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.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a generally applicable California labor statute setting forth the conditions that must be satisfied to classify a worker as an independent contractor (as opposed to an employee), when applied to trucking operations in the State, is "related to a price, route, or service of any motor carrier," 49 U.S.C. 14501(c)(1), and thus preempted by federal law.

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This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Petitioners brought this suit seeking to preclude enforcement of a state statute setting forth the conditions that must be satisfied to classify a worker as an independent contractor (as opposed to an employee), for purposes of state law. The district court granted a preliminary injunction on the ground that the statute likely was preempted by federal law. Pet. App. 51a-79a. The court of appeals reversed. *Id.* at 1a-50a.

1. a. Whether a worker is an employee or an independent contractor is an issue of importance in a variety of areas of law. See, *e.g.*, *Nationwide Mutual Insur-*

ance Co. v. *Darden*, 503 U.S. 318 (1992) (employee benefits); *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989) (copyright); *NLRB* v. *United Insurance Co.*, 390 U.S. 254 (1968) (union representation); *United States* v. *Silk*, 331 U.S. 704 (1947) (Social Security benefits); *Singer Manufacturing Co.* v. *Rahn*, 132 U.S. 518 (1889) (vicarious tort liability). If a worker is an employee, the hiring business may bear many responsibilities, such as providing worker's compensation insurance and complying with various wage-and-hour provisions of state law. See *Dynamex Operations West, Inc.* v. *Superior Court*, 416 P.3d 1, 5 (Cal. 2018). By contrast, "the business does not bear any of those costs or responsibilities" with respect to an independent contractor. *Ibid.*

Like other jurisdictions, California has sought to define the circumstances in which a worker will be classified as an employee for certain state-law purposes notwithstanding the hiring entity's desire to treat the worker as an independent contractor. Until 2018, California classified workers for a variety of purposes based on a common-law test that principally considered "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *S.G. Borello & Sons, Inc.* v. *Department of Industrial Relations*, 769 P.2d 399, 404 (Cal. 1989) (citation omitted). California also considered "several 'secondary' indicia of the nature of a service relationship," including "whether or not the work is a part of the regular business of the principal." *Ibid.*

In its 2018 decision in *Dynamex*, the Supreme Court of California adopted a new test—called the "ABC" test (presumably because it has three principal elements)—

for classifying workers for purposes of California wage-and-hour laws. 416 P.3d at 7. Under that test, a worker is an independent contractor only if the hiring entity can demonstrate that (A) "the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact"; (B) "the worker performs work 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 of the same nature as the work performed for the hiring entity." *Ibid.* As of April 2021, at least 20 States and the District of Columbia had adopted the ABC test for at least some purposes. Jon O. Shimabukuro, Congressional Research Service, R46765, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test* 9 (Apr. 20, 2021), go.usa.gov/xu5Ab; see *id.* at 14-27 (listing state laws).

In 2019 and 2020, the California legislature codified the ABC test in Assembly Bill 5 and Assembly Bill 2257, respectively. Cal. Labor Code § 2775 *et seq.*; see § 2775(b)(1)(A)-(C) (2020) (codifying the three elements of the ABC test). In its current form, the statute expands the applicability of the ABC test beyond the wage-and-hour laws, see § 2775(b), while at the same time exempting certain occupations and services from its reach, see §§ 2776-2784. One of those exemptions provides that the ABC test "do[es] not apply to a bona fide business-to-business contracting relationship" if certain conditions are satisfied. § 2776; see § 2776(a)(1)-(12). In general, if the ABC test does not apply "to a particular context," the California statute provides that "the determination of employee or independent con-

tractor status in that context shall instead be governed by" the common-law test in *Borello*, *supra*. Cal. Labor Code § 2775(b)(3) (2020).

b. This case involves the application of California's ABC test to independent owner-operators in the trucking industry. As the name implies, owner-operators are drivers who own (or, sometimes, lease) and operate their own trucks. See C.A. E.R. 202, 221-222. Owner-operators generally enter into contracts with motor carriers (*i.e.*, trucking companies) both to lease the vehicle to the motor carrier for transporting property and to drive the truck for the duration of the lease. See *ibid.* Under regulations issued by the Federal Motor Carrier Safety Administration, if a licensed motor carrier uses a leased truck, the motor carrier must "assume complete responsibility" for the truck's operations and be given "exclusive possession, control, and use" of the truck for the duration of the lease. 49 C.F.R. 376.12(c)(1); see 49 U.S.C. 14102; 49 C.F.R. 376.11.

Petitioners, a trade association that represents motor carriers and two individual owner-operators, sued several California state officials (respondents here) challenging application of the ABC test. Respondent International Brotherhood of Teamsters intervened as a defendant. As relevant here, petitioners argued that application of the ABC test to motor carriers and the owner-operators with whom they contract is preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569.

The FAAAA provides as a general matter that "a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier

* * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). That language was borrowed directly from a provision in the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, which as amended preempts all state laws "related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1).

Those preemption provisions were part of federal deregulatory efforts. In the ADA, Congress "largely deregulated domestic air transport," *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 222 (1995), replacing the prior public-utility model for regulating commercial airlines with one favoring "maximum reliance on competitive market forces and on actual and potential competition," ADA § 3(a), 92 Stat. 1706. Congress likewise deregulated trucking in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, as "part of [its] continuing effort * * * to reduce unnecessary regulation by the Federal Government." § 2, 94 Stat. 793; see *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364, 368 (2008). The ADA's broadly worded preemption provision was intended "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). "Congress similarly sought to pre-empt state trucking regulation" in the FAAAA, *Rowe*, 552 U.S. at 368, albeit only "with respect to the transportation of property," 49 U.S.C. 14501(c)(1); see *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 261 (2013).

This Court has recognized that the identical language in the two preemption provisions—"related to a price, route, or service"—should be interpreted identically. See *Rowe*, 552 U.S. at 370. The Court also has

explained that those provisions have an "expansive sweep." *Morales*, 504 U.S. at 384 (citation omitted). They preempt not only those state laws that make "reference to" the prices, routes, or services of airlines and motor carriers, but also those laws of general applicability that have a "significant impact" on prices, routes, or services. *Id.* at 388, 390; see *Rowe*, 552 U.S. at 375; *Wolens*, 513 U.S. at 224. The Court has emphasized, however, that the statutes do not preempt generally applicable state laws that affect prices, routes, or services in merely a "tenuous, remote, or peripheral" manner. *Morales*, 504 U.S. at 390 (citation omitted).

2. The district court preliminarily enjoined application of the ABC test "as to any motor carrier operating in California." Pet. App. 78a; see *id.* 51a-79a. As relevant here, the court held that petitioners had raised at least "serious questions" about whether the FAAAA preempts application of California's codification of the ABC test to motor carriers operating in the State. *Id.* at 62a (citation omitted); see *id.* at 62a-75a. The court explained that "the FAAAA likely preempts 'an all or nothing' state law * * * that categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees." *Id.* at 66a-67a (citation omitted). The court found that to be "precisely the case here" because "drivers who may own and operate their own rigs will *never* be considered independent contractors under California law" under the second element of the ABC test, given that they "necessarily perform work *within* 'the usual course of the motor carrier hiring entity's business.'" *Id.* at 67a (brackets omitted).

The district court reasoned that the ABC test "determin[es] whether *all* of California employment laws

do or do not apply," and thus is likely preempted as applied to motor carriers because "the combined effect of all such laws has a significant impact on motor carriers' prices, routes, or services." Pet. App. 73a. The court rejected respondents' argument that petitioners and other motor carriers and owner-operators could avail themselves of the business-to-business exemption in the statute, Cal. Labor Code § 2776 (2020), explaining that respondents "ha[d] not shown how that is possible" and that California officials had "not expressly concede[d] that the exception would apply." Pet. App. 74a; see *id.* at 74a n.11.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-50a.

a. The court of appeals held that petitioners were unlikely to succeed on the FAAAA preemption issue. After reviewing relevant precedent, the court explained that "a generally applicable state law is not 'related to a price, route, or service of any motor carrier' for purposes of the F[AAA]A 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 (citation and emphasis omitted). The court further explained that the ABC test "does not have the sort of binding or freezing effect on prices, routes, or services that [is] preempted under the F[AAA]A" because the ABC test affects only "a motor carrier's relationship with its workforce," not its "relationship with consumers." *Id.* at 20a-21a.

The court of appeals then turned to petitioners' argument that application of the ABC test to motor carriers nevertheless would have an "impact [that] is so significant that it indirectly determines prices, routes, or services." Pet. App. 21a; see *id.* at 21a-24a. The court

observed that petitioners had alleged that application of the ABC test would increase equipment and labor costs "by as much as 150% or more," which would cause carriers to reconfigure or eliminate some routes and potentially cease operating in the State altogether, leaving the remaining carriers to offer only diminished services. *Id.* at 22a. The court acknowledged 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." *Id.* at 24a. But the court observed that it had previously rejected preemption claims based on predicted incidental effects similar to those posited by petitioners. *Id.* at 22a-24a. The court also noted that petitioners' allegations of increased costs relied heavily on their contention that motor carriers would be forced to buy a fleet of trucks, but that petitioner California Trucking Association had conceded that carriers could avoid those costs by hiring drivers who own their own trucks, rendering any impact on prices, routes, or services speculative given the underdeveloped state of the record. *Id.* at 22a & n.11.

The court of appeals rejected petitioners' reliance on decisions from the First and Third Circuits. See Pet. App. 29a-30a. In *Schwann* v. *FedEx Ground Package System, Inc.*, 813 F.3d 429 (2016), the First Circuit held that the FAAAA preempts application of the second element of the ABC test as codified under Massachusetts law. The court of appeals here explained that *Schwann* found the second element of the ABC test preempted "because interfering with the employer's decision whether to use an employee or an independent contractor could prevent a motor carrier from using its pre-

ferred methods of providing delivery services, raise the motor carrier's costs, and impact routes." Pet. App. 30a. In *Bedoya* v. *American Eagle Express Inc.*, 914 F.3d 812, cert. denied, 140 S. Ct. 102 (2019) (No. 18-1382), the Third Circuit held that the FAAAA does *not* preempt application of the ABC test as codified under New Jersey law. The court of appeals in this case observed, however, that *Bedoya* had "opin[ed] in dicta that the F[AAA]A preempt[ed] Massachusetts' ABC test because it 'mandates a particular course of action—e.g., requiring carriers to use employees rather than independent contractors.'" Pet. App. 30a (brackets and citation omitted). The court stated that the "language relied upon" in *Schwann* and *Bedoya* "is contrary to [Ninth Circuit] precedent" that had "concluded that such indirect consequences have 'only a tenuous, remote, or peripheral connection to rates, routes[,] or services.'" *Ibid.* (citation omitted).

b. Judge Bennett dissented. Pet. App. 33a-50a. In his view, the majority "ignore[d] the possibility that a state law might affect a motor carrier's relationship with its workforce *and* have a significant impact on that motor carrier's prices, routes, or services." *Id.* at 36a. In Judge Bennett's view, the California law "will 'categorically prevent motor carriers from exercising their freedom to choose between using independent contractors or employees,'" and therefore "*will* significantly impact motor carriers' services by mandating the means by which they are provided." *Id.* at 40a (brackets and citation omitted). Specifically, he stated that application of the ABC test to motor carriers under California law will "diminish[] the specialized transportation services that motor carriers are able to provide through independent contractor drivers" and "eliminate motor

carriers' flexibility to accommodate fluctuations in supply and demand." *Id.* at 40a-41a.

c. The court of appeals stayed issuance of the mandate pending disposition of the petition for a writ of certiorari. Pet. App. 82a-83a.

DISCUSSION

The petition for a writ of certiorari should be denied. The court of appeals correctly determined that petitioners were unlikely to succeed on their claim that the FAAAA preempts applying the ABC test as codified under California law to owner-operators, and the court's decision does not conflict with any decision of this Court. Although the circuits have reached differing outcomes with respect to FAAAA preemption of the ABC test as codified under the laws of various States, those case-specific decisions do not create a conflict warranting this Court's review. Moreover, the interlocutory posture of this case and the need to resolve a threshold issue of state law—namely, whether motor carriers and owner-operators may fall within the business-to-business exemption under California law—make this case a poor vehicle in which to address the question presented. Further review is unwarranted.

1. a. To be preempted under the FAAAA, a claim must seek to enforce a state law "related to a price, route, or service of any motor carrier." 49 U.S.C. 14501(c)(1). This Court has provided important guidance on the meaning of that language in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364 (2008).

In *Morales*, the Court concluded that the phrase "relat[ed] to" in the ADA's similarly worded preemption provision reflects a broad and deliberately expan-

sive preemptive purpose, and that the ADA thus preempts state-law claims "having a connection with, or reference to, airline 'rates, routes, or services.'" 504 U.S. at 383-384 (citation omitted). The Court held in *Morales* that a state law "may 'relate to'" a price, route, or service even if it is not specifically addressed to the airline industry or the effect is "only indirect." *Id.* at 386 (citation omitted). At the same time, the Court recognized that "'some state actions may affect airline fares in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* at 390 (brackets and citation omitted). The Court had no occasion in *Morales* to define "'where it would be appropriate to draw the line,'" because the state provisions at issue there—guidelines interpreting general consumer-protection laws in a way that restricted airlines' advertising of their fares—plainly related to (indeed, expressly referred to) airline fares and had a "significant impact" on them. *Id.* at 389-390 (citation omitted).

In *Rowe*, the Court held that the same principles govern the preemptive scope of the FAAAA. Applying those standards, the Court held that the FAAAA preempted a Maine statute forbidding licensed tobacco retailers from employing a "delivery service" unless that service followed a particular set of prescribed delivery procedures. 552 U.S. at 371 (citation omitted); see *id.* at 370-372. The Court emphasized that the Maine statute directly focused on motor-carrier services and would require carriers "to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Id.* at 372. The Court concluded that "[t]he Maine law thereby produce[d] the very effect that the federal law sought to avoid, namely, a State's direct substitu-

tion of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Ibid.* (citation omitted).

The Court in *Rowe* noted, however, that the FAAAA does not preempt laws of general applicability that only incidentally affect motor carriers. Citing *Morales*, the Court stressed that "the state laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services," and not laws that apply to carriers only in their capacity as members of the general public. *Rowe*, 552 U.S. at 375 (citation omitted); see *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 260-261 (2013).

b. Under those principles, the court of appeals correctly concluded that petitioners were not likely to succeed on the merits of their preemption argument. The court agreed with petitioners that the FAAAA would preempt a generally applicable state labor law whose "impact is so significant that it indirectly determines price, routes, or services." Pet. App. 21a. The court also assumed that the ABC test would "require[] that motor carriers use employees rather than independent contractors as drivers." *Ibid.* But on the present record, the court rejected petitioners' conclusion that applying the ABC test would necessarily result in a significant impact on prices, routes, or services.

Petitioners had contended that the ABC test would increase carriers' costs "by as much as 150% or more" as a result of having to use employees instead of independent contractors as drivers. Pet. App. 22a. But as the court of appeals observed, that contention "rel[ied] heavily on [the] claim that motor carriers w[ould] be forced to buy a fleet of trucks," notwithstanding peti-

tioners' acknowledgment that carriers "could avoid incurring such costs by hiring owner-operators (i.e., drivers who own their own trucks) as employees." *Id.* at 22a n.11; see *Estrada* v. *FedEx Ground Package System, Inc.*, 154 Cal. App. 4th 1, 25 (2007) (explaining that under California law, "an employer may require its employees to provide their own trucks" as long as the employer reimburses the employee for operating expenses). Moreover, California law does not require motor carriers to hire drivers as *full-time* employees, and California generally allows piece-rate compensation for part-time or seasonal employees as long as the compensation results in payment of at least a minimum wage, taking into account rest and recovery breaks. See Cal. Labor Code § 226.2 (2015). Contrary to petitioners' suggestion (Pet. 27), therefore, carriers would retain the flexibility to engage owner-operators as needed to provide "specialized trucking services" or "increased service in times of peak demand." The court of appeals thus was correct to conclude that petitioners' claimed impacts on prices, routes, or services due to increased costs were "merely speculative" given "the undeveloped record in the district court." Pet. App. 22a n.11. Petitioners provide no sound basis for this Court to second-guess those factbound determinations, especially at this interlocutory stage of the proceedings.

Furthermore, petitioners' assertions concerning substantially increased costs, leading in turn to a significant impact on prices, routes, or services, implicitly rely on the premise that applying the new California statute will require widespread reclassification of drivers. But petitioners have not established that premise for two reasons.

First, petitioners principally focus on the second element of the ABC test, which requires that the worker "perform[] work that is outside the usual course of the hiring entity's business." Cal. Labor Code § 2775(b)(1)(B) (2020). But whether "the work is a part of the regular business of the principal" also is a consideration (even if not a mandatory element) under the common-law test that would apply if the ABC test were inapplicable. *S.G. Borello & Sons, Inc.* v. *Department of Industrial Relations*, 769 P.2d 399, 404 (Cal. 1989). And the common-law test, like the first element of the ABC test, places great weight on whether the hirer exercises control and direction over the worker. Given those considerations, petitioners have not established that owner-operators necessarily would be *properly* classified as independent contractors under the common-law test. Cf. *People* v. *Superior Court*, 57 Cal. App. 5th 619, 625 (2020) (*Cal Cartage*) (documenting the California legislature's recent findings that "two-thirds of California port drayage drivers" were "misclassified as independent contractors when they in fact work as employees under California and federal labor laws," and that "rampant misclassification of drivers contributes to wage theft and leaves drivers in a cycle of poverty") (citation omitted), cert. denied, 142 S. Ct. 76 (2021) (No. 20-1453); Teamsters Br. in Opp. 18. If most owner-operators should be classified as employees even under the common-law test, application of the ABC test would not result in any widespread reclassification from a prior lawful status, and thus would not fairly be regarded as having a significant impact on prices, routes, or services either.

Second, petitioners' argument overlooks that the California statute exempts from the ABC test any "bona

fide business-to-business contracting relationship"—including one with "an individual acting as a sole proprietor"—when certain conditions are satisfied. Cal. Labor Code § 2776(a) (2020); see § 2776(a)(1)-(12) (listing the conditions). Some of those conditions are obviously inapposite, *e.g.*, § 2776(a)(12) (excluding "work for which a license from the Contractors' State License Board is required"), and others are unremarkable, *e.g.*, § 2776(a)(3) (requiring the contract to be in writing and to specify the payment and due dates); § 2776(a)(4) (requiring the service provider to have a "business license or business tax registration" if the jurisdiction requires one). The remaining conditions require, among other things, that the service provider be "free from the control and direction of the contracting business entity in connection with the performance of the work," § 2776(a)(1); generally "provid[e] services directly to the contracting business rather than to customers of the contracting business," § 2776(a)(2); "maintain[] a business location * * * that is separate from the business or work location of the contracting business," § 2776(a)(5); be "customarily engaged in an independently established business of the same nature as that involved in the work performed," § 2776(a)(6); be able to "contract with other businesses to provide the same or similar services," § 2776(a)(7); "advertise[] and hold[] itself out to the public as available to provide the same or similar services," § 2776(a)(8); generally "provide[] its own tools, vehicles, and equipment to perform the services," § 2776(a)(9); be able to "negotiate its own rates," § 2776(a)(10); and, "[c]onsistent with the nature of the work," be able to "set its own hours and location of work," § 2776(a)(11).

Petitioners assert (Pet. 33 n.6) that "carriers and owner-operators generally will not be able to meet" all of those conditions, but petitioners neither specify which conditions the carriers and owner-operators could not meet, nor demonstrate that any steps required to meet all of the conditions would result in a significant impact on prices, routes, or services. See *Cal Cartage*, 57 Cal. App. 5th at 633-634 (rejecting the argument that "independent owner-operators can never meet several of the requirements in the business-to-business exemption"). Perhaps petitioners ultimately would be able to demonstrate that the business-to-business exemption is unavailable without itself imposing a significant impact on prices, routes, or services—but they have not done so at this interlocutory stage, which further counsels against this Court's review.

c. Petitioners assert that the court of appeals erred by adopting the view "that the FAAAA preempts only laws that 'bind, compel or otherwise freeze into place a particular price, route, or service.'" Pet. 24; see Pet. 24-30. That assertion is overstated. After reviewing the statutory language and relevant case law, the court explained that "a generally applicable state law is not 'related to a price, route, or service of any motor carrier' for purposes of the F[AAA]A unless the state law [(1)] 'binds the carrier to a particular price, route or service' or otherwise [(2)] freezes them into place or [(3)] determines them to a significant degree." Pet. App. 19a (citation and emphasis omitted). For that proposition, the court relied (*ibid.*) on its prior decision in *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), cert. denied, 575 U.S. 996 (2015) (No. 14-801). *Dilts* stated that the FAAAA preempts "those state laws that are significantly 'related to' prices, routes, or services,"

and found that certain state laws governing employee meal and rest breaks were not preempted as applied to short-haul truck drivers because "the laws do not 'bind' motor carriers to specific prices, routes, or services"; do not "'freeze into place' prices, routes, or services"; and do not "'determine (to a significant degree) the prices, routes, or services that motor carriers will provide.'" *Id.* at 647 (brackets and citations omitted). Like the decision below, therefore, *Dilts* viewed the binding of carriers to specific prices, routes, or services as one way to establish preemption—not as the exclusive test for FAAAA preemption.

In focusing on the "binds" and "freezes" language, petitioners overlook the disjunctive "or determines them to a significant degree" language. Pet. App. 19a (citation omitted). That language is taken directly from this Court's decision in *Rowe*. See 552 U.S. at 372. The court of appeals' recognition that the FAAAA preempts state laws that "determine (to a significant degree) the prices, routes, or services that motor carriers will provide," *Dilts*, 769 F.3d at 647 (brackets and citation omitted), thus makes clear that the Ninth Circuit's preemption test is consistent with this Court's precedent and not meaningfully different from the "significant effect" test that petitioners derive (cf. Pet. 27, 31) from that precedent. Indeed, the Ninth Circuit in *Dilts* expressly "agree[d] with" the government's invited amicus brief in that case explaining that state labor laws and similar generally applicable laws "are not preempted by the FAAAA unless they have a 'significant effect' on prices, routes, or services." 769 F.3d at 649-650; see Gov't Amicus Br. at 14-16, 18-23, *Dilts*, *supra* (9th Cir. Feb. 18, 2014) (No. 12-55705).

Other Ninth Circuit cases likewise have made clear the court's view that the FAAAA and ADA preempt state laws that have a significant impact on prices, routes, or services, regardless of whether the laws bind carriers to or freeze into place particular prices, routes, or services. For example, in finding that the ADA does not preempt a generally applicable California labor law regarding wage statements, the Ninth Circuit discussed the "binding" language to which petitioners object, but then held that "what proves dispositive here is that [the airline] has presented no evidence that [its] increased costs would have a 'significant impact' on its prices, routes, or services." *Ward* v. *United Airlines, Inc.*, 986 F.3d 1234, 1243 (2021) (citation omitted).

Similarly, in *Miller* v. *C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (2020), petition for cert. pending, No. 20-1425 (filed Apr. 8, 2021), the Ninth Circuit held that a state-law negligence claim was "'related to' carrier prices, routes, or services" under the FAAAA's preemption provision even though the claim did "*not* 'bind' [the carrier] to 'specific prices, routes, or services.'" *Id.* at 1023-1024 (emphasis added; citation omitted). The court acknowledged its prior use of the "binding" language, but clarified "that the scope of FAAAA preemption is broader than this language suggests." *Id.* at 1025. And in *California Trucking Association* v. *Su*, 903 F.3d 953 (2018), cert. denied, 139 S. Ct. 1331 (2019) (No. 18-887), the Ninth Circuit reiterated that the FAAAA preempts a state law "that significantly impacts a carrier's prices, routes, or services," as distinguished from one "that has only a tenuous, remote, or peripheral connection." *Id.* at 960.

As those decisions make clear, the Ninth Circuit has adopted and regularly applies a test for ADA and

FAAAA preemption that looks to "significant impact" on prices, routes, or services—a phrase used in *Morales*, see 504 U.S. at 390, and repeated in *Rowe*, see 552 U.S. at 375. And the Ninth Circuit has done so notwithstanding its use as well of the "binds" or "freezes" language—which itself echoes language from this Court's cases, see *Morales*, 504 U.S. at 388 (describing the preempted law as having imposed "binding requirements as to how [airline] tickets may be marketed"); *Rowe*, 552 U.S. at 372 (explaining that the preempted "law would freeze into place services that carriers might prefer to discontinue in the future").

2. Further review also is unwarranted because the decision below does not create a conflict with any decision of this Court or another court of appeals that warrants this Court's review. Petitioners base (Pet. 15-23) an asserted circuit conflict on the Ninth Circuit's supposed adoption of a "binds" or "freezes" test. But as just explained, the Ninth Circuit has not actually adopted such a test, as exemplified by recent decisions making clear that the "dispositive" consideration is whether application of state law to a carrier "would have a 'significant impact' on its prices, routes, or services," *Ward*, 986 F.3d at 1243 (citation omitted); see *Miller*, 976 F.3d at 1024-1025; *California Trucking Association*, 903 F.3d at 960. And because petitioners have not identified any other court of appeals or state court of last resort that has adopted a "binds" or "freezes" test, any residual disagreement between Ninth Circuit panels would at most amount to an intracircuit conflict that would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to recon-

cile its internal difficulties."); see also, *e.g.*, *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

Petitioners contend (Pet. 18-21) that the decision below conflicts with decisions of the First Circuit and the Supreme Judicial Court of Massachusetts holding that the FAAAA preempted application of the second element of the ABC test as codified under Massachusetts law. See *Massachusetts Delivery Association* v. *Healey*, 821 F.3d 187 (1st Cir. 2016); *Schwann* v. *FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016); *Chambers* v. *RDI Logistics, Inc.*, 65 N.E.3d 1 (Mass. 2016). Petitioners further contend (Pet. 21-23) that the decision below "cannot be reconciled with the analysis used by the Third and Seventh Circuits," Pet. 21, in decisions holding that the FAAAA did *not* preempt application of the ABC test under New Jersey and Illinois law, respectively. See *Bedoya* v. *American Eagle Express Inc.*, 914 F.3d 812 (3d Cir.), cert. denied, 140 S. Ct. 102 (2019) (No. 18-1382); *Costello* v. *BeavEx, Inc.*, 810 F.3d 1045 (7th Cir. 2016), cert. denied, 137 S. Ct. 2289 (2017) (No. 15-1305). None of those case-specific decisions establishes a conflict warranting this Court's review.

Both the First Circuit and the Massachusetts high court found it significant that the relevant Massachusetts statutes would *compel* carriers to treat "last mile" delivery drivers as employees. See *Schwann*, 813 F.3d at 438 (stating that the law "requires FedEx to use persons who are employees to perform first-and-last mile pick-up and delivery services"); *Chambers*, 65 N.E.3d at 9 (citing *Schwann* and stating that the law imposes a "de facto ban" on "us[ing] independent contractors" for such services); see also *Massachusetts Delivery Association*, 821 F.3d at 191-192 (relying on *Schwann*). In

reaching that conclusion, the First Circuit observed that Massachusetts law prohibited the parties from contracting around some of the more onerous requirements applicable to employees, *Schwann*, 813 F.3d at 433, 439, and distinguished the Seventh Circuit's decision in *Costello* precisely because of "the carrier's ability under Illinois law to contract around the state rule[s]" applicable to employees, *id.* at 440 n.8; see *Costello*, 810 F.3d at 1057. The Third Circuit, conversely, distinguished *Schwann* on the ground that unlike the Massachusetts statute codifying the ABC test, New Jersey's statute contained an "alternative method for reaching independent contractor status—that is, by demonstrating that the worker provides services outside of the putative employer's 'places of business.'" *Bedoya*, 914 F.3d at 824 (citation omitted).

Here, the presence of the business-to-business exemption indicates that, like the Illinois and New Jersey statutes—but unlike the Massachusetts one—the California statute does not necessarily require motor carriers to hire owner-operators as employees for purposes of state labor law rather than to engage them as independent contractors. Moreover, any analysis of FAAAA preemption requires analyzing the effects of applying the challenged state law to the particular parties and industry at issue. Cf. *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 283 (2014) ("What is important * * * is the effect of a state law, regulation, or provision, not its form."). At a minimum, the effects of the California law on classification of owner-operators—and any resulting indirect impact on carriers' prices, routes, or services—would become clearer with a fuller record, cf. Pet. App. 22a n.11, at which point the court below could

revisit its preliminary conclusion as to petitioners' likelihood of success.

3. This case is an unsuitable vehicle to review the question presented not just because of its interlocutory posture, but also because, as noted above, whether owner-operators could be covered by the business-to-business exemption remains a substantial and unresolved question of state law. In a recent case involving FAAAA preemption, this Court declined to address one of the questions on which it had granted certiorari because "the pre-enforcement posture of th[e] case" made it unclear how the municipal entity would enforce the challenged law. *American Trucking Associations, Inc.* v. *Los Angeles*, 569 U.S. 641, 654 (2013). This case likewise effectively presents a pre-enforcement challenge, given that the district court's preliminary injunction has remained in force in light of the stay of the court of appeals' mandate. As in *American Trucking*, there is "no reason to take a guess now" about whether the business-to-business exemption would cover owner-operators, or what the burdens associated with satisfying its conditions would be. *Id.* at 654-655. "There will be time enough to address" the FAAAA preemption issue if warranted once that threshold question of state law has been answered. *Id.* at 655.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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