No. 20-1453

In The Supreme Court of the United States

CAL CARTAGE TRANSPORTATION EXPRESS, LLC; CCX2931, LLC; K&R TRANSPORTATION CALIFORNIA, LLC; KRT2931, LLC; CMI TRANSPORTATION, LLC; CM2931, LLC,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA; SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION FOR THE PEOPLE OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

The questions presented are:

1. Does 28 U.S.C. § 1257(a) authorize review of an interlocutory decision of an intermediate state appellate court that may be rendered effectively moot by further proceedings below, where this Court can review the decision after final judgment if the issue does survive?

2. Does the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1), preempt state worker-classification laws that require motor carriers to meet certain criteria before they can classify their drivers as independent contractors?

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STATUTORY PROVISIONS INVOLVED

The statutory provisions involved here are:

- 49 U.S.C. § 14501(c)(1) (the preemption provision of the Federal Aviation Administration Authorization Act (the F4A)), reproduced at Pet. App. 57a;
- Cal. Labor Code § 2775 (California's ABC test), reproduced at Pet. App. 61a; and
- Cal. Labor Code § 2276 (California's business-to-business exemption), reproduced at Pet. App. 63a.

INTRODUCTION

Petitioners request review of an interlocutory state court decision correctly applying consensus preemption analysis—a decision that is not dispositive and may be rendered moot by further proceedings. Petitioners fail to meaningfully address this Court's jurisdiction to grant their request for review under these circumstances, and, at this stage, there is no such jurisdiction. But even if that were not true, there also is no substantive reason for this Court to grant review. There is no conflict among the courts on the scope of Federal Aviation Administration Authorization Act (F4A) preemption, and the decision below is entirely consistent with the decisions of both this Court and the federal and state appellate courts.

On the issue of jurisdiction, Petitioners do not meaningfully address the obvious flaws in their position. This Court can only review state court decisions that are final "as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). On its face, the decision below does not qualify. It is an order of an intermediate state appellate court on a motion in limine; its most immediate effect is on the scope of discovery and evidence presented at trial. It is undisputed that the question Petitioners ask this Court to resolve does not dispose of the matter.

Nor do Petitioners find assistance in the exceptions set out in *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). Those exceptions are only available where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had," *id*. at 478, or where later review of the issue by this Court would be difficult or impossible*, id*. at 481-84. Neither circumstance is present here. Petitioners themselves have advanced arguments in the litigation that, if they are successful, will effectively moot the preemption question. On the other hand, if Petitioners lose and the issue survives, they can just as easily seek this Court's review at that time, when the Court would have jurisdiction, and a developed record, to consider it.

And Petitioners do not even mention, much less address, the fact that they have raised other federal issues in an attempt to dispose of the litigation; these issues have yet to be addressed on appeal and could require this Court's review in the future. The

existence of such issues likewise undermines this Court's jurisdiction. *See, e.g.*, *Cox*, 420 U.S. at 477 (jurisdiction generally not available where "other federal questions . . . might also require review by the Court at a later date").

But even if the Court could exercise jurisdiction, there is no reason for it to do so. The decision below is consistent with the consensus approach to F4A preemption that has been adopted by state and federal appellate courts nationwide. There is no conflict among the courts on how to determine whether F4A preempts a worker classification law. Instead, just as the Court of Appeal did here, courts uniformly analyze the degree of relation between the law at issue and prices, routes, and services, considering indicia including whether the state law targets motor carriers or is generally applicable. The court below found, as a matter of California statutory interpretation, that California's law does not cross the line set by the F4A.

Petitioners attempt to manufacture a conflict by claiming that courts are split on whether "generally applicable" laws—i.e., laws that apply to all businesses without targeting motor carriers—are preempted. They claim that some courts find that such laws are never preempted, while others find the opposite. This characterization of the cases does not withstand scrutiny. Across the country, courts look to the general applicability of a classification law as a "helpful but not dispositive" factor in analyzing how closely related a law is to prices, routes, and services. *Bedoya v. Am. Eagle Express*, 914 F.3d 812, 821 (3d Cir. 2019).

Petitioners' claim that courts reach different outcomes considering F4A preemption of the "same laws" is also wrong. Under the consensus approach, courts have found that some worker classification laws are preempted while others are not. But this is a result of differences among the state laws, not differences in interpretation of the applicable federal standard. There have always been differences among the states' worker classification laws; they constitute neither a split in authority nor cause for this Court's intervention.

Finally, the decision below is a faithful application not just of the consensus approach to F4A preemption, but also of this Court's precedent. It is Petitioners' view of F4A preemption that misstates this Court's cases. They claim that AB2257, California's worker classification law, runs afoul of the F4A by imposing standards on the classification of workers as independent contractors. They argue that, by imposing standards, it impermissibly imposes costs on their operations and "discourages" the use of independent contractors. But the same could be said of any worker classification law—not to mention that any regulation, from zoning laws to business taxes, similarly increases the costs to trucking companies, and would fail on the same rationale. This Court has repeatedly recognized that Congress never intended "deregulation" to sweep so broadly. *See, e.g.*, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 375 (2008). The F4A's legislative history confirms this: It reveals Congress's view on worker classification laws and firmly establishes that Congress *approved* varied worker classification laws that

similarly "discourage" the use of independent contractors—including one that is quite similar to AB2257.

The court below properly synthesized the cases and legislative history in analyzing whether the F4A preempts AB2257. It correctly concluded that it does not. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

This matter arises out of Petitioners' attempt to obtain early resolution of the question whether the F4A preempts prong B of AB2257, California's "ABC" worker classification law. The parties agree that this issue is not dispositive; it determines only the standard that the trial court would apply to the misclassification claims in this matter.[1] Opp. App. at 13-14, 17-22. Nonetheless, arguing that it would shape the scope of discovery, Petitioners pressed the superior court to decide the issue before substantial discovery or summary adjudication motions. Pet. App. at 8a.

The superior court agreed and entertained the issue in the context of an early motion in limine, which,

[1] There is a dispute, however, on the standard that would apply if prong B is preempted. Petitioners argue that California's prior classification law would spring back into place if prong B were preempted. The People argue that prong B would be severed, leaving prongs A and C. Because the court below did not find preemption, it did not resolve this California law issue.

finding preemption, it granted.[2] Pet. App. at 8a. The People sought immediate review through a Petition for a Writ of Mandate. The California Court of Appeal held that the superior court misconstrued AB2257 as a matter of California law. As a result, it found that AB2257 is not preempted and issued the Writ. *Id*. at 2a. The California Supreme Court declined review. *Id.* at 1a.

A. California adopts, then modifies, its ABC test.

This matter arises out of a dispute over the worker classification practices of three short-haul trucking companies operating within California. The companies, Petitioners here, have classified their drivers as independent contractors, rather than employees. This means, among other things, that Petitioners have failed to contribute to state worker's compensation or unemployment insurance funds. They also fail to provide drivers the benefits and protections to which employees are entitled under California law, including sick pay and reimbursement for expenses.

The People contend that, under California law, many of Petitioners' drivers are misclassified for at least some purposes. Petitioners' misclassification practices give them a significant advantage over law-abiding competitors, and taxpayers are left to cover the

[2] The superior court has stayed the matter pending final resolution of the question, and neither substantial discovery nor any other proceedings have moved forward in the interim.

expense when their drivers suffer misfortune on the job.

The Complaint in this matter was filed in 2017 under California's then-governing worker classification standard, commonly referred to as the *Borello* standard.[3] In *Borello*, the California Supreme Court articulated the classification test under some, but not all, California laws. It recognized that the intent of California's worker classification regime is to ensure that the costs and risks associated with work are properly and efficiently allocated among taxpayers, consumers, and workers by requiring basic protections for workers who are unlikely to be able to protect themselves. The laws require employee protections for workers who do not operate legitimately independent businesses, but excuse those protections for individuals who do. *See, e.g.*, *Borello*, 769 P.2d at 409. As a result, the court adopted a multi-factor classification inquiry focusing on the independence of the worker classified as an independent contractor. *Borello*, 769 P.2d at 406.

Shortly after the People filed the Complaint in this case, the California Supreme Court revisited the issue of classification standards. The court noted that the specific laws before it have especially broad purposes and that misclassification has been a significant and

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[3] That standard was established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989). Petitioners concede that the F4A does not preempt the *Borello* standard, as the Ninth Circuit found in *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 966 (9th Cir. 2018), *cert. denied*, 2019 U.S. LEXIS 2053 (U.S., Mar. 18, 2019).

ongoing problem in California despite *Borello*.[4] *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 5 (Cal. 2018). It noted that multi-factor balancing tests like *Borello* can create both uncertainty for employers and workers and opportunities for employers to evade the law.

It concluded that a simpler and more definite standard adopted by several other states, the ABC test, governed in the context of the laws before it. *Id*. at 33-34. Under the ABC test, workers are employees unless an employer can show that (a) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; (b) the worker performs work that is outside the usual course of the hiring entity's business; and (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. *Dynamex*, 416 P.3d at 34.

A little more than a year later, based on continuing concerns about misclassification, the California Legislature codified the ABC test and certain exemptions.

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[4] For example, misclassification in defendants' own industry is significant. In 2018, the California Legislature found that "California's port drayage drivers are the last American sharecroppers, held in debt servitude and working dangerously long hours for little pay," and noted that a "recent report finds that two-thirds of California port drayage drivers [are misclassified], and rampant misclassification of drivers contributes to wage theft and leaves drivers in a cycle of poverty." Cal. Sen. Bill. No. 1402 (2017-2018 Reg. Sess.) § 1.

Cal. Assemb. Bill 5 (2019-2020 Reg. Sess.). The Legislature expanded the ABC test beyond the laws considered in *Dynamex*, but also narrowed its reach by establishing exemptions.[5] *Id*. As a result, while California's ABC test has elements in common with those of other states, a California employer can establish that a worker is an independent contractor by satisfying either the ABC test or one of several statutory exemptions.

One of California's exemptions, the business-to-business exemption, is particularly relevant here. Under it, an employer may classify a worker as an independent contractor if the relationship satisfies statutory conditions generally going to the existence of a "bona fide business-to-business contracting relationship." Cal. Labor Code § 2776. These conditions include, for example, that the worker can contract with other businesses and maintain a clientele without restrictions; can negotiate their own rates; and, consistent with the nature of the work, can set their own work times and locations. *Id.* § 2776(a).

As a result, as the Court of Appeal found, AB2257 does not wipe out independent contracting in trucking; it merely requires that drivers meet criteria showing they are actual independent business owners. Indeed, the bill's author confirmed that truckers *can* be independent contractors under state law; consistent with

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[5] Shortly afterward, California legislature refined some of these exemptions. Cal. Assemb. Bill 2257 (2019-2020 Reg. Sess). The court below considered the law as amended. Pet. App. 8a.

the statutory text and the decision of the court below, owner-operators, like any purported independent contractor, can be classified as independent contractors so long as they are or "become a legitimate small business." Cal. Assemb. Floor Session (Sept. 11, 2019), at 1:07:38-1:07:49.

B. The F4A's preemption provision.

i. Congress considered and approved laws like AB2257—and variability in worker classification laws—in passing the preemption provision.

In 1994, Congress added the preemption provision at issue here to the F4A, prohibiting states from enacting laws "related to a price, route, or service" of motor carriers "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). In passing this provision, Congress made clear what it intended to target, identifying "[t]ypical forms of [impermissible] regulation," such as "entry controls, tariff filing and price regulation, and types of commodities carried." H.R. Conf. Rep. No. 103-677 at 86 (1994).

On the other hand, Congress also provided guidance on what it regarded as *permissible* regulation, including exactly the sort of generally applicable worker classification standards at issue here. States have long had different standards for employee classification; such laws fall squarely within the states' traditional authority. *See, e.g.*, *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987) ("[T]he establishment of

labor standards falls within the traditional police power of the State."). Congress adopted the F4A's preemption provision against this backdrop and made clear in the provision's legislative history that such laws were not the provision's intended target, *approving* the varied general worker classification laws of several states. *See, e.g.*, *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 329 P.3d 180, 190 (Cal. 2014) (discussing H.R. Conf. Rep. No. 103-677 and identifying relevant laws).

ii. This Court has found that preemption does not displace laws that are only tenuously or remotely related to prices, routes, and services.

Consistent with the limitations reflected in the legislative history, while the F4A preempts state laws directly or indirectly "related to" prices, routes, and services, this Court has emphasized that this "does not mean the sky is the limit." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013). "[A]s many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). As a result, the Court has repeatedly rejected the application of an "uncritical literalism" to the provision; otherwise, "for all practical purposes pre-emption would never run its course." *Dan's City*, 569 U.S. at 260 (internal quotations omitted). The scope of preemption is also "massively limit[ed]" by the provision's limitation to laws related

"to the transportation of property." *Id*. at 261 (internal quotations omitted).

As a result, in a series of decisions beginning with *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this Court has set guidelines governing the bounds of preemption.[6] In *Morales*, the Court noted that the provision's language is broad. But it also found that not all regulations that affect prices, routes, and services are within its intended scope; regulations with sufficiently indirect and attenuated effects are not preempted. *Morales*, 504 U.S. at 390 (no preemption of laws affecting carrier prices, routes, and services in only a "tenuous, remote, or peripheral . . . manner") (internal quotations omitted). In *Morales*, however, the Court had no occasion to "draw [that] line," because the regulation at issue was squarely within the scope of preemption. *Id.* (internal quotations omitted).

This Court's later cases clarify where that line is drawn. For example, this Court has found that the phrase "related to" does not displace "basic regulation of employment conditions" even though that regulation "will invariably affect the cost and price of services." *New York State Conf. of Blue Cross & Blue Shield Plans*

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[6] *Morales* considered the preemption provision of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. § 41713, which is similar to the preemption provision of the F4A but does not include the limiting language "with respect to the transportation of property." *See Dan's City*, 569 U.S. at 256 (discussing the ADA's and F4A's preemption provisions).

v. Travelers Ins. Co., 514 U.S. 645, 660 (1995).[7] It has also recognized that the F4A does not "generally preempt[] state public health regulation," and noted, as an example, that generally applicable state laws that affect truck drivers solely in their capacity as members of the public are not preempted. *Rowe*, 552 U.S. at 375. Further, the "congressional purpose" underlying the F4A is not elimination of all regulation but, instead, preventing states' "direct substitution of their own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Id.* at 372.

iii. Applying this Court's cases, state and federal appellate courts find that many classification laws are only tenuously related to prices, routes, and services.

Based on this precedent, courts across the country interpreting the F4A have looked to whether classification laws are a "significant" "direct substitution of [the state's] governmental commands," or, instead, whether they have a sufficiently remote, tenuous, or indirect effect to fall outside the scope of preemption. In doing so, even those courts that Petitioners identify as properly applying this Court's guidance have recognized that the fact that the law at issue "may impose

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[7] *Travelers* interpreted the "related to" language of the Employee Retirement Income Security Act of 1974. This Court has recognized the parallel between the two laws and used the principles articulated in *Travelers* in interpreting the F4A. *See, e.g.*, *Dan's City*, 569 U.S. at 260.

costs on [carriers] and therefore adversely affect" prices, routes and services "is inconsequential," because "to apply to a state law solely in that circumstance, preemption 'would effectively exempt [carriers] from state taxes, state lawsuits . . . and perhaps most other state regulation of any consequence.' " *Brindle v. R.I. Dep't of Labor & Training*, 211 A.3d 930, 936 (R.I. 2019) (quoting *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 89 (1st Cir. 2011)).

Instead, applying this Court's guidance, courts nationwide have looked to various indicia of how tenuously or closely related a law is to prices, routes and services. Among those indicia, they have looked to whether the law is generally applicable as "a *helpful but nondispositive* factor for determining whether a law has a direct effect on motor carriers' prices, routes, or services." *Bedoya*, 914 F.3d at 821 (emphasis added). The courts recognize that this Court's cases, including *Rowe*, *Travelers*, and others, teach that Congress did not aim preemption specifically at laws of general applicability—and, as a result, a law's general applicability may be "a relevant consideration because it will likely influence whether the effect on prices, routes, and services is tenuous or significant." *Su*, 903 F.3d at 966. At the same time, they also recognize that such laws "may nonetheless be preempted where they have a significant impact on the services a carrier provides." *Bedoya*, 914 F.3d at 821 (citing *DiFiore*, 646 F.3d at 89).

This approach has been broadly adopted by the state and federal appellate courts, including those

Petitioners say conflict on this point. *See, e.g.*, *Su*, 903 F.3d at 966 ("[G]eneral applicability is not dispositive" but "it is a relevant consideration because it will likely influence whether the effect on prices, routes, and services is tenuous or significant."); *Schwann v. FedEx Ground Package Sys.*, 813 F.3d 429, 437 (1st Cir. 2016) (because "the Massachusetts Statute is a generally applicable law regulating the relationships between businesses and persons who perform services for those businesses," the "preemption analysis [focuses on] the manner in which [it] would apply to FedEx's operations"); *Chambers v. RDI Logistics, Inc.*, 65 N.E.3d 1, 13 (Mass. 2016) ("[P]laintiffs' misclassification claim is not directly related to the defendant's 'services,' but relates instead to a 'generally applicable background regulation several steps removed from prices, routes, or services.' This tenuous connection to services does not, without more, fall within the FAAAA's preemptive scope.") (cleaned up, quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014)); *see also Watson v. Air Methods Corp.*, 870 F.3d 812, 818-19 (8th Cir. 2017) (recognizing that "[l]aws of general applicability can be pre-empted by the ADA," but claim was not preempted because its connection to rates, routes, or services was "too tenuous, remote, or peripheral").

Classification laws that are not generally applicable, but instead target the motor carrier industry, have been regarded as more directly—i.e., not "tenuous[ly or] remote[ly]"—related to prices, routes, and services, and have been found preempted. *See, e.g.*, *Am. Trucking Ass'ns v. City of L.A.*, 559 F.3d 1046, 1056 (9th Cir.

2009). On the other hand, where the laws are generally applicable, courts do not halt the analysis, but have looked to whether they nonetheless represent a prohibited "substitution in judgment" and are therefore preempted. *See, e.g.*, *Bedoya*, 914 F.3d at 821 (analyzing factors in addition to general applicability in F4A analysis); *Dilts*, 769 F.3d at 647 (same).

Following this analysis, courts across the country have analyzed laws of general applicability for their degree of impact on prices, routes, and services. In doing so, they have acknowledged that, given the complexity of the task, congressional intent is a particularly important guide. *Dilts*, 769 F.3d at 643 (because "'everything is related to everything else,' understanding the nuances of congressional intent is particularly important in FAAAA preemption analysis.") (quoting *Dillingham*, 519 U.S. at 335 (Scalia, J., concurring)). They have found particular guidance in the legislative history's reference, discussed above at section B.i, to the types of laws that Congress intended to fall outside the scope of preemption, including worker classification laws. *See, e.g.*, *Bedoya*, 914 F.3d at 819; *Pac Anchor*, 329 P.3d at 190; *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998).

C. The decision below.

Applying this analysis, the Court of Appeal rejected Petitioners' claim that AB2257's prong B is preempted. Given that there was no meaningful dispute

on the applicable standard, *see* Pet. App. at 14a, the Court of Appeal's task was one of California statutory interpretation. Pursuant to *Rowe's* guidance, and consistent with the approach of *Bedoya*, *Schwann, Su*, and others, the Court of Appeal first analyzed whether AB2257 is a labor law of general applicability. Pet. App. 16a. Finding that it is, the Court of Appeal nonetheless "recognize[d]," that "even laws of general applicability can be preempted" if they have a sufficient effect on prices, routes, or services. Pet. App. at 16a, n.12. As a result, the court went on to analyze whether AB2257 nonetheless has such a prohibited effect; Petitioners claimed that it did because, as a matter of California law, it "makes it impossible for motor carriers to use independent contractors to drive trucks." Pet. App. 14a, 16a-22a.

Reviewing the effect of AB2257, the court found that it falls outside the scope of F4A preemption for two independent reasons, both centering on interpretation of AB2257. First, it found that, as a matter of California statutory interpretation, rather than "mandat[ing]" the use of employees, AB2257 is at most "a worker-classification test that states a general and rebuttable presumption that a worker is an employee unless the hiring entity demonstrates certain conditions." Pet. App. 16a-17a. Second, interpreting the business-to-business exemption, it rejected Petitioners' interpretation of the exemption as barring classification of drivers as independent contractors and found that Petitioners failed to show "a substitution of [the state's] governmental commands." Pet. App. at 18a-22a.

Accordingly, it issued the peremptory writ of mandate reversing the superior court.[8]

ARGUMENT

A. This Court lacks jurisdiction to review the decision below at this stage.

This Court reviews only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). This "firm final judgment rule" establishes that, to be reviewable, "a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Jefferson*, 522 U.S. at 81 (1997) (quoting *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)).

The decision below, an interlocutory order by an intermediate state appellate court, is not such a judgment. Petitioners raised the preemption issue here in the context of a motion in limine at this early stage of the case to guide discovery; they did not claim that it is dispositive. Opp. App. at 13-14, 17-22. In other words, Petitioners essentially urge this Court to

[8] The decision is not binding on other California appellate courts. *See, e.g.*, *Sarti v. Salt Creek Ltd.*, 167 Cal. App. 4th 1187, 1193 (Cal. App. 2008) ("there is no horizontal stare decisis in the California Court of Appeal").

resolve an interlocutory discovery dispute. As a result, the question does not fit within the exceptions set out in *Cox*, 420 U.S. 469.

Despite all of this, Petitioners fail to meaningfully address the issues of the Court's jurisdiction. Instead, they briefly invoke the second *Cox* exception, claiming that "[t]here is no impediment to reviewing the decision below" because the federal question here "will require decision no matter what happens next in the state courts following this appeal." Pet. at 29 (internal citation omitted). This is both inaccurate and insufficient to establish jurisdiction. Nor are any of the remaining *Cox* exceptions available to Petitioners.[9]

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[9] While the Court of Appeal's interlocutory review was through a Petition for Writ of Mandate, the procedural vehicle for discretionary interlocutory review does not affect the analysis of jurisdiction. *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6 (1984) (applying *Cox* jurisdictional analysis to an interlocutory appeal arising out of a petition for writ of mandate). Petitioners do not argue otherwise; they acknowledge that the *Cox* analysis applies here and argue that one of its exceptions applies. Pet. at 29-30. While some cases pre-dating *Cox* find that California appellate courts' resolution of a writ of *prohibition* may constitute a final judgment for purposes of this Court's jurisdiction, that situation is inapposite. *See, e.g.*, *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 565 (1947). A writ of prohibition addresses a lower court's jurisdiction to hear a matter at all—an issue that is foundational and will necessarily survive further proceedings. The same is true of the writ considered in *Atl. Richfield Co. v. Christian*, which was "a self-contained case, not an interlocutory appeal," and a significantly different type of writ than the one considered here. 140 S. Ct. 1335, 1349 (2020). In contrast, the determination here is no more final, as a practical matter, than the one in *Jefferson*, 522 U.S. at 81. In both cases, a state supreme court granted a petition for appeal of an interlocutory order on a

i. Petitioners cannot rely on the second *Cox* exception.

The second *Cox* exception applies when a state court has ruled on a federal issue and "[n]othing that could happen . . . short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Cox*, 420 U.S. at 480. As *Cox* explained, the second exception contemplates situations in which "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* at 478. Under this exception, a federal issue is reviewable when (1) the State courts have adjudicated the federal question, (2) whatever happens next in the State court litigation, the federal issue will survive, and (3) the future proceedings will not give rise to additional federal questions. *Id*. at 480. The question here fails both the second and third requirements.

As to the second requirement, survival of the federal issue, Petitioners argue that the preemption issue will necessarily survive because they cannot classify their drivers as independent contractors. This is so, they say, because there is no way that they can meet the "B" prong of the AB2257, which asks whether the

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non-dispositive issue. Treating the situations as different based on the name the courts give the mechanism for discretionary interlocutory review would elevate form over substance. But in any case, even if the judgment here was final, for all the same reasons that the matter does not meet the *Cox* standard, this case is a poor vehicle for review of the preemption issue.

worker performs work that is "outside the usual course of the hiring entity's business," or its business-to-business exemption. Pet. at 29. They imply—but stop short of saying—that they will necessarily lose further proceedings, and the issue will necessarily survive.

Petitioners' argument that the issue will survive in the litigation is doubly wrong—it is both wrong as a matter of California law and also irreconcilable with Petitioners' positions in this litigation. First, the Court of Appeal found, as a matter of California law, that Petitioners *can* classify their drivers as independent contractors. Pet. App. at 16a-22a. As a result, there is no assurance that the People will prevail, as there must be in order to meet this requirement. *See, e.g.*, *Jefferson*, 522 U.S. at 82 (*Cox's* second exception does not apply where petitioner could "effectively moot" the question by prevailing on an alternative theory.).

Second, Petitioners themselves have already taken the position in this litigation that they can prevail under AB2257. They have at least two paths to victory, either of which would effectively moot the preemption question: They can show either that they meet the requirements of the "ABC" test or those of the business-to-business exemption.[10] They have already

[10] Oddly, Petitioners frame the issue as whether their *drivers* can demonstrate that they are independent contractors; they assert that at least some will not be able to do so. Pet. at 29. But it is Petitioners who are the defendants in this action, not their drivers; no drivers have sought to intervene in this matter to preserve their misclassification. And the question, under prong B, is whether the work that drivers perform is within the normal scope of Petitioners' business. Petitioners' argument on this prong is the

asserted in this litigation that they *can* meet the requirements of the ABC test, and they have represented to the trial court that they intend to pursue that position in further proceedings in this matter. *See, e.g.*, Opp. App. at 9-10; (Petitioners' contention interrogatory response asserting that they meet the ABC test); Opp. App. at 17-22 (discussing Petitioners' plan to show that they meet the "B" prong, expert and other discovery that they intend to develop to do so, if they lose on the preemption question); Opp. App. at 13, n.3 ("Defendants reserve their right to challenge Plaintiff's characterization of their business.").

If Petitioners prevail on their argument that they properly classify their drivers under AB2257, the decision below will effectively be moot. *See, e.g.*, *Pierce Cty. v. Guillen*, 537 U.S. 129, 141, n.5 (2003) ("[P]etitioner's victory on the merits would moot" the issue before the Court.). And Petitioners may well attempt to avoid liability on some other basis. Because discovery is in early stages and motions for summary adjudication have not even been filed, other issues may easily arise to moot the preemption issue. In this situation, this Court lacks jurisdiction under section 1257. *See, e.g.*, *Jefferson*, 522 U.S. at 82 (where defense to liability would moot the federal-law question, the second *Cox* exception does not apply); *Pierce*, 537 U.S. at 141, n.5 (same).

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same for every driver. *See, e.g.*, Opp. App. at 9-10 (Petitioners' contention interrogatory response asserting that they satisfy the ABC test); Opp. App. at 17-22 (discussing Petitioners' plan to show that they satisfy the "B" prong, expert and other discovery that they intend to develop to do so).

As to the third requirement of this exception, Petitioners also cannot show that future proceedings will not give rise to additional federal questions. Petitioners have already attempted to obtain dismissal of certain claims on the basis of a *different* federal preemption argument, relating to federal Truth-in-Leasing regulations. *See* Opp. App. at 25-26. While they lost that motion in the superior court, they may well ultimately seek this Court's resolution of that issue as well, foreclosing this Court's jurisdiction. *See, e.g.*, *Cox*, 420 U.S. at 480 (review inappropriate where additional proceedings might "give rise to a federal question . . . that may later come here") (alteration in original, internal quotations omitted). The existence, at even this early stage, of additional federal questions that may require this Court's intervention undermines this Court's jurisdiction—and further discovery may well reveal additional questions.

ii. No other *Cox* exception applies.

In addition to foreclosing reliance on the second *Cox* exception, the posture of this case renders each of the remaining three *Cox* exceptions similarly unavailable to Petitioners.

The first *Cox* exception applies where, "the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. Like the second exception, this applies only where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have

little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id*. at 478. As discussed above, the issue here "is not conclusive and does not foreordain the outcome of the proceedings below" because Petitioner may avoid liability on a different basis—and has, in any case, promised to try. *See, e.g.*, *Pierce*, 537 U.S. at 141, n.5. As a result, Petitioners cannot rely on the first *Cox* exception.

The third *Cox* exception deals with cases in which, "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. That is not the case here, and Petitioners do not argue otherwise. There is no jurisdiction under this exception where, as here, "[i]f petitioner does not prevail on the merits, it remains free to raise the . . . issue on appeal." *Pierce*, 537 U.S. at 141, n.5. As in *Pierce*, here, even if the California courts regard the decision below as "'law of the case,' [this Court] would still be able to review the . . . issue once a final judgment has been entered." *Id*.

And, finally, the fourth *Cox* exception applies only where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox*, 420 U.S. at 482-83. Again, that is not the case here, and Petitioners do not argue that it is. As Petitioners themselves told the trial court, as in *Pierce*, the decision below "controls 'merely . . . the nature and character of, or . . . the admissibility of evidence in, the

state proceedings still to come.'" *Pierce*, 537 U.S. at 141, n.5 (quoting *Cox*, 420 U.S. at 483); Opp. App. at 13-14, 17-22. So Petitioners cannot rely on the fourth exception, either.

B. There is no conflict among state and federal courts.

Even if this Court had jurisdiction, there is no conflict for it to resolve on the scope of F4A preemption. Petitioners claim that the federal and state courts are divided on whether laws of general applicability are never, or always, preempted. They contend that one group of courts, including the Third, Seventh, and Ninth Circuits, joined by the California courts, hold "that the FAAAA does *not* preempt generally applicable worker-classification laws." Pet. at 4. They claim that a second group, composed of the First Circuit, Massachusetts, and Rhode Island courts, hold "the opposite," Pet. at 15, that the "FAAAA does preempt generally applicable worker-classification laws," or, in the case of Rhode Island, substantively similar laws. Pet. at 4.[11]

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[11] In their Petition for Review to the California Supreme Court, Petitioners drew a different purported circuit split. There, they contended that the Third Circuit's *Bedoya* case "squarely contradicts" the decision below but aligned with the decisions of the First Circuit and Massachusetts courts. Opp. App. at 2-5. They now contend that the Third Circuit is *aligned* with the decision below but is *in conflict with* the decisions of the First Circuit. Pet. at 14-15. Petitioners' new purported split holds up no better than their last one.

There is no such split among the appellate courts.[12] Indeed, one of the very cases that Petitioners rely on to establish this purported conflict rejects their reading of the cases. Petitioners claim that *Massachusetts Delivery Association v. Coakley*, 769 F.3d 11 (1st Cir. 2014), conflicts with the Ninth and Seventh Circuit's supposed rule that generally applicable laws are never preempted. Pet. at 16. But *Coakley* itself rejects this premise, correctly recognizing that the Seventh and Ninth Circuits have no such rule: "The Seventh Circuit disclaimed any notion of [such] 'a simple all-or-nothing question,'" and "the Ninth Circuit recognized that generally applicable statutes, 'broad laws applying to hundreds of different industries,' *could* be preempted if they have a 'forbidden connection with prices, routes, and services.'" *Coakley*, 769 F.3d at 20 (emphasis added). And *Bedoya*, which Petitioners claim is among the cases holding that generally applicable laws may *not* be preempted, Pet. at 14-15, in fact finds that such "*may* . . . be preempted where they have a significant impact on the services a carrier provides," citing *DiFiore*, a case from the First Circuit, which is supposedly on the other side of the split. *Bedoya*, 914 F.3d at 821 (citing *DiFiore*, 646 F.3d at 89) (emphasis added).

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[12] The Court of Appeal's decision underscores that there is no real issue for this Court to resolve; the dispute below, and the decision itself, turned on interpretation of California law, and whether the AB2257 made it "impossible" for defendants to use independent contractor drivers. Pet. App. 16a-22a.

Instead, the state and federal appellate courts have generally (and consistently) found that the general applicability of a law is *not dispositive* under the F4A. But, consistent with *Rowe* and this Court's other guidance, whether the law targets the motor carrier industry can be *relevant* to the degree of the law's impact on prices, routes, and services—and whether that impact is "remote" or "tenuous" within the meaning of *Morales*. Laws that specifically target the industry are more likely to have a non-remote, non-tenuous (i.e., direct or significant) impact on it. *See, e.g.*, *Su*, 903 F.3d at 966 ("This is not to say that the general applicability of a law is, in and of itself, sufficient to show it is not preempted. . . . While general applicability is not dispositive, *Dilts* and *Rowe* still instruct that it is a relevant consideration because it will likely influence whether the effect on prices, routes, and services is tenuous or significant.").[13]

California's approach, embodied in the decision below, is identical. In the foundational *Pac Anchor* case,

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[13] In their Supplemental Brief, Petitioners point to the Ninth Circuit's recent decision in *California Trucking Ass'n v. Bonta*, in support of their claim of a circuit split. 996 F.3d 644, 656 (9th Cir. 2021). But *Bonta* expressly confirms the consensus approach—and further confirms that there is no dispute on the role of general applicability. *Bonta* holds that a "law's general applicability, while not dispositive, 'will likely influence whether the effect on prices, routes, and services is tenuous or significant.' " *Bonta*, 996 F.3d at 656 (quoting *Su*, 903 F.3d at 966). Even if it were somehow inconsistent with existing precedent, including *Su*, *Bonta* would be at most an intracircuit disagreement that should be allowed to mature through review and development of the law at the Ninth Circuit.

the California Supreme Court noted that the F4A targets "'a State's direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide.'" *Pac Anchor*, 329 P.3d at 188-89 (quoting *Dan's City*, 569 U.S. at 264) (cleaned up). As a general matter, a lawsuit "based on an alleged general violation of labor and employment laws does not implicate those concerns." *Id*. at 188. Nonetheless, it acknowledged that a generally applicable classification law could have a prohibited impact, for example where the law would "prevent [motor carriers] from using independent contractors" altogether. *Id*. at 189. Under some circumstances, such a law could represent a prohibited "direct substitution" in judgment by motor carriers to integrate drivers into their operations—and, thus, require motor carriers to particular services. *Id*.

This same approach has been adopted across the country, including in cases that, according to Petitioners, conflict with California's analysis. For example, in analyzing F4A preemption in *Schwann*, which Petitioners claim is inconsistent with the California approach, the First Circuit inquired whether the Massachusetts classification law at issue amounted to a "regulatory prohibition" on "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." *Schwann*, 813 F.3d at 439.

The Massachusetts Supreme Judicial Court asked the same question in another case that Petitioners claim is inconsistent with the California analysis, *Chambers*, 65 N.E.3d 1. In *Chambers*, the court asked whether Massachusetts' law established a "de facto ban" on the use of independent contractors, found that a portion of the law did, and found preemption of that portion as a result. *Id.* at 9. And the Third Circuit, which is purportedly on the other side of the conflict from *Chambers*, followed suit in *Bedoya*, 914 F.3d 812. There, the court inquired whether the New Jersey law "categorically prevents carriers from using independent contractors." *Id.* at 824. The Ninth Circuit has also expressly adopted the *Pac Anchor* analysis as the standard for F4A preemption. *Su*, 903 F.3d at 67 ("Our conclusion today brings us in accord with [*Pac Anchor*]—and, as that court discussed, Congress' intent for the FAAAA's preemptive reach.").

Petitioners' contention that general applicability is dispositive under California precedent also is at odds with their position in the Court of Appeal. There, they argued that general applicability does *not* immunize laws from preemption under California authority. Instead, they argued that laws of general applicability should be evaluated under *Pac Anchor* for whether they prevent the use of independent contractors—that is, whether they substitute the state's judgment for that of the market. Pet. App. at 14a. That is exactly the issue the Court of Appeal evaluated here. It rejected Petitioners' preemption argument because

it found, as a matter of state law interpretation, that AB2257 does not do so. Pet. App. at 16a-22a.

Finally, the illusory nature of Petitioners' purported split is underscored by the fact that it has little to do with the question they assert is presented here, which focuses not on laws' general applicability, but instead on whether a classification law "discourag[es]" the use of independent contractors. Pet. at i. At base, Petitioners' quarrel has less to do with general applicability than it does with their view that any classification law that "discourag[es]" the use of independent contractors—that is, that imposes any costs on their use—should be impermissible. But as Petitioners seem to recognize, there is no split in authority on this issue, either. Courts—including this one—have uniformly held that the mere fact that a regulation increases operating costs is not enough to trigger preemption. *See, e.g.*, *Travelers*, 514 U.S. at 659-60; *DiFiore*, 646 F.3d at 89; *Dilts*, 769 F.3d at 646; *Brindle*, 211 A.3d at 936.

C. Courts have concluded that some laws are preempted while others are not because those laws are different.

Petitioners also assert that "*[t]he same law*" has been found preempted in some courts, but not in others. Pet. at 18. This is incorrect. Petitioners treat "ABC tests" as used among various states as "the same law." They are not. The laws at issue are fundamentally different—and not just because they are the laws of different states, with different legislative histories and

different rules of statutory interpretation. The language of these laws materially differs on precisely the details that matter for the preemption analysis.

As discussed above, whether drivers may be classified as independent contractors is a key factor in the analysis of F4A preemption, with many courts finding that there may be preemption where classifying drivers as independent contractors is prohibited. *See supra* at 28-29. The classification laws at issue vary on exactly this inflection point.

For example, the court below found that AB2257 does not prevent the use of independent contractors because it contains the business-to-business exemption. Pet. App. at 18a. Neither the Massachusetts nor Illinois law contains an analog to this provision. Mass. Gen. Laws ch. 149 § 148B; 820 Ill. Comp. Stat. Ann. 115/2. Illinois's "B" prong, in turn, is more permissive than either California's or Massachusetts' "B" prong, permitting the classification of drivers as employees not just where they perform work outside the usual course of the employer's business, but also where the work is performed "outside all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees." 820 Ill. Comp. Stat. § 115/2. This difference is crucial; the Massachusetts courts found *only* the "B" prong of Massachusetts' law preempted, and only because it set "an impossible standard for motor carriers wishing to use independent contractors" and established a "de facto ban constitut[ing] an impermissible

'significant impact' on motor carriers." *Chambers*, 65 N.E.3d at 9. Accordingly, considering Illinois's permissive "B" prong, the *Chambers* court likely would have reached a different conclusion.

In the end, these are different laws. It is unsurprising that courts applying the same analysis would reach different conclusions as to their validity.

D. The decision below is consistent with this Court's precedent.

Petitioners claim that the decision below is inconsistent with this Court's precedent because it (1) gives weight to the fact that the law is generally applicable; (2) asks whether the law's effect is direct or indirect; and (3) asks whether it is impossible for carriers to classify their drivers as independent contractors. They say that this analysis is inconsistent with this Court's instruction that general applicability does not save a law from preemption, that indirect effects can be sufficient to establish preemption, and that laws can be preempted despite not directly compelling particular prices, routes, or services.

But there is no inconsistency here; as discussed above, consistent with the teaching of *Morales*, *Dan's City*, *Rowe*, *Travelers*, and this Court's other cases, the lower courts generally regard each of these factors as "helpful, but not dispositive," in that they are indicative of the degree to which any impact on prices, routes, and services is remote or tenuous such that it does not come within the scope of preemption. *Bedoya*, 914 F.3d

at 821. While this Court has instructed the lower courts not to adopt categorical rules finding no preemption on the basis of general applicability or indirect effects, reviewing the degree of relation to prices, routes, and services is exactly what this Court's cases demand. It plainly is not the same as finding that these factors, standing alone, categorically protect a law from preemption.

At base, Petitioners' complaint is that they do not wish to pay the taxes and benefits associated with properly classifying their workforce or suffer the administrative burdens associated with doing business in states with different regulations. They would prefer to invalidate any law that "'curtail[s]' a motor carrier's ability to set prices, routes, and services as the free market allows" or has the effect of causing carriers to make decisions that differ from those they would make in the absence of the law. Pet. at 25. But any state law applied to motor carriers, from business taxes to insurance and zoning regulations, would fail under such an analysis. This Court has consistently rejected claims that the F4A sweeps so broadly. *See, e.g.*, *Travelers*, 514 U.S. at 660; *Rowe*, 552 U.S. at 375.

This Court has also emphasized that a demonstration of "clear and manifest" congressional intent is required before finding preemption of basic laws, like those at issue here, that are firmly within the states' police power. *See, e.g.*, *Travelers*, 514 U.S. at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Congress adopted the F4A against the backdrop of diverse worker classification standards, and

not only did it fail to endorse the view that this would constitute an impermissible "regulatory patchwork," it specifically *approved* the existence of different standards.[14] H.R. Conf. Rep. No. 103-677 at 86.

Petitioners claim that a California law cited in the House report shows that Congress disapproved classification laws. But that law has nothing to do with the generally applicable worker classification standards Congress approved or the one at issue here. First, as courts have recognized, one of the primary aims of the F4A was to "'even the playing field' between air carriers and motor carriers." *Mendonca*, 152 F.3d at 1187 (quoting H.R. Conf. Rep. No. 103-677 at 85). As the House report reflects, the law that Congress disapproved was an example of disparities between air and motor carriers that the F4A was passed to eliminate. H.R. Conf. Rep. No. 103-677 at 87. The law also discriminated against companies using a high proportion of independent contractors. Neither issue is present here. *See, e.g.*, *Pac Anchor*, 329 P.3d at 190 (contrasting "generally applicable laws governing when a worker is an independent contractor," with the California law at

[14] Underscoring the point that AB2257 does not create a "regulatory patchwork," there is little that is new about AB2257; older classification standards that Petitioners concede are valid are no different. Many of the very same elements of AB2257 to which Petitioners object were also elements of the *Borello* standard, the validity of which Petitioners do not dispute. Far from creating disruption, because it is a clear test and not a multi-factor standard, AB2257 brings additional predictability to business and drivers.

issue, which singled out companies using large number of independent contractors).

To the contrary, in the legislative history of the F4A's preemption provision, Congress *approved* a broad range of approaches to classification. H.R. Conf. Rep. No. 103-677 at 86. As the Court of Appeal below noted, these laws included one that is very similar to AB2257, 1994 Wis. Stat. § 102.07.[15] That law is structurally identical and substantively similar to AB2257. It classifies workers providing services in an employer's usual course of business as employees, except where the nine conditions of an exemption are met. 1994 Wis. Stat. § 102.07(8)(a), (b). The conditions of this exemption are directed to ensuring that contractors are operating truly independent businesses and largely overlap with those of California's business-to-business exemption. *Id*. § 102.07(8)(b). In other words, Congress did not just fail to clearly indicate that laws like AB2257 are preempted—it also indicated the opposite is true.

The court below properly considered each of these factors. It correctly concluded that AB2257 is a perfectly permissible regulation of the same kind as the "basic regulations of employment conditions" that Congress did not intend to preempt. *Travelers*, 514 U.S. at 660.

[15] Reproduced at Opp. App. at 28.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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