No. 21-194

In the Supreme Court of the United States

CALIFORNIA TRUCKING ASSOCIATION, INC., *et al.*,
Petitioners,

v.

ROB BONTA, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Like other States, California applies a general definition of "employee" for purposes of distinguishing between employees and independent contractors under a range of state rules and programs. California's definition, codified by statute under A.B. 5, applies to employers in hundreds of different industries across the State. Petitioners sought a preliminary injunction against application of A.B. 5 to the motor carrier industry under the Federal Aviation Administration Authorization Act (FAAAA), which preempts certain laws "related to a price, route, or service of [a] motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The question presented is:

Whether the court of appeals correctly held that petitioners' preemption challenge is unlikely to succeed on the merits.

PARTIES TO THE PROCEEDING

The petition correctly identifies the parties to the proceeding, *see* Pet. ii, except that the Director of the Department of Industrial Relations is presently Katrina S. Hagen, and the Labor Commissioner is now Lilia Garcia-Brower.

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STATEMENT

1. a. In California and other jurisdictions, many labor and employment laws turn on whether a worker is classified as an "employee" or "independent contractor."[1] Courts and administrative bodies have adopted various tests for purposes of distinguishing between employees and independent contractors.

Some States follow a multi-factor balancing approach. *See* Bruntz, *The Employee/Independent Contractor Dichotomy*, 8 Hofstra Lab. L.J. 337, 338 (1991); Restatement (Second) of Agency § 220 (1958). While the relevant factors are generally "nonexhaustive" and no single one "is determinative," *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989), the principal factor is typically "whether the person to whom services is rendered has the right to control the manner and means of" the work, *e.g.*, *Dynamex Operations W. v. Superior Ct.*, 4 Cal.5th 903, 922 (2018); *see* Bruntz, *supra*, at 338-339.

Other States have adopted a simpler test, often referred to as the "ABC test." Shimabukuro, Cong. Research Serv, R46765, *Worker Classification* 9 (2021), https://crsreports.congress.gov/product/pdf/R/R46765 (last visited Oct. 8, 2021).[2] That test presumes that a worker is an employee and looks to just three factors: whether (A) "the worker is free from the control and direction of the hirer in connection with the performance of the work"; (B) "the worker performs work

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[1] *See, e.g.*, Cal. Unemp. Ins. Code § 976 (unemployment insurance); Cal. Labor Code § 1174 (payroll records for employees); *id.* § 246 (sick leave); *id.* § 3600 (workers' compensation).

[2] Some States have adopted the ABC test for purposes of just one or several state laws or programs; others apply it more broadly. *See* Shimabukuro, Cong. Research Serv., *supra*, at 10.

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." *E.g.*, *Dynamex*, 4 Cal.5th at 957; *see id.* at 950 n.20. Generally, "all three elements must be satisfied before an individual will be classified as an independent contractor." Shimabukuro, Cong. Research Serv., *supra*, at 10.[3]

b. Before 2018, California courts generally applied a version of the multi-factor balancing approach, often called the "*Borello* test" after *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). *See* Pet. App. 2a. Under that test, workers in a number of different industries challenged employer classification decisions, arguing that their employers had improperly treated them as independent contractors. *See Dynamex*, 4 Cal.5th at 954. Drivers working for motor carriers, for example, filed numerous complaints challenging their classification as independent contractors. In a great many of those cases, courts or administrative agencies agreed with the drivers that they should have been classified as employees under the *Borello* test.[4]

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[3] In some States, factor (B) examines whether the worker's services are "*either* outside the [employer's] usual course of . . . business" *or* "outside of [the employer's] places of business." *Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 816-817 (3d Cir. 2019) (emphasis added) (examining New Jersey ABC test).

[4] *See, e.g.*, Cal. S. Comm. on Appropriations, Analysis of S.B. 1402 at 1-2 (May 7, 2018), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1402 (last visited Oct. 8, 2021) (of some 1,150 misclassification complaints filed by drivers working for carriers at the State's ports, drivers prevailed in 97% of cases); *Garcia v. Seacon Logix, Inc.*, 238 Cal. App. 4th 1476, 1488 (2015) (describing "unassailable" evidence that motor

In 2018, the California Supreme Court unanimously held that a version of the ABC test governs worker classification for purposes of California wage orders. *See Dynamex*, 4 Cal.5th at 916-917. Wage orders are issued by the Industrial Welfare Commission and impose a range of requirements on employers "relating to minimum wages, maximum hours, and specified basic working conditions." *Id.* at 926; *see id.* at 913-914 & n.3. The court explained that the multi-factor "all the circumstances" standard "afford[ed] a hiring business greater opportunity to evade its fundamental responsibilities" under labor and employment laws. *Id.* at 955; *see also id.* at 954 (noting that the multi-factor balancing approach "frequently le[ft] the ultimate [classification] determination to a subsequent and often considerably delayed judicial decision").

In 2019, the California Legislature enacted A.B. 5, which both extended and narrowed the *Dynamex* decision. *See* Pet. App. 4a. It extended the decision by adopting the ABC test to define the term "employee" for certain provisions of the State's Labor and Unemployment Insurance Codes, as well as the wage orders addressed in *Dynamex*. Cal. Labor Code § 2775(b)(1).[5]

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carrier drivers "were employees, not independent contractors" under the *Borello* test); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101-1105 (9th Cir. 2014) (similar); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988-997 (9th Cir. 2014) (similar); *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 10-13 (2007) (similar); *Air Couriers Int'l v. Emp. Dev. Dep't*, 150 Cal. App. 4th 923, 937-939 (2007) (similar).

[5] A.B. 5 does not apply to all California labor and employment rules. For example, "traditional common law principles of agency and respondeat superior supply the proper analytical framework" for evaluating certain forms of employer liability under a statute

It narrowed *Dynamex* by adopting certain exemptions to the ABC test, "including a 'business-to-business' exception." Pet. App. 5a. That exception clarifies that "[A.B. 5] and the holding in *Dynamex* do not apply to a bona fide business-to-business contracting relationship." Cal. Labor Code § 2776. Where certain criteria are satisfied, "the determination of employee or independent contractor status of the business services provider shall be governed by *Borello*." *Id.*; *see, e.g.*, *People v. Superior Ct. of Los Angeles Cty.*, 57 Cal. App. 5th 619, 632-634 (2021) (*Cal Cartage*) (explaining how motor carrier drivers may potentially qualify as independent contractors under this exemption), *cert. denied* No. 20-1453 (Oct. 4, 2021).[6]

2. Petitioner California Trucking Association is a trade group representing "motor carriers that provide trucking services in California." Pet. 10. In 2016, following a number of decisions holding that the Association's members had misclassified their drivers as independent contractors, *see, e.g.*, *supra* pp. 2-3 n.4, the Association filed a suit alleging that the *Borello* test was preempted by the Federal Aviation Administration Authorization Act (FAAAA). The FAAAA preempts state laws and regulations "related to a price, route, or service of [a] motor carrier . . . with respect to the transportation of property." 49 U.S.C.

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barring workplace harassment. *Patterson v. Domino's Pizza, LLC*, 60 Cal.4th 474, 499 (2014). And where a provision of the Labor or Unemployment Insurance Codes (or a wage order) includes a provision-specific definition of "employee," that definition continues to apply. *See* Cal. Labor Code § 2775(b)(2).

[6] In 2020, the Legislature adopted A.B. 2257, amending and clarifying A.B. 5 in several respects immaterial to the question presented here. *See* Pet. App. 4a-5a & nn.4-5. Like the court of appeals' opinion, this brief refers to "A.B. 5" for simplicity.

§ 14501(c)(1). The Association argued that the *Borello* standard falls within the FAAAA's preemptive scope because it "disrupts" the ability of motor carriers to classify their workers as independent contractors. *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 958 (9th Cir. 2018).

In that case, a federal district court rejected the Association's preemption claim and the court of appeals affirmed. The court of appeals explained that "generally applicable background regulations that are several steps removed from prices, routes, or services" are not normally preempted by the FAAAA. *Su*, 903 F.3d at 963. It viewed the *Borello* test as a prime example: "if a current driver is found to be an employee" under *Borello*, a motor carrier will still "be able to provide the service[s] it was once providing through that driver." *Id.* at 965. While the classification of a driver as an employee might increase "business costs," meaning that carriers might "have to take the *Borello* standard and its impact on labor laws into account when arranging operations," the court concluded that "[t]he mere fact that a motor carrier must take into account a state regulation when planning services is not sufficient to require FAAAA preemption." *Id.*

The Association sought plenary review in this Court, which denied certiorari without calling for a response. *See* No. 18-887 (March 18, 2019).

3. In 2019, following the California Supreme Court's decision in *Dynamex* and the Legislature's enactment of A.B. 5, the Association and two individual drivers (all petitioners here) filed the complaint from which this petition arises. Pet. App. 6a. While abandoning the Association's prior argument that the FAAAA preempts application of the *Borello* standard, *see, e.g.*, C.A. Answering Br. 76, petitioners alleged

that the FAAAA preempts A.B. 5 as applied to motor carriers' classification of their drivers. *See* Pet. 10.

a. Petitioners moved for a preliminary injunction, and the district court (Benitez, J.) granted the requested relief, enjoining A.B. 5 with respect "to any motor carrier operating in California." Pet. App. 78a. The district court reasoned that, unlike the multi-factor *Borello* standard, A.B. 5 "categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees." *Id.* at 66a-67a. Under prong "B" of the new three-part test, the court reasoned, "drivers necessarily perform work *within* 'the usual course of the [motor carrier] hiring entity's business,'" meaning that drivers "will *never* be considered independent contractors under California law." *Id.* at 67a. In the district court's view, that sufficed to show that petitioners' FAAAA preemption claim is likely to succeed on the merits because application of "all of California's employment laws" to motor carrier drivers would have a "significant impact on motor carriers' prices, routes or services." *Id.* at 73a.[7] The court concluded that the remaining equitable factors also supported provisional relief. *Id.* at 75a-77a. The effect of the preliminary injunction was to leave the *Borello* test in place as the standard governing whether motor carrier drivers qualify as employees or independent contractors. *Id.* at 77a.

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[7] The district court was not persuaded "that motor carriers could . . . avail themselves" of the business-to-business exemption in A.B. 5, and thereby avoid application of the ABC test. *Id.* at 74a; *see supra* p. 4. It incorporated by reference a state trial court's rejection of the "argument that the 'business-to-business' exception saves AB-5 from FAAAA preemption." Pet. App. 74a. That trial court decision was subsequently reversed. *See Cal Cartage*, 57 Cal. App. 5th at 632-634; Pet. App. 30a n.13.

b. The court of appeals reversed. The court's opinion, authored by Judge Ikuta, began with the text of the FAAAA. It recognized that the words "related to" must be construed to "'draw a line between laws that are significantly related to rates, routes, or services, even indirectly, and thus are preempted, and those that have only a tenuous, remote, or peripheral connection to rates, routes, or services, and thus are not preempted.'" Pet. App. 16a. Otherwise, "preemption would never run its course." *Id.* at 15a (quoting *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013)). The court pointed to Justice Scalia's observation that, while "many a curbstone philosopher has observed [that] everything is related to everything else," "the 'related to' language" cannot be read "to decree a degree of preemption that no sensible person could have intended." *Id.* (quoting *Cal. Div. of Lab. Standards Enf't v. Dillingham Const.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring)).

In light of this Court's decisions, the court of appeals held that petitioners are unlikely to succeed in showing that A.B. 5 is sufficiently related to carrier prices, routes, or services to be preempted by the FAAAA. Pet. App. 32a. The court emphasized that A.B. 5 is a "generally applicable labor law"—a background regulation "clearly within an area of traditional state power." Pet. App. 31a-32a & n.14; *see id.* at 2a, 20a. It does not "directly or indirectly" require carriers to adopt certain prices, routes, or services. *Id.* at 18a (internal quotation marks omitted); *see id.* at 20a-21a. Nor had petitioners demonstrated that A.B. 5 would otherwise "meaningfully interfere" with carrier prices, routes, or services. *Id.* at 18a. Petitioners conceded that carriers could continue to rely on "owner-operators (*i.e.*, drivers who own their own trucks)" "by hiring [them] . . . as employees." *Id.* at

22a n.11.[8] And petitioners' other "allegations of increased costs" were "merely speculative" in light of the "undeveloped record in the district court" at this preliminary stage of the case. *Id.*; *see id.* at 21a-24a.[9]

Judge Bennett dissented. In his view, the FAAAA preempts A.B. 5, as applied to motor carriers, because it "requires them to use employees rather than independent contractors as drivers," thereby "mandat[ing] the very means by which [the Association's] members must provide transportation services to their customers." Pet. App. 38a. The dissent noted, however, that the majority applied the correct "legal standard." *Id.* at 48a-49a n.7. The "district court and the majority disagree[d] only as to the *application* of that law to the *facts* of this case." *Id.*

Petitioners filed a petition for rehearing en banc, but the court denied it after "no judge requested a vote for en banc consideration." Pet. App. 81a

ARGUMENT

The court of appeals properly held that petitioners are not entitled to a preliminary injunction barring application of A.B. 5 to the motor carrier industry. A.B. 5 is a generally applicable worker-classification standard that does not require motor carriers to adopt any particular prices, routes, or services; and petitioners have not substantiated their allegations that A.B.

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[8] *See, e.g.*, C.A. Excerpts of Record 104 ("Of course, [owner-operators] can be employed or hired. However, they must be hired *as employees*.").

[9] Because the court determined that petitioners' preemption claim is unlikely to succeed whether or not the "business-to-business exemption permits motor carriers to contract with truly independent [drivers]," the court declined to "address this issue." *Id.* at 21a n.10 (internal quotation marks omitted).

5 will otherwise materially impair prices, routes, or services. Petitioners principally seek this Court's review on the basis of alleged disagreement among the lower courts. But petitioners fail to identify a "square[]" circuit conflict (Pet. 15) of the type that would warrant further review by this Court—or any other basis that would justify this Court's intervention at this stage of the proceedings. Indeed, this Court very recently denied a petition raising the same question and highlighting the same purported conflict, *see Cal Cartage Transp. v. California*, No. 20-1453 (Oct. 4, 2021), and it has repeatedly denied petitions raising similar questions, *see infra* pp. 11-14.

I. THE DECISION BELOW CORRECTLY APPLIES THIS COURT'S PRECEDENTS

Consistent with the statutory text and this Court's decisions, state and federal courts routinely reject FAAAA preemption challenges to generally applicable state labor and employment rules that do not significantly impact the prices, routes, and services of a motor carrier with respect to the transportation of property. Here, the court of appeals properly applied this Court's precedent to conclude—at this preliminary stage of the case—that petitioners had not established a likelihood of success on their preemption challenge to A.B. 5.

1. Congress's goal in enacting the FAAAA was to promote "reliance on competitive market forces," "ensur[ing] that the States would not undo federal deregulation with regulation of their own." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 255-256 (2013) (internal quotation marks omitted). As the text of 49 U.S.C. § 14501(c)(1) makes clear, however, Congress "resolved to displace" only "'*certain* aspects of the State regulatory process.'" *Id.* at 263. It "massively

limit[ed] the scope of preemption" by requiring that a state law relate not just to a "'price, route, or service' of a motor carrier in any capacity," but to a price, route, or service specifically involving "a motor carrier's 'transportation of property.'" *Id.* at 261 (quoting *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting)).

And while the words "relate to" could theoretically "extend to the furthest stretch of . . . indeterminacy," *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997), this Court has "refused to read" that language "with an 'uncritical literalism,'" *Dan's City*, 569 U.S. at 260. That is because "'[a] reasonable person conversant with applicable social conventions' would not understand 'relate to' as covering any state law with a connection to" a motor carrier's transportation of property, "no matter how remote the connection." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 484 (2020) (Thomas, J., concurring) (addressing similar language in ERISA preemption clause); *see also id.* ("If someone, for instance, asserted that he is 'related to Joe,' it would be reasonable to presume a close familial relationship.").

Consistent with that ordinary meaning, the Court held in *Dan's City* that a regulation of "the means by which [a motor carrier] obtained payment for" certain transportation services was not sufficiently related to the underlying services to trigger FAAAA preemption. 569 U.S. at 265. The Court also agreed with Justice Scalia's "characterization of" FAAAA preemption "in the *Ours Garage* dissent," *id.* at 261 n.4, where he explained that "restrictions on the weight of cars and trucks that may enter highways or pass over bridges" do not bear a sufficient relationship to carrier trans-

portation services to be preempted, even if they effectively control the types of trucks a carrier may use to provide such services across the country, *Ours Garage*, 536 U.S. at 449. By contrast, in *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364, 372 (2008), the Court concluded that the FAAAA preempted a Maine statute requiring motor carriers to perform certain services related to the delivery of tobacco—services that "the market [did] not . . . provide (and which the carriers . . . prefer[red] not to offer)."

The Court has also recognized that the FAAAA does not ordinarily preempt laws of general applicability—that is, laws "broadly prohibit[ing] certain forms of conduct" by both motor carriers and other businesses alike. *Rowe*, 552 U.S. at 375; *see Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting). In *Dan's City*, for example, the Court explained that generally applicable zoning regulations "fall[] outside the [FAAAA's] preemptive sweep," even if such regulations effectively determine "the physical location of motor-carrier operations." 569 U.S. at 264. The Court emphasized that preemption of zoning regulations would be especially inappropriate because they have long been "peculiarly within the province of state and local legislative authorities." *Id.* (internal quotation marks omitted).

2. Applying the FAAAA's text and this Court's precedent, state and federal appellate courts have consistently rejected FAAAA preemption challenges to generally applicable "state employment laws." *Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 820 (3d Cir. 2019) (collecting cases). And this Court has repeatedly denied certiorari when the challengers in those cases sought further review.

Most recently, the California Court of Appeal rejected the same FAAAA preemption challenge to A.B. 5 that petitioners present here. *See People v. Superior Ct. of Los Angeles Cty.*, 57 Cal. App. 5th 619, 632 (2020) (*Cal Cartage*). Pointing to the statute's business-to-business exemption, the court explained that A.B. 5 is "a generally applicable employment law" that "states a general and rebuttable presumption that a worker is an employee unless the hiring entity demonstrates certain conditions." *Id.* at 630, 631; *see id.* at 632-634; *supra* p. 4. For that reason, the court concluded that A.B. 5 "does not have an impermissible effect on prices, routes, or services." 57 Cal. App. 5th at 630. Last week, this Court denied certiorari. *See* No. 20-1453 (Oct. 4, 2021).

Similarly, in *Costello v. BeavEx, Inc.*, 810 F.3d 1045 (7th Cir. 2016) the Seventh Circuit held that the FAAAA did not preempt an Illinois statute adopting the ABC test for purposes of a rule governing "deductions from [employees'] pay." *Id.* at 1056. The court explained that the statute was the type of generally applicable "background labor law that . . . only indirectly affects prices by raising costs"—it "regulat[es] the motor carrier as an employer," but "'operat[es] one or more steps away from the moment at which the firm offers its customers a service for a particular price.'" *Id.* at 1055 (emphases omitted). At the certiorari stage, the Acting Solicitor General filed an invitation brief agreeing with the Seventh Circuit's analysis and urging this Court to deny review. Br. for the United States as Amicus Curiae, *BeavEx, Inc. v. Costello*, No. 15-1305 (May 23, 2017), 2017 WL 2303089 (U.S. *Beavex* Br.). The brief explained that "the FAAAA does not preempt laws of general application that only incidentally affect motor carriers," *id.* at

11, and agreed with the Seventh Circuit that the Illinois statute "affects motor carriers only in their capacity as employers" without "significantly impact[ing]" carrier prices, routes, or services, *id.* at 12, 16. The Court denied certiorari. No. 15-1305 (June 26, 2017).

In *Bedoya*, the Third Circuit likewise rejected an FAAAA preemption challenge to New Jersey's version of the ABC test for purposes of "minimum and overtime wage requirements," rules "regarding the time and mode of pay," and "restrictions on pay deductions." 914 F.3d at 817. It stressed that "New Jersey's ABC classification test" is a "'background regulation'" that "applies to all businesses as part of the 'backdrop' they 'face in conducting their affairs'" and had no "significant effect on prices, routes, or services." *Id.* at 824. This Court again denied certiorari. No. 18-1382 (Oct. 7, 2019).

Those are just a few of the many cases presenting FAAAA preemption challenges to generally applicable labor or employment rules in which lower courts have rejected the challenge and this Court has denied review. *See, e.g.*, *MacMillan-Piper Inc. v. State Emp. Sec. Dep't*, 1 Wash. App. 2d 1055 (2017) (use of Washington ABC test for purposes of unemployment insurance contribution rules), *cert. denied* No. 18-469 (Dec. 3, 2018); *Cal. Trucking Ass'n v. Su*, 903 F.3d 953 (9th Cir. 2018) (*Borello* test), *cert. denied* No. 18-887 (Mar. 18, 2019); *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal.4th 772 (2014) (similar), *cert. denied* No. 14-491 (Feb. 23, 2015); *Ortega v. J. B. Hunt Transp., Inc.*, 694 F. App'x 589 (9th Cir. 2017) (minimum wage, meal break, and rest break laws), *cert. denied* No. 17-1111 (June 4, 2018); *Godfrey v. Oakland Port Servs. Corp.,* 230 Cal. App. 4th 1267 (2014) (similar), *cert. de-*

nied No. 14-1464 (Oct. 13, 2015); *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014) (similar), *cert. denied* No. 14-801 (May 4, 2015); *Campbell v. Vitran Express, Inc.*, 582 F. App'x 756 (9th Cir. 2014) (similar), *cert. denied* No. 14-819 (May 4, 2015); *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998) (prevailing wage law), *cert. denied* No. 98-1077 (Apr. 5, 1999); *cf. Amerijet Int'l, Inc. v. Miami-Dade Cty., Fla.*, 627 F. App'x 744 (11th Cir. 2015) (minimum wage ordinance challenged under similar preemption provision in the Airline Deregulation Act), *cert. denied* No. 15-1122 (May 16, 2016).

3. The decision of the court of appeals below is consistent with the FAAAA's text, this Court's precedent, and the long line of lower court decisions discussed above.

Consistent with *Rowe* and *Dan's City*, the court of appeals first observed that it is significant—though "not dispositive"—that A.B. 5 is a generally applicable law "clearly within an area of traditional state power." Pet. App. 16a, 31a-32a n.14; *see id.* at 20a-21a. The court explained that A.B. 5 applies to "hundreds of different industries" across the State, *id.* at 20a, and does not "directly or indirectly" require a carrier to adopt any particular price, route, or service, *id.* at 18a (internal quotation marks omitted); *see id.* at 20a-21a. As this Court has recognized, the FAAAA preempts state laws "requir[ing] motor carrier operators to perform certain services" (or offer such services at a certain "price" or along a certain "route"). *Rowe*, 552 U.S. at 376; *see* Pet. App. 31a-32a n.14. But the statute does not, as a general matter, "preempt laws of general application that only incidentally affect"

carrier services, prices, or routes. U.S. *BeavEx* Br. 11; *see generally Rowe*, 552 U.S. at 374-375.[10]

The court of appeals recognized that a law of general application may nonetheless be preempted by the FAAAA if it has a "significant impact on prices, routes [or] services," Pet. App. 24a, or "meaningfully interfere[s]" with prices, routes, or services, *id.* at 18a.[11] But as discussed in greater detail below, *see infra* pp. 20-22, petitioners have made no such showing. Petitioners conceded below that A.B. 5 does not require carriers to "buy a new fleet of trucks" because they can instead hire "owner-operators (i.e., drivers who own their own trucks) as employees." Pet. App. 22a n.11; *supra* pp. 7-8 & n.8. And petitioners' remaining allegations of harm are "merely speculative" in light of the "undeveloped record" at this preliminary

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[10] As the court of appeals recognized, *see* Pet. App. 15a, this Court has applied the similarly worded preemption provision in the Airline Deregulation Act to preempt certain "particularized application[s] of a general statute," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992). But that does not cast doubt on the Court's recognition that it is highly relevant whether the challenged "state law is . . . general." *Rowe*, 552 U.S. at 375.

[11] Petitioners are thus incorrect in suggesting that the court of appeals construed the FAAAA to preempt only laws "actually prescribing rates, routes or services" or "bind[ing] [or] compel[ling]" carriers to adopt "a particular price, route, or service." Pet. 26 (internal quotation marks omitted). Indeed, as the court of appeals recently explained, while "[w]e have occasionally suggested that preemption occurs only when a state law" "'bind[s]' [a carrier] to 'specific prices, routes, or services,'" "the scope of FAAAA preemption is broader than this language suggests." *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1024-1025 (9th Cir. 2020); *see* No. 20-1425 (Oct. 4, 2021) (calling for the views of the Acting Solicitor General in *Miller* on a different FAAAA issue not presented here).

stage of the litigation. Pet. App. 22a n.11. In any event, such allegations bear only a "remote . . . and tenuous" connection to carrier prices, routes, or services. *Id.* at 23a (internal quotation marks omitted).[12]

Another defect in petitioners' preemption theory is that they do not (and cannot) suggest that merely labeling drivers as "employees" under A.B. 5 somehow relates to a "price, route, or service of [a] motor carrier . . . with respect to the transportation of property," 49 U.S.C. § 14501(c)(1). Petitioners instead challenge *application* of that label under "the full panoply of California laws governing the employment relationship." Pet. 9. But they fail to explain why all or most—or even many—of those diverse provisions are preempted under the FAAAA.[13] Crediting petitioners' preemption challenge would require a significant departure from this Court's ordinary approach of conducting a careful, provision-by-provision analysis before concluding that provisions of state law are

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[12] Petitioners predict, for example, that the costs of providing various employment benefits might lead certain carriers "to curtail or cancel certain routes" that pass through California. Pet. 11. As a factual matter, petitioners have not substantiated that assertion. *See* Pet. App. 22a n.11. And as a legal matter, if a carrier's predicted response to possible increased costs were enough to qualify as an impermissible effect on routes (or prices or services), then FAAAA preemption would have no logical stopping point. "[N]umerous areas of state regulation"—ranging from business taxes to safety regulations to nondiscrimination laws—could be preempted "based solely" on projected compliance costs. *Id.* at 23a.

[13] *See, e.g.*, Cal. Labor Code § 226 (requiring employers to issue itemized wage statements to workers); *id.* § 2810.5 (requiring employers to provide certain "written notice[s]" to workers).

preempted. *See, e.g.*, *Rowe*, 552 U.S. at 371-373; *Arizona v. United States*, 567 U.S. 387, 400-415 (2012); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158-179 (1978).

Finally, petitioners' allegations of harm hinge on the assertion that carriers "generally will not be able to meet" the A.B. 5 "business-to-business" exemption. Pet. 33 n.6; *see supra* p. 4. But it is not at all clear that their assertion is accurate. For example, an individual driver or a "'small businessman' who 'owns and operates one, or a few, trucks for hire'" (Pet. 4) might qualify under the exemption by either acting as a "sole proprietor[]," *Cal Cartage*, 57 Cal. App. 5th at 632, or forming one of several "legally organized business entities," *id.* at 634; *see, e.g.*, *id.* (describing certain "'outside carriers' or 'outside brokers'" already providing independent driving services to motor carriers); Br. of Owner-Operator Independent Drivers Ass'n, Inc. as Amicus Curiae 4-5 (similar); *cf. Cook v. Estes Express Lines, Corp.*, 2018 WL 1773742, at *2 (D. Mass. Apr. 12, 2018) (applying similar "business-to-business" exemption to independent driving-services provider). At a minimum, the scope of the business-to-business exemption is a contested matter of state law, and this Court is generally "reluctant to grant review of cases turning on" such issues. Shapiro et al., *Supreme Court Practice* § 4.10, p. 4-32 (11th ed. 2019).[14]

[14] The court of appeals was able to "disregard[]" the business-to-business exemption (Pet. 33 n.6) only because it held that, even accepting petitioners' understanding of that exemption, the FAAAA does not preempt A.B. 5, *see* Pet. App. 21a n.10. But this Court could not credit petitioners' allegations of harm without first addressing whether and in what circumstances the exemption applies to carriers.

II. THIS CASE DOES NOT IMPLICATE ANY CONFLICT WARRANTING REVIEW

Petitioners principally seek "[i]ntervention by this Court" (Pet. 16) on the basis of a "square[]" (*id.* at 15) circuit conflict. But the petition substantially overstates the degree of any conflict and fails to demonstrate that any tension between the lower courts has a substantial real-world effect or otherwise warrants review.

Three of the five decisions discussed by petitioners plainly present no conflict with the decision below. In *Brindle v. Rhode Island Department of Labor & Training*, the Rhode Island Supreme Court did not apply (or even mention) the FAAAA. 211 A.3d 930, 931 (R.I. 2019), *cert. denied* No. 19-352 (2020). Instead, it held that "there was sufficient evidence in the record" regarding the relationship of a state overtime requirement with an airline's services to bring it "within the preemptive scope of the [Airline Deregulation Act]." *Id.* at 938. While that preemption provision is similar to the one at issue here, this Court has recognized that the preemptive scope of the ADA is materially broader than that of the FAAAA. *Dan's City*, 569 U.S. at 261. Nothing in *Brindle* would compel the Rhode Island Supreme Court to apply the FAAAA to invalidate a statute like A.B. 5.

In *Bedoya*, 914 F.3d at 817, and *BeavEx*, 810 F.3d at 1056, the Third and Seventh Circuits *rejected* FAAAA preemption challenges to generally applicable laws that adopt the ABC test for purposes of various state labor and employment rules. As discussed above, their analysis closely tracks the court of appeals' analysis in this case. *Supra* pp. 12-13. Petitioners highlight dicta in *Bedoya* and *Beavex* observing that a state law might be preempted if it required carriers to

classify drivers as employees for "all purposes," Pet. 22, or "categorically prevent[ed] carriers from using independent contractors," *id.* at 21. But A.B. 5 does not do either of those things. *See supra* pp. 3-4 & n.5, 17; *Cal Cartage*, 57 Cal. App. 5th at 630-634.

As the panel below recognized, *see* Pet. App. 30a, there is some tension between its decision and the two cases out of Massachusetts highlighted by petitioners, *see* Pet. 18-21; but that is not a sufficient basis for granting certiorari. In each of those cases, the court concluded that the FAAAA preempts a generally applicable definition of "employee" under a Massachusetts law that adopted the same "ABC test codified in AB-5." Pet. App. 30a; *see Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 437-444 (1st Cir. 2016); *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 102-105 (2016). But neither *Schwann* nor *Chambers* addressed the specific question petitioners seek to present here: "whether the FAAAA preempts . . . a state worker-classification law that effectively precludes motor carriers from using independent *owner-operators* to provide trucking services." Pet. i (emphasis added). Indeed, neither decision mentioned the term "owner-operators" or assessed allegations of potential interference with carriers' continued ability to rely on "individual drivers who own and operate their own trucks." Pet. 4.

Both of those cases also arose on summary judgment, rather than (as here) at the preliminary injunction stage. *See Schwann*, 813 F.3d at 435; *Chambers*, 476 Mass. at 99. That is an important distinction because the "undeveloped record" at this preliminary stage of this case makes it impossible to credit petitioners' "allegations of increased costs." Pet. App. 22a n.11. In light of the posture of this case and that

undeveloped record, the Ninth Circuit merely held that petitioners' preemption claim is "unlikely to succeed on the merits," Pet. App. 32a; it did not reach any final determination on the merits, which would be necessary to demonstrate a square conflict with *Schwann* and *Chambers*.

Finally, any conflict with *Schwann* and *Chambers* is shallow and appears unlikely to make much of a real-world difference. Both *Schwann* and *Chambers* severed prong "B" of the Massachusetts ABC test, leaving prongs "A" and "C" in place. *See* 813 F.3d at 440-441; 476 Mass. at 105. The practical effect was to create a worker-classification standard focused, in substantial part, on "the right to control analysis" that is also required under "commonly used State and Federal tests of employment." *Chambers,* 476 Mass. at 106 & n.15; *supra* p. 1. Applying that "right to control analysis," Massachusetts courts have classified motor carrier drivers as employees both before and after *Schwann* and *Chambers*. *See, e.g.*, *Reynolds v. City Express, Inc.*, 2018 WL 679437, at *14-15 (Mass. Super. Jan. 25, 2018); *Amero v. Townsend Oil Co.*, 2009 WL 1574229, at *2 (Mass. Super. Apr. 15, 2009).

III. PETITIONERS OVERSTATE THE PRACTICAL SIGNIFICANCE OF THIS CASE

For similar reasons, petitioners fail to substantiate their argument that this is a case of "exceptional importance" and that A.B. 5 would "dramatic[ally] . . . disrupt[]" California's motor carrier industry. Pet. 32. Both before and after the statute's enactment, California law often—but not invariably—required carriers to classify their drivers as employees. *See supra* pp. 2-3 & n.4, 4, 17; *Cal Cartage*, 57 Cal. App. 5th at 630-634.

Petitioners cannot demonstrate that the classification of drivers as employees will "obligat[e] [carriers] to purchase trucks . . . and create a whole new business infrastructure." Pet. 32-33; *see id.* at 10-12. That allegation depends on petitioners' claim that A.B. 5 will prevent carriers from relying on "owner-operators (i.e., drivers who own their own trucks)." Pet. App. 22a n.11; *see, e.g.*, Pet. i, 3, 10-12, 32-34. As petitioners conceded below, however, California precedent establishes that it is "lawful for an employer to require its employees to provide their own vehicles as a condition of employment," *Estrada v. Fedex Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 24-25 (2007); *supra* pp. 7-8 & n.8.[15] Because nothing in A.B. 5 altered that principle, carriers need not "abandon the owner-operator model." Pet. 10. They can instead hire those owner-operators "as employees." Pet. App. 22a n.11.

Petitioners' remaining allegations of harm are that treatment of owner-operators as employees will "materially increase . . . labor costs," Pet. 12, by requiring carriers to provide certain benefits (such as sick leave and workers' compensation coverage), *see id.* at 9-10, and "maintain [certain] employment records," *id.* at 10. As this case comes to the Court, however, those allegations are "merely speculative" in light of the "undeveloped record" at this preliminary stage of the litigation, Pet. App. 22a n.11; *see also id.* at 21a-24a. And it is not likely that petitioners will be able to substantiate such allegations with respect to many (or even

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[15] Although *Estrada*'s holding that employers need not "reimburse [employee] drivers for the cost of their [vehicles]" (154 Cal. App. 4th at 25) is not without doubt, it is binding statewide unless the California Supreme Court or another division of the Court of Appeal disagrees with it, *see generally Auto Equity Sales, Inc. v. Superior Ct. of Santa Clara Cty.*, 57 Cal.2d 450, 455 (1962).

most) of the labor and employment rules implicated by petitioners' preemption challenge, such as rules that simply require carriers to "furnish itemized wage statements" or "record drivers' working hours." Pet. 9.

Petitioners also suggest that A.B. 5 will unduly "undermine . . . uniformity" in state labor and employment rules, Pet. 34, creating a "patchwork" of regulation for carriers "engage[d] in long hauls across the country, entering and leaving California," *id.* at 34-35.[16] But regardless of whether petitioners obtain review (or reversal) of the court of appeals' judgment, carriers will face a wide variety of state-specific worker-classification standards. *See, e.g.*, *Dynamex Operations W. v. Superior Ct.*, 4 Cal.5th 903, 950-951 & n.20 (2018) (collecting examples); *Chambers,* 476 Mass. at 106 n.15 (same). Petitioners do not challenge the ABC tests in other States lacking the "precise . . . features of AB-5." Pet. 34; *see supra* pp. 1-2 nn. 2-3. And they have abandoned their prior challenge to the *Borello* standard, California's version of the multi-factor balancing test. *Supra* p. 5.

[16] Of course, many motor carrier operations never cross state boundaries, and could not conceivably face any "patchwork" problem. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. City of Los Angeles, Cal.*, 569 U.S. 641, 644 (2013) (describing "[s]hort-haul trucks, called 'drayage trucks,'" which move cargo short distances "into and out of" ports).

CONCLUSION

The petition for a writ of certiorari should be denied.

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