No. 21-194

IN THE
Supreme Court of the United States

CALIFORNIA TRUCKING ASSOCIATION, INC., ET AL.,
Petitioners,

v.

ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

SCOTT A. KRONLAND
STACEY M. LEYTON
Counsel of Record
ALTSHULER BERZON LLP
177 Post Street, #300
San Francisco, CA 94108
(415) 421-7151
sleyton@altber.com

Counsel for Intervenor-Respondent International Brotherhood of Teamsters

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTION PRESENTED

Does the Federal Aviation Administration Authorization Act ("FAAAA") preempt the application to motor carriers of a general state law that establishes a statutory test for whether a worker is an employee or independent contractor for purposes of state employment law protections?

CORPORATE DISCLOSURE STATEMENT

Intervenor-Respondent International Brotherhood of Teamsters has no parent corporation, and no company owns any stock in Intervenor-Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

PRELIMINARY STATEMENT

The petition for certiorari is premised on several misrepresentations regarding the impact of California's statutory test for employment status, the "ABC test." The result of those misrepresentations is to distort the issues that would be before this Court if certiorari were granted.

Petitioners' Question Presented and the content of their petition falsely suggest that California's statutory test for employment status precludes motor carriers from utilizing owner-operator drivers. But it does not, both because motor carriers may contract with owner-operators while complying with California's minimum employment standards, and because the California courts have held that motor carriers may avail themselves of a statutory exemption to the ABC test. Petitioners' arguments presume that the only state appellate court to address the availability of the statutory exemption is wrong in its interpretation of state law, which makes this case an inappropriate vehicle for this Court's review.

Petitioners also contend that California's test for employment status requires a wholesale restructuring of the state's trucking industry by mandating that motor carriers hire permanent employees and purchase fleets of trucks. But even if California law did require that all motor carrier drivers be classified as employees for state law purposes (which it does not), Petitioners' claims about the impact of employee status are grossly exaggerated and find no support in the preliminary injunction record or any factual findings below. Employees can be hired on a part-time basis or paid piece rates, and employees can be reimbursed for

the use of their own trucks. Moreover, even before the adoption of the ABC test challenged here, motor carriers were often held to have misclassified their drivers as independent contractors for purposes of California law, and so it is unclear whether the ABC test has much practical impact at all on motor carriers' obligations under state law.

Further, the question whether a given test for employment status is preempted cannot be decided in isolation, without reference to the individual obligations that apply when a worker is considered an employee (*e.g.,* worker's compensation insurance), and whether those obligations have a direct impact on the "price, route, or service" of motor carriers "with respect to the transportation of property." 49 U.S.C. §14501(c)(1). Yet Petitioners ask this Court to do just that, because there has been no factual development or findings on this critical issue at this preliminary injunction stage.

The decision below by Judge Sandra S. Ikuta correctly concluded that Petitioners had not shown a likelihood of success on the merits because the impact of a generally applicable law that governs the employer-employee relationship, and does not operate at the consumer-motor carrier level, is not the type of direct impact that triggers FAAAA preemption. That decision is well reasoned and is consistent with this Court's precedent. Petitioners overstate the existence of a circuit conflict. While lower courts reached different conclusions about a similar test for employment status in Massachusetts, the scope of FAAAA preemption in relation to worker classification is an issue that has not been fully developed in the lower courts, and the outcome of lower court cases has varied because it

has depended on the specific nature of the state law(s) being analyzed.

Finally, if certiorari were granted, Article III issues would prevent this Court from reaching a decision on the merits. Under this Court's associational standing jurisprudence, petitioner California Trucking Association lacks standing because it did not identify any affected members.

There is no reason for this Court to grant certiorari to address a misleading Question Presented that rests on resolution of state law issues in a manner contrary to the conclusions reached by the state courts, in a case that is in a preliminary posture and thereby lacking in factual development or findings, and where a jurisdictional problem will prevent a merits decision.

For these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Background

1. California's test for employment status

The classification of a worker as an employee or independent contractor for purposes of employment standards protections has significant implications for that worker's well-being. Employees enjoy the protection of "numerous state … statutes and regulations governing … wages, hours, and working conditions," while independent contractors do not. *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 913 (Cal. 2018). Such laws are "primarily for the benefit of the workers themselves, intended to enable

them to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect." *Id.* at 952. But the laws also benefit "the public at large, because … the public will often be left to assume responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions." *Id.* at 953.

In *Dynamex*, a case brought by truck drivers challenging their re-classification as independent contractors, a unanimous California Supreme Court held that the easy-to-apply "ABC test" determines whether a worker is an employee or independent contractor for purposes of California's wage orders, which guarantee to employees certain minimum labor protections like entitlement to minimum wages, meal and rest breaks, and overtime. *Id.* at 955-56.

The ABC test requires a hiring entity claiming that a worker is an independent contractor to demonstrate that the worker "(a) … is free from the control and direction of the hiring entity … ; … (b) … performs work that is outside the usual course of the hiring entity's business; and (c) … is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." *Id.* Thus, since April 2018, workers who are employees under the ABC test, including motor carrier drivers, have enjoyed certain protections, including the right to minimum wages (Cal. Code Regs., tit. 8, §11090, Parts 4-5), meal and rest breaks

(*id*., Parts 11-12), and provision of or reimbursement for work-required tools (*id*., Part 9(B)).[1]

The California Legislature subsequently enacted Assembly Bill 5 ("AB 5"), which codified *Dynamex* and adopted the ABC test to distinguish between employees and independent contractors for purposes of California's Labor Code and Unemployment Insurance Code. 2019 Cal. Stat., ch. 296; Cal. Lab. Code §2775 (formerly §2750.3).[2] While AB 5 was under consideration, Petitioner California Trucking Association ("CTA") lobbied the legislature for "relief from AB-5's strict test" but was unsuccessful, as AB 5 does not include a special exemption for drivers in the trucking industry. ER 273. AB 5 does, however, contain a general exception for "bona fide business-to-business contracting." Cal. Labor Code §2776 (formerly 2750.3(e)).[3] If the requirements of that exception are

---

[1] California's Wage Orders are quasi-legislative regulations of work conditions that have the force of law. *See Dynamex*, 4 Cal.5th at 914 n.3.

[2] In Assembly Bill 2257 (2020) ("AB 2257"), the California Legislature amended AB 5 and recodified its provisions in different code sections. For the Court's convenience, when citing the current statutory provisions, Intervenor-Respondent also provides the code sections where these provisions were previously codified under AB 5, before AB 2257's enactment. Hereinafter, Intervenor-Respondent will use "AB 5" to refer to AB 5 as amended by AB 2257.

[3] The "business-to-business" exception's requirements are that the "business service provider is free from the control and direction of the contracting business entity"; provides services directly to the contracting business and not the latter's customers; has a written contract with the contracting business that specifies the payment amount and due date; "has the required business license or business tax registration" (if required in the

met, then the question whether a contract between two businesses creates an employment relationship is governed not by the ABC test but instead by a multi-factor test for determining employee status set forth in a decades-old California Supreme Court decision, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (Cal. 1989). *See* Cal. Labor Code §§2775(b)(3), 2776(a), 2778(a).[4]

2. Owner-operators in the trucking industry

Trucking companies utilize a variety of different business models. Some trucking companies own their own trucks and use a labor force composed entirely of full-time drivers who work exclusively for one trucking company and drive company trucks. *See* ER 201-

---

jurisdiction); "maintains a business location … that is separate from" the contracting business's location ("which may [be] the business service provider's residence"); is "engaged in an independently established business"; "can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity"; "advertises" to other businesses as well as the contracting business; "provides its own tools, vehicles, and equipment"; "can negotiate its own rates" and "set its own hours and location of work"; and "is not performing the type of work for which a license from the Contractors' State License Board is required." Cal. Labor Code §2776(a) (formerly §2750.3(e)(1)).

[4] Under *Borello*, those factors include the "right to control work," whether the worker is engaged in a distinct occupation or business, the amount of required supervision, the skill required, whether the worker supplies the tools of work, the length of time for which services are to be performed, the method of payment, whether the work is part of the hiring entity's regular business, and the parties' beliefs as to whether they are creating an employment relationship. 48 Cal.3d at 350-51.

204. Other trucking companies utilize what is known as the "owner-operator" model, whereby the driver either owns or, in many cases, leases his or her truck. *Id.* Most owner-operators are under long-term contracts with the same motor carrier, from which the owner-operator often leases the truck that he or she drives (but is still referred to in the industry as an owner-operator). ER 202-203, 221-222.

Contrary to Petitioners' suggestion otherwise, *e.g.*, Pet. 3, 9-10, 32-33,[5] "owner-operator" and "independent contractor" are not equivalent terms. Rather, for purposes of state and federal employment laws, some owner-operators may be employees (in which case they enjoy the protections of these laws) while others may be independent contractors (in which case they do not), depending on the applicable statutory or regulatory definition of "employee" and the particular relationship between a company and an owner-operator driver. *See* ER 232-233.

Petitioners conceded below that, after AB 5's enactment, California law continues to allow motor carriers to contract with owner-operators. *See* ER 104 (conceding that "[o]f course" "businesses can still 'hire' or '*employ*' owner operators") (emphasis in original); *see also* ER 203-204 (expert opinion that AB 5 does not preclude motor carriers from hiring owner-operators).

---

[5] *See also*, *e.g.*, Amici Brief of American Trucking Associations et al. at 9 (asserting that AB 5 "mak[es] it effectively impossible for motor carriers to contract with independent owner-operators"); Amici Brief of 48 State Trucking Associations at 3-4, 6-7, 12 (similar).

B. Proceedings below

Petitioners filed this case in October 2018 against various state officials ("State Defendants"). ER 315. The International Brotherhood of Teamsters intervened on the side of State Defendants. Dist. Ct. Dkt. 21. Pursuant to the parties' agreement, the case was stayed pending disposition of an appeal in another case presenting similar issues. ER 314. During that time, no injunction prevented continued application of the *Dynamex*/ABC test to motor carriers for purposes of California's wage orders.

On December 2, 2019, Plaintiffs filed a motion for a preliminary injunction. The District Court granted the motion, holding that the FAAAA likely preempted AB 5 because AB 5 "categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees." App. 66a-67a. The District Court made no factual findings regarding the impact of complying with California's minimum employment standards upon Petitioners or motor carriers in general. The District Court rejected the argument that motor carriers could avail themselves of the business-to-business exemption from the ABC test, basing this rejection on "the thorough reasoning" of a Los Angeles Superior Court decision, App. 74a, which was subsequently overturned on appeal, *People v. Superior Court of Los Angeles Cty.*, 57 Cal.App.5th 619 (Cal. Ct. App. 2020), *review denied* (Feb. 24, 2021), *cert. denied*, 2021 WL 4507665 (Oct. 4, 2021). By the time the District Court issued its preliminary injunction, the ABC test had been the law in California for 21 months.

The Ninth Circuit reversed the District Court's preliminary injunction decision in an opinion authored by Judge Sandra S. Ikuta and joined by District Judge Douglas P. Woodlock. The Court of Appeals recognized that this Court has previously held that generally applicable laws sometimes may be preempted by the FAAAA, but not if their effect on rates, routes, or services is "tenuous, remote, or peripheral." App. 14a-15a (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 391 (1992), discussing preemption under analogous Airline Deregulation Act provision).[6] The Court of Appeals also relied on this Court's discussion of similar "related to" language in the ERISA context, noting that the phrase could not be given "an uncritically literal reading" while still retaining any limits. App. 15a (citing *Cal. Div. of Lab. Standards Enf't v. Dillingham Const., NA, Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring)).

The Court of Appeals noted that circuit precedent "draw[s] 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." App. 16a (quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014)). The Court of Appeals explained that generally applicable laws are likely to be preempted under this standard when they regulate or otherwise impact motor carriers' relationships with

---

[6] The Court of Appeals rejected Petitioners' argument that AB 5's exceptions for certain professions means that AB 5 is not a generally applicable law, noting that AB 5 applies to hundreds of industries and that generally applicable "[l]abor laws typically include exemptions." App. 20a & n.9.

consumers. App. 16a-17a. By contrast, generally applicable laws regulating motor carriers' relationships with their workforces (such as anti-discrimination and minimum wage laws) "are not significantly related to rates, routes, or services." App. 17a. Nor does the fact that "a motor carrier must take [a] law into account when making business decisions," or that "the law increases a motor carrier's operating costs," render it preempted. App. 19a.

The Court of Appeals stated that "our precedents do not rule out the possibility that a generally applicable law could so significantly impact the employment relationship between motor carriers and their employees that it effectively binds motor carriers to specific prices, routes, or services at the consumer level …." App. 24a. But the Court of Appeals rejected Petitioners' argument that the impact of California's minimum employment standards on motor carriers' labor costs and routes were sufficient to trigger preemption, explaining that, "[g]iven the undeveloped record in the district court, CTA's allegations with respect to prices, routes, and services are merely speculative." App. 22a & n.11. Accordingly, the Court of Appeals concluded, "the [FAAAA] does not prohibit California from enforcing normal background rules applying to employers doing business in California which are not 'related to' carrier prices, routes, or services." App. 29a. Given these conclusions, the Court of Appeals did not need to reach the question whether motor carriers could contract with owner-operator drivers and classify them as independent contractors through the state law business-to-business exemption. App. 21a.

Judge Mark J. Bennett dissented. The dissent agreed with the panel majority that generally applicable laws that govern motor carriers' relationships with their workers are not ordinarily related to rates, routes, or services. App. 33a. Unlike the majority, however, which found the record regarding AB 5's impact to be "speculative" and "undeveloped," App. 22a & n.11, the dissent concluded that the California law would diminish the specialized transportation services provided through independent contractor drivers and, by forcing motor carriers to purchase their own fleets of trucks, reduce carriers' flexibility to accommodate supply and demand. App. 40a-42a.[7] The dissent did not address the question whether motor carriers could avail themselves of the business-to-business exception.

Petitioners sought rehearing en banc, but no circuit judge requested an en banc vote. App. 80-81a.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied for several reasons. First, the petition's premise—that AB 5 precludes motor carriers from contracting with owner-operators—is inaccurate. The state court of appeal has ruled that motor carrier-driver relationships may qualify for the statutory business-to-business exemption from the ABC test, so it is inaccurate to say that

[7] Petitioners admitted below that such truck purchases would not actually be required, *see* App. 22a, and their evidence about the supposed impact of AB 5 was contradicted by evidence submitted by Intervenor-Respondent. *See*, *e.g.*, ER 156-233. The District Court did not rely on or credit Petitioners' evidence, nor did it make any findings regarding the contested facts.

AB 5 precludes classifying truck drivers as independent contractors. And even if this were not the case, motor carriers could continue to contract with owner-operators while complying with California's minimum employment standards. Petitioners grossly exaggerate the impact of compliance with these minimum standards, suggesting that motor carriers would be forced to purchase fleets of trucks, precluded from hiring owner-operators for specific jobs, and required to arrange the handoff of cargo from one truck to another at the California border. These suggestions are inaccurate, and they are not supported by the undeveloped preliminary injunction record below.

Second, Petitioners overstate the division in the lower courts, which have generally approached FAAAA preemption consistently and have reached different conclusions due to variations in the state laws being analyzed.

Third, the Court of Appeals' decision below is correct and is faithful to this Court's jurisprudence and to the FAAAA's legislative history.

Fourth, CTA's lack of associational standing is a jurisdictional problem that would prevent this Court from reaching the merits of the case.

I. The petition largely ignores a critical state law issue and mischaracterizes the impact of AB 5.

Petitioners' question presented and argument as to why certiorari should be granted rest on the assertion that AB 5 adopts an "effective ban on owner-

operators." Pet. 11. *See also* Question Presented (state law "effectively precludes" use of "independent owner-operators"); Pet. 3 (AB 5 would "prohibit or substantially restrict motor carriers' use of owner-operators"). But that assertion is false, for two primary reasons. First, the state courts have construed AB 5's business-to-business exemption to allow motor carriers to continue classifying drivers as independent contractors. Second, even if that were not the case, motor carriers could continue to contract with owner-operators while complying with California's minimum employment standards. There is no record support for Petitioners' assertions that AB 5 will require the wholesale restructuring of the motor carrier industry, and Petitioners have elsewhere conceded that many of the impacts they now contend will result from AB 5 are not actually required. The lack of support for Petitioners' many factual and legal assertions prevent this case from being a proper vehicle to resolve the questions that Petitioners seek to pose.

A. Motor carriers' drivers can avail themselves of the business-to-business exemption under state law.

Petitioners' argument focuses entirely on the impact of the ABC test, while largely ignoring AB 5's adoption of the statutory business-to-business *exemption* from the ABC test. Under that exemption, a bona fide business-to-business relationship between a motor carrier and an owner-operator driver is subject not to the ABC test for employee status but to the same multi-factor test that predated AB 5. *See supra* at 5-6 & nn.3-4. Thus, Petitioners' framing of the issue—as whether a new test that effectively requires

classification of owner-operators as employees is preempted by federal law—rests on a completely false premise that ignores a statutory exception to that test.

The only California appellate court to consider this issue has held that relationships between motor carriers and owner-operators *can* qualify for this business-to-business exemption. In that case, the motor carrier defendant argued, as do Petitioners here, that "independent owner-operators can never meet several of the requirements in the business-to-business exemption" and, therefore, that AB 5 is preempted by the FAAAA. *People v. Superior Ct. of Los Angeles Cty.*, 57 Cal.App.5th at 632–633. The California Court of Appeal analyzed each of the business-to-business exemption's requirements in detail and was "unpersuaded" by the motor carrier's arguments. *Id.* at 633-34. The Court of Appeal held that AB 5 "do[es] *not* prohibit the use of independent contractors" by motor carriers and "is not preempted by the FAAAA" on the theory that such a prohibition would be preempted. *Id*. at 624, 630 (emphasis added). The California Supreme Court and this Court both denied review of the decision.

Petitioners disagree with the California courts' interpretation of California law. They argue, in the single footnote of their Petition that mentions the business-to-business exemption, that "application of the exception hinges on satisfaction of a long list of requirements that carriers and owner-operators generally will not be able to meet …" Pet. 33 n.6. But that is contrary to the conclusions of the California

Court of Appeal about the meaning of the state law, which are not for this Court to revisit.[8]

Petitioners also take the position that the exemption "has no bearing here." Pet. 33 n.6.[9] But the argument that owner-operators can qualify for the business-to-business exemption was fully briefed below. *See*, *e.g.*, Intervenors' 9th Cir. Opening Br. at 35-42; ER 147-48 & nn.15-16. And while the Ninth Circuit did not need to rely on the business-to-business exemption to reject the FAAAA preemption challenge, Petitioners' Question Presented and argument depend on the conclusion that the exemption is unavailable so that AB 5 effectively requires that all drivers be classified as employees. This Court should not grant certiorari in order to answer a federal question that presumes an interpretation of state law that the state courts have rejected.

---

[8] As noted, the District Court agreed with Petitioners that the business-to-business exemption is unavailable, but did not analyze the issue other than to adopt the conclusions of the Los Angeles Superior Court that were later reversed by the California Court of Appeal. App. 74a. Thus, the District Court's preliminary injunction decision was premised on an incorrect interpretation of the challenged state law.

[9] The Court of Appeals dissent does not mention the exemption at all. *See* App. 38a-40a.

B. Even if the business-to-business exemption were not available, Petitioners grossly exaggerate the impact that AB 5 would have upon motor carriers' services.

Petitioners' failure to address the impact of the business-to-business exemption is not their only error. Petitioners also use the terms "owner-operator" and "independent contractor" interchangeably, disguising the fact that a driver can be an owner-operator who owns (or leases) the truck that he or she drives while still being classified as an employee under state law.

An "owner-operator" is simply a truck driver who either owns or, in many cases, leases a truck rather than having it provided by the trucking company. ER 201-204. As such, depending on the circumstances and the applicable test of employment status, an owner-operator may be classified either as an employee (in which case the driver enjoys the protections of state employment laws) or as an independent contractor (in which case the driver does not). Intervenor-Respondent presented evidence below showing that many owner-operators are in fact classified as employees, *e.g.*, ER 203-04, 232-33, and the District Court made no contrary fact findings.

Even more egregiously, Petitioners falsely assert that under AB 5 "motor carriers would be forced to significantly restructure their operations—to obtain their own trucks, hire drivers, and create the administrative structure necessary to manage their new fleets …." Pet. 10; *see also* Pet. 32-33 (asserting that AB 5 would "obligat[e]" motor carriers "to purchase trucks …."). But that assertion is contrary to

Petitioners' concession below that motor carriers would *not* need to purchase trucks but "could avoid incurring such costs by hiring owner-operators (i.e., drivers who own their own trucks) as employees." App. 22a n.11; *see also* Plaintiffs' 9th Cir. Answering Br. at 68 n.12. State law is clear that businesses are *not* required to reimburse employees for vehicle acquisition costs, but may require "employees to provide their own vehicles as a condition of employment" so long as they "'reimburse the employee for all the costs incurred by the employee in the operation of the equipment,'" such as mileage and additional insurance premiums. *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal.App.4th 1, 24–25 (Cal. Ct. App. 2007) (quoting Department of Labor Standards Enforcement ("DLSE") Opinion Letter No. 1991.08.30).

Petitioners also wrongly suggest that AB 5 mandates that motor carriers maintain large numbers of permanent employees and even will require trucks to stop at the California border to hand off goods between California employee drivers and non-California owner-operators. *E.g.*, Pet. 32-33. But nothing prohibits motor carriers from hiring employee owner-operators for each particular job and paying them by the job. California law allows piece rate compensation systems, so long as they result in payment of at least the minimum wage. *See* Cal. Labor Code §226.2. Nor would motor carriers have to hand off goods from one truck to another at the state border; they can simply ensure that they comply with California's employment laws with respect to work by employees that takes place within California's borders, just like all other employers must do. Petitioners conceded this below. *See* ER 248 n.9.

Furthermore, Petitioners' argument ignores that, in most cases, the application of the ABC test will not even matter, because the level of control that motor carriers exercise over their drivers typically requires that such drivers be classified as employees under the multi-factor *Borello* test that predated *Dynamex* and AB 5.[10] Between 2010 and 2018, the California DLSE adjudicated over 1,150 misclassification complaints involving drayage drivers, and found that the hiring entity had misclassified the driver as an independent contractor in 97% of the cases. *See* Analysis of SB 1402, Cal. Senate Committee on Appropriations at 1-2 (May 7, 2018), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1402. The primary difference between the ABC test and the *Borello* test is that the ABC test is easier to administer, so that case-by-case adjudication will be less burdensome, but ease of application cannot be dispositive of the preemption issue.

Finally, Petitioners err in focusing on the applicable test for employment as opposed to the individual substantive obligations that classification as an employee trigger. Only substantive legal requirements—and not a coverage test itself, in isolation from those requirements—could possibly have a "'significant impact'" on motor carriers' rates, routes, or services. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 375 (2008) (citing *Morales*, 504 U.S. at 390). For example, workers classified as employees participate in the unemployment insurance system, Cal. Lab. Code §2750.3(a)(1), which simply requires that the

[10] The vast majority of owner-operators are under long-term contracts with the same motor carrier, which often leases the truck to the owner-operator. ER 202-203, 221-222.

employer pay taxes into a state-run insurance fund. *See Hunt Building Corp. v. Bernick*, 79 Cal.App.4th 213, 219 (Cal. Ct. App. 2000) (discussing statutory scheme). This requirement to pay unemployment taxes may increase a business' costs, but it does not impose any arguable burden on the actual operation of the business. There is thus no plausible argument that the obligation to make such payments has an impermissible effect on motor carriers' rates, routes, and services.[11]

In light of Petitioners' misplaced focus on the test itself rather than on the obligations that the test triggers, it is not surprising that the District Court made no factual findings regarding how AB 5 would affect the actual operations of motor carriers. Petitioners submitted some evidence on this point, but that evidence was deeply flawed and vigorously disputed, including through the submission of contrary expert analyses. ER 156-229. Because the District Court failed to make any findings on this issue, the expedited preliminary injunction record would not permit this Court to conclude that Petitioners have shown the type of significant impact that they seek to assert.

Given Petitioners' misplaced framing of the inquiry below, the undeveloped nature of the preliminary injunction record, and the absence of any

---

[11] Moreover, "Congress intended the several States to have broad freedom in setting up the types of unemployment compensation that they wish." *New York Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 537 (1979); *see also id.* at 539 ("Congress has been sensitive to the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria.").

factual findings by the District Court regarding the actual impact of these employment obligations on motor carriers' operations, this Court will be unable to conclude that the impact of AB 5 is significant or direct enough to trigger FAAAA preemption.

II. Petitioners exaggerate the division in the lower courts.

The petition should also be denied because this Court's intervention is not required in order to resolve division in the lower courts.

Petitioners claim there is a direct conflict between the conclusions of the Ninth Circuit and California Court of Appeal that AB 5 is not preempted and the First Circuit and Massachusetts Supreme Court's holdings that a similar test in that state is preempted. Pet. 15, 18-21 (citing *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 433 (1st Cir. 2016); *Chambers v. RDI Logistics, Inc.*, 65 N.E.3d 1, 7–8 (Mass. 2016)). In doing so, Petitioners again offer misleading arguments.

As an initial matter, the decision below was issued at the preliminary injunction stage based on an "undeveloped record in the district court." App. 22a n.11. Petitioners also wrongly assert that "[t]he Ninth Circuit itself expressly recognized that AB-5 is in relevant part 'identical' to the Massachusetts statute held by the First Circuit to be preempted …." Pet. 15 (citing App. 30a). In fact, however, the Ninth Circuit recognized only that the two states had adopted the same "B prong" of the ABC test. App. 30a. The Massachusetts statute does not contain the same business-to-business exemption as the California law,

and so the laws are not "identical" as relates to the question whether they categorically prohibit classification of drivers as independent contractors. *See Schwann*, 813 F.3d at 438–439 (concluding that Massachusetts test requires use of employees rather than independent contractors). Unlike AB 5, the Massachusetts law, as analyzed by that state's courts, *did* in fact impose a "de facto ban" on the use of independent contractors. *Chambers*, 65 N.E.3d at 9.[12]

Petitioners also contend that the Court of Appeals' decision is in tension with those of the Third Circuit, Seventh Circuit, and Rhode Island Supreme Court. Pet. 15, 20-23. But Petitioners overstate their case.

Bedoya v. American Eagle Express Inc., 914 F.3d 812, 824 (3d Cir. 2019), *upheld* New Jersey's version of the ABC test for purposes of wage and hour laws against an FAAAA preemption challenge. In doing so, the Third Circuit employed an analysis that closely resembles that of the Court of Appeals in this case. The Third Circuit recognized that generally applicable laws (like New Jersey's ABC employment test, which applied to businesses in general) "are usually viewed as not having a direct effect on motor carriers," and are preempted only "where they have a significant impact on the services a carrier provides." *Id.* at 821, 824 (citing *Rowe*, 552 U.S. at 375). The Third Circuit explained that laws that "address[] the carrier-employee relationship as opposed to the carrier-customer

[12] The Massachusetts Supreme Court discussed whether the plaintiffs' formation of corporations deprived them of standing to assert misclassification claims, *Chambers,* 65 N.E.3d at 108-09, but the Court's merits discussion assumed that there is no exemption from the ABC test.

relationship" generally "have too remote an effect on the price the company charges, the routes it uses, and service output it provides, and are less likely to be preempted by the FAAAA." *Id.* at 821–822, 824. And the Third Circuit rejected the motor carrier's representation that the law "may require it to shift its model away from using independent contractors, which will increase its costs, and in turn, its prices" as "conclusory" and insufficient to establish preemption. *Id.* at 825; *see also id.* at 825–886 (impact on employer of shifting labor model "does not equate to a significant impact on Congress' goal of deregulation"). To be sure, the Third Circuit did note that the New Jersey test had an additional exception that was not present in the Massachusetts test, so that it did not "categorically prevent[] carriers from using independent contractors." *Id.* at 824–825. But that is true of California's test as well. *See supra* at 13-15. Moreover, in making this distinction, *Bedoya* did not affirmatively hold that the case would have come out differently otherwise.

Similarly, *Costello v. BeavEx, Inc.*, 810 F.3d 1045 (7th Cir. 2016)), upheld Illinois' use of an ABC test. The Seventh Circuit noted the general federal court consensus that, unlike laws governing motor carriers' relationships with their customers, "the effect of a labor law, which regulates the motor carrier *as an employer*, is often too 'remote' to warrant FAAAA preemption." *Id.* at 1054 (emphasis in original). Rather than analyzing the ABC test in the abstract (as Petitioners propose is the appropriate approach, *see supra* at 18-19), the Seventh Circuit examined the specific obligations that were triggered by the application of the ABC test in that case, and concluded that

the law at issue did not require reclassification of all independent contractor drivers for all purposes. *Id.* at 1055-56. But the Seventh Circuit did *not* hold (nor could it, because the issue was not before it) that such a wholesale reclassification mandate would be preempted. In any event, here, too, the California law does not require reclassification of all truck drivers, because of the availability of the business-to-business exemption.

Nor is *Brindle v. Rhode Island Dep't of Labor & Training*, 211 A.3d 930 (R.I. 2019), in conflict with the Court of Appeals decision in this case. In *Brindle*, the Rhode Island Supreme Court acknowledged that a showing of increased labor costs does not establish preemption, *id.* at 936–937, and therefore engaged in a fact-specific analysis of the airline's showing in that case that a law requiring premium pay on Sundays and holidays "would have a direct impact on an airline's decision-making process concerning discretionary services, customer interaction, and staffing," and lead to service reductions on those dates. *Id.* at 937–938. No such specific showing has been made here.[13]

In the absence of any direct conflict, and given that these issues are continuing to work their way through the lower courts, there is no need for this Court to grant review at this time, especially of a preliminary injunction decision. Instead, this Court would benefit from allowing other state and federal courts to consider the issues raised by states' generally applicable

[13] Moreover, *Brindle* addressed the ADA, which preempts more broadly than the FAAAA. *See infra* at 24 n.14.

employment regulations in relation to the FAAAA's preemption provision.

III. The decision below is correct.

Review should also be denied because the Ninth Circuit's decision is correct. The Court of Appeals properly relied on this Court's precedent, which holds that generally applicable laws may be preempted by the FAAAA, but not if their effect is "too tenuous, remote, or peripheral a manner to have pre-emptive effect." App. 14a-15a (quoting *Morales*, 504 U.S. at 390).[14] That is, the FAAAA preempts state laws that "aim directly at the carriage of goods" or have a "'*significant* impact' on carrier rates, routes, or services," but does not disturb laws that apply to motor carriers and have only a "tenuous, remote, or peripheral" connection to rates, routes, or services. *Rowe*, 552 U.S. at 375–376 (quoting *Morales*, 504 U.S. at 390) (emphasis in original in *Rowe*).[15]

The Ninth Circuit acknowledged "the possibility that a generally applicable law could so significantly

---

[14] *Morales* addressed preemption under the Airline Deregulation Act, which is analogous to FAAAA preemption with a crucial exception: the FAAAA "contains one conspicuous alteration—the addition of the words 'with respect to the transportation of property,'" which "massively limits the scope of preemption ordered by the FAAAA" compared to the ADA. *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013).

[15] Petitioners' merits argument rests heavily on the FAAAA's broad "related to" language but, as they acknowledge, Pet. 25, this Court has clarified that the phrase must not be read with "uncritical literalism," because "the breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars*, 569 U.S. at 260.

impact the employment relationship between motor carriers and their employees that it effectively binds motor carriers to specific prices, routes, or services at the consumer level ...." App. 24a. But given that no such record regarding AB 5's impact on prices, routes or services had been developed, App. 22a & n.11, the Court of Appeals properly concluded that AB 5 was a generally applicable, background law that regulated motor carriers' relationships with their workers, an area that was not a target of the FAAAA's preemption provision. App. 16a-19a. The Court of Appeals also properly concluded that, even if AB 5 increases a motor carrier's labor costs, that would not be sufficient to trigger preemption. App. 19a. *See also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 660 (1995) (ERISA does not preempt "basic regulation of employment conditions" even that would "invariably affect the cost and price of services").

The relevant legislative history also supports the Court of Appeals' conclusion. In adopting the FAAAA preemption provision, Congress targeted "[t]ypical forms of [impermissible] regulation" such as "entry controls, tariff filing and price regulation, and types of commodities carried." H.R. Conf. Rep. No. 103-677 at 86 (1994). Congress identified states that had no laws in place that would offend the new FAAAA preemption provision, including numerous states with wage and hour laws and tests for employment status that would apply to motor carriers' drivers. *See Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir.1998); *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal.4th 772, 783–786 (Cal. 2014).

The Court of Appeals was therefore right to reject Petitioners' broad arguments.

IV. A standing problem would prevent resolution of the merits in this case.

Finally, this case would not be an appropriate vehicle because a jurisdictional barrier would prevent the Court from reaching the merits if review were granted.

The Court of Appeals held that Petitioner CTA had associational standing to seek a preliminary injunction because its members would suffer injury from the challenged statute. App. 7a-11a. In *Summers v. Earth Island Institute*, 555 U.S. 488, 498–501 (2009), however, this Court held that to establish associational standing, the plaintiff must "*identify* members who have suffered the requisite harm" and that the plaintiffs in *Summers* did not have standing because they did not satisfy the "requirement of *naming* the affected members." *Id.* at 498–99 (emphases added). Petitioners' complaint and evidence in the District Court did not identify any CTA members that would be harmed. *See* App. 60a-61a. The District Court nonetheless held that CTA did not need to identify specific members in order to establish its associational standing. App. 61a.[16]

---

[16] The District Court's conclusion cannot be defended based on the preliminary injunction posture of the case. "When a preliminary injunction is sought, a plaintiff's burden to demonstrate standing 'will normally be no less than that required on a motion for summary judgment.'" *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 907 n.8 (1990)).

If certiorari were granted, CTA's failure to identify any affected members, as required by *Summers* in order to establish Article III standing, would prevent this Court from deciding the merits issue of whether the FAAAA preempts AB 5's application to motor carriers.[17]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

SCOTT A. KRONLAND
STACEY M. LEYTON
Counsel of Record
ALTSHULER BERZON LLP
177 Post Street, #300
San Francisco, CA 94108
(415) 421-7151
sleyton@altber.com

Counsel for Intervenor-Respondent International Brotherhood of Teamsters

October 12, 2021

[17] In addition to CTA, two individual owner-operators were plaintiffs in this case, but Petitioners sought a preliminary injunction "only as to [CTA's] motor carrier members." App. 61a n.5. As such, CTA's failure to establish associational standing would require that the preliminary injunction be vacated without regard to the merits.