No. 21-194

IN THE

Supreme Court of the United States

CALIFORNIA TRUCKING ASSOCIATION, INC.; RAVINDER SINGH; AND THOMAS ODOM,

Petitioners,

v.

ROBERT BONTA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country—including throughout California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Amicus curiae has a strong interest in this case because it raises important and recurring questions concerning the extent to which States may interfere with the prices, routes, and services of motor carriers in the face of Congress's decision to expressly preempt such interference. Many of the Chamber's members are motor carriers themselves or rely on the services of motor carriers in their day-to-day business. Indeed, the motor carrier industry affects nearly every business in the United States, whether directly or indirectly, as well as American consumers.

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[1] Counsel for petitioners and respondents received timely notice of the intent to file this brief, and both parties have consented to its filing. *See* Rule 37.2(a). Pursuant to Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Granting the Petition for a Writ of Certiorari and reversing the Ninth Circuit's decision below is necessary to resolve the clear split between the First Circuit and Ninth Circuit on the application of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") to worker classification laws affecting the motor carrier industry. As the split currently stands, substantially similar worker classification laws are preempted by the FAAAA in First Circuit jurisdictions, but not in Ninth Circuit jurisdictions. As a result motor carriers can contract with independent contractors in some markets but not others. This significantly hampers the national shipping market and prevents motor carriers from competing freely and efficiently, with prices, routes, and services dictated by the marketplace instead of by state regulation. It also increases costs for businesses and consumers alike, as motor carriers are forced to cope with the expense of regulatory burdens that Congress prohibited in passing the FAAAA.

Granting the petition and reversing would also ensure that, consistent with Congress's goals, businesses and consumers continue to enjoy a full range of services at prices determined largely by the free market. The Court should not allow California to dictate particular business models for the national transportation marketplace.[2]

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[2] The same question regarding the FAAAA preemption provision's interpretation is also presented in C*al Cartage Transportation Express, LLC* v. *California*, No. 20-1453 (Petition filed Apr. 13, 2021), further underscoring the need for this Court's guidance on whether motor carriers may continue to use an independent contractor business model in all jurisdictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FAAAA expressly preempts any state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). This broad preemption provision serves the FAAAA's "overarching goal": to "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.'" *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

The Ninth Circuit's decision deepens a circuit split over interpretation of the FAAAA's preemption provision, and violates this Court's clear instruction that the preemption provision applies broadly. The Ninth Circuit held in a split decision that a "generally applicable law" that "affect[s] a motor carrier's relationship with its workforce"—like California's Assembly Bill 5 ("AB5") and its ABC test—is "not significantly related to rates, routes or services," and therefore is not preempted. Pet. App. 17a. Narrowing the FAAAA, the panel majority explained that a state law may be preempted only if it "'*binds* the carrier to a particular price, route or service'" and "compels a result at the level of the motor carrier's relationship with its customers or consumers"—regardless of whether it upends motor carriers' business models, increases costs, and leads to carriers curtailing services and raising rates. *Id.* (citations omitted).

In so holding, the Ninth Circuit ignored this Court's FAAAA preemption precedent by upholding a state law that "produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) *the services that motor carriers will provide*." *Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378) (emphasis added). As Judge Bennett noted in his dissent, by "brush[ing]" aside *Rowe* and other "binding precedent from the Supreme Court," the panel majority "undermine[d] the balance of state and federal power contemplated by the [FAAAA]." Pet. App. 46a–47a.

Further, the Ninth Circuit solidified a split in the circuit courts' approach to the FAAAA's express preemption provision, acknowledging that the First Circuit has come to the opposite conclusion on the exact same question: whether the FAAAA preempts the ABC worker classification test as applied to motor carriers, because it prevents them from using independent contractors to provide trucking services.

The panel majority recognized that the First Circuit had held the Massachusetts ABC test preempted "because interfering with the [motor carrier's] decision whether to use an employee or an independent contractor could prevent a motor carrier from using its preferred methods of providing delivery services, raise the motor carrier's costs, and impact routes." Pet. App. 30a (citing *Schwann* v. *FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 438–39 (1st Cir. 2016)). Nonetheless, the majority rejected the First Circuit's ruling as "contrary to our precedent" because "such indirect consequences have 'only a tenuous, remote, or peripheral connection to rates,

routes or services.'" *Id.* (quoting *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014)). Thus, after the Ninth Circuit's ruling, a motor carrier operating in California is subject to that state's ABC test, while a carrier in Massachusetts is not subject to that state's virtually identical classification test. *See also id*. at *17–18 (Bennett, J., dissenting) (noting circuit split).

If allowed to stand, the Ninth Circuit's decision and AB5 will directly impede the free and uniform flow of interstate commerce in the nationwide marketplace that Congress established in the FAAAA. The already consequential harms to businesses and workers across the country will grow if the existing split in application of the FAAAA is not corrected.

I. AB5 exerts an impermissible significant impact on motor carriers' prices, routes, and services, as this Court's precedent establishes. The Ninth Circuit's contrary decision cements an intractable split in the courts to have addressed the issue, with the First Circuit and Massachusetts Supreme Judicial Court holding that the FAAAA *does* preempt the ABC test, and the Ninth Circuit and California Supreme Court holding that the same ABC test is *not* preempted. Permitting California to impose its own preferred model for driver classification, which would necessarily distort the national market for motor carrier services, would thwart the FAAAA's core deregulatory purpose and resurrect the very problems Congress sought to eliminate.

II. Motor carriers and the businesses and consumers that rely on them, including many of the Chamber's members, face irreparable harm from the imminent state-mandated restructuring of the entire motor carrier industry in California. If the Court of

Appeal's decision is permitted to stand, AB5 will impose on motor carriers an impossible choice between violating the law, backed by potential criminal penalties, and incurring unrecoverable costs from the forced restructuring of business operations. Moreover, it would irrevocably disrupt and harm companies' business reputations and goodwill; exert a negative impact on customers and businesses relying on motor carriers' services; and encumber a national delivery and supply chain that continues to operate under acute burdens during a time of ongoing economic uncertainty.

III. If the Ninth Circuit's FAAAA preemption analysis is permitted to stand, the harm will not be limited to the trucking industry. Because the FAAAA's preemption language is expressly borrowed from the Airline Deregulation Act ("ADA") and also closely mirrors the Employee Retirement Income Security Act of 1974's ("ERISA") preemption provision, the Ninth Circuit's faulty reasoning can be replicated—and in fact already has been replicated—in those contexts, too. Therefore, the Court can ensure the even and faithful application of its preemption precedents to multiple statutory contexts, affecting multiple industries, by granting the petition and reversing.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition and reverse the Ninth Circuit's decision striking down the district court's preliminary injunction against the enforcement of AB5 against motor carriers in California.

I. The FAAAA Preempts AB5.

The FAAAA's preemption clause was central to the statute's aim of deregulating the motor-carrier industry. Congress already had abolished the old regime, under which a federal agency oversaw motor carriers' prices, routes, and services. But Congress recognized the need to ensure that individual States did not try to re-impose something like the old regime—not only because Congress favored deregulation as a policy matter, but also because a patchwork of inconsistent state-law motor-carrier regulations would be in many ways *worse* than overbearing federal regulations. The uniform, nationwide approach of the FAAAA (with specified exceptions not relevant here) facilitates interstate commerce, efficiency, and competition. This Court has followed Congress's directive, repeatedly holding state laws invalid where those laws "relate[] to" a protected "price, route, or service" (49 U.S.C. § 14501(c)(1)), even if they take "the guise of some form of unaffected regulatory authority" (H.R. Conf. Rep. No. 103-677, at 84 (1994); *see also Rowe*, 552 U.S. at 375 (declining to exempt law from preemption where it is intended to address health and safety concerns)). The Ninth Circuit flouted this precedent and entrenched a circuit split in the process.

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

1. *The Deregulatory Background*: Congress enacted the FAAAA's preemption clause as an integral part—indeed, the culmination—of a long-term effort to deregulate air and motor carriage. Under the preceding regulatory system, federal and

state agencies had developed a patchwork of diverse laws. Congress recognized that, if individual States remained free to impose their own regulations, the benefits of deregulation would be lost. In fact, in one key respect, state regulation was *worse* than the federal regulation Congress abolished: "[t]he sheer diversity of [state] regulatory schemes" was itself "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677, at 87.

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

In 1980, two years after its successful airline deregulation, "Congress deregulated trucking." *Rowe*, 552 U.S. at 368. Congress did not adopt a preemption clause in the 1980 legislation, but it was well aware that certain "individual State regulations and requirements … [we]re in many instances confusing, lacking in uniformity, unnecessarily duplicative, and burdensome." Motor Carrier Act of 1980, Pub. L. No. 96-296, § 19, 94 Stat. 811. Congress directed the relevant federal agencies to conduct a study and develop legislative recommendations. *Id.*

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

Rowe, 552 U.S. at 370 ("the Congress that wrote the [FAAAA] copied the language of the air-carrier pre-emption provision of the Airline Deregulation Act of 1978 …. fully aware of this Court's interpretation of that language").

While it made narrow, specified exceptions tailored to the motor-carrier industry not relevant or asserted here, Congress drew the "*[g]eneral* rule" of preemption in the FAAAA very broadly, exactly as it had in the ADA. 49 U.S.C. § 14501(c)(1) (emphasis added). It did so to forestall States' "attempt[s] to de facto regulate prices, routes or services of intrastate trucking *through the guise of some form of unaffected regulatory authority*." H.R. Conf. Rep. No. 103-677, at 84 (emphasis added).

Thus, in both the ADA and the FAAAA, Congress specified that States may not adopt laws or regulations "related to" the deregulated aspects of the air and motor-carrier industries. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). In the case of motor carriers, the preemption clause specifies that state law may not relate to "a price, route, or service of any motor carrier … with respect to the transportation of property." *Id.* § 14501(c)(1). This provision is appropriately applied broadly: the "'breadth of [the] pre-emptive reach is apparent from [its] language,'" and the statute accordingly has an "expansive sweep" preempting any law "having a connection with or reference to [motor carrier] 'rates, routes, or services.'" *Morales*, 504 U.S. at 384 (citations omitted).

B. AB5 Is Preempted Under This Court's Binding Precedent.

The FAAAA preempts state laws that, like AB5, require motor carriers to "terminate [their]

independent-contractor arrangements and instead hire only employees" (Pet. App. 9a) because such a restriction is "related to a price, route, or service of any motor carrier" (49 U.S.C. § 14501(c)(1)). The "ordinary meaning of these words is a broad one" that encompasses not only direct effects, but indirect effects; if Congress had intended to preempt only state laws that *explicitly* regulate prices, routes, or services, "it would have forbidden the States to 'regulate'" those matters. *Morales*, 504 U.S. at 383–85.

Instead, the FAAAA's preemption clause is framed in "deliberately expansive" language—"conspicuous for its breadth" (*Morales*, 504 U.S. at 384 (citations omitted))—precisely because Congress was mindful that States would "attempt to de facto regulate prices, routes or services … through the guise of some form of unaffected regulatory authority" (H.R. Conf. Rep. No. 103-677, at 84).

AB5 is "related to" all three prohibited categories, and it is therefore preempted:

First, AB5 is "related to … *services*"—it dictates what type of workers (employees) must drive trucks in California. Thus, for every motor carrier who would prefer to continue engaging independent contractors, AB5 impermissibly "require[s] carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer)." *Rowe*, 552 U.S. at 372.

AB5 thus *is* a "service-determining law[]" (*id.* at 373), which "insist[s] on" a "particular employment structure" favored by the State for policy reasons (*Am. Trucking Associations, Inc.* v. *City of Los Angeles*, 559 F.3d 1046, 1056 (9th Cir. 2009)). That is the core of what the FAAAA preempts in its effort to ensure that

"[s]ervice options will be dictated by the marketplace[,] and not by an artificial regulatory structure." H.R. Conf. Rep. No. 103-677, at 88. Congress sought to "ensure transportation … services [would] reflect maximum reliance on competitive market forces" (*Rowe*, 552 U.S. at 371), but AB5 undermines that objective by forcing motor carriers to use employees instead of independent contractors.

Moreover—and contrary to the Ninth Circuit's decision to apply a more lenient preemption analysis to "generally applicable" laws (Pet. App. 2a)—because AB5 has the *effect* of dictating that motor carriers use employees, it makes no difference that the law achieves that end without using those express words. "What is important" for FAAAA preemption purposes "is the *effect* of a state law, regulation, or provision, not its form." *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 283 (2014) (emphasis added). "It defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry." *Id.* at 284 (internal quotation marks omitted).

Second, AB5 is independently preempted because it is "related to" motor carriers' "*routes*." This includes both direct regulatory requirements, such as route changes to ensure that drivers can comply with the meal and rest breaks that California mandates for employees (but not independent contractors), and significant indirect economic impacts, such as route consolidations to offset the increased costs of AB5's mandated employee-driver model. The FAAAA preempts state laws that "as an economic matter … have the forbidden significant effect" on motor carriers, which would offend Congress's deregulatory objectives no less than laws "actually prescribing

rates, routes, or services." *Morales*, 504 U.S. at 385, 388.

The Ninth Circuit ignored these clear effects on routes by narrowing FAAAA preemption for so-called "generally applicable" laws, holding that such laws are not preempted unless they "*bind, compel, or otherwise freeze into place* a particular price, route, or service of a motor carrier *at the level of its customers*." Pet. App. 32a (emphasis added). But such a myopic approach to preemption "simply reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, [Congress] would have forbidden the States to 'regulate rates, routes, and services.'" *Morales*, 504 U.S. at 385 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987)).

There is no exception from FAAAA preemption for state laws of general applicability. This Court rejected that proposed "loophole" nearly three decades ago as "utterly irrational" because "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Id.* at 386. Instead, laws of general applicability, like all other laws, are subject to the ordinary rules of FAAAA preemption.[3]

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[3] Moreover, the Ninth Circuit's analysis fails even under its own invented standard, as AB5 is not a law of general applicability. It is riddled with dozens of exemptions for various occupations, and the vast majority of the statute's text is spent delineating these lobbied exceptions. *See* Cal. Lab. Code §§ 2776–2785. AB5 exempts millions of California workers, spanning all sorts of vocations, skill levels, income, and education. But AB5 contains no exemption for motor carriers.

Unsurprisingly, this Court's precedents are rife with examples of laws that are preempted even though they do not directly *set* prices, routes, or services. For example, the FAAAA forbids the application to motor carriers of "a State's general consumer protection laws" (*id.* at 383) or "state-law claim[s] for breach of the implied covenant of good faith and fair dealing … [that] seek[] to enlarge the contractual obligations that the parties voluntarily adopt" (*Northwest*, 572 U.S. at 276) due to those laws' relation to motor carriers.

AB5 is similar to these laws—it will predictably cause motor carriers to consolidate and reconfigure their routes. For example, employee drivers must tailor their routes to make parking available in order to comply with California's mandated meal and rest breaks for employees. This will inevitably reduce and alter the routes that the free market provides, resulting in serious consequences for the Chamber's members.

Third, AB5 is also independently preempted because it is "related to" motor carriers' "*prices*." Congress, in enacting the FAAAA, expressed particular concern that "[s]tate economic regulation of motor carrier operations causes … increased costs," among other "significant inefficiencies." H.R. Conf. Rep. No. 103-677, at 87.

AB5's mandated replacement of independent owner-operators with a fleet of employee-drivers may raise carriers' costs by *150% or more*. *See* Pet. App. 22a. This significant impact of AB5 on the industry falls well within the bounds of FAAAA preemption, and is obviously a far cry from those laws that, this Court has noted, the FAAAA "might not pre-empt" due to their "'tenuous, remote, or peripheral'" impact

on carriers, "such as state laws forbidding gambling" (*Rowe*, 552 U.S. at 371 (citation omitted)), or "prostitution" (*Morales*, 504 U.S. at 390).

The Ninth Circuit erred in determining that AB5 is not preempted by the FAAAA, and the decision below obviously and blatantly departed from this Court's precedents.

C. The Ninth Circuit's Decision Cements A Split In Courts' Application Of The FAAAA's Preemption Provision.

The panel majority's contortions to evade the inexorable conclusion that AB5 is preempted entrench a circuit split regarding the application of the FAAAA's preemption provision to the ABC test and other so-called "generally applicable" laws. *See* Petition at 15–23.

The panel majority recognized that its decision squarely conflicts with the First Circuit's, which held that the identical ABC test *is* preempted "because interfering with the decision whether to use an employee or an independent contractor could prevent a motor carrier from using its preferred methods of providing delivery services, raise the motor carrier's costs, and impact routes." Pet. App. 30a (citing *Schwann* v. *FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 438-39 (1st Cir. 2016)). The majority opinion below disregarded the First Circuit's analysis as "contrary to our precedent" because "such indirect consequences have 'only a tenuous, remote, or peripheral connection to rates, routes or services.'" *Id.* (quoting *Dilts*, 769 F.3d at 643); *see also Cal. Trucking Ass'n* v. *Su*, 903 F.3d 953, 964 (9th Cir. 2018) (acknowledging that "other States have adopted the 'ABC' test to classify workers, the application of which

courts have then held to be preempted") (citing *Schwann*, 813 F.3d at 437).

Likewise, the Ninth Circuit's decision conflicts with the Massachusetts Supreme Judicial Court's decision adopting the First Circuit's reasoning (*Chambers* v. *RDI Logistics, Inc.*, 65 N.E.3d 1, 7–8 (Mass. 2016)); the Third Circuit's explanation that New Jersey's subtly different ABC test would be preempted if it mirrored Massachusetts' version of the test in prohibiting motor carriers' use of independent contractor drivers (*Bedoya* v. *Am. Eagle Express Inc.*, 914 F.3d 812 (3d Cir. 2019)); and the Seventh Circuit's similar decision explaining that a classification law requiring a motor carrier "to switch its entire business model from independent-contractor-based to employee-based" would be preempted (*Costello* v. *BeavEx, Inc.*, 810 F.3d 1045, 1056 (7th Cir. 2016)). *See also* Petition at 18–23 (further detailing the split).

Thus, the petition presents the Court with an opportunity to resolve the important question of the FAAAA's preemption provision's application to the ABC test—and to "generally applicable" laws more broadly—affecting hundreds of thousands of businesses and workers in states across the country, including in at least 17 states that have so far adopted some form of the ABC test. *See* Robert Sprague, *Using the ABC Test to Classify Workers*, 11 William & Mary Bus. L.R. 733, 748 & n.63 (2020). Permitting the Ninth Circuit's decision to stand, on the other hand, would enable California and other states within the Ninth Circuit to erect new and anticompetitive barriers to the interstate transportation of property—precisely the type of rule that Congress abolished 26 years ago.

II. Implementing AB5 Will Harm Motor Carriers, Businesses That Rely On Them, And Consumers.

As the district court initially found, AB5 poses enormous harm to motor carriers and the countless businesses that rely on them. It also poses great risks to consumers—especially in a period of economic uncertainty caused by COVID-19-related supply chain disruptions and recent inflation affecting Americans and businesses across the country.

A. AB5 Will Harm Motor Carriers.

AB5 will inflict enormous harm on motor carriers, including the motor carriers that provide critical support to the Chamber's member businesses. The impossible choice that motor carriers will face between dramatically "restructur[ing] their business model[s]" and facing criminal and civil penalties (Pet. App. 76a) inflicts irreparable harm on motor carriers and, in turn, on the Chamber's members that rely on them.

The benefits for motor carriers of the existing independent-contractor relationship, as opposed to a mandated employer-employee relationship, are substantial. That is why "competitive market forces"—which Congress wanted to be the primary factor in "determining … the services that motor carriers will provide" (*Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378))—have led numerous motor carrier businesses in California and the nationwide market to adopt independent contractor models. It is often simply more efficient for a logistics company not to be in the business of delivering packages over the "last mile" from distribution center to doorstep. Particularly in the logistics industry, where demand

fluctuates seasonally, maintaining flexibility to expand and contract the workforce as needed is vital to maintaining competitive rates and services.

Yet AB5 would preclude carriers from choosing to contract with individual drivers to provide services to consumers. In its wake, motor carriers may hesitate to take on additional workers as employees, causing severe disruption in supply and distribution chains and leaving business customers that rely on trucking services in a lurch. Thus, allowing AB5 to regulate motor carriers would not only require carriers to adopt California's preferred business model even when it is inefficient to do so from a business perspective, but also spur the re-emergence of just the kind of inconsistent, economically disruptive "patchwork of state service-determining laws, rules and regulations" that Congress sought to eradicate in enacting the FAAAA. *Rowe*, 552 U.S. at 373.

B. AB5 Will Harm Shippers, Retailers, And Manufacturers.

If the split is permitted to stand, the Chamber's members outside the motor carrier industry will face similar harm. All retailers rely upon just-in-time delivery to efficiently manage inventory for retail operations. It takes years for retailers to create reliable, efficient, and cost-effective supply chains and distribution operations. Any disruption to motor carriers' services, routes, and pricing schemes would jeopardize, if not destroy, retailers' longstanding business arrangements in this area. If the Ninth Circuit's approach to FAAAA preemption applies going forward, retailers would be forced to change their operations in the national transportation marketplace to adapt to California's aberrational mandate.

In fact, the Ninth Circuit's decision could not have come at a worse time, as it exacerbates existing stress on retail and other goods-oriented businesses that rely on trucking but are already stretched by COVID-19-fueled materials and labor shortages, supply chain backups, and price increases. The challenges the shipping industry *already* face are enormous. For example, a global semiconductor shortage "is short-circuiting heavy-duty truck production" and as of July 2021, "the backlog of trucks ordered but not built has nearly tripled from the same month a year ago, to 262,100." Jennifer Smith, *Chip Shortage Curtails Heavy-Duty Truck Production*, WALL STREET JOURNAL (Sept. 3, 2021), https://on.wsj.com/3yMccJa. And even where there *are* trucks available, there is simply too much cargo to move and not enough infrastructure to move it, as businesses are coping with a full-fledged "supply-chain crisis," including "port delays … near a record high," with dozens of ships carrying "tens of thousands of shipping containers" "waiting off the shore for weeks, pushing back delivery dates and driving up the cost of transportation" even further. Grace Kay, *The US Shipping Crisis Is Not Going Away As 33 Cargo Ships Float Off The Coast Of LA Waiting To Dock*, BUSINESS INSIDER (Jul. 26, 2021), https://bit.ly/3j5JyhF.

All of this manifests itself in the form of dramatically higher prices for businesses. Consistent with a broader trend of inflation across the country, U.S. freight costs are already rising disproportionate to demand: "U.S. freight demand rose 3.4% from February to March [2021] while … freight expenditures rose nearly twice as fast, at 6.5%." Jennifer Smith, *Truckers Expect U.S. Transport Capacity Crunch to Persist*, WALL STREET JOURNAL (May 2, 2021), https://on.wsj.com/3mmWt0K. And

this trend is set to continue, as "U.S. ports expect congestion" of the nation's shipping routes "to continue deep into next year," with "logjams stretch[ing] into warehouses and distribution networks across the country." Paul Berger, *U.S. Ports See Shipping Logjams Likely Extending Far Into 2022*, WALL STREET JOURNAL (Sept. 5, 2021), https://on.wsj.com/3DVCXOV. As the Council of Economic Advisers has explained, "[t]he situation has been especially difficult for businesses with complex supply chains, as their production is vulnerable to disruption due to shortages of inputs from other businesses." Susan Helper & Evan Soltas, *Why the Pandemic Has Disrupted Supply Chains*, The White House (June 17, 2021), https://bit.ly/3B3Fgx4.

Adding AB5 into the mix would dramatically increase disruption. AB5 would force motor carriers to take on the additional expenses of converting to an all-employee business model, which would add fixed costs while decreasing motor carriers' flexibility to scale up or down as seasonal demand for their services ebbs and flows. For some carriers, this will simply drive them out of business. In fact, "U.S. trucking company failures nearly *tripled* in 2020 from the previous year as fallout from the pandemic deepened pressure on smaller operators," leading to a staggering 3,140 trucking fleets going out of business last year. *See* Jennifer Smith, *Trucking Failures Surged Last Year Under Pandemic*, WALL STREET JOURNAL (Feb. 8, 2021), https://on.wsj.com/38WKTRO. And many other carriers simply cannot absorb these artificially-imposed costs without passing them off to the businesses they contract with, further exacerbating the already-alarming cycle of inflation. *See* Smith, *Truckers Expect U.S. Transport Capacity Crunch to*

Persist ("Manufacturers and retailers … have pointed in recent quarterly earnings reports to rising transport costs and tight capacity as operational hurdles as they seek to restock inventories and meet strong consumer demand.").

C. AB5 Will Harm Consumers

Nor are consumers immune from the inflation that is already affecting the shipping industry, or the price increases that would stem from AB5's drastic increase in labor costs for motor carriers. Consumer goods across the spectrum are already seeing inflation stemming from "'an astronomical rise in shipping rates, a dramatic lengthening of transit times and a logjam of cargo at every port.'" Abha Bhattarai, *How the Delta Variant Stole Christmas: Empty Shelves, Long Waits – And Yes, Higher Prices*, WASH. POST (Sept. 1, 2021), https://wapo.st/3jRpz6L. Impacted goods run the gamut, and include staples that affect the household budgets of countless Americans: antiseptic wipes, trash bags, household appliances, baby-care products, feminine-care products, toilet paper, soda, coffee, peanut butter, and more. Grace Kay, *From Trash Bags To Kitchen Appliances, Here's A Slew Of Household Staples That Are About To Get More Expensive*, BUSINESS INSIDER (May 17, 2021), https://bit.ly/3y15ONT. "Chronic shipping delays also are feeding inflation, just as consumers prepare to stock up for the coming school year. Spot shortages of clothing and footwear could appear within weeks, and popular toys may be scarce during the holiday season." David J. Lynch, *From Ports To Rail Yards, Global Supply Lines Struggle Amid Virus Outbreaks In The Developing World*, WASH. POST (Jul. 26, 2021), https://wapo.st/3szzsZv.

And it is not just retail goods—consumer-facing *services* have also been affected by existing market forces, even without the additional strain that AB5 would cause. For example, airlines "are facing possible fuel shortages at some airports" in more remote areas that are not well-served by rail or pipeline infrastructure and rely on motor carriers to consistently deliver fuel. In those airports, "a shortage of truck drivers and fuel trucks" have led to passenger and cargo delays and flight cancellations. *See* Michael Laris, *Trucker Shortage Leads To Possible Fuel Shortages At Some Airports, Airline Industry Says*, WASH. POST (Jul. 26, 2021), https://wapo.st/3ybeml3. For example, "[a]bout 18% of flights at Bozeman Yellowstone International Airport were delayed or canceled on a recent Sunday due to slow fuel deliveries to airlines." Alison Sider, *Airlines Struggle With Fuel Shortages at Some Smaller Western U.S. Airports*, WALL STREET JOURNAL (Jul. 27, 2021), https://on.wsj.com/3B2sWgC. Adding the cost-increasing and service- and route-limiting effects of AB5 would exacerbate this existing fuel delivery issue.

Finally, the economic effects of increased trucking costs are not evenly distributed across the country. As the aircraft industry example above illustrates, remote or rural areas are disproportionately dependent on trucking as a primary mode of cargo transportation, because they often lack rail or other cargo-carrying infrastructure. In fact, although rural areas account for "only 19% of the nation's population," "[n]early half of all truck vehicle-miles-traveled (VMT) occur on rural roads." *See Fact Sheet: Rural Opportunities to Use Transportation for Economic Success*, U.S. Dep't of Transp., https://bit.ly/3z6QWyR. Thus, rural communities

that are already underserved in myriad other respects are even more susceptible to the shipping price fluctuations that AB5 promises.

III. If Permitted To Stand, The Ninth Circuit's Erroneous Preemption Analysis Will Extend To Other Preemption Statutes

Finally, if the Ninth Circuit's decision immunizing "generally applicable" laws from preemption is permitted to stand, its reach will extend beyond the trucking industry to other statutes with analogous preemption provisions, such as the ADA (upon which the FAAAA's preemption provision was modeled) and ERISA.

In fact, the Ninth Circuit's carve-out for generally applicable laws has already crept into other preemption analyses. For example, in *Bernstein* v. *Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021), the Ninth Circuit decided that California's meal and rest break requirements are not preempted as applied to airlines that fly across state lines, despite the ADA's preemption (like the FAAAA) of any state law "related to a price, route or service of an air carrier." 49 U.S.C. § 41713(b)(1). The *Bernstein* panel's reasoning is almost identical to that of the panel majority below, and relied on the same circuit authority to justify its approach: "Where a law bears no [direct] reference" to prices, routes, or services, the panel explained, "the proper inquiry is whether the provision, directly or indirectly, *binds the carrier to a particular price, route, or service* and thereby interferes with the competitive market forces within the industry." *Bernstein*, 3 F.4th at 1141 (quoting *Dilts*, 769 F.3d at 645 (emphasis added)). The panel further reasoned that California's break laws are "generally applicable"

and do not "bind" airlines to any service—even though they significantly increase costs for airlines. *Id.*

As in the opinion below, the *Bernstein* panel cited no Supreme Court precedent in applying a heightened preemption standard to laws without a direct reference to prices, routes, and services. Nor could it—as this Court has made clear, "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute," and "this notion … ignores the sweep of the 'relating to' language" in both the FAAAA's and ADA's express preemption provisions. *Morales*, 504 U.S. at 386.

But instead of faithfully applying this precedent, the *Bernstein* panel—like the court below—cited the Ninth Circuit's own opinion in *Dilts*, showing that in the ADA context, just as in the FAAAA context, the Ninth Circuit is forging its own preemption framework instead of adhering to the one dictated by this Court and applied by the other circuits. And there is little to stop the Ninth Circuit from going further, applying its immunity for generally applicable laws to other preemption provisions that hinge on whether a state law is "related to" a certain topic, such as ERISA, which "supersede[s] any and all State laws insofar as they . . . *relate to* any employee benefit plan." 29 U.S.C. § 1144(a); *see also Morales*, 504 U.S. at 383–84 (explaining that ERISA's preemptive scope, like the ADA's, "clearly and unmistakably rel[ies] on express pre-emption principles and a construction of the phrase 'relates to'"). Thus, the Ninth Circuit's analysis below poses a risk not just to the trucking industry, but also to airlines and any other industry governed by a preemption provision similar to the FAAAA.

The Court should grant the petition and reverse, resolving the entrenched circuit split and curbing the Ninth Circuit's disregard of this Court's precedent before it does additional damage to trucking and other industries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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