No. 18-1382

IN THE

Supreme Court of the United States

AMERICAN EAGLE EXPRESS, INC., d/b/a AEX Group,
Petitioner,

v.

EVER BEDOYA, DIEGO GONZALES, MANUEL DECASTRO, on behalf of themselves and all others similarly situated,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Third Circuit correctly concluded that the test for determining whether a worker is an employee for purposes of the New Jersey Wage and Hour Law and the New Jersey Wage Payment Law is not "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), and is therefore not preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA).

2. Whether petitioner waived its argument that no presumption against preemption applies in this case, and, if not, whether the Third Circuit's brief discussion of the presumption's applicability affects the correctness of its decision that the FAAAA does not preempt the challenged New Jersey law.

PARTIES TO PROCEEDING AND RELATED CASES

The parties to the proceeding in the Third Circuit are listed in the petition for a writ of certiorari.

The following proceedings are directly related to this case:

• *Bedoya et al. v. American Eagle Express, Inc.*, No. 2:14-cv-02811-ES-JAD, U.S. District Court for the District of New Jersey. No judgment entered (case pending).

• *Bedoya, et al. v. American Eagle Express, Inc.*, No. 17-8053, U.S. Court of Appeals for the Third Circuit. Order granting petition for permission to appeal entered March 12, 2018.

• *Bedoya, et al. v. American Eagle Express, Inc.*, No. 18-1641, U.S. Court of Appeals for the Third Circuit. Judgment entered January 29, 2019.

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INTRODUCTION

This case presents the question whether a provision of the Federal Aviation Administration Authorization Act of 1994 (FAAAA) that preempts state laws "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), preempts New Jersey's test for determining whether a worker is an employee for purposes of the state's Wage and Hour Law (NJWHL) and Wage Payment Law (NJWPL). In the decision below, the Third Circuit carefully surveyed the case law on preemption under the FAAAA and the related Airline Deregulation Act (ADA), set forth various factors to consider in determining whether a state law "relate[s] to" motor carrier prices, routes, or services, and determined that the New Jersey test is not preempted because it "has neither a direct, nor an indirect, nor a significant effect on carrier prices, routes, or services." Pet. App. 22a.

Petitioner American Eagle Express, Inc. (AEX) seeks review, contending that the Third Circuit decision "contravenes this Court's precedents" and "attempt[s] to narrow the scope of FAAAA preemption." Pet. 14–15. To the contrary, the Third Circuit faithfully applied this Court's precedents and broadly construed the FAAAA's preemption provision, recognizing multiple ways a party can show that a state law is related to motor carrier prices, routes, or services. The court's determination that the New Jersey test is not preempted is not the result of a narrow construction of the scope of FAAAA preemption, but instead reflects that, even under a broad construction of the provision, the New Jersey test is not related to motor carrier prices, routes, or services.

AEX also contends that the circuits are in "disarray" over the scope of FAAAA preemption and suggests that there is a circuit split over whether generally applicable state labor laws are categorically exempt from preemption. That purported conflict is not presented here because the Third Circuit did not take such a categorical approach. Nor, indeed, did any of the other cases cited by AEX. And the Third Circuit specifically explained that the New Jersey test is "unlike the preempted Massachusetts law" at issue in the First Circuit decisions that AEX claims conflict with the ruling below. Pet. App. 23a.

Finally, AEX asserts that the Court should grant review to address the applicability of the "presumption against preemption" in express preemption cases where the state law at issue involves an area historically regulated by the states. However, AEX failed to preserve any argument about the presumption against preemption in the court of appeals. Moreover, the Third Circuit's decision gives no indication that the presumption against preemption made a difference to the outcome of this case.

The Third Circuit correctly determined that the New Jersey test for determining whether a worker is an employee for NJWHL and NJWPL purposes is not related to motor carrier prices, routes, or services, and is therefore not preempted by the FAAAA. Review by this Court is unwarranted.

STATEMENT OF THE CASE

A. AEX is a regional package delivery company. Respondents are drivers who work full-time for AEX, showing up every day at around 6:00 A.M. and making deliveries for AEX along regular routes. AEX monitors the drivers' performance and subjects them to

written and unwritten policies and procedures. *See* 3d Cir. App. A40–A42.

The drivers meet the definition of employees for purposes of the NJWHL, N.J. Stat Ann. §§ 34:11-56a *et seq*., which establishes minimum wage and overtime requirements, *see id*. § 34:11-56a4, and the NJWPL, *id*. §§ 34:11-4.1 *et seq*., which governs the time and mode of payment of wages to employees, *see id*. § 34:11-4.2, and forbids withholding or diverting employees' wages except as expressly permitted, *id*. § 34:11-4.4. Under the test used to define an employee for NJWHL and NJWPL purposes, known as the "ABC test," a worker performing services for renumeration is considered an employee unless the employer can show that: "(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business." *Id*. § 43:21-19(i)(6).

Although the drivers meet the ABC test's definition of employees, AEX classifies them as independent contractors and does not treat them as employees for NJWHL and NJWPL purposes. The NJWHL requires employers to pay their employees time-and-a-half overtime for hours worked in excess of 40 per week, *id*. § 34:11-56a4, but AEX does not pay its drivers overtime compensation. *See* 3d Cir. App. A43. And al-

though the NJWPL requires employers to pay employees the full amount of wages due, N.J. Stat. Ann. § 34:11-4.2, and prohibits employers from taking deductions from employees' wages unless the deductions fall within one of the statute's listed exceptions, *id.* § 34:11-4.4, AEX does not pay its drivers all wages due, and takes deductions that do not fall within the NJWPL's exceptions, including deductions for use of AEX's equipment such as AEX's scanners, for occupational insurance, for late deliveries, and for other items. 3d Cir. App. A42.

B. On May 1, 2014, the drivers filed this case as a class action, alleging that AEX improperly classified them as independent contractors under the NJWPL and NJWHL; violated the NJWHL by failing to pay them overtime; violated the NJWPL by failing to pay them all of their wages due and by subjecting them to wage deductions and withholdings that are not permitted by law; and was unjustly enriched by retaining illegal deductions. 3d Cir. App. A38, A42–A44.

AEX moved for judgment on the pleadings, arguing that the ABC test's definition of employee is preempted by the FAAAA, which preempts state laws "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).

The district court denied the motion. Pet. App. 38a. The court explained that the challenged laws "govern Defendant's relationship with its workforce," and laws that merely govern that relationship "are often too tenuously connected to the carrier's relationship with its customers" to be preempted. *Id.* at 34a. Moreover, the court continued, "Defendant cannot show that the New Jersey wage laws significantly affect Defendant's

prices, routes, or services. Defendant lists a litany of *potential* costs that it *may* incur if all of its independent contractors were reclassified as employees …. However, the Court concludes that Defendant has failed to demonstrate how these potential impacts would significantly affect Defendant's prices, routes, or services." *Id.* at 35a.

C. On interlocutory appeal, the Third Circuit affirmed the district court's denial of AEX's motion for judgment on the pleadings.

The court began by explaining that express preemption "requires an analysis of whether state action may be foreclosed by express language in a congressional enactment." *Id.* at 8a (internal quotation marks, alteration, and citation omitted). Noting that this Court applied a presumption against preemption in the FAAAA context in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 438 (2002), the court stated that the presumption applies to state laws reflecting the exercise of the state's police power to protect workers, "such as the wage laws at issue here," Pet. App. 9a. The court explained, however, that the presumption is rebutted where Congress had a clear and manifest purpose to preempt state laws and that, to discern Congress's purpose, courts "look to the plain language of the statute and, if necessary, to the statutory framework as a whole." *Id.*

The Third Circuit then discussed the statutory context and language of the FAAAA and noted that this Court has "articulated several principles" that are informative about the breadth of FAAAA preemption. *Id.* at 12a. The court identified three such principles: First, "the 'related to' language from the FAAAA

preemption clause gives it a broad scope," but the breadth of the words "'does not mean the sky is the limit.'" *Id.* (quoting *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2014)). Second, "FAAAA preemption reaches laws that affect prices, routes, or services even if the effect 'is only indirect,'" *id.* (quoting *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008)), but "where a law's impact on carrier prices, routes, or services is so indirect that the law affects them 'in only a tenuous, remote, or peripheral … manner,' the law is not preempted," *id.* at 13a (quoting *Dan's City*, 569 U.S. at 261, and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)). Third, "preemption occurs where a state law has 'a significant impact on carrier rates, routes, or services.'" *Id.* (quoting *Rowe*, 552 U.S. at 375 (internal quotation marks omitted)).

The Third Circuit then surveyed the case law and, based on the statutory language and case law, identified some factors for courts to consider in assessing "the directness of a law's effect on prices, routes, or services." *Id.* at 21a. In making this assessment, the court explained, "courts should examine whether the law: (1) mentions a carrier's prices, routes, or services; (2) specifically targets carriers as opposed to all businesses; and (3) addresses the carrier-customer relationship rather than non-customer-carrier relationships (e.g., carrier-employee)." *Id.* Recognizing that both laws with direct effects and laws with indirect effects may be preempted, the court explained that these factors, and potentially others, will help guide the inquiry into whether laws with indirect effects are sufficiently connected to prices, routes, or services to be preempted, or whether, conversely, the laws' effects are tenuous, remote, or peripheral. *Id.*

The court likewise identified factors to consider in assessing whether a state law has a "significant effect" on prices, routes, or services. *Id.* In making this assessment, "courts should consider whether: (1) the law binds a carrier to provide or not provide a particular price, route, or service; (2) the carrier has various avenues to comply with the law; (3) the law creates a patchwork of regulation that erects barriers to entry, imposes tariffs, or restricts the goods a carrier is permitted to transport; and (4) the law existed in one of the jurisdictions Congress determined lacked laws that regulate intrastate prices, routes, or services and thus, by implication, is a law Congress found not to interfere with the FAAAA's deregulatory goal." *Id.* Here, again, the court stated that other factors may also be relevant to the inquiry. *Id.*

The Third Circuit then turned to the case before it and concluded that "New Jersey's ABC classification test is not preempted as it has neither a direct, nor an indirect, nor a significant effect on carrier prices, routes, or services." *Id.* at 22a.

The court first determined that "[a]ny effect New Jersey's ABC classification test has on prices, routes, or services is tenuous." *Id.* "The test does not mention carrier prices, routes, or services," does not "single out carriers," "applies to all businesses as part of the backdrop they face in conducting their affairs," and "does not regulate carrier-customer interactions or other product outputs." *Id.* (internal quotation marks and citation omitted). The test "only concerns employer-worker relationships" and is "steps removed" from prices, routes, or services. *Id.* at 22a–23a (internal quotation marks and citation omitted).

The court then determined that the ABC test also "does not have a significant effect on prices, routes, or services." *Id.* at 23a. Distinguishing the Massachusetts state-law test for employee status considered by the First Circuit in *Schwann v. FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016), the court noted that New Jersey's ABC test does not "categorically prevent[] carriers from using independent contractors," and that it "offers carriers various options to comply with New Jersey employment law." Pet. App. 24a. The court then rejected AEX's argument "that applying the New Jersey law may require it to shift its model away from using independent contractors, which will increase its costs, and in turn, its prices," explaining that AEX had not provided "a logical connection between the application of New Jersey's ABC classification test and the list of new costs it would purportedly incur." *Id.* at 25a. "[C]onspicuously absent from [the company's] parade of horrors," the court noted, "is any citation of authority showing that it would be required to comply with [other] federal and state laws." *Id.* at 25a–26a (quoting *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1056 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2289 (2017)). "'[W]e see no basis for concluding that [New Jersey law] would require'" AEX to "'switch its entire business model … given that the federal employment laws and other state labor laws [may] have different tests' for determining whether someone is an employee." *Id.* at 26a (quoting *Costello*, 810 F.3d at 1056).

Finally, the court noted that nothing in Congress's goal of ensuring that prices, routes, and services were determined by market forces reflects an intent "to exempt workers from receiving proper wages," *id.*; that New Jersey's test is similar to that used in many other

states and would not create a patchwork of unique state legislation, *id* at 27a; and that "eight of the ten jurisdictions that Congress identified as not regulating intrastate prices, routes, and services [when the FAAAA was enacted] had laws for differentiating between an employee and an independent contractor, … and at least three codified ABC tests similar to that of New Jersey," *id.* at 27a–28a (internal quotation marks and citations omitted).

The court concluded that "any effect the New Jersey ABC classification test has on prices, routes, or services with respect to the transportation of property is tenuous and insignificant" and that the test therefore is not preempted. *Id.* at 28a. It affirmed the district court's denial of AEX's motion for judgment on the pleadings and remanded. *Id.*

REASONS FOR DENYING THE WRIT

I. The Third Circuit's Decision Follows This Court's Precedents.

AEX claims that the decision below "contravenes this Court's precedents" and "conflicts with this Court's consistent holding that, in the context of the FAAAA and the ADA, the phrase 'relates to' must be construed broadly." Pet. 14, 25. To the contrary, the Third Circuit carefully followed this Court's precedents. It explained that the FAAAA preemption provision has "a broad scope," Pet. App. 12a, that it "reaches laws that affect prices, routes, or services even if the effect 'is only indirect,'" *id.* (quoting *Rowe*, 552 U.S. at 370), and that it preempts state laws that have "a 'significant impact' on carrier rates, routes, or services," *id.* at 13a (quoting *Rowe*, 552 U.S. at 375). The Third Circuit simply concluded that, despite the preemption provision's breadth, it does not preempt

the state law at issue here because that law has "neither a direct, nor an indirect, nor a significant effect on carrier prices, routes, or services." *Id.* at 22a.

AEX's claims that the Third Circuit contravened this Court's precedents rest on misunderstandings of the court of appeals' decision. Most notably, AEX erroneously treats each of the factors that the Third Circuit suggested should be analyzed in determining whether a state law is preempted as "require[ments]," *all* of which must be met for the FAAAA to preempt the law. Pet. 21. The Third Circuit's decision makes clear, however, that a state law does *not* need to meet all of the factors to be preempted.

For example, one of the factors the Third Circuit states should be considered is whether the state law "mentions a carrier's prices, routes, or services." Pet. App. 21a. AEX objects to this factor, stating that "[i]t would be hard to design a more narrow test than one requiring explicit mention of carriers, routes, and services—and one in contravention of *Morales*." Pet. 21. The decision below is clear, however, that a state law is not "require[ed]" to mention carrier prices, routes, or services to be preempted; a state law can also be preempted based on its impact on carrier prices, routes, or services. *See*, *e.g.*, Pet. App. 13a.

To be sure, the Third Circuit's opinion recognizes that whether the state law mentions carrier prices, routes, or services is relevant to the preemption inquiry. That consideration, however, flows directly from *Morales*, which explained that a state law is preempted if it has "a connection with *or reference to*" carrier prices, routes, or services. *Morales*, 504 U.S. at 384 (emphasis added).

Similarly, AEX argues that "[r]equiring explicit targeting of carriers is … in contravention of *Morales*." Pet. 21. But the Third Circuit did not require such targeting. To the contrary, the court explicitly stated that state "laws of general applicability" may be preempted. Pet. App. 16a. And although AEX objects to the consideration of whether a state law is directed at motor carriers, the Third Circuit's consideration of that factor stems directly from *Rowe*, which recognized the relevance of whether a state law "aim[s] directly at the carriage of goods" or "affect[s] truckers solely in their capacity as members of the general public." 552 U.S. at 375, 376.

Likewise misguided is AEX's criticism of the Third Circuit's consideration of whether a state law "addresses the carrier-customer relationship rather than non-customer-carrier relationships." Pet. App. 21a. Although AEX states that that factor "appears to have been the Third Circuit's own invention," Pet. 21, the Third Circuit's consideration of that factor flows from the statutory language, which preempts only laws related to a motor carrier "price, route, or service," 49 U.S.C. § 14501(c)(1)—that is, a price, route, or service "a motor carrier offers its customers," *Dan's City*, 569 U.S. at 263—and from the Court's recognition that state laws are not preempted if they affect such "prices, routes, and services 'in only a 'tenuous, remote, or peripheral … manner,'" *id.* at 261 (quoting *Rowe*, 552 U.S. at 371). As the Third Circuit explained, because state laws that affect only resource inputs such as labor, capital, and technology "'operate one or more steps away from the moment at which the firm offers its customer[s] a service for a particular price,'" they "have too remote an effect on the price the

company charges, the routes it uses, and service outputs it provides and are less likely to be preempted by the FAAAA." Pet. App. 18a (quoting *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012)).

AEX also asserts that the Third Circuit's consideration of whether a state law "'binds a carrier to provide or not provide a particular price, route, or service,'" is equivalent to a test requiring a state law to "prescribe" prices, routes, or services. Pet. 23–24 (quoting Pet. App. 21a). Again, however, the Third Circuit did not require state laws to bind a carrier to a particular price, route, or service to be preempted. Indeed, the court of appeals explicitly noted that "relying solely on such a 'binds to' test may narrow FAAAA preemption to an unacceptable degree." Pet App. 20a n.5. Instead, the court included this factor as "one of several possible avenues to demonstrate that a state law has a significant effect on prices, routes, or services." *Id*. In doing so, the court followed *Rowe*, which held that a state law was preempted where the law would "require carriers to offer a system of services that the market does not now provide" and "would freeze into place services that carriers might prefer to discontinue in the future." 552 U.S. at 372.

In addition to criticizing specific factors considered by the Third Circuit, AEX objects to the court's consideration of "the directness of a law's effect on prices, routes, or services" as a whole, Pet. App. 21a, stating that "this Court has gone to some lengths to avoid a direct/indirect dichotomy," Pet. 22. The Third Circuit, however, did not create a "direct/indirect dichotomy." Rather, following this Court's lead, it recognized that the FAAAA can preempt both state laws whose effect

on prices, routes, or services is direct and state laws whose effect "is only indirect," Pet. App. 12a (quoting *Rowe*, 552 U.S. at 370), but that the FAAAA does not preempt state laws whose effects are so indirect as to be only "tenuous, remote, or peripheral," *id.* at 13a (quoting *Dan's City*, 569 U.S. at 261, and *Morales*, 504 U.S. at 390). The factors the court set forth are meant to help assess whether the effects of the state law are, on the one hand, either direct or indirect yet still sufficiently related to prices, routes, or services for the law to be preempted, or, on the other hand, so "tenuous, remote, or peripheral" that the law is not preempted. Pet. App. 21a.

Overall, the Third Circuit broadly construed the FAAAA's preemption provision, recognizing a variety of ways that a state law can be sufficiently "related to" carrier prices, routes, or services to be preempted. Its holding in this case is not the result of its adopting a narrow test for assessing preemption. Rather, its holding reflects that, even using a broad test, New Jersey's ABC test is not "related to" motor carrier prices, routes, or services and is therefore not preempted by the FAAAA.

II. Certiorari Is Not Warranted to Review Any "Disarray" in the Circuits' Approaches to FAAAA Preemption.

Contrary to AEX's claims, there is no need for this Court to grant review to resolve any "disarray" or circuit split regarding the scope of FAAAA preemption.

AEX begins its discussion of the purported disarray by noting that, in 2000, Justice O'Connor stated that the Ninth and Third Circuits used a narrower definition of the term "service" in the ADA than did some other circuits. Pet. 25 (citing *Nw. Airlines, Inc.*

v. Duncan, 531 U.S. 1058 (2000) (O'Connor, J., dissenting from the denial of certiorari)). Because this case does not concern the definition of the term "service," it does not implicate any split on that topic. In any event, AEX itself states that *Rowe* subsequently "resolved the scope of the term 'service.'" *Id.* at 26.

AEX next contends that the decision below, the Seventh Circuit's decision in *Costello*, and the Ninth Circuit's decision in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015), all conflict with *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11 (1st Cir. 2014) (*MDA*), which "refuse[d] the … invitation to adopt … a categorical rule exempting from preemption all generally applicable state labor laws," and stated that courts "must engage with the *real and logical* effects of the state statute, rather than simply assigning it a label," Pet. 30 (quoting *MDA*, 769 F.3d at 20) (emphasis in petition).

Like *MDA*, however, the decision below declined to adopt a categorical rule holding that generally applicable state labor laws are not preempted. The Third Circuit specifically stated that "laws of general applicability may … be preempted where they have a significant impact on the services a carrier provides." Pet. App. 16a. And it cited as an example *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 88–89 (1st Cir. 2011), which held that the ADA preempted a "generally applicable state tip law as applied to airlines," Pet. App. 16a. Instead of applying a categorical rule that generally applicable state labor laws are not preempted, which would have allowed the court to end its opinion there, the Third Circuit went on to exam-

ine whether the New Jersey test had a "significant effect on prices, routes, or services," *id.* at 23a, as *MDA* instructed, *see* 769 F.3d at 20. And in conducing that examination, the Third Circuit did not take any "special approach" based on the ABC test's general applicability. Pet. 30. Rather, like the First Circuit, the Third Circuit looked at the test's real and logical effects. *See*, *e.g.*, Pet. App. 25a (explaining that AEX "does not provide even a logical connection between the application of New Jersey's ABC classification test and the list of new costs it would purportedly incur").

Thus, even if *Costello* and *Dilts* had adopted categorical rules exempting generally applicable employment laws from FAAAA preemption, this case, in which no such rule was applied, would not be the case in which to consider AEX's claim that such a categorical exemption is improper. In any event, *Costello* and *Dilts* did *not* adopt such categorical rules. The Seventh Circuit explicitly stated in *Costello* that it was not "adopting 'a categorical rule exempting from preemption all generally applicable state labor laws,'" and explained that it was conducting an "individualized inquiry that 'engage[s] with the real *and logical* effects of the state statute.'" 810 F.3d at 1055 (quoting *MDA*, 769 F.3d at 20, and explaining that *MDA* "counsels a different result here") (emphasis in *Costello*). And *MDA* itself specifically noted that *Dilts* had not adopted the approach *MDA* was rejecting, explaining that, "in *Dilts*, the Ninth Circuit recognized that generally applicable statutes … *could* be preempted if they have a 'forbidden connection with prices, routes, and services.'" *MDA*, 769 F.3d at 20 (quoting *Dilts*, 769 F.3d at 646) (emphasis added).

AEX also asserts that the decision below "directly oppose[s]" *MDA* and *Schwann*, 813 F.3d 429, which held that the FAAAA preempts the second prong of the Massachusetts Independent Contractor Statute's three-pronged test for determining whether a worker is an employee, Mass. Gen. Laws ch. 149, § 148B(a)(2).[1] Pet. 13. The Third Circuit explained, however, that distinctions between the New Jersey law at issue here and the Massachusetts law at issue in *MDA* and *Schwann* caused the laws to have different effects. *See* Pet. App. 23a ("The New Jersey ABC classification test … is unlike the preempted Massachusetts law at issue in *Schwann*[.]"). In particular, the Third Circuit explained that the second prong of the Massachusetts law—under which workers can only be classified as independent contractors if they perform a service outside the employer's usual course of business—required carriers to classify their drivers, whose services are within the carriers' usual course of business, as employees. *Id.* at 19a. In contrast, the second prong of the New Jersey statute includes an "alternative method for reaching independent contractor status," allowing the employer (if the other prongs are met) to classify a worker as an independent contractor if the worker performs the relevant service outside of all of the employer's "'places of

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[1] Section 148B(a) states that an individual performing a service is an employee unless: "(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed."

business.'" *Id.* at 23a (quoting N.J. Stat. Ann. § 43:21-19(i)(6)(B)). Accordingly, the Third Circuit stated, the New Jersey test does not "categorically prevent[] carriers from using independent contractors." *Id.* at 24a. "[T]he state law at issue here does not mandate a particular course of action—e.g., requiring carriers to use employees rather than independent contractors—and it offers carriers various options to comply with New Jersey employment law." *Id.*

AEX attempts to minimize this distinction, stating that *Schwann* "analyzed what would logically result from a same-day courier reclassifying its … couriers as employees under the state-law ABC test," which AEX states is "exactly the issue presented in this appeal." Pet. 33–34. What *Schwann* analyzed, however, was the effects of a state law effectively "mandating" that services be performed by someone classified as an employee. 813 F.3d at 438. The Third Circuit explained that the Massachusetts and New Jersey tests differ in the extent to which they so mandate.

Moreover, the Third Circuit made clear that the second prongs of the Massachusetts and New Jersey laws also differ in the extent to which they contribute to a patchwork of state laws. In *Schwann*, the First Circuit stated that the second prong of the Massachusetts test is "something of an anomaly," and that the "relatively novel aspect of Prong 2 runs counter to Congress's purpose to avoid a patchwork of state service-determining laws." *Id.* (internal quotation marks and citation omitted). In contrast, the Third Circuit explained, the New Jersey test "is similar to that used in many other states" and would "not result in a patchwork of unique state legislation," Pet. App. 27a (internal quotation marks and citation omitted).

Furthermore, the Massachusetts and New Jersey tests have different potential effects on prices, routes, and services because of the different scope of laws they trigger. In *Schwann*, the First Circuit determined that the Massachusetts test triggered a wide range of state law provisions, including provisions related to days off, parental leave, and work breaks. 813 F.3d at 433. In contrast, the effects of finding a worker to be an employee under the New Jersey test are far narrower, and AEX did not cite "any authority showing that it would be required to comply with [other] … state laws." Pet. App. 26a (citation omitted). "Because the scope of the [New Jersey test] is limited, its logical effect is necessarily more limited than the statute at issue in *MDA*" and *Schwann*. *Costello*, 810 F.3d at 1055; *cf.* Br. for U.S. as Amicus Curiae, *BeavEx, Inc. v. Costello*, No. 15-1305, at 20 (U.S., filed May 23, 2017) (explaining that the "different results reached by the First Circuit in *Schwann* and *MDA I* and by the Seventh Circuit in [*Costello*] are … 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").

In short, the First and Third Circuits' different conclusions about whether the laws before them would have a significant effect on prices, routes, or services reflect differences in the laws. In addition, *MDA* and *Schwann* held only that the second prong of the Massachusetts test was preempted. *See Schwann*, 813 F.3d at 440–41. Since *Schwann*, district courts in the First Circuit and Massachusetts state courts have determined that "Prongs 1 and 3 are not preempted by the FAAAA," *Vargas v. Spirit Delivery & Distrib. Servs., Inc.*, 245 F. Supp. 3d 268, 284 (D. Mass. 2017),

and that drivers can prevail on claims that they were misclassified "by showing that either Prong [1] or [3] is not satisfied," *DaSilva v. Border Transfer of MA, Inc.*, 377 F. Supp. 3d 74, 86 (D. Mass. 2019); *see also DaSilva v. Border Transfer of MA, Inc.*, 227 F. Supp. 3d 154, 159 (D. Mass. 2017); *Chambers v. RDI Logistics, Inc.*, 65 N.E.3d 1, 11 (Mass. 2016); *Khan v. E. Coast Critical, LLC*, No. MICV20152762D, 2016 WL 8114230, at *2 (Mass. Super. May 31, 2016); Pet. App. 23a n.7 (noting that "AEX cites no case holding that prong A or C is preempted under either the FAAAA or the ADA"). Unlike the second prongs, the first and third prongs of the Massachusetts and New Jersey tests are similar, and, given the level of control exerted by AEX over the drivers, the drivers would likely prevail on the merits even if only those two prongs existed. Accordingly, even apart from the differences in the scope and effects of the New Jersey and Massachusetts tests, AEX has not shown that this case would ultimately come out any differently if it had been brought in the First Circuit.

Moreover, the differences between the Massachusetts and New Jersey tests and the fact that the different prongs of the test might require individual preemption analyses underscore that any review by this Court would be premature at this time. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., opinion respecting the denial of certiorari). This case, however, arises from the denial of a motion for judgment on the pleadings and an appellate court decision affirming that denial and remanding for further proceedings. Accordingly, the lower courts have not yet had the opportunity to determine which

prongs of the New Jersey test AEX fails and why. If any further analysis of preemption in this case were warranted, that analysis would benefit from that determination by the lower courts, which would allow the preemption analysis to focus on the relevant portions of the state law at issue. The interlocutory posture of this case thus counsels further in favor of the petition's denial.

III. The Third Circuit Correctly Concluded That the FAAAA Does Not Preempt the New Jersey ABC Test.

Leaving aside its claims of conflict, AEX's challenge to the decision below boils down to a case-specific assertion that the Third Circuit erred in finding that any effects of New Jersey's ABC test on motor-carrier prices, routes, or services are "tenuous and insignificant." Pet. App. 28a. AEX contends that "the conclusion that the ABC test has no significant effect strains credulity." Pet. 42. According to AEX, classifying the drivers as employees under the ABC test would "force AEX to drastically alter its business model" and to incur the expenses of recruiting and hiring employees, creating a human resources department, acquiring, operating, and maintaining a fleet of vehicles, planning delivery routes, providing liability insurance and occupational hazard insurance, providing fringe benefits, and paying overtime wages and employment taxes. *Id.* at 42–43.

As the Third Circuit explained, however, AEX "does not provide even a logical connection between the application of New Jersey's ABC classification test and the list of new costs it would purportedly incur." Pet. App. 25a. The terms "employee" and "independent contractor" are simply labels that indicate

whether certain laws apply to those workers. The only effect of determining that a driver is an "employee" under the ABC test is that laws that use the ABC test apply. The test does not determine whether the driver is an employee for other purposes, including for purposes of other state and federal laws. Accordingly, properly classifying the drivers under the ABC test would not require AEX to change its entire business model or to incur the laundry list of costs it cites. As the Third Circuit noted, "AEX 'rel[ies] on conclusory allegations that compliance with the [NJWHL and NJWPL] will require [AEX] to switch its entire business model … [but w]e see no basis for concluding that [New Jersey law] would require that change given that the federal employment laws and other state labor laws [may] have different tests' for determining whether someone is an employee under a specific statute." *Id.* at 26a (quoting *Costello*, 810 F.3d at 1056).[2] AEX's repetition of its contrary assertions fails to establish that the Third Circuit erred in holding that New Jersey's ABC test is not "related to" motor carrier prices, routes, or services and that the FAAAA does not preempt it.

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[2] *See also* Pet. App. 25a–26a ("[C]onspicuously absent from [the company's] parade of horrors is any citation of authority showing that it would be required to comply with [other] federal and state laws." (quoting *Costello*, 819 F.3d at 1056)); *cf.* Br. for U.S. as Amicus Curiae, *BeavEx, Inc v. Costello*, No. 15-1305, at 13 (in recommending denial of the petition in *Costello*, noting that "petitioner's arguments for this Court's review presume that enforcement of the [Illinois test] necessarily requires petitioner to treat its couriers as employees for purposes of other state laws," but "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").

IV. There Is No Need to Review Whether a Presumption Against Preemption Applies in This Case.

In considering the scope of express preemption under the FAAAA in *City of Columbus v. Ours Garage & Wrecker Services, Inc.*, this Court explained that preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 536 U.S. at 432 (quoting *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991)). Concluding that the "statute does not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority,'" *id.* at 434 (quoting *Mortier*, 501 U.S. at 611), the Court held that a provision exempting "the safety regulatory authority of a State" from FAAAA preemption "spares from preemption local as well as state regulation," *id.* at 442 (addressing 49 U.S.C. § 14501(c)(2)(A)).

The assumption that "the historic police powers of the States were not to be superseded … unless that was the clear and manifest purpose of Congress" is sometimes referred to as the "presumption against preemption." *See* Pet. App. 8a. The Third Circuit's brief observations about the presumption in this case did nothing more than introduce the court's analysis of FAAAA preemption in the same way this Court did in *Ours Garage*.

Nonetheless, AEX asks this Court to review the Third Circuit's discussion of the presumption against preemption. Without citing *Ours Garage*, AEX contends that the presumption against preemption is categorically inapplicable to express preemption cases in

light of *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), which addressed whether Puerto Rico is a state for purposes of a Bankruptcy Code preemption provision. Pet. 13–14. In that case, after explaining that "the statute's language is plain," and thus that its analysis began and ended "with the language of the statute itself," 136 S. Ct. at 1946 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)), the Court stated that "because the statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent,'" *id.* (quoting *Chamber of Commerce of United States of Am. v. Whiting*, 563 U.S. 582, 594 (2011)).

AEX, however, did not raise any argument about the presumption against preemption in the court of appeals. AEX's omission did not reflect unawareness that the presumption might be implicated in this case: The district court below had stated that "federal laws are presumed not to preempt a state's police powers unless that was the clear and manifest purpose of Congress," Pet. App. 32a, and the drivers' brief discussed the "starting presumption that Congress did not intend to supplant state law," Response Br. of Pl.-Appellees, *Bedoya v. Am. Eagle Express, Inc.*, No. 18-1641, at 15 (3d Cir., filed Aug. 6, 2018) (quoting *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997)). Yet neither in its opening brief nor in its reply brief did AEX argue that the presumption against preemption does not apply to this case. In particular, AEX did not mention *Puerto Rico*, which was decided by this Court over two years before AEX filed its opening brief in the Third Circuit, and it did

not hint at its current position that the presumption never applies in express preemption cases.[3] As a result, the Third Circuit's decision unsurprisingly does not address that question.

This Court "normally decline[s] to entertain" arguments that the parties "failed to raise … in the courts below." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016); *see also*, *e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). This Court should not grant review to consider an issue that was not in dispute in the court of appeals.

Moreover, even apart from AEX's forfeiture of the issue, this case does not present an appropriate vehicle for considering the presumption against preemption. The Third Circuit's opinion gives no indication that the presumption against preemption made a difference to the outcome of this case. The court of appeals did not suggest that this was a close case. It did not determine, for example, that the New Jersey test had a substantial effect on prices, routes, and services but decide, in light of the presumption, that the effect

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[3] The only time the presumption is even mentioned in AEX's Third Circuit briefing is in a parenthetical on page 17 of its opening brief. On the previous page, AEX stated that *Morales*, *Rowe*, *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), and *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014) "constitute the four pillars of FAAAA preemption analysis and govern this case." Br. for Appellant, *Bedoya v. Am. Eagle Express, Inc.*, No. 18-1641, at 16 (3d Cir., filed July 5, 2018). The brief then includes two citations in supposed support of that statement, the second of which reads "*DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 86 (1st Cir. 2011) ("All … of the major Supreme Court cases endorsed preemption and read the preemption language broadly … and none adopted plaintiff's position … that we should presume strongly against preempting in areas historically occupied by state law.")." Br. for Appellant, *Bedoya*, No. 18-1641, at 17.

was not significant enough for the law to be preempted. Rather, the court determined that the law did not have a direct, indirect, or significant effect on prices, routes, or services. Pet. App. 22a.

AEX contends that the decision below conflicts with cases from the Eighth, Ninth, and Tenth Circuits that stated that the presumption against preemption does not apply in express preemption cases. *See* Pet. 37 (citing *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017) (en banc), *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017), and *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016)). However, AEX does not identify any way in which the analysis of whether the New Jersey test is related to motor carrier prices, routes, or services would have differed in those circuits from the analysis used by the Third Circuit.

Rather, the Third Circuit's approach of "look[ing] to the plain language of the statute and, if necessary, to the statutory framework as a whole," Pet. App. 9a, is fully consistent with those circuits' analysis of FAAAA preemption issues. Indeed, the Eighth, Ninth, and Tenth Circuits use the same approach as the Third Circuit to determine whether a state law that does not expressly reference carrier prices, routes, or services is "related to" such prices, routes, or services, agreeing with the Third Circuit that laws that affect prices, routes, and services in only a tenuous, remote, or peripheral manner and have no significant effect on Congress's deregulatory objectives are not preempted by the FAAAA.

Thus, in *Watson*, the Eighth Circuit concluded that any effect Missouri wrongful discharge claims have on services "is too tenuous, remote, or peripheral to deem

the claims expressly preempted by the ADA," and held that the ADA did not preempt the plaintiff's claim that he was wrongfully discharged for being a whistleblower. 870 F.3d at 818. The court explained that neither the state law preventing the termination of employees who report safety violations nor the whistleblower's complaint were likely to significantly affect the air carrier's services. *Id*. Like the Third Circuit, the court drew a distinction between laws that regulate how services are performed and "those that regulate how an airline behaves as an employer." *Id*. at 819 (citation omitted). And consistent with the Third Circuit's decision in this case, the court determined that the whistleblower's claim did not "frustrate the ADA's primary economic objectives." *Id*.

Similarly, in *California Trucking Ass'n v. Su*, 903 F.3d 953 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1331 (2019), the Ninth Circuit stated that "the FAAAA does not preempt state laws that affect a carrier's prices, routes, or services in only a 'tenuous, remote, or peripheral ... manner' with no significant impact on Congress's deregulatory objectives." *Id*. at 960 (quoting *Rowe*, 552 U.S. at 371). The court accordingly held, consistent with the decision below, that a common law test for determining whether a worker is an employee for state labor law purposes was not preempted. *Id*. at 961. The Ninth Circuit also noted that "the scope of the pre-emption must be tempered by the presumption against the pre-emption of state police power regulations." *Id*. (citation omitted). That observation, of course, is flatly incompatible with any claim of conflict between the Third and Ninth Circuits on this point.[4]

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[4] *Atay*, the Ninth Circuit case cited by AEX, did not involve the FAAAA or ADA. *See* 842 F.3d 688.

And in *Boyz Sanitation Service, Inc. v. City of Rawlins, Wyoming*, 889 F.3d 1189 (10th Cir. 2018), the Tenth Circuit explained that the effect an ordinance requiring all garbage in a city to be taken to a specific transfer station had on prices, routes, and services was "too insignificant to warrant preemption." *Id.* at 1200. The court noted that the ordinance "neither significantly determine[s] what services garbage haulers in [the city] will provide nor require[s] garbage haulers to provide a service not available in the market," "has only a tenuous effect on the prices, routes, and services of garbage haulers," and "is too far removed from Congress's deregulatory purpose to warrant preemption." *Id.*[5]

As these decisions demonstrate, any debate over the applicability of the presumption against preemption is largely academic to the outcome of FAAAA preemption questions. Given these decisions' analyses, there is no reason to think this case would have come out differently in the circuits AEX cites for its conflict.

In any event, the Third Circuit's discussion of the presumption was not erroneous. Recognizing that "the States are independent sovereigns in our federal system," this Court has long applied the presumption in

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[5] In *EagleMed*, the Tenth Circuit case cited in the petition, the court held that the ADA preempted a state statute and regulation that expressly referenced prices and services. 868 F.3d at 902. The court stated that the presumption did not apply in the course of rejecting the argument that, for policy reasons, the ADA should not preempt the statute and regulation despite their express reference to prices, routes, or services. *Id.* at 903–04. As the decision below makes clear, the Third Circuit agrees that the presumption against preemption cannot save a state law that expressly references carrier prices and services.

cases involving "'the historic police powers of the States,'" including in express preemption cases. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see*, *e.g.*, *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *Ours Garage*, 536 U.S. at 432; *De Buono*, 520 U.S. at 813–14 & n.8; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). *Puerto Rico*, in which the Court determined that the statute's language was plain, and that its analysis could thus both begin and end "with the language of the statute itself," 136 S. Ct. at 1946 (citation omitted), did not purport to overturn this precedent concerning the presumption, which has an impact only "when the text of a pre-emption clause is susceptible of more than one plausible reading," *Altria*, 555 U.S. at 77.

Regardless of the presumption, however, the Third Circuit properly analyzed the FAAAA's preemption provision and correctly concluded that the FAAAA does not preempt the New Jersey test. That test "has neither a direct, nor an indirect, nor a significant effect on carrier prices, routes, or services," Pet. App. 22a, and is not "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).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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