
Katherine Moran Meeks
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Counsel for Appellant

Aaron T. Craft
OFFICE OF THE ATTORNEY GENERAL
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204
Telephone: (317) 232-4774
Fax: (317) 232-7979
Aaron.Craft@atg.in.gov

Counsel for Appellees

s/ John C. Neiman, Jr.
OF COUNSEL