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' SUPPLEMENTAL 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.

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8 of the Rules of this Court, petitioners submit this supplemental brief in response to the brief submitted by the United States.

The government's brief calls to mind the question famously posed by Chico Marx: "[W]ho you gonna believe, me or your own eyes?"[1] The government thus postulates that AB-5's requirements are easily avoided; that the law may have no impact at all on carriers or owner-operators; that the decision below simply follows this Court's FAAAA precedent; and that there is no conflict in the circuits. But each of these submissions is head-scratchingly wrong.

In fact, AB-5 was designed to, and surely will, upend the operation of the trucking industry. The Ninth Circuit could not have been clearer that it applied a "binds or freezes" test of FAAAA preemption that the government does not even attempt to defend. And that court affirmatively embraced its conflict with the First Circuit, acknowledging that the Massachusetts statute invalidated in *Schwann* was "identical" to AB-5 but rejecting the First Circuit's holding as "contrary to our precedent." Pet. App. 30a.

There is no real doubt on these points. Numerous *amici* that are users of trucking services—who have no ax to grind in this litigation and whose only goal is obtaining affordable and efficient shipping—explain that AB-5 will have profoundly destructive effects. The trade association that represents owner-operators agrees that AB-5 "would cause motor carriers and

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[1] DUCK SOUP (1933) (posed by Chicolini to Mrs. Gloria Teasdale).

owner-operators to bear the substantial, if not insurmountable, costs and burdens associated with shifting to an employer/employee business model." Br. of *Amicus* OOIDA 3. Indeed, that is *already* happening: Even the prospect of AB-5 taking effect has led carriers to limit or abandon operations in California.[2] Review by this Court is urgently needed.

A. AB-5 will require fundamental changes to trucking prices, routes, and services.

The government first asserts that AB-5 is unlikely to have a significant impact because carriers have an easy way to comply with the law—namely, hire current owner-operators as part-time employee drivers and require them to supply their own trucks, with no noticeable change in operations. U.S. Br. 12-13. But this is not a real possibility, for several reasons.

First, this proposed work-around assumes that owner-operators will give up their independent businesses and become employees of carriers. But in fact, a great many owner-operators would *not* respond to AB-5 by becoming employees. That is what owner-operators themselves say; they regard independence and flexibility as far more important than do employee drivers. See American Transportation Research Institute, *Owner-Operators/Independent Contractors in*

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[2] See John D. Schulz, *Owner-Operator Business Model Under Assault in California, Congress*, LOGISTICS MANAGEMENT (Mar. 12, 2021) ("Schneider, the nation's second-largest truckload carrier, already has stopped using California-domiciled owner-operators until the issue is settled."); Todd Dills, *California AB 5: Likely Next Steps, Wait-and-See Mode, Unanswered Questions Prevail among Small Fleets, Leased Operators*, OVERDRIVE (May 7, 2021) ("Only the largest of motor carriers * * * might be able to absorb such added costs [from AB 5 enforcement], and many have already fled the state anticipating enforcement of AB 5.").

the Supply Chain 18-20, 25-26 (Dec. 2021). Knowledgeable third parties agree that "many owner-operators will reject a switch to company employee driver status." Br. of *Amicus* NMFTA 12. It therefore can be expected that numerous owner-operators would retire, leave California to work as owner-operators in other states, or seek work opportunities in other industries, rather than become employees of carriers.

This prediction is confirmed by the data. There is no shortage of jobs for drivers who are interested in working as employees of carriers; the current driver shortage has been widely noted.[3] Yet owner-operators have not abandoned their small businesses to become employees of carriers, perhaps because owner-operators may earn substantially more than employee drivers. See Br. of *Amicus* NMFTA 11-12 (citing data).

Second, even if existing owner-operators were willing to become employees, the government's proposal would not be workable. Such part-time employee drivers would be subject to California rules requiring payment of a separate hourly wage for non-productive time worked by "piece-rate" employees (see Cal. Lab. Code §226.2; U.S. Br. 13), which would change the economics of the relationship. And owner-operators and employee drivers have different means and measures of compensation, with owner-operators more likely to be paid per trip or percentage of rate (see OOIDA, *2020 Owner-Operator Member Profile Survey* 2), while employee drivers would be subject to California's complicated and challenging wage-and-

[3] See, *e.g.*, David J. Lynch, *Amid huge shortage, new truck drivers train for some of supply chain's toughest jobs,* THE WASHINGTON POST (Dec. 16, 2021).

hour requirements. Substituting an employment for an owner-operator relationship therefore would alter the incentives governing the transport of goods, with impossible-to-quantify consequences.

It also would be a wholly novel approach that would require the development of new mechanisms for hiring and assigning work to drivers. For example, many owner-operators receive jobs after contacting numerous brokers and weighing which loads are most desirable (see OOIDA, *2020 Owner-Operator Member Profile Survey* 2), while employee drivers receive assignments directly from their carrier employers (without the ability to refuse undesirable loads). Abandoning the broker assignment process would cause inefficiencies, with the attendant adverse impact on prices, routes, and services.[4] And, of course, carriers whose businesses currently use owner-operators would have to create an employment infrastructure to handle salary, record-keeping, human resources, and all the other elements associated with a structured workplace.

Third, carriers could not effectively substitute part-time employees for owner-operators who transport goods into California from the many states

[4] Real-world evidence confirms that substituting employees for owner-operators often simply would not be workable. For example, the Hub Group, one of the larger carriers that served the Los Angeles/Long Beach Ports, "in 2014 converted hundreds of its California [drayage] drivers from owner-operators to employee drivers to settle class actions alleging the company misclassified them. But Hub Group announced [in 2016] that it w[ould] close its terminal serving the ports of Los Angeles and Long Beach altogether because of unsustainable costs" resulting from the switch. Linda Chiem, *Truckers Weigh Doing Business in Calif. Amid Tougher Regs*, LAW360 (Mar. 24, 2016).

where owner-operators are classified as independent contractors. AB-5 applies to all drivers while they are operating in California, making no exception for carriers that are headquartered in other states. Accordingly, AB-5 would require drivers (and the carriers that employ them) to comply with California's onerous laws for employees, even if an owner-operator is in the State only briefly. See Br. of *Amicus* OOIDA 11; Br. of *Amicus* Transportation Intermediaries Ass'n 12-13. To meet the requirements of the law, AB-5 therefore would obligate carriers moving freight into or out of California to either (i) use an employee driver for the entire trip (even if the driver could lawfully operate as an owner-operator in other states) or (ii) incur the expense and delay of transferring the freight to a truck driven by an employee when the freight enters California or to a truck owned by an owner-operator when the freight leaves California. The government makes no attempt to explain how this problem could be addressed.

Fourth, the government suggests that petitioners conceded below that carriers could comply with AB-5 by requiring employee drivers to supply their own trucks, rather than purchase new carrier-owned truck fleets. U.S. Br. 12-13. As explained in the reply brief (at 4-5 n.3), however, petitioners made no such concession. In any event, the government's approach *could not* be a permanent solution. Even if current owner-operators become employees and provide their own vehicles, as trucks become obsolete over time existing trucks will have to be replaced with new ones. Carriers would be responsible for that replacement, as employees could hardly be expected to purchase and maintain vehicles that cost well in excess of $100,000 (new trucks can cost up to $240,000) simply so that the vehicles could be leased to their employers. See

Erica E. Phillips, *Trucking Companies Try New Approach at Congested California Ports*, THE WALL STREET JOURNAL (July 1, 2015). Sooner rather than later, AB-5 unquestionably would require carriers that now contract with owner-operators to change their business model by acquiring fleets of trucks, as well as places to park them and facilities to maintain them.

There is, accordingly, no work-around for AB-5. If the law goes into effect, it will change the operation of the Nation's trucking industry in fundamental respects.

B. AB-5 will require the reclassification of drivers as employees.

The government also offers two other reasons to hope that AB-5 will not change trucking practices in California. Maybe, the government speculates, "most owner-operators should be classified as employees even under" the pre-AB-5 test. U.S. Br. 14. Or maybe, the government continues, most owner-operators will remain independent contractors even under AB-5, through application of the statute's business-to-business exemption. *Ibid*. These assertions—that owner-operators either never have been or always will be independent contractors—are mutually inconsistent. Both are wrong.

1. The contention that most owner-operators should be treated as employees even without reference to AB-5 is insupportable. It is hardly likely that California enacted a law—one that had the purpose of "getting rid" of the "outdated" owner-operator model (Pet. 32 & n.5)—that has no effect on existing practice. The State made no such contention below. In fact, California courts repeatedly have held owner-operators to

be independent contractors under the pre-AB-5 standard, both before and after enactment of AB-5.[5] That history surely "establish[es] that owner-operators necessarily would be *properly* classified as independent contractors under the common-law test." U.S. Br. 14.[6]

2. The government invokes the business-to-business exemption as a basis on which owner-operators might continue to function as independent contractors under AB-5. That is a red herring; the exemption has no bearing here, for both legal and practical reasons.

First, the exception can come into play only if each of twelve statutory prerequisites is satisfied. Although the government complains that petitioners do not "specify which conditions the carriers and owner-operators could not meet" (U.S. Br. 16), it is plain that, at a minimum, an owner-operator could not realistically "advertise[] and hold[] itself out to the public as available to provide the same or similar services" that

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[5] See SER 048, 083; *Canava* v. *Rail Delivery Servs., Inc.*, No. 19-cv-00401 (C.D. Cal. May 6, 2022), ECF 399. In *Canava*, a jury last month determined that drivers were properly classified as independent contractors under the pre-AB-5 test; liability under the ABC test remains to be resolved by the court, with defendants exposed to millions of dollars in damages and penalties if FAAAA preemption does not apply. See also *Parada* v. *E. Coast Transport Inc.*, 62 Cal. App. 5th 692 (2021) (drayage drivers held to be independent contractors under *Borello*; court remanded for determination under AB-5).

[6] The government points to a purported state legislative finding that many California port drayage drivers are misclassified. U.S. Br. 14. But even if that is correct, drayage drivers are a small, specialized subset of drivers; there is no basis to believe that independent-contractor relationships that have been central to the broader trucking business in California for generations have violated existing law for much of that time.

it offers to carriers. Cal. Lab. Code § 2276(a)(8). As a practical matter, owner-operators do not advertise to the public at all because that is not how they obtain business; and as a legal matter, truck drivers may not provide services to the general public without holding a motor carrier license, which would place them outside the owner-operator context. See Pet. 4-6.

Second, even if this and the other business-to-business requirements could be satisfied, doing so would obligate carriers and owner-operators to restructure their operations in significant ways. Requiring owner-operators to maintain business locations or operations they do not need, or run advertisements and cultivate categories of customers that are unnecessary for their businesses, would force them "to offer * * * services that the market does not now provide (and which [they] would prefer not to offer)." *Rowe*, 552 U.S. at 372.[7] That is an independent reason why the theoretical possibility of a business-to-business work-around to AB-5 would not avoid FAAAA preemption.

Third, as a practical matter, carriers and owner-operators simply will not try to invoke the business-to-business exemption. To benefit from the exemption,

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[7] Other business-to-business exemption requirements include the mandates that the independent contractor "is *free* from the control and direction of the contracting business entity" and that the independent contractor can contract with other businesses to provide the same or similar services and maintain a clientele "*without restrictions* from the hiring entity." Cal. Lab. Code §§ 2776(a)(1), (7), and (2) (emphasis added). These requirements inarguably conflict with the federal motor-carrier safety regulations obligating motor carriers to maintain exclusive control over the independent contractor's equipment so as to ensure safe operations by the independent contractor. See 49 C.F.R. §§ 376.11, 376.12(c).

a carrier would have to separately establish a "bona fide business-to-business contracting relationship" as to each owner-operator with which it deals, a fact-specific showing that would require the restructuring of the businesses involved with no assurance of success and no mechanism for obtaining advance approval of business-to-business status. But there *is* substantial certainty that attempted use of the business-to-business exemption would be challenged in class-action litigation and state enforcement proceedings, with the prospect of enormous civil damages,[8] as well as criminal and civil penalties.[9] No business could be expected to roll the dice in the face of that uncertainty. The government therefore is playing a shell game when it contends that the Court should postpone consideration of AB-5's validity until application of the exemption has been tested in litigation. U.S. Br. 16.

That the business-to-business exemption does not and was never meant to apply to the trucking industry is underscored by the fact the State did not argue below that the exemption applies here. That presumably also is why respondents were "stumped" when asked below how a carrier could contract with an owner-operator as an independent contractor under AB-5. Pet. App. 39a-40a (dissenting opinion). And, of course, the court below expressly found it unnecessary to address the business-to-business exemption "[f]or purposes of determining whether the [FAAAA] preempts AB-5." *Id*. at 21a n.10. The meaning of the exemption therefore is not a "threshold question" in this case, as the

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[8] See, *e.g.*, Cal. Lab. Code §§ 226 (itemized wage statements), 226.2 (non-compliant piece rate plan), 1194 (minimum wage), 2802 (unreimbursed expenses).

[9] See, *e.g.*, Cal. Lab. Code §§ 95(a), 93.3(a), 226.6, 226.8, 1199.

government repeatedly maintains (U.S. Br. 10, 22); it has no bearing on the proper outcome here at all.

C. The Ninth Circuit's decision conflicts with the holdings of this Court and of other circuits.

The petition explained that the Ninth Circuit's FAAAA test finds preemption only when state laws "bind, compel, or otherwise freeze into place a particular price, route, or service of a motor carrier at the level of its customers." Pet. App. 32a. The government makes no attempt to defend that standard, which is plainly inconsistent with this Court's approach. See Pet. 26-30. Instead, the government denies that the court below used such a standard, insisting that the Ninth Circuit followed this Court's decisions in *Morales* and *Rowe*. U.S. Br. 16-19.

But that argument ignores the Ninth Circuit's express application of its aberrational "binds" test, which it articulated and applied repeatedly throughout its decision. The panel stated its test in those terms at the outset. Pet. App. 2a. It returned to the test again and again. *E.g.*, *id.* at 18a, 19a, 24a. It indicated that its precedent did not allow it to find a generally applicable law preempted unless the law "effectively binds motor carriers to specific prices, routes, or services at the consumer level," and then declined to "depart[] from our precedent." *Id.* at 24a. And it summed up its holding by reciting the identical "bind, compel, or otherwise freeze into place" formula. *Id.* at 32a. That is the rule in the Ninth Circuit.

Arguing to the contrary, the government points to four other Ninth Circuit decisions that, it asserts, looked beyond the "binds" requirement. U.S. Br. 17-19. But all of those decisions *rejected* preemption

claims, so hardly can be thought to establish a broader approach to FAAAA preemption. Indeed, the court below affirmatively cited two of these decisions for the proposition that a generally applicable state law is not preempted "unless the 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 (citing *Dilts* and *Su*))—just as noted here. And the panel below relied on another of the decisions cited by the government for the rule that preemption never can be warranted when state law "impact[s] motor carriers' business at the point where the motor carriers interact with their workers" (*id.* at 17a (citing *Miller*))—a proposition that also is inconsistent with this Court's holdings. See Pet. 30-31; Pet. App. 36a (Bennett, J., dissenting); see also Reply Br. 8 n.5 (addressing *Miller*). The decision below, and the Ninth Circuit's approach to the FAAAA, therefore is not defensible.

Finally, the government barely even attempts to deny the existence of a conflict between the Ninth and First Circuits. It asserts without explanation that the conflicting decisions are "case-specific" (U.S. Br. 20), but it is hard to see much space between rulings that reach opposite conclusions about the validity of "identical" state statutes. Pet. App. 30a. And because AB-5's business-to-business exemption is unavailable to carriers and owner-operators as a practical matter, that exemption does not serve to distinguish the Massachusetts statute invalidated in *Schwann*—as the Ninth Circuit evidently recognized when it acknowledged its conflict with the First Circuit, even as it dismissed the relevance of the business-to-business exemption to its preemption analysis. Consequently, the decision below makes impossible the uniformity that

is essential to the effective operation of nationwide trucking businesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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