No. 15-1305

In the Supreme Court of the United States

BEAVEX, INCORPORATED, PETITIONER

v.

THOMAS COSTELLO, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1509 (49 U.S.C. 14501 *et seq.*), prohibits states from enacting laws which are "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). Petitioner is a delivery company that employs respondents as couriers.

The question presented is whether the FAAAA preempts respondents' claim under the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. Ann. 115/1 *et seq.* (West 2008), which requires petitioner to obtain express written consent from its employees before deducting business expenses from their pay.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting 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

1. a. In the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, Congress deregulated the airline industry and instituted a policy of "maximum reliance on competitive market forces." § 3(a), 92 Stat. 1706. To ensure that state-law regulation would not frustrate those objectives, Congress expressly preempted state laws "relating to the rates, routes, or services of any air carrier." *Morales* v.

TWA, Inc., 504 U.S. 374, 376 (1992); see 49 U.S.C. 41713(b)(1).[1]

The Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569 (49 U.S.C. 14501 *et seq.*), achieved similar deregulation of the motor carrier industry. It also provides 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). A "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C. 13102(14). The FAAAA, however, exempts from its preemptive scope state laws regulating motor vehicle safety, size, and weight; motor carrier insurance; the intrastate transportation of household goods; and vehicle transportation by tow truck undertaken without prior consent of the vehicle owner. See 49 U.S.C. 14501(c)(2).

b. The Illinois Wage Payment and Collection Act (IWPCA or Act), 820 Ill. Comp. Stat. Ann. 115/1 *et seq.* (West 2008), prohibits an employer from making deductions from an employee's wages or final compensation unless the deductions are "required by law," inure "to the benefit of the employee," are "in response to a valid wage assignment or wage deduction order," "are made with the express written consent of the employ-

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[1] In 1994, in a technical amendment to the ADA, Congress enacted its current language, which preempts state laws or regulations "related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1); see Act of July 5, 1994, Pub. L. No. 103-272, § 1(a), 108 Stat. 745.

ee, given freely at the time the deduction is made," or fall within certain additional exceptions. 820 Ill. Comp. Stat. Ann. 115/9 (West Supp. 2016); see 56 Ill. Code R. 300.720(a) (LexisNexis 2014).[2] The regulations deem authorization to have been "given freely at the time the deduction is made" if a single written agreement authorizes equal, periodic deductions over a specified time period. 56 Ill. Code R. 300.720(b) (LexisNexis 2014). The IWPCA allows employees to file a claim with the Illinois Department of Labor or a civil action for underpayment of wages and statutory damages if the employee was "not timely paid wages, final compensation, or wage supplements by his or her employer" as required by the Act. 820 Ill. Comp. Stat. Ann. 115/14(a) (West Supp. 2016).

The purpose of the IWPCA "is to provide employees with a cause of action for the timely and complete payment of earned wages or final compensation." *Majmudar* v. *House of Spices (India), Inc.*, 1 N.E.3d 1207, 1210 (Ill. App. Ct. 2013). The Act, however, "does not establish a substantive right to overtime pay or any other kind of wage"; rather, "plaintiffs suing under the [Act] must allege that compensation is due to them under an employment 'contract or agreement.'" *Enger* v. *Chicago Carriage Cab Co.*, 77 F. Supp. 3d 712, 716 (N.D. Ill. 2014) (citations and internal quotation marks omitted), aff'd, 812 F.3d 565 (7th Cir. 2016).

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[2] The Act defines "wages" as "any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties, whether the amount is determined on a time, task, piece or any other basis of calculation." 820 Ill. Comp. Stat. Ann. 115/2 (West Supp. 2016).

The IWPCA distinguishes between an "employee" covered by the statute and an independent contractor excepted from its reach: the term "employee" includes "any individual permitted to work by an employer in an occupation," but does not include any individual:

> (1) who has been and will continue to be free from control and direction over the performance of work, both under his contract of service with [the] employer and in fact; and
>
> (2) who performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer unless the employer is in the business of contracting with third parties for the placement of employees; and
>
> (3) who is in an independently established trade, occupation, profession or business.

820 Ill. Comp. Stat. Ann. 115/2 (West Supp. 2016). All three conditions must be satisfied before an individual will be considered an independent contractor excepted from coverage. See 56 Ill. Code R. 300.460(a) (LexisNexis 2014).

2. Respondents, the plaintiffs below, work for petitioner BeavEx, Inc. as couriers. Pet. App. 52. Petitioner is one of the largest courier companies in the Nation. Its primary function is to perform same-day delivery and logistics services for clients across the country. *Id.* at 3, 55. At the time of this lawsuit, petitioner employed approximately 104 couriers in Illinois, whom petitioner classified as independent contractors. *Id.* at 3. Some BeavEx couriers use subcontractors to complete deliveries. *Ibid.*

BeavEx couriers make deliveries using their own vehicles, which they lease to BeavEx. Pet. App. 57. They generally begin a shift by reporting to one of BeavEx's office locations, where they receive a manifest listing customer names, locations, order of delivery, and a specified time for each delivery. *Id.* at 56-57. Drivers are required to wear apparel with the BeavEx logo when performing deliveries, and their vehicles must have the BeavEx name, logo, phone number, and Illinois Commerce Commission number on both sides. *Id.* at 57. They are also required to use company-supplied scanners and logs to record information about a delivery. *Ibid.* BeavEx pays drivers by route for each delivery completed. *Id.* at 56.

Petitioner requires couriers to sign certain agreements that classify couriers as independent contractors. Pet. App. 57-58. Under the agreements, petitioner does not pay couriers' payroll or unemployment insurance taxes. *Id.* at 56. Nor does petitioner provide couriers with health insurance or workers'-compensation benefits. *Ibid.* The agreements further permit petitioner to make various deductions from couriers' pay, including for insurance, uniforms, scanners, and "chargebacks" in the event that petitioner determines that the driver failed to make a satisfactory delivery. *Id.* at 58.

3. Respondents filed this action against petitioner alleging, among other claims, that the IWPCA classifies them as employees, not independent contractors, and that the Act therefore prohibits petitioner's deductions from their compensation. Pet. App. 52-53; *id.* at 145. Respondents sought restitution of all past deductions. *Id.* at 146. The district court granted

respondents partial summary judgment on their IWPCA claim. *Id.* at 32-87.

The district court determined that the FAAAA does not preempt respondents' IWPCA claim. It reasoned that the IWPCA does not expressly refer to motor carriers and that petitioner therefore could not succeed on its preemption defense unless it established that the IWPCA had a significant effect on its prices, routes, or services. Pet. App. 64.

Turning to that inquiry, the district court determined that the IWPCA is a "background law" applicable to all employers and employees that "simply standardizes the employment arena within Illinois" and "operat[es] at least a step away from the point that [petitioner] offers services to customers." Pet. App. 67. The district court further found that petitioner had failed to demonstrate that application of the Act would have a significant impact on petitioner's pricing or services. *Id.* at 67-69.

On the merits, the district court found that petitioner had not contested respondents' claim that they qualified as employees rather than independent contractors under the IWPCA. The court accordingly concluded that the various deductions from respondents' pay were unlawful. Pet. App. 84-85, 87.[3]

4. On interlocutory appeal pursuant to 28 U.S.C. 1292(b), the court of appeals agreed with the district court that the FAAAA does not preempt respondents' IWPCA claim. Pet. App. 6-31.

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[3] The district court denied respondents' motion for class certification, Pet. App. 80-81, 87, but the court of appeals reversed and remanded on that issue, *id.* at 23-31. Petitioner does not challenge that ruling. See Pet. 7.

a. The court of appeals first noted that "[t]he preemptive scope of the FAAAA is broad," and the FAAAA preempts state laws that "ha[ve] a direct connection with or specifically reference[] a [motor] carrier's prices, routes, or services," or that "have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." Pet. App. 9 (quoting *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008)). The court cautioned, however, that preemption under the FAAAA "is not unlimited" and it "does not preempt state laws 'that affect fares in only a tenuous, remote, or peripheral . . . manner.'" *Ibid.* (quoting *Rowe*, 552 U.S. at 371) (internal quotation marks omitted).

The court of appeals further observed that decisions of the Seventh Circuit and other courts of appeals have drawn a "distinction for purposes of FAAAA preemption between generally applicable state laws that affect the carrier's relationship with its customers," which "fall squarely within the scope of FAAAA preemption," and state laws "that affect the carrier's relationship with its workforce," which "are often too tenuously connected to the carrier's relationship with its consumers to warrant preemption." Pet. App. 16 (emphasis omitted). But the court declined to "adopt[] a categorical rule exempting from preemption all generally applicable state labor laws," *id.* at 19 (quoting *Massachusetts Delivery Ass'n* v. *Coakley*, 769 F.3d 11, 20 (1st Cir. 2014) (*MDA I*)), and instead conducted an "individualized inquiry that engage[d] with the real and logical effects of the state statute," *id.* at 18 (quoting *MDA I*, 769 F.3d at 20) (emphasis and internal quotation marks omitted).

b. Applying those principles, the court of appeals concluded that respondents' IWPCA claim is not preempted by the FAAAA. Pet. App. 17-22.

The court of appeals determined that the IWPCA is not directed specifically at motor carriers' prices, routes or services. Pet. App. 18-19. The court observed that "[t]he scope of the IWPCA is limited, and [respondents] are only seeking to enforce the provision prohibiting wage deductions," which petitioner could satisfy by obtaining the employees' express written consent. *Id.* at 18; see *id.* at 20, 22. The court further reasoned that, because the Act merely regulates a labor input, it affects a motor carrier only in its capacity "as an employer" and thereby "operate[s] one or more steps away from the moment at which the firm offers its customers a service for a particular price." *Id.* at 18 (quoting *S.C. Johnson & Son, Inc.* v. *Transport Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012)) (brackets in original; emphasis omitted).

The court of appeals acknowledged that "reclassifying its couriers as employees for all purposes [under state and federal law] could undermine [petitioner's] ability to continue offering on-demand delivery services," especially if petitioner were required to pay couriers for "on call" time. Pet. App. 20-21. But particularly where "federal employment laws and other state labor laws have different tests for employment status" than the IWPCA, *id.* at 21, the court declined to accept petitioner's "bare assertion" that the IWPCA's definition of employee necessarily triggered other state and federal regulation of employees, such as state minimum-wage, overtime, maximum-hour, payroll-tax, workers'-compensation, and unemployment-insurance requirements, *id.* at 20; see *id.* at 19-21.

The court of appeals further determined that any indirect impact of the IWPCA on carrier prices is "too tenuous, remote, or peripheral" to be preempted by the FAAAA. Pet. App. 18. The court found that petitioner failed to demonstrate that its prices, routes, or services would be significantly impacted by either "absorb[ing] the costs it previously deducted," "pass[ing] [the costs] along to its couriers through lower wages or to its customers through higher prices," or "absorb[ing] the transaction costs of acquiring consent." *Id.* at 20, 22.

The court of appeals contrasted the IWPCA's limited scope with the breadth of the Massachusetts employment laws at issue in *MDA I*, *supra*, and *Massachusetts Delivery Ass'n* v. *Healey*, 117 F. Supp. 3d 86 (D. Mass. 2015), aff'd, 821 F.3d 187 (1st Cir. 2016) (*MDA II*). Pet. App. 17-18. Although Massachusetts uses a test similar to the IWPCA's to distinguish employees from independent contractors, the court noted that classification of a worker as an employee under the Massachusetts definition triggered "far more employment laws" than the IWPCA's limited wage-deduction rules. *Id.* at 17. For example, the court noted that if couriers were classified as employees under Massachusetts law, a delivery company would be forced to alter its routes, provide meal and rest breaks, maintain a fleet of delivery vehicles, and pay employees for "on call" time—a result that would have a "significant impact" on the company's "prices, routes, and services." *Id.* at 15 (citing *MDA II*, 821 F.3d at 192-193). By contrast, "[b]ecause the scope of the IWPCA is limited," the court reasoned, "its logical effect is necessarily more limited than the statute at issue in *MDA I*." *Id.* at 18.

DISCUSSION

I. THE COURT OF APPEALS CORRECTLY HELD ON THIS RECORD THAT APPLICATION OF THE IWPCA'S EXPENSE-DEDUCTION PROVISION TO PETITIONER IS NOT PREEMPTED BY THE FAAAA

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 * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). This Court has provided important guidance on the meaning of that provision in *Morales* v. *TWA, Inc.*, 504 U.S. 374 (1992), and *Rowe* v. *New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008).

In *Morales*, the Court, construing the analogous provision of the ADA, concluded that the phrase "relat[ed] to" reflects a broad and deliberately expansive 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. 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, citation and internal quotation marks omitted). The Court had no occasion in *Morales* to define "where it would be appropriate to draw the line," because there the guidelines applying general state consumer protection laws —which restricted airlines' advertising of their fares —plainly related to, and indeed expressly referred to,

airline fares and had a "significant impact" on them. *Id.* at 389-390.

In *Rowe*, the Court held that the same principles govern the preemptive scope of the similarly worded 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 stressed that the Maine statute directly focused on motor-carrier services and compelled 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 produces the very effect that the federal law sought to avoid, namely, a State's direct substitution 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 application 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*, 133 S. Ct. 1769, 1778 (2013).

B. Under these principles, the FAAAA does not preempt respondents' claim that petitioner violated

the IWPCA's wage-deduction regulation. The IWPCA is a state law of general application that affects motor carriers only in their capacity as employers. See Pet. App. 18. The IWPCA thus is further removed from prices, routes, and services than the state laws and implementing guidelines applied in *Morales* and the state law at issue in *Rowe*, which focused on carrier fares and services, respectively. Although general background laws can affect a carrier's costs and, as a result, affect its prices, this Court has not addressed whether or, in what circumstances, that sort of indirect effect from a generally applicable state law has a sufficient connection to prices, routes, and services in order to trigger FAAAA preemption. Compare *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (discussing effect of increased costs under ERISA preemption). There is no occasion here to consider whether some showing beyond that called for under *Morales* and *Rowe* is required to establish preemption of such a law because the court of appeals correctly concluded that the IWPCA is not preempted under the "significant impact" formulation used in assessing the laws at issue in *Rowe*, 552 U.S. at 375, and *Morales*, 504 U.S. at 390. That case-specific determination does not warrant further review.

1. Petitioner primarily contends (Pet. 13-14) that the IWPCA is preempted because classification of its couriers as employees under the Act will trigger a host of other state-law regulations that, in aggregate, would "make[] motor carriers' independent-contractor model illegal," Pet. 13, and thereby have a significant impact on petitioner's operations and prices. But the court of appeals declined to credit petitioner's "bare

assertion" that if it is required to treat its couriers as employees under the IWPCA, then it must also treat them as employees under other federal and state labor laws that "have different tests for employment status" than the IWPCA. Pet. App. 20-21 (citing 26 U.S.C. 3121(d)(2) (defining employee for purposes of tax code) and 56 Ill. Code R. 210.110 (LexisNexis 2014) (providing six-factor test for employee status for state minimum-wage purposes)). Similarly, the court found that petitioner offered only "conclusory allegations that compliance with the IWPCA will require [it] to switch its entire business model from independent-contractor-based to employee-based." *Id.* at 21. Under these circumstances, the court had no occasion to consider the cumulative effects of other state laws.

Likewise, petitioner's arguments for this Court's review presume that enforcement of the IWPCA necessarily requires petitioner to treat its couriers as employees for purposes of other state laws. See Pet. i (framing question presented as "whether the FAAAA preempts generally-applicable State laws that force motor carriers to treat and pay all drivers as 'employees' rather than as independent contractors") (internal citation omitted); see also Pet. 13-14. But here, as in the court of appeals, petitioner cites no authority to show that such a broad-based impact under Illinois law, effectively requiring a change in its business model, necessarily follows from respondents' narrow claim for enforcement of the IWPCA's deduction restriction.[4] See Pet. 14; Cert. Reply Br. 3.

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[4] Petitioner now contends (Pet. 30-31) that Illinois uses a common definition of "employee" for purposes of both the IWPCA and its unemployment-compensation law. Even if that were so, petitioner did not argue below, much less demonstrate, that the joint

2. Petitioner also argues (Pet. 14-17) that the court of appeals improperly "minimize[d]" the impact of IWPCA compliance on petitioner's prices, routes, and services, and contends (Pet. 18) that the court categorically excluded "generally applicable state labor laws" like the IWPCA from FAAAA preemption. To the contrary, the court expressly rejected such a categorical rule. Pet. App. 19. Instead, following the approach suggested by petitioner (Pet. 21), the court of appeals "conduct[ed] an individualized inquiry" that "engage[d] with the real *and logical* effects" of the IWPCA, Pet. App. 18 (quoting *Massachusetts Delivery Ass'n* v. *Coakley*, 769 F.3d 11, 20 (1st Cir. 2014) (*MDA I*)), and concluded that petitioner had failed to show that IWPCA compliance would have a significant impact on its prices, routes, or services, *id.* at 20-21.[5]

In evaluating that impact, the court of appeals first noted the IWPCA's limited scope: its only "substan-

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cost of compliance with the IWPCA and the state unemployment law would result in a significant impact on petitioner's prices, routes, or services. See Pet. App. 19-21.

[5] The court of appeals did perceive a "relevant distinction" between generally applicable state laws that affect a motor carrier's relationship with its consumers, which the court said "fall squarely within the scope of FAAAA preemption," and general labor laws that affect the carrier's relationship with its workforce, which "are often too tenuously connected to the carrier's relationship with its consumers to warrant preemption." Pet. App. 16 (emphasis omitted). Such a distinction may furnish some useful guidance in assessing whether a state law relates to prices, routes, and services, but there can be no categorical rule to that effect for purposes of FAAAA preemption. That distinction, however, was not critical to the court of appeals' analysis, which ultimately evaluated whether the IWPCA would have a significant impact on petitioner's prices, routes or services. Pet. App. 19.

tive requirement" is that an employer "refrain from making deductions from its [employee's] pay without 'express written consent of the employee, given freely at the time the deduction is made.'" Pet. App. 20 (quoting 820 Ill. Comp. Stat. Ann. 115/9 (West Supp. 2016)). The IWPCA does not mandate any particular wage level or otherwise "confer rights to compensation that are absent from the employee's contract or employment agreement." *Cohan* v. *Medline Indus., Inc.*, 170 F. Supp. 3d 1162, 1175 (N.D. Ill. 2016) (citing state law cases); see *Enger* v. *Chicago Carriage Cab Corp.*, 812 F.3d 565, 568 (7th Cir. 2016); *Majmudar* v. *House of Spices (India), Inc.*, 1 N.E.3d 1207, 1210 (Ill. App. Ct. 2013). Nor does the Act prohibit carriers from making deductions from employee compensation to defray the costs of uniforms, necessary equipment, or other similar business expenses—it merely requires that the employer secure an employee's written consent to do so. 820 Ill. Comp. Stat. Ann. 115/9 (West Supp. 2016).[6]

The court of appeals further found that "[petitioner] has not demonstrated * * * that preventing it from deducting * * * couriers' wages or the transaction costs associated with acquiring consent to do so would have a significant impact related to [petitioner's] prices, routes, or services." Pet. App. 22. Peti-

[6] A one-time agreement to take equal, periodic deductions over a specified time frame will be deemed to comply with the IWPCA's requirement that employee consent be given at the time a deduction is made. 56 Ill. Code R. 300.720(b) (LexisNexis 2014). The district court held that petitioner had waived any contention that the parties' agreement satisfied the IWPCA because petitioner failed to raise any defense to the merits of respondents' claim. See Pet. App. 84-85.

tioner notes (Pet. 15) that it "offered evidence that its overhead costs would rise $185,000 per year" to comply with the IWPCA's requirements; however, the court found that petitioner provided "no frame of reference" to allow it to conclude that such increased costs "would significantly impact [petitioner's] prices." Pet. App. 20.

In addition, because the IWPCA gives employers the "flexibility" to "contract around" its prohibition on deductions by obtaining the express written consent of the employees at the time the deduction is made, the court of appeals further concluded that the IWPCA does not create a "patchwork" of state employment laws contrary to Congress's "deregulatory aim." Pet. App. 21-22. That analysis is consistent with *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422 (2014), where the Court held that a State's implied covenant of good faith and fair dealing "will escape pre-emption" if the state law "permits an airline to contract around those rules." *Id.* at 1433. Thus the "transaction costs" of modifying contracts to comply with state contract-law requirements do not trigger FAAAA preemption, at least absent evidence that such costs would significantly impact prices, routes, or services. *Ibid.*

3. The court of appeals also did not err in taking into account company-specific empirical evidence in its preemption analysis. See Pet. 21-23. Petitioner wrongly suggests (Pet. 21-22) that this Court's decision in *Rowe* mandates that courts entirely ignore empirical evidence in conducting the FAAAA preemption analysis. The Court in *Rowe* had no need to evaluate the state law's financial impact on motor carriers because the Maine statute at issue in *Rowe* "focuse[d] on trucking and other motor-carrier services[,] * * *

thereby creating a direct 'connection with' motor-carrier services." 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 384). Petitioner does not argue that the IWPCA directly regulates motor carriers or their customers.

Instead, petitioner contends (Pet. 19-20) that the indirect impact the IWPCA has on its operations and prices is substantial. But a court cannot evaluate whether a state law's indirect economic impact effectively requires changes to a carrier's operations without assessing the nature and extent of the economic burden. Similarly, an adequate record may be necessary to decide whether increases in overhead costs will have a significant impact on a carrier's prices. The permissibility of considering the company-specific effects of a state law, in appropriate circumstances, is reflected in the text of the FAAAA, which, by providing for preemption of a state law "related to a price, route, or service of *any* motor carrier," 49 U.S.C. 14501(c)(1) (emphasis added), suggests that an inquiry into the effect of a state law on a particular carrier may be relevant. Preemption, moreover, is an affirmative defense that the party objecting to application of the state law must plead and prove. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

In any event, contrary to petitioner's contention (Pet. 21), the court of appeals stressed that "[e]mpirical evidence is not mandatory," and instead, it "engage[d] with the real *and logical* effects of the state statute." Pet. App. 18 (citation omitted). The court did so by examining the IWPCA's scope and evaluating whether the cost of IWPCA compliance would have a significant impact on petitioner's business model. *Id.* at 18-20. The court's narrow and fact-

bound conclusion that the IWPCA's impact on petitioner is insufficient to trigger FAAAA preemption does not merit this Court's review. Indeed, the absence of a robust factual record demonstrating a concrete impact on petitioner makes this case a poor vehicle for deciding questions about the extent of FAAAA preemption.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THE FIRST CIRCUIT OR OTHER COURTS OF APPEALS

A. Petitioner contends (Pet. 23-32) that the decision below conflicts with decisions of the First Circuit in *Schwann* v. *FedEx Ground Package System*, 813 F.3d 429, 432 (1st Cir. 2016), and *MDA I*, 769 F.3d at 19-20. Respondents' narrow IWPCA claim is distinguishable from the broad employment regulations found to be preempted by the First Circuit in *Schwann* and *MDA I*—as the courts of appeals each recognized. Accordingly, no conflict exists warranting this Court's review.

In *Schwann*, a group of drivers for FedEx Ground Package System (FedEx) alleged that the company had misclassified them as independent contractors rather than employees under Massachusetts' independent contractor law, Mass. Ann. Laws ch. 149, § 148B(a) (LexisNexis 2016), and they sought damages for unpaid wages, improper wage deductions, and loss of benefits. *Schwann*, 813 F.3d at 432-433. The First Circuit determined that classification of a worker as an employee rather than an independent contractor under that Massachusetts law triggered a wide range of state labor provisions, including requirements that the employer pay minimum wages and overtime, pay for employees' "on call" time, afford

meal and rest breaks, provide various leave and holidays, record hours worked and compensation paid, and reimburse all employees' out-of-pocket expenses. See *id.* at 433; see also Pet. App. 14-15. Massachusetts law also prohibited an employer from contracting around its expense-reimbursement requirement. *Schwann*, 813 F.3d at 433; see Mass. Ann. Laws ch. 149, § 148 (LexisNexis 2016). The First Circuit held that the FAAAA preempted the Massachusetts independent contractor statute because, if an employer were compelled to treat its drivers as employees under that state law, the resulting constellation of employment regulations would "largely foreclose[]" FedEx's preferred method of providing delivery services. *Schwann*, 813 F.3d at 439.

Although the definition of employee is similar under the Massachusetts independent contractor law and the IWPCA, the First and Seventh Circuits found that the impact of the statutory schemes on the respective carriers' prices, routes, and services differed in key respects, and, therefore, neither court perceived a conflict. *Schwann*, 813 F.3d at 440 n.8.; Pet. App. 17-18. The First Circuit noted that, unlike under Massachusetts law, the carrier had "the * * * ability under Illinois law to contract around the state rule prohibiting deductions from wages."[7] See *Schwann*,

[7] Petitioner argues (Pet. 29) that the flexibility to "contract around" the IWPCA's expense-deduction provisions does not distinguish the Massachusetts statute because the IWPCA still requires petitioner to undertake the "significant administrative task" of obtaining employees' consent to deductions. The court of appeals, however, found that petitioner adduced insufficient evidence that the administrative costs of obtaining consent would have a significant impact on consumer prices. See Pet. App. 20, 22. By contrast, the Massachusetts law prohibited payroll deductions,

813 F.3d at 440 n.8. The First Circuit distinguished "the lesser scope of laws implicated by application of the [IWPCA]" and emphasized that, unlike FedEx, which demonstrated the impact of the Massachusetts independent contractor law on its business model, petitioner "fail[ed] to show that application of the [IWPCA] would require a change in the services that the carrier itself provides." *Ibid.* Conversely, the Seventh Circuit recognized below that, if petitioner had established that the IWPCA would require reclassifying its couriers as employees for all purposes, then the law could have sufficiently affected petitioner to warrant FAAAA preemption. Pet. App. 20-21.

The different results reached by the First Circuit in *Schwann* and *MDA I* and by the Seventh Circuit in this case are therefore attributable to distinctions between the Massachusetts and Illinois statutory provisions before the respective courts and not the result of a conflict regarding the FAAAA's preemptive scope.[8]

B. The decision below is consistent with the decisions of other courts with respect to FAAAA preemption of generally applicable employment laws. See *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637, 647 (9th Cir. 2014) (finding no FAAAA preemption of California meal-and-rest-break laws that do not set prices, mandate or prohibit certain routes, or prescribe or

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required reimbursement of employees' out-of-pocket expenses, and expressly prohibited contracts that purported to create exceptions to those rules. See *Schwann*, 813 F.3d at 439.

[8] A district court decision finding the Massachusetts independent contract law preempted also does not demonstrate the existence of a circuit conflict. See Pet. 33-34 (citing *Sanchez* v. *Lasership, Inc.*, 937 F. Supp. 2d 730, 739 (E.D. Va. 2013)).

prohibit carrier services), cert. denied, 135 S. Ct. 2049 (2015); *Californians for Safe & Competitive Dump Truck Transp.* v. *Mendonca*, 152 F.3d 1184, 1188-1189 (9th Cir. 1998) (state law requiring all public-works contractors to pay prevailing wage rate not preempted by FAAAA absent evidence that state law would significantly interfere with competitive market forces), cert. denied, 526 U.S. 1060 (1999); see also *Amerijet Int'l, Inc.* v. *Miami-Dade Cnty.*, 627 Fed. Appx. 744 (11th Cir. 2015) (per curiam) (county ordinance prescribing minimum-wage standard for certain service contractors not preempted by ADA absent significant effect on air carrier rates, routes, or services), cert. denied, 136 S. Ct. 2015 (2016).

Petitioner points (Pet. 33-34) to decisions of certain state and federal district courts as evidence of a lack of clarity in the governing law. But it identifies no actual conflict in the decisions of the courts of appeals. In any event, any divergence in lower court authority is attributable to case-specific differences in the scope of the state employment laws and their economic impact on motor carriers.

For example, in *Harris* v. *Pac Anchor Transportation, Inc.*, 329 P.3d 180 (Cal. 2014), the California Supreme Court concluded that the FAAAA did not preempt a lawsuit alleging that a motor carrier had misclassified its drivers as independent contractors in violation of California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq*. (West 2008). 329 P.3d at 187-190. The court reasoned that California's UCL did not "encourage employers to use employee drivers rather than independent contractors," and that the motor carrier remained "free to use independent contractors as long as they are

properly classified" under state laws. *Id.* at 190; see *id.* at 189. Although petitioner notes (Pet. 33) that the California Supreme Court stated that "the FAAAA does not preempt generally applicable employment laws that affect prices, routes, and services," *Pac Anchor Transp.*, 329 P.2d at 188, the court later examined the effect of the California law on prices, routes, and services, and found the impact too remote to warrant FAAAA preemption, *id.* at 190. In any event, any imprecision by the California Supreme Court in describing the scope of FAAAA preemption in those circumstances does not warrant review of the court of appeals' decision in this case.

Similarly, no conflict is demonstrated by a district court decision that the FAAAA preempts a Los Angeles Port Authority requirement that trucks operating in the Los Angeles port be driven by employees, particularly where the record in that case "demonstrate[d]" that the challenged state requirement "would significantly affect" motor carriers' costs. *American Trucking Ass'ns* v. *City of Los Angeles*, No. CV 08-4920, 2010 WL 3386436, at *19 (C.D. Cal. Aug. 26, 2010), aff'd in part, rev'd in part, 660 F.3d 384 (9th Cir. 2011), rev'd in part on other grounds, 133 S. Ct. 2096 (2013)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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