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

PETITIONERS' REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners incorporate by reference the corporate disclosure statement that appears in the petition for a writ of certiorari. No amendments are needed to make that statement current.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

PETITIONERS' REPLY BRIEF

It is revealing that the briefs in opposition seek to disguise the substance and effect of the decision below. But the key considerations are apparent from the Ninth Circuit's ruling. That decision creates an acknowledged conflict in the circuits on the meaning of a crucial federal statute. It will change the nature of an important national industry, while undermining the livelihoods of hundreds of thousands of owner-operators. It enables the very patchwork of divergent state laws that Congress sought to eliminate by enacting the FAAAA.

And its enormous practical significance is manifest. Substantial changes in carrier prices, routes, and services necessarily will follow from application of a rule, governing shipments into and out of the State with the nation's largest economy, that will require carriers to abandon the model that has governed their business for generations. And lest there be any doubt on that score, the array of *amicus* briefs filed in support of the petition by myriad carriers, shippers, other businesses, and owner-operators—which, notably, are ignored by respondents—illustrate the cascade of adverse consequences that will follow from the decision below. This Court should grant review.

A. The circuits and state courts of last resort are in conflict on application of the FAAAA.

1. As demonstrated in the petition (at 16-20), there is a clear conflict between the Ninth Circuit on the one hand, and the First Circuit and Supreme Judicial Court of Massachusetts on the other, about the validity of state worker-classification laws that in relevant part are, as the Ninth Circuit itself recognized,

"identical." Pet. App. 30a. The Ninth Circuit declined to follow the First Circuit's holding in *Schwann*, deeming it "contrary to our precedent." *Ibid*. The court below thus acknowledged the First Circuit's conclusion that Massachusetts' ABC statute would impermissibly "prevent a motor carrier from using its preferred methods of providing delivery services, raise prices, and impact routes." *Ibid*. But the Ninth Circuit rejected that standard, stating: "[W]e have previously concluded that such indirect consequences have 'only a tenuous, remote, or peripheral connection to rates, routes or services.'" *Ibid*. (citation omitted).

The State's attempt to minimize the lower courts' disagreement is insubstantial.

First, the State's observation that the First Circuit did not specifically address the application of the ABC test to owner-operators (State Opp. 19) ignores *Schwann*'s holding. The First Circuit ruled that the ABC test was preempted because "[t]he decision whether to provide service directly, with one's own employee, or to procure the services of an independent contractor is a significant decision in designing and running a business." *Schwann*, 813 F.3d at 438. That determination necessarily encompasses a carrier's decision to make use of owner-operators, whose settled status as independent contractors has been central to the trucking industry almost from its inception. See Pet. 4-6.

Second, that *Schwann* was decided on summary judgment is beside the point: Neither the First Circuit in *Schwann* nor the Massachusetts Supreme Judicial Court in *Chambers* grounded its decision on factual findings. The First Circuit instead explained that "a statute's 'potential' impact on carriers' prices, routes, and services' need not be proven by empirical

evidence; rather, courts may 'look[] to the logical effect that a particular scheme has on the delivery of services.'" 813 F.3d at 437.[1] See *Chambers*, 65 N.E.3d at 9. And here, as in *Schwann* and *Chambers*, that logical effect is both obvious and profound.

Third, the State is mistaken that the conflict "appears unlikely to make much of a real-world difference." State Opp. 20. Motor carriers may and do lawfully contract with owner-operators as independent contractors in Massachusetts and the many other states that follow its approach, but may not in California.[2] The point is not debatable: In California itself, courts have held drivers to be independent contractors under the older *Borello* standard but employees under AB-5. See, *e.g.*, *Parada* v. *East Coast Transp., Inc.*, 62 Cal. App. 5th 692 (2021). That consequential "real-world difference" is precisely why California enacted AB-5.

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[1] Although the State notes that this case is at the preliminary-injunction stage (State Opp. 19-20), the Court often reviews cases at that stage when there is no real prospect that the lower court's ruling will change on final judgment. See, *e.g.*, *Benisek* v. *Lamone*, 138 S. Ct. 1942, 1945 (2018). That doubtless is the situation here, given the Ninth Circuit's holding that state law is not preempted when it does not "bind" or "freeze" the carrier regarding particular prices, routes, or services. See Pet. 16.

[2] The State points to *Reynolds* v. *City Express, Inc.,* 2018 WL 679437 (Mass. Super. Jan. 25, 2018), for the proposition that Massachusetts courts have classified drivers as employees after *Schwann* and *Chambers*. State Opp. 20. But there, the carrier controlled every aspect of the work performed by drivers, who did not conduct *any* of the functions of an independent business. See *Reynolds*, 2018 WL 679437, at *11-14. The decision says nothing about Massachusetts' treatment of true independent owner-operators.

2. There is a compelling need for the Court to resolve this conflict. Disparate understandings of the FAAAA across the circuits permit the application of radically divergent state-law standards, which in turn preclude the uniformity that is essential to the effective operation of a nationwide transportation business. And motor carriers regularly transport freight between California and other states; AB-5 will disrupt those shipments, requiring that carriers arrange to switch drivers and trucks at the California border, that freight be delayed at that point for the transition, or that motor carriers convert their nationwide businesses to ones that use only employee drivers. See Pet. 32-33. Although the State describes this conflict as "shallow" (State Opp. 20), that is an odd characterization for a disagreement over the rules governing every carrier that transports freight into and out of the State that is the nation's largest producer and importer of goods.

The State's only response to this disruption in interstate commerce is the observation that motor carriers may hire current owner-operators "as employees." State Opp. 21 (cleaned up); see IBT Opp. 7, 11 n.7, 17. But that is not an answer to the problem posed by AB-5; it *is* the problem. Putting operators on the payroll as employees is, of course, precisely the change that would require carriers to modify their business model, affecting their prices, routes, and services.[3]

[3] Respondents assert repeatedly that plaintiffs "conceded" below that carriers could continue to rely on owner-operators by hiring them as employees. State Opp. 7; see *id.* at 15, 21; IBT Opp. 17. This contention is, to put it charitably, misleading. Plaintiffs did agree, as is self-evidently true, that nothing in AB-5 prevents the hiring as employees of drivers who had been owner-operators. See ER 104 ("Of course, they can be employed or hired. However,

The State's proposed solution also assumes that current owner-operators in fact would be willing to abandon their independent businesses to become employees—which, as *amici* explain, many owner-operators simply will not do. See, *e.g.*, Br. National Motor Freight Traffic Ass'n 10-12. And even leaving aside those complications, the State imagines that motor carriers could seamlessly use owner-operators for one portion of a trip and employees for another; that sort of jumbled arrangement, however, is just what Congress sought to avoid when it enacted the FAAAA to prevent "[t]he sheer diversity" of state regulatory schemes from posing "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677 at 87 (1994)).

3. The State gets no further when it insists that review is unwarranted because lower courts "consistently" have rejected FAAAA challenges to generally applicable state employment laws and this Court has denied certiorari in those cases. State Opp. 9, 11-14. The decisions cited by the State arose in very different circumstances, and presented very different questions, from those here. Most of the decisions cited by the State predated enactment of AB-5 and (1) neither involved state laws that effectively preclude motor carriers from using owner-operators (as does AB-5)

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they must be hired *as employees*."). But plaintiffs assuredly did *not* concede that carriers would be able to hire enough employees who own their own (enormously expensive) trucks to make the purchase of new truck fleets by carriers unnecessary, or that hiring former owner-operators as employees would alleviate any of the other service-limiting consequences caused by moving from an independent-contractor to an employee model.

nor (2) implicate the current conflict in the circuits on the validity of such laws. See State Opp. 13-14.

As for the decisions principally addressed by the State, the Third Circuit rejected the FAAAA challenge in *Bedoya* because the state law there at issue differed materially from AB-5—so that the Third Circuit's reasoning cannot be reconciled with that of the Ninth Circuit here. See Pet. 21-22. And in *BeavEx*, the Seventh Circuit suggested that a requirement reclassifying independent contractors as employees for all purposes might well be preempted. See *ibid.* Far from showing uniformity in approach, these decisions confirm the need for clarification of the governing test.[4]

B. The issue in this case has enormous practical importance.

For some of these same reasons, the State is off-base in minimizing the practical impact of the decision below. State Opp. 20-22. It does not deny that the independent-contractor model has long been central to the trucking industry; that carriers and owner-operators would be required to abandon that model by AB-5; that carriers would have to develop a whole new business infrastructure to do so; that prohibiting the use of independent contractors would prevent motor carriers from supplementing their fleet services to

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[4] The denial of review in *Cal Cartage,* repeatedly invoked by the State (State Opp. 9, 12), has no significance here. That case was decided by an intermediate California appellate court; the certiorari petition predated the decision in this case; and the State opposed review on the ground that this Court lacked jurisdiction because the state court's decision was not final. See California Br. in Opposition, *Cal Cartage Transportation Express, LLC* v. *California*, No. 20-1453 (July 2, 2021), at 18-25. Moreover, the Ninth Circuit in this case engaged in a much more comprehensive review of the issues than did *Cal Cartage*.

meet regular fluctuations in demand; and that by changing the character of the industry, this switch unavoidably would have an effect on the services that carriers provide. This does not require "'speculati[on]'" (State Opp. 15, 21); as the First Circuit explained, this sort of regulatory mandate would "logically be expected to have a significant impact on the actual routes followed for the pick-up and delivery of packages." *Schwann*, 813 F.3d at 439. *Amici* confirm that observation.

The State's remaining arguments on the importance of the issue are directed at straw men. It is true that some drivers in some circumstances are appropriately treated as employees and that state worker-classification laws differ from one another in their details. See State Opp. 20-22. Those truisms, however, do not save AB-5. As Judge Bennett explained below, the key consideration here is that an ABC statute in the form of AB-5 "mandates the very means by which [carriers] must provide transportation services to their customers." Pet. App. 38a. For present purposes, it is beside the point that other statutes that take a different form and have different effects may escape FAAAA preemption.

C. The Ninth Circuit's decision is wrong.

Respondents' defense of the decision below on the merits hops the track in several respects.

1. Respondents disregard the Ninth Circuit's actual holding. The court below unambiguously held that FAAAA preemption comes into play only when state law "'*binds* the carrier to a particular price, route or service' or otherwise freezes them into place or determines them to a significant degree." Pet. App. 19a. The Ninth Circuit therefore refused to follow

Schwann because it believed that state laws preventing a motor carrier "from using its preferred methods of providing delivery services"—even laws that "raise the motor carrier's costs, and impact routes" (*id.* at 30a)—have consequences that are too "indirect" to warrant preemption. *Ibid.*; see *id.* at 22a ("such indirect effects" do not trigger preemption); *id.* at 24a ("our precedents have consistently considered and rejected predicted effects similar to those raised by [petitioners]").

As shown in the petition (at 28-30), the Ninth Circuit consistently has used this "binds or freezes" formulation. Tellingly, respondents do not defend this categorical limit on the scope of FAAAA preemption, which cannot be squared with this Court's precedent. See Pet. 24-30.[5]

2. The Ninth Circuit summed up its holding by opining that preemption is inappropriate because "AB-5 is a generally applicable labor law that impacts the relationship between a motor carrier and its workforce, and does not bind, compel, or otherwise freeze into place a particular price, route, or service at the level of its customers." Pet. App. 32a. Defending that reasoning, the State maintains repeatedly that "generally applicable" state laws "ordinarily" are not preempted by the FAAAA. State Opp. 11, 13, 14. But

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[5] Although the State notes language in *Miller* v. *C.H. Robinson Worldwide, Inc.,* 976 F.3d 1016, 1024-1025 (9th Cir. 2020), pointing away from the "binds or freezes" test (State Opp. 15 n.11), the Ninth Circuit applied that test repeatedly, both before and after the decision in *C.H. Robinson.* The Ninth Circuit did not back away from the test even after petitioners called the court's attention to *C.H. Robinson* in their unsuccessful petition for rehearing en banc in this case (at 13). The test as stated below therefore must be regarded as controlling in the Ninth Circuit.

that analysis, too, is wrong. As this Court explained in *Morales*, it would create an "utterly irrational loophole" if "state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." 504 U.S. at 386. Nor does it matter that AB-5 operates by regulating the relationship between motor carriers and their drivers: Obviously, a limit on the use of independent contractors "significantly impact[s] [carriers'] relationships with their workers *and* the services that [they] are able to provide to their customers." Pet. App. 38a (dissenting opinion).[6]

3. Respondents are correct that preemption is not warranted when there is only a "remote" connection between state law and carriers' transportation services. State Opp. 10 (cleaned up). But here, there is nothing remote about the effect on carrier prices,

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[6] The State is mistaken in contending that the United States' brief in *BeavEx* supports denial of review here. State Opp. 12-13. In fact, the United States in *BeavEx* expressed no opinion on when the FAAAA preempts "general background laws." Br. for the United States as *Amicus Curiae*, *BeavEx, Inc.* v. *Costello,* No. 15-1305 (May 23, 2017), 2017 WL 2303089, at *12. Instead, the United States recommended against review because there had been no showing that the challenged Illinois statute required the carrier "'to switch its entire business model from independent-contractor-based to employee-based'" (*id.* at *13) and, given the law's limited scope, its "'real *and logical* effects'" would not be significant enough to justify preemption. *Id.* at *14. In addition, by allowing the carrier to contract around the state rule, the challenged provision did not create a "'patchwork' of state employment laws." *Id.* at *16. And the United States saw no conflict between *BeavEx* and *Schwann* because the laws challenged in those cases differed in material respects. *Id.* at *19-20. Here, in contrast, *all* of these considerations point in favor of review. Consequently, there is no need for the Court to seek the views of the United States before granting certiorari in this case.

routes, and services of a state law that makes illegal the business model used by the trucking industry for generations. Further guidance from the Court may be helpful on just where along this spectrum the preemption line should be drawn—as is suggested by the conflicts between and within circuits on the application of the FAAAA to state ABC statutes. See Pet. 16-23 & n.4. But that is a reason to grant, not deny, review.

4. AB-5's "business-to-business" exemption, invoked by the State (Opp. 17) and IBT (Opp. 13-15), has no bearing here, for several reasons:

First, in categorically rejecting FAAAA preemption of the ABC test, the Ninth Circuit expressly disregarded that exemption. Pet. App. 21a n.10. Respondents therefore contend that the Ninth Circuit's ruling is saved by an argument that the panel itself declined to address. This Court's reversal of the Ninth Circuit's misapplication of the FAAAA would dispose of the case without any need for consideration of the exemption.

Second, the State did not defend AB-5 below on the ground that the exemption applies to owner-operators—a surprising oversight, on the part of the state authorities responsible for enforcing AB-5, if the exemption really does apply and makes preemption unnecessary. (IBT did invoke the exemption.) The State's position before this Court is cagey ("it is not at all clear" that the exemption is inapplicable (State Opp. 17)), presumably because the State plans to argue in future enforcement proceedings that the exemption does *not* apply and that owner-operators always *are* employees. Indeed, as Judge Bennett noted, both the State and IBT were "stumped" when asked below how a motor carrier could contract with an owner-operator as an independent contractor under

AB-5. Pet. App. 39a-40a. That makes their current reliance on the exemption inappropriate.

Third, the intermediate appellate court opined in *Cal Cartage*, as an alternative ground for decision, that the exemption could apply. But that court rested its conclusion on the *Cal Cartage* defendants' failure to offer "evidence demonstrating it would be impossible to meet the requirements of the business-to-business exemption." 57 Cal. App. 5th at 633-634. In the posture of that case, those defendants hadn't had an opportunity to show that the exemption's numerous requirements could not be satisfied; the decision therefore offers no reason to believe that the exemption actually diminishes the impact of AB-5 on carriers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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