No. 18-1382

IN THE

Supreme Court of the United States

AMERICAN EAGLE EXPRESS INC.,
D/B/A AEX GROUP,

Petitioner,

v.

EVER BEDOYA, DIEGO GONZALES, MANUEL DECASTRO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

REPLY BRIEF

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I. The Third Circuit's disagreement with *Schwann* and *Healey* is irreconcilable

The Third Circuit's holding below that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") does *not* preempt New Jersey's ABC test conflicts irreconcilably with the holdings in the United States Court of Appeals for the First Circuit that the FAAAA preempts Prong B of Massachusetts' ABC test. *See Schwann v. FedEx Ground Package Svs.*, 813 F.3d 429 (1st Cir. 2016) and *Mass. Delivery Ass'n v. Healey*, 821 F.3d 187 (1st Cir. 2016) ("MDA").

Respondents purport to distinguish *Schwann* and *MDA* on the ground that New Jersey's and Massachusetts' laws are "different." (Respondents' Brief in Opposition ("Opp.") at 16-17). Specifically, they observe that Prong B of the Massachusetts statute permits classification as independent contractors only where the workers perform services "outside the usual course of the business of the employer." *Mass. Gen. Laws ch. 149, § 148B(a)(2)* ("Massachusetts Prong B" or "2"). The New Jersey statute's Prong B, they note, "includes an alternative method for reaching independent contractor status" (Opp. at 16), permitting such classification where the workers perform services either "outside the usual course of the business for which such service is performed" or "outside of all the *places of business* of the enterprise for which such service is performed." *N.J. Stat. Ann. § 43:21-19(i)(6)(B)* ("New Jersey Prong B" or "2") (emphasis added).

This is a distinction without a difference because Respondents contend that AEX fails to satisfy *either* alternative of the New Jersey Prong B. Regarding the

first alternative—"outside the usual course of the business for which such service is performed"—Respondents explicitly allege that "[t]he work [they] perform is part of the usual course of business of AEX, and indeed is its primary business." Class Action Complaint, ¶ 22, *Bedoya v. Am. Eagle Express, Inc.*, No. 2:14-cv-02811-ES-JAD (D.N.J., filed May 1, 2014) ("Class Action Complaint"). And *Schwann* and *MDA* establish that within the First Circuit, this alternative is preempted.

Concerning the second alternative—"outside of all the places of business of the enterprise"—Respondents allege that "[w]hether the delivery routes and sites used by a courier company's workers are properly viewed as 'places of business' is an open question under New Jersey law." Response Brief of Plaintiffs-Appellees at 46, *Bedoya v. Am. Eagle Express, Inc.*, No. 18-1641 (3d Cir., filed August 6, 2018). Respondents further allege that the drivers perform work at AEX's places of business when they report to AEX's facility to pick up their packages each morning. Class Action Complaint, ¶¶ 14 (Respondent Bedoya is required to "report[] to a warehouse operated by AEX…, where many other drivers like him show up every day to work"; Opp. at 2 ("Respondents are drivers who work full-time for AEX, showing up every day at around 6:00 A.M. and making deliveries for AEX along regular routes")).

Accordingly, Respondents' "successful reliance on Prong 2 in this case," *Schwann*, 813 F.3d at 437, would require AEX to change the way it provides its service to avoid having to re-classify the drivers as employees. Specifically, AEX would be forced to use employees to pick up the packages from its facilities, and deliver them to

independent contractors at some other location, who would then complete the deliveries. Or, as would have been the case in *Schwann* and *MDA* had the First Circuit utilized the Third Circuit's reasoning, AEX must use employees for every step of the delivery process. The same holds true for Prongs 1 and 3 of the New Jersey ABC test, in that any Prong which triggers a reclassification of Petitioner's drivers will have the same significant impact on rates, routes, or services.

Respondents further contend that *Schwann* and *MDA* are distinguishable because "the effects of finding a worker to be an employee under the New Jersey test are far narrower" than those effects under the Massachusetts test. (Opp. at 18). But this argument requires an over-simplified reading of *Schwann*. Indeed, in *Schwann* the First Circuit explained in depth that reclassification of drivers as employees creates an inherently significant impact on rates, routes or services because it shifts economic incentives away from drivers, irrespective of whether the reclassification has other effects under state labor laws. As Schwann recognized, "[t]he regulatory interference posed by Plaintiffs' application of Prong 2 is not peripheral." *Schwann*, 813 F.3d at 438. "The decision whether to provide a service directly, with one's own employee, or to procure the services of an independent contractor is a significant decision in designing and running a business." *Id*. "As this case shows, that decision implicates the way in which a company chooses to allocate its resources and incentivize those persons providing the service." *Id*. "Imagine, for example, state legislation that barred any company from vertically integrating (that is, performing all connected services itself through its own employees)." *Id*. "Legislation of that type would directly

and substantially restrain the free-market pursuit of perceived efficiencies and competitive advantage that some competitors might otherwise choose to pursue in designing the manner in which they perform their services to meet market demands." *Id.* "Prong 2, as Plaintiffs propose to apply it, is simply the flip side of this same type of market interference: It requires a court to define the degree of integration that a company may employ by mandating that any services deemed 'usual' to its course of business [or under New Jersey law, services performed in its places of business] be performed by an employee." *Id.* (alteration added). "Such an application of state law poses a serious potential impediment to the achievement of the FAAAA's objectives because a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them." *Id.*

Schwann explained further, "[a] company that transports property might opt to transport the property itself from pick-up to delivery." *Id.* "Or it might opt to run only a portion of the route itself, contracting with others to transport the property for some portion of the route." *Id.* "In other words, a company might provide transportation, or it might provide for transportation by others." *Id.* "Through such an arrangement, [the company] provide[s] these individuals with an economic incentive to keep costs low, to deliver packages efficiently, and to provide excellent customer service." *Id.* at 439 (alterations added). However, "[t]his method of providing for delivery services would be largely foreclosed by Plaintiffs' application of Prong 2 if a court determined that first-and-last mile transportation was 'the usual course of the business of [AEX]," *id.*, or in this case was performed at least in part

in AEX's places of business. *Id.* And "[b]ecause Prong 2 would mandate that [AEX] classify these individual contractors as employees, [AEX] would be required to reimburse them for business-related expenses." *Id.* "The logical effect of this requirement would thus preclude [AEX] from providing for first-and-last mile pick-up and delivery services through an independent person who bears the economic risk associated with any inefficiencies in performance." *Id.*

Schwann concluded, "[t]his regulatory prohibition would also logically be expected to have a significant impact on the actual routes followed for the pick-up and delivery of packages." *Id.* "It is reasonable to conclude that employees would have a different array of incentives [from those facing independent contractors] that could render their selection of routes less efficient, undercutting one of Congress's express goals in crafting an express preemption proviso." *Id.* (citing *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 371 (2008) (describing "Congress' overarching goal as helping ensure transportation rates, routes, and services that reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality")).

AEX faces the same inherent consequences if it is forced to alter its business model and either change how it provides its services altogether or reclassify its drivers as employees. Thus, the conflict among the First and Third Circuits is evident and substantial. If the First Circuit's rationale is applied here, then Respondents' successful application of the New Jersey ABC test to AEX's business model would have a significant impact on, and therefore

would relate to, AEX's prices, routes, or services. The Third Circuit's irreconcilable reasoning flatly contradicts the First Circuit's holdings in *Schwann* and *MDA*.

In any event, Respondents contend that if they and the putative class are reclassified as employees they would be entitled to more than $5 million in damages. Class Action Complaint, ¶ 2 ("[t]he amount in controversy exceeds $5,000,000"). And New Jersey's *amicus curiae* brief below asserted that a judgment in favor of AEX would "prevent[] the Department [of Labor and Workforce Development] from collecting tens of millions of dollars in yearly unemployment taxes." (Amicus Brief of the State of New Jersey in Support of Affirmance of the District Court's Denial of Defendant-Third Party Plaintiff-Appellant's Motion for Judgment on the Pleadings at 4, *Bedoya v. Am. Eagle Express, Inc.*, No. 18-1641 (3d Cir., filed August 13, 2018). These are themselves "significant impact[s] related to Congress' deregulatory and pre-emption-related objectives." *Schwann*, 813 F.3d at 436.

Respondents also contend that the Third Circuit's holding below is consistent with *Schwann* and *MDA* because the two statutes "differ in the extent to which they contribute to a patchwork of state laws." (Opp. at 17). Respondents assert that New Jersey's Prong B "is similar to that used in many other states," whereas *Schwann* noted that Massachusetts' is "something of an anomaly." (Opp. at 17) (quoting *Schwann*, 813 F.3d at 438). However, Respondents do not and cannot claim that the Massachusetts test is *unique*. Additionally, other states may adopt ABC tests in the future. Whether such future tests are identical to, or different from the ABC tests currently utilized in Massachusetts and New Jersey should

not control the preemption analysis. An impermissible patchwork of state regulation already exists and is likely to expand. New Jersey's and Massachusetts' respective versions of the ABC test both contribute to this. Moreover, nothing in the FAAAA's text states it preempts minority rules only. And ironically, although California was the state whose law *Schwann* identified as being less of an "anomaly" than Massachusetts', *Schwann*, 813 F.3d at 438, California has since explicitly adopted Massachusetts' Prong B, and explicitly rejected New Jersey's Prong B, to govern this issue under its wage orders. *Dynamex Operations W. v. Superior Court*, 4 Cal.5th 903, 956 n.23 (2018). Accordingly, now more than ever, there is no merit to Respondents' contention that only Massachusetts' ABC test, but not New Jersey's, contributes to an impermissible patchwork of state regulation in this area.

The First and Third Circuit's contradictory conclusions on FAAAA's preemption of Massachusetts' and New Jersey's ABC tests are irreconcilable. Certiorari is warranted to resolve this Circuit split on an issue with broad importance on a national scale.

II. The Third Circuit erroneously applied a presumption against preemption, departing from sister Circuits

The Third Circuit held below that a presumption against preemption applied because New Jersey's ABC test is among "the historic police powers of the States." (Petitioner's Appendix ("Pet. App.") 8a-9a). Respondents do not dispute that the Third Circuit's holding conflicts with those of the Eighth, Ninth and Tenth Circuits. (Opp. at 25). Certiorari is warranted to resolve this split.

Respondents' contention that AEX "forfeited" the issue (Opp. at 23-24) lacks merit, for two reasons. First, the Third Circuit explicitly addressed the issue. (Pet. App. 8a-9a). This alone suffices for Supreme Court review. *Va. Bankshares v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). Second, as Respondents concede (Opp. at 24 n.3), AEX cited four Supreme Court cases as "constitute[ing] the four pillars of FAAAA preemption analysis [that] govern this case," and argued that "[a]ll…of the major Supreme Court cases endorsed preemption and read the preemption language broadly…and *none adopted plaintiff's position…that we should presume strongly against preempting in areas historically occupied by state law*." Brief for Appellant at 16-17, *Bedoya v. Am. Eagle Express, Inc.*, No. 18-1641 (3d Cir., filed July 5, 2018) (emphasis added) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), *American Airlines v. Wolens*, 513 U.S. 219 (1995), *Rowe, supra*, and *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014)). To argue at more length would have been futile. *MedImmune, Inc. v. Genentech, Inc.* 549 U.S. 118, 125 (2007). The Third Circuit had already twice held that, notwithstanding *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016), a presumption against preemption continues to apply where the state's historic police powers are at issue, even in the face of an express preemption clause. *Shuker v. Smith & Nephew*, PLC, 885 F.3d 760, 771 & n.9 (3rd Cir. 2017); *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 n.5 (3rd Cir. 2018). Accordingly, AEX preserved the issue for review. *MedImmune*, 549 U.S. at 125.

Respondents contend that the Third Circuit did not "indicat[e] that the presumption against preemption made a difference to the outcome of this case." (Opp. at

24). On the contrary, because the Third Circuit adopted a presumption against preemption, the Third Circuit required AEX to "rebut" it with evidence that "Congress had a 'clear and manifest purpose' to preempt state laws." (Pet. App. 9a). Accordingly, the Third Circuit explicitly put its thumb on the "no preemption" side of the scale. Moreover, when the presumption does not affect the Third Circuit's analysis of FAAAA preemption, it says so. *Lupian*, 905 F.3d at 131 n.5 (applying the presumption against preemption under the FAAAA but stating "we would reach the same result in this case even if this presumption was not applied"). The Third Circuit did not say so here.

III. Conclusion

The Court should grant Certiorari to correct the Third Circuit's departure from this Court's precedents and resolve the circuit splits on the important issues raised in the Petition.

Respectfully submitted,

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