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 AMERICAN TRUCKING ASSOCIATIONS, INC. AND TRUCKLOAD CARRIERS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

RICHARD PIANKA
Counsel of Record
ATA Litigation Center
950 North Glebe Road
Arlington, VA 22203
(703) 838-1889
rpianka@trucking.org

Counsel for Amici Curiae

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INTEREST OF THE AMICI CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

The Truckload Carriers Association is the only national trade association whose sole focus is the truckload segment of the trucking industry. The association represents dry van, refrigerated, flatbed, and rail intermodal carriers operating in the 48 contiguous U.S. states, as well as Alaska, Mexico, and Canada. TCA and its trucking company members regularly comment on matters affecting the national transportation industry's common interests.

Amici each have members who regularly contract with independent owner-operators, and who regularly

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* 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, amici state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

conduct operations in the state of California as well as other states. Thus, they have an acute interest both in the preservation of the independent owner-operator model in the trucking industry, and in ensuring that the congressional policy establishing a deregulated trucking industry is not undermined by a patchwork of state-level impediments to the safe and efficient flow of commerce. Moreover, ATA has special familiarity with the issue of preemption under the Federal Aviation Administration Authorization Act (FAAAA), because it actively participated in the formulation of federal motor carrier deregulation and preemption policy in Congress. See, *e.g.*, H.R. Conf. Rep. No. 103-677, at 88 (1994). Since that time, ATA has been involved, either as a party or as an amicus, in many of the cases before this Court and other courts interpreting and applying the FAAAA's preemption provision and the materially identical preemption provision of the Airline Deregulation Act, as well as cases before numerous courts concerning the use of independent owner-operators in the trucking industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Aviation Administration Authorization Act of 1994 (FAAAA) prohibits states from "enact[ing] or enforce[ing] a 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). In the decision below, a divided panel of the Ninth Circuit held that the FAAAA's preemption provision did not preclude application of California's highly restrictive "ABC test" for worker classification (enacted in 2019 by California's Assembly Bill 5, or

AB-5) to the relationship between motor carriers and owner-operators. The panel majority reached that conclusion without regard to the actual effects of California's test on motor carrier prices, routes, and services, instead concluding that state laws like AB-5 are preempted only if they *bind* motor carriers to *specific* prices, routes, or services. Petitioners have explained in detail the split among the lower courts on the question presented, Pet. 15–23, and why the decision below is wrong, *id.* at 23–32.

Amici submit this brief to further explain how the Ninth Circuit's decision interferes with the Congressional policies embedded in the FAAAA's preemption provision. By effectively allowing California to prohibit motor carriers from using a widespread business model that is permissible in every other state, the decision below creates precisely the kind of patchwork interference with market-driven uniformity and efficiency in the trucking industry that Congress sought to promote when it enacted the FAAAA. And by employing a test that effectively insulates whole categories of state laws from preemption under the FAAAA (and the equivalent provision of the Airline Deregulation Act governing airlines) even when they significantly affect prices, routes, or services, the Ninth Circuit has created a massive exception that is nowhere to be found in the text of the statutes or the Congressional policies behind them, and is foreclosed by this Court's cases. Moreover, this case represents an ideal opportunity to address the Ninth Circuit's serial refusal, in a long line of decisions, to give full effect to these preemption statutes, and to faithfully apply this Court's precedents.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE TO THE TRUCKING INDUSTRY.

The FAAAA preempts any "law related to a price, route, or service of any motor carrier … with respect to the transportation of property" or any "air carrier … transporting property … by motor vehicle." 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). This broad preemption provision was enacted in 1994 with the goal of eliminating the patchwork of burdensome state trucking regulations that had previously developed, and to ensure that state policies would not undo the program of federal deregulation that began with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. Specifically, Congress concluded that state regulation "causes significant inefficiencies," "increase[s] costs," and "inhibit[s] … innovation and technology." H.R. Conf. Rep. No. 103-677 at 87. Indeed, despite deregulatory efforts at the federal level, "[t]he sheer diversity of [state] regulatory schemes [remained] a huge problem for national and regional carriers attempting to conduct ***a standard way of doing business***." *Ibid*. (emphasis added).

To achieve its goal of preserving this kind of regulatory uniformity for the trucking industry, Congress expressly adopted the preemptive language and effect of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. § 41713(b)(1), as this Court had broadly interpreted it in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992). H.R. Conf. Rep. No. 103-677 at 83. As this Court has explained, that choice reflects "Congress' major legislative effort to leave such decisions"

about prices, routes, or services, "where federally unregulated, to the competitive marketplace." *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008). The upshot is that "***States may not seek to impose their own public policies*** or theories of competition or regulation on the operations of a[] … carrier." *Am. Airlines* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995) (emphasis added, internal quotation marks omitted).

The decision below runs roughshod over those Congressional policies in multiple ways. Most immediately, it allows California to effectively prohibit an operational model that, in response to market forces, plays a major role in the trucking industry (and, by extension, the national supply chain). More broadly, the Ninth Circuit's holding amounts to a rule-swallowing exception that would allow states to impose their policy preferences on the trucking industry—no matter how great the impact of those policies on prices, routes, or services—so long as they do so under cover of a generally applicable law or regulation. These interferences with Congressional policy urgently warrant this Court's review.

A. The Independent Owner-Operator Model Is an Important Component of the Market-Driven, Nationally Uniform Business Practices Congress Sought to Promote with the FAAAA.

Petitioners have explained the crucial role that independent owner-operators play in matching freight-hauling capacity to the ever-shifting demands of the national supply chain. Pet. 4–6. See also Br. of National Motor Freight Traffic Ass'n as Amicus Curiae Supporting Petitioners at 6–12. The importance and prevalence of the independent owner-operator model are further reflected in the fact that, everywhere in

the nation outside of California, owner-operators and motor carriers are permitted to enter into independent contracting relationships. Indeed, a majority of states have indicated their embrace of independent owner-operators by enacting express statutory provisions classifying owner-operators as independent contractors. And to amici's knowledge, no other state has erected the kind of barrier to independent contracting relationships between owner-operators and motor carriers that California has—with the exception of Massachusetts, whose materially identical barrier the First Circuit held was preempted under the FAAAA. *Schwann* v. *FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 437 (1st Cir. 2016). To be sure, California is by no means the only state to use *some* kind of ABC test for *some* worker classification purposes. But nowhere else does a state's worker classification law compel motor carriers to provide services exclusively with employee drivers, for a number of reasons.

1. First, the ABC test adopted by the California Supreme Court in *Dynamex Operations W.* v. *Sup. Ct.*, 416 P.3d 1 (Cal. 2018), and codified in AB-5, is far more restrictive than the prevailing form of the test as historically implemented elsewhere. Specifically, while the (B) prong of California's ABC test can only be satisfied if the service performed is "outside the usual course of the hiring entity's business," Cal. Lab. Code § 2775(b)(1)(B), in most jurisdictions that prong can be satisfied "by establishing *either* (1) that the work provided is outside the usual course of the business for which the work is performed, *or* (2) that the work performed is outside all the places of business of the hiring entity." *Dynamex*, 416 P.3d at 34 n.23. See, *e.g.*, Alaska Stat. § 23.20.525(a)(8); Conn. Gen. Stat. § 31-222(a)(1)(B); Del. Code Ann. tit. 19 § 3302(10)(K); Haw. Rev. Stat. § 383-6; 820 Ill. Comp. Stat. 405/212;

La. Rev. Stat. Ann. § 23:1472(12)(E); Md. Code Ann., Lab. & Empl. § 8-205(a); Neb. Rev. Stat. § 48-604(5); Nev. Rev. Stat. § 612.085; N.H. Rev. Stat. Ann. § 282-A:9(III); N.J. Stat. Ann. § 43:21-19(i)(6); N.M. Stat. § 51-1-42(F)(5); 21 Vt. Stat. Ann. § 1301(6)(B); Wash. Rev. Code § 50.04.140(1); W. Va. Code § 21A-1A-16(7).[1]

This difference is crucial for worker classification determinations in the trucking context. Because owner-operators provide services that are *within* the usual course of a motor carrier's business, an owner-operator will never satisfy California's version of the (B) prong—as the Ninth Circuit itself recognized elsewhere. *California Trucking Ass'n* v. *Su*, 903 F.3d 953, 964 (9th Cir. 2018). By contrast, owner-operators typically do perform their work outside the hiring entity's places of business, and thus can meet the conditions of the more common version of the test. See *Bedoya* v. *Am. Eagle Express Inc.*, 914 F.3d 812, 824 (3d Cir. 2019) (because New Jersey used the broad form of the (B) prong in its ABC test, it—unlike the narrow form in the Massachusetts ABC test—did not "categorically prevent[] carriers from using independent contractors").

2. Second, while California has adopted the ABC test for purposes of the state's employment laws generally, see Cal. Lab. Code § 2775(b)(1), other states that have adopted an ABC test have typically done so

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[1] Some states have gone further and rejected the (B) prong altogether, instead embracing an "AC" test that looks just to the "control or direction" and "independently established trade" criteria. See*, e.g.*, Colo. Rev. Stat. § 8-70-115; Ga. Code Ann. § 34-8-35(f)(1); Idaho Code Ann. § 72-1316(4); Pa. Stat. Ann. tit. 43, § 753(l)(2)(B); Or. Rev. Stat. § 670.600(2); S.D. Codified Laws § 61-1-11; Utah Code Ann. § 35A-4-204(3).

for narrow purposes (again, with the exception of Massachusetts' preempted test). In particular, the ABC test has been most widely adopted to provide state administrative agencies with criteria governing unemployment insurance (UI) programs, rather than the full range of state wage and hour laws. See U.S. Dep't of Labor, Comparison of State Unemployment Insurance Laws (2019) at 1–4 ("[m]any of the states provide criteria commonly called the 'ABC' test" to determine whether a worker is an employee for unemployment insurance purposes), *available at* https://oui.doleta.gov/unemploy/pdf/uilawcompar/2019/complete.pdf. See also*, e.g.*, *Carpet Remnant Warehouse, Inc.* v. *N.J. Dep't of Labor*, 593 A.2d 1177, 1184 (N.J. 1991) (noting that "[a] minority of states adopted the federal [common-law] definition of employee" for UI purposes, but "a majority of states … use the ABC test").

Beyond this, a handful of states have adopted ABC tests to govern worker classification outside the administrative-program context. For example, some states have adopted some form of ABC test in establishing penalties for misclassification, but limited to certain specific industries where it presumably deemed independent contracting to be especially problematic. See*, e.g.*, Md. Code Ann., Lab. & Empl. §§ 3-902 *et seq*. (enacting penalties for misclassification, determined by narrow ABC test, in the construction and landscaping industries); N.J. Stat. Ann. § 34:20-4 (adopting traditional ABC test for broad employment law purposes in construction industry); N.Y. Lab. Law § 861-c(1)(a) (narrow ABC test for construction industry); Pa. Stat. Ann. tit. 43 § 933.3(a)(1) (modified ABC test for construction industry). Others have adopted the traditional form of the ABC test (whose (B) prong can be satisfied if the services are performed outside its places of business) to determine the applicability of

specific worker pay rules. See*, e.g.*, 820 Ill. Comp. Stat. 115/2; 21 Vt. Stat. Ann. § 341. But to amici's knowledge, with the (preempted) exception of Massachusetts, no other state has done what California has done: imposed the impossible-to-satisfy version of the ABC test on the trucking industry for the full range of state employment law, making it effectively impossible for motor carriers to contract with independent owner-operators.

3. In fact, a majority of states have enacted express statutory provisions excluding owner-operators from the default test for employment, to ensure that they are unambiguously treated as independent contractors—much as California did for a wide range of other occupations when it enacted and amended AB-5. See Cal. Lab. Code §§ 2777–84. These statutory owner-operator exceptions have the same virtues the California Supreme Court saw in the ABC test: they provide "an easily and consistently applied standard," compared to a multifactor test that "often leaves both businesses and workers in the dark with respect to basic questions." *Dynamex*, 416 P.3d at 33. The difference, of course, is that these exceptions consistently *promote* the independent owner-operator model rather than prohibit it.[2]

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[2] That clarity can be particularly important in the trucking industry, where federal law makes motor carriers just as responsible for the safety performance of independent owner-operators as they are for employee drivers, and charge the carrier with ensuring the owner-operator's adherence to the federal motor carrier safety regulations. 49 U.S.C. § 14102(a)(2); 49 C.F.R. § 376.12(c)(1). While such government-mandated supervision does not, properly understood, constitute the kind of "control" indicative of an employment

States have taken different approaches in formulating their exceptions. For some, the exception is categorical. For example, in both its workers' compensation and UI statutes, Missouri excludes from the definition of "employee" any "individual who is the owner … and operator of a motor vehicle which is leased or contracted with a driver to a for-hire motor carrier." Mo. Rev. Stat. §§ 287.020(1), 288.035.

Other states condition their exception on specifically enumerated, objective criteria that are tailored to the practicalities of motor carrier/owner-operator relationships. For example, Virginia's UI statute recognizes that "[i]n the trucking industry, an owner-operator or lessee of a vehicle which is licensed and registered as a truck, tractor, or truck-tractor … is an independent contractor, not an employee, while performing services in the operation of his truck," provided that "[t]he individual owns the equipment or holds it under a bona fide lease;" "is responsible for the maintenance of the equipment;" "bears the principal burdens of the operating costs;" "is responsible for supplying … personal services to operate the equipment;" is compensated "based on factors related to the

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relationship, it is sometimes nevertheless so construed. Compare*, e.g.*, *N. Am. Van Lines, Inc.* v. *NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) ("employer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status") with *W. Ports Transp., Inc.* v. *Emp. Sec. Dep't*, 41 P.3d 510, 517 (Wash. Ct. App. 2002) ("federally mandated controls" can be considered as evidence of an employment relationship). The statutory exceptions most states have enacted ensure that the independent owner-operator model is protected against such misapplication of an abstract standard.

work performed … and not on the basis of … time expended;" "generally determines the details and means of performing the services" while taking into account "regulatory requirements, operating procedures of the carrier and specifications of the shipper;" and "enters into a contract that specifies the relationship to be that of an independent contractor." Va. Code Ann. § 60.2-212.1.[3]

Whatever the precise form of the exception, each represents the decision of the respective state legislature to ensure that its general worker classification tests do not inhibit the ability of motor carriers and owner-operators to enter into independent contracting arrangements. Especially against the background of this widespread embrace of the independent owner-operator model, AB-5 profoundly interferes with the ability of motor carriers to "conduct a standard way of doing business" throughout the nation, as Congress

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[3] See also Ala. Code § 25-5-1(4); Colo. Rev. Stat. § 8-40-301(5); Fla. Stat. § 440.02(15)(d)(4); Ga. Code Ann. § 34-8-35(n)(17); *id.* § 34-9-1(2); *id.* § 40-2-87(19); 820 Ill. Comp. Stat. 405/212.1; Ind. Code Ann. § 22-3-6-1(b)(8); *id.* § 22-4-8-3.5; Iowa Code § 85.61(11)(c)(3); Kan. Stat. Ann. § 44-503c; *id.* § 44-703(i)(4)(Y); La. Rev. Stat. Ann. § 23:1021(10); Me. Rev. Stat. Ann. tit. 26, § 1043(11)(F)(33); Md. Code Ann., Lab. & Empl. § 8-206(f)(2); *id.* § 9-218; Minn. Stat. § 176.043; *id.* § 268.035(25b); Neb. Rev. Stat. § 48-604(6)(q); N.J. Stat. Ann. § 43:21-19(i)(7)(X); N.D. Cent. Code § 65-01-03; Ohio Rev. Code Ann. § 4111.03(D)(3)(i); *id.* § 4123.01(A)(1)(d); *id.* § 4141.01(B)(2)(m); Okla. Stat. tit. 40, § 1-208.1; *id.* § 2.18(b)(9); Or. Rev. Stat. § 656.027(15); *id.* § 657.047(1)(b); S.C. Code Ann. § 42-1-360(9); S.D. Codified Laws § 62-1-10; *id.* § 62-1-11; Tenn. Code Ann. § 50-6-106(1)(A); *id.* § 50-7-207(e)(1); Tex. Lab. Code Ann. § 406.122(c); Utah Code Ann. § 34A-2-104(5)(d); Wash. Rev. Code § 51.08.180; Wyo. Stat. Ann. § 27-3-108(a)(x); *id.* § 27-14-102(a)(vii)(O).

intended when it enacted the FAAAA. H.R. Conf. Rep. No. 103-677 at 87. And because owner-operators regularly engage in long-haul, interstate transportation, even motor carriers and owner-operators based outside California will have to take heed of California's outlier policy preferences—rather than market demands—when they move freight to, from, or through the state. The result is precisely the kind of state regulatory "patchwork" that Congress enacted the FAAAA to preclude. *Rowe*, 552 U.S. at 373.

B. The Ninth Circuit's Holding Effectively Insulates All Generally Applicable State Laws from Preemption Under the FAAAA and ADA.

In reaching the conclusion that the FAAA does not preempt AB-5, the Ninth Circuit did not undertake an evaluation of AB-5 effects on motor carrier prices, routes, or services—as both the text of the statute and this Court's precedents demand. Instead, it applied an idiosyncratic, atextual test that it uses for state laws and regulations of general applicability: whether the challenged measure *binds* motor carriers to *particular* prices, routes, or services. Pet. App. 19a.

That "binds to" test—which was outcome determinative in this case—for all practical purposes amounts to a categorical exemption to the FAAAA (and ADA) for generally applicable state laws and regulations. The Ninth Circuit invokes its "binds to" test "when a State does not directly regulate (or even *specifically reference*) rates, routes, or services." *Am. Trucking Ass'ns* v. *City of Los Angeles*, 660 F.3d 384, 396–97 (9th Cir. 2011) (emphasis added), *rev'd in part on other grounds*, 569 U.S. 641 (2013). While this test in theory allows for the possibility of preempting a general law or regulation, it is difficult to imagine how a

law that does not so much as "specifically reference" a motor carrier's prices, routes, or services could nevertheless somehow *bind* the motor carrier to a *particular* price, route, or service.

The practical impossibility of satisfying the Ninth Circuit's test is illustrated by this very case. If any general law could satisfy such a test, surely AB-5 would: as Judge Bennett explained in dissent below, AB-5 *does* bind motor carrier to provide services to its customers by means of a specific, state-favored model. Pet. App. 38a. And the Ninth Circuit has *never* found a law of general applicability that meets its "binds to" test in any of its FAAAA or ADA cases.

The upshot is a categorical exclusion of general laws from preemption under those statutes. As this Court explained nearly thirty years ago, insulating from preemption laws that do not "specifically address[]" carriers would "creat[e] an utterly irrational loophole," 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." *Morales*, 504 U.S. at 386. That is precisely what the Ninth Circuit's "binds to" test for general laws does, and this Court's review is necessary to correct the resulting impairment of the federal scheme the FAAAA and ADA were designed to protect.

II. THE NINTH CIRCUIT'S SERIAL REFUSAL TO FAITHFULLY APPLY THIS COURT'S FAAAA AND ADA PRECEDENTS FURTHER NECESSITATES REVIEW.

Resolving the lower-court split on an issue of such importance is more than enough to warrant this Court's review. But review is all the more urgent in

light of the fact that the decision below is by no means an isolated case. On the contrary, it is part of a long line of decisions in which the Ninth Circuit has followed its atextual—and unsatisfiable—test for preemption of generally applicable state laws and regulations, despite this Court's repeated rejection of such an approach. This case thus presents an opportunity to correct the Ninth Circuit's steadfast refusal to apply the preemption provisions of the FAAAA and ADA in conformance with the text and with this Court's precedents.

1. The Ninth Circuit first articulated its "binds to" analysis in the ADA preemption context, in *Air Transport Association of America* v. *City & County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001). There, in a challenge to a "generally applicable … Ordinance," *id*. at 1074, the majority of a divided panel looked to the Supreme Court's cases involving ERISA, which preempts state laws "insofar as they … relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). The *Air Transport* majority concluded that the "ERISA cases suggest that in order for the 'effect' of a state law to cause preemption, the state law must compel or bind an ERISA plan administrator to a particular course of action with respect to the ERISA plan." 266 F.3d at 1071. As Petitioners explain, this conclusion rested on a misreading of the ERISA decisions. Pet. 28–29. And in importing that approach to the ADA context, the *Air Transport Association* majority ignored this Court's express rejection of the argument that it "only pre-empts the States from actually prescribing rates, routes, or services," because such an approach "simply reads the words 'relating to' out of the statute." *Morales*, 504 U.S. at 385.

2. The Ninth Circuit later invoked the "binds to" formulation in a preemption challenge under the FAAAA, in *American Trucking Associations*. There, another divided panel held that in a so-called "borderline" case—*i.e.*, "when a State does not *directly* regulate (or even *specifically reference*) rates, routes, or services"—"the proper inquiry is whether the provision, directly or indirectly, 'binds the … carrier to a particular price, route or service.'" 630 F.3d at 396–97 (quoting *Air Transport Ass'n*, 266 F.3d at 1072) (emphasis added).

3. The Ninth Circuit applied effectively the same standard in *Ginsberg* v. *Northwest, Inc.*, 695 F.3d 873 (9th Cir. 2012), only to be reversed by this Court. *Ginsberg* involved a common-law claim against an airline for breach of the implied covenant of good faith and fair dealing in terminating the plaintiff from its frequent-flier program. Relying on *Air Transport Association*, the Ninth Circuit held that the claim was not preempted because the effect of "enforcement of the covenant is not 'to *force* the Airlines to *adopt or change* their prices, routes or services—the prerequisite for ADA preemption.'" *Id.* at 880 (quoting *Air Transport Ass'n*, 266 F.3d at 1074) (emphasis added).

But this Court unanimously rejected that approach. *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273 (2014). It began by specifically noting that the Ninth Circuit's decision had "[r]el[ied] on pre-*Wolens* Circuit precedent" for the proposition that a state law is not preempted if it "does not '*force* the Airlines to *adopt or change* their prices, routes or services.'" *Id.* at 279 (quoting *Ginsberg*, 695 F.3d at 880) (emphasis added). Instead, the Court explained, "[w]hat is important is the *effect* of a state law, regulation, or provision, not its form." *Id.* at 283 (emphasis added). The Court held

that the proper inquiry to determine whether a particular state law "relates to" "rates, routes, or services" is whether "it has 'a connection with, or reference to, airline' prices, routes, or services.'" *Id.* at 284 (quoting *Morales*, 504 U.S. at 384). All nine Justices agreed that a claim for breach of the implied covenant of good faith and fair dealing necessarily had such a connection and effect—despite the fact that the background law did not force the airline to do anything, much less *bind* it to a *particular* price, route, or service—because it was invoked to apply "state policy" preferences to a dispute about the terms of the airline's frequent flyer program. *Id.* at 288. See also *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995) (holding that the ADA preempted claims under the generally applicable Illinois Consumer Fraud Act).

4. Despite this Court's rebuke in *Ginsberg*, the Ninth Circuit returned to its "binds to" test in *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), when it held that the FAAAA did not preempt application of California's meal- and rest-break rules to commercial drivers. The *Dilts* panel acknowledged that the state break rules would affect motor carriers "when allocating resources and scheduling routes." *Id.* at 647. But instead of assessing the impact on carrier prices, routes, or services, the Ninth Circuit treated those effects as irrelevant, holding simply that that the break rules were not preempted because they "do not 'bind' motor carriers to specific prices, routes, or services." *Ibid.* (quoting *Am. Trucking*, 660 F. 3d at 397).

5. The decision below, in turn, relied on *Dilts* for its holding that AB-5 is not preempted because it does not "bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers." Pet.

App. 2a (citing *Dilts*, 769 F.3d at 647). And in a series of subsequent decisions, the Ninth Circuit has routinely applied its "binds to" test as a categorical rule that is dispositive in FAAAA and ADA preemption challenges to generally applicable laws, without consideration of the actual effects of those laws on carrier prices, routes, or services. See *Bernstein* v. *Virgin Am., Inc.*, 3 F.4th 1127, 1141 (9th Cir. 2021) (relying on *Dilts* to hold that ADA did not preempt application of California break rules to flight attendants, without consideration of their actual effect on airline prices, routes, or services), petition for cert. pending sub nom. *Virgin Am., Inc.* v. *Bernstein*, No. 21-260 (filed Aug. 19, 2021); *Air Transp. Ass'n of Am.* v. *Wash. Dep't of Labor & Indus.*, 2021 WL 3214549, *2 (9th Cir. May 21, 2021) (relying on *Dilts* and *Bernstein* to hold that "generally applicable labor regulations are too tenuously related to airlines' services to be preempted" as a category, and that the "proper inquiry" is the "binds to" test); *Ward* v. *United Airlines*, 986 F.3d 1234, 1243 (9th Cir. 2021) (holding that ADA does not preempt application of California Labor Code § 226 to pilots and flight attendants "for the same reasons" the break laws at issue in *Dilts* were not preempted: they were general laws that "did not bind motor carriers to specific prices, routes, or services" and "[t]hus were not the sorts of laws that the FAAAA or ADA preempt"); *Ridgeway* v. *Walmart Inc.*, 946 F.3d 1066, 1083 (9th Cir. 2020) (relying on *Dilts* to "quickly dispense" with the argument that the FAAAA preempted California law regarding driver layovers, because they "'do not set prices, mandate or prohibit certain routes, or tell motor carriers what services that they may or may not provide'" (quoting *Dilts*, 769. F.3d at 647)).

In short, the Ninth Circuit's refusal to give full effect to the broad preemption provisions of the FAAAA

and the ADA is a frequently recurring problem that has gone on long enough. The Court should take this opportunity put an end to it, and reaffirm the important Congressional policies that the Ninth Circuit's approach undermines.

III. THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THE COURT TO RESOLVE THESE RECURRING AND IMPORTANT ISSUES.

This case presents an ideal vehicle for resolution of the issues it presents, for several reasons.

1. First, the conflict among the lower courts created by the decision below is indisputable. The majority below expressly acknowledged as much, when it characterized the First Circuit's holding in *Schwann* and the Third Circuit's analysis in *Bedoya* as "contrary to our precedent." Pet. App. 29a–30a. The panel majority recognized that the Massachusetts ABC test was "identical" in relevant respects to AB-5's test, but rejected the outcome in *Schwann* as inconsistent with the holding in *Dilts* that generally applicable laws like AB-5 are, as a category, insufficiently connected to rates, routes, or services to warrant preemption under the FAAAA. Pet. App. 30a (citing *Dilts*, 769 F.3d at 643). And, as Petitioners explain, the split among the lower courts goes much further than that. See Pet. 15–23.

2. Second, the case comes to the Court with a well-developed evidentiary record, reflecting the real-world effects of AB-5 on motor carrier prices, routes, and services. Courts do not require "the presentation of empirical evidence" to find a state measure preempted under the FAAAA, and instead regularly look to "the logical effect that a particular scheme

has." *N.H. Motor Transp. Ass'n* v. *Rowe,* 448 F.3d 66, 82 n.14 (1st Cir. 2006), *aff'd* 552 U.S. 364. And as the First Circuit concluded with respect to Massachusetts' equivalent ABC test, the logical effects on prices, routes, and services of an effective prohibition on independent contractor owner-operators are significant enough that "this impact need not be proven by empirical evidence." *Schwann*, 813 F.3d at 435. The same is true with respect to California's ABC test, but the evidence submitted below makes this all the more clear by concretely illustrating AB-5's logical effects. See Pet. 10–12.

3. Lastly, because this case arises from a federal court of appeals, there is no question of the Court's jurisdiction to review under 28 U.S.C. § 1254. Moreover, as a practical matter, the substance of the Ninth Circuit's holding would render any further proceedings below a waste of judicial and party resources. The Ninth Circuit reversed the district court's grant of a preliminary injunction not because Petitioners failed to make a sufficient factual showing of their likelihood of success, but because it held, as a matter of law, that "AB-5 … is not preempted by the F4A." Pet. App. 2a. Thus, there is no possibility of a different outcome after a fully developed record and trial, and further proceedings would not assist this Court in reviewing the Ninth Circuit's unequivocal holding. Given the urgency of the issues presented here to motor carriers—who currently face major business-model and investment decisions that turn on whether or not California is permitted to prohibit independent owner-operators—this Court should not wait any longer to vindicate the "broad pre-emptive purpose" that Congress expressed in the FAAAA. *Morales*, 804 U.S. at 383.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted.

RICHARD PIANKA
Counsel of Record
ATA Litigation Center
950 North Glebe Road
Arlington, VA 22203
(703) 838-1889
rpianka@trucking.org

Counsel for Amici Curiae

September 10, 2021