No. 15-1305

IN THE

Supreme Court of the United States

BEAVEX INCORPORATED,
Petitioner,

v.

THOMAS COSTELLO, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The circuit split on this FAAAA preemption issue is clear. The relevant portions of the Illinois and Massachusetts employment laws are worded the same. Undisputedly, the laws have the same immediate impact on motor carriers in both states—they ban the use of independent contractors as drivers and the owner-operator business model. Undisputedly, drivers in the two states brought parallel class actions. And undisputedly, the Massachusetts law was preempted, yet the Illinois one was upheld. BIO 15 (conceding that the circuits reached "differing conclusions with regard to the state law provisions before them"); WTA Amicus Br. 11 ("The Seventh Circuit's analysis of the [Illinois wage law] . . . is contrary to the First Circuit's analysis of a similar Massachusetts law").

Plaintiffs' efforts to minimize the error below and the circuit split merely nibble at the periphery of the real issue. For instance, Plaintiffs argue that the Massachusetts and Illinois wage laws have different "scopes," but this argument merely tries to re-focus the analysis on other statutes not at issue in either circuit decision. Plaintiffs hint that the cases are not completely over yet, but there is no reason to believe either circuit will revisit its preemption holding. Plaintiffs note that only two circuits make up the clear split presented here, but they ignore that Congress has identified the "patchwork" variety of state laws on this topic as part of the problem FAAAA preemption was meant to solve.

And Plaintiffs completely ignore the amicus brief, which points out that Washington state has the same "employee" definition as Illinois and Massachusetts. WTA Amicus Br. 10–12.

Counsel for these Plaintiffs-Respondents below acknowledged that the First and Seventh Circuit's holdings are "directly on point and squarely contradict[]" each other. App. 127. He also agreed that this "issue [is] of exceptional importance." *Id.* He was right on both points. Plaintiffs now deny this case is cert-worthy using replacement counsel from among their six amici below.

I. The Seventh Circuit erred.

1. The impacts of the Illinois wage law alone are sufficient to preempt it.

Undisputedly, the Illinois wage law defines all drivers for motor carriers as "employees." Undisputedly, the immediate impact is that 104 BeavEx owner-operator drivers in Illinois must now be labeled "employees" instead of independent contractors.

Thus, the wage law bans a motor carrier's entire business model—using independent contractors as drivers, paying by the route, and deducting expenses from those payments. This ban requires a structural change to BeavEx's business. *See* WTA Amicus Br. 14 (noting that the owner-operator setup is a "business model used by motor carriers for more than a century").

The BIO argues that such structural changes are "irrelevant" because the Seventh Circuit found insufficient impact on BeavEx. BIO 8 (arguing that it can be "irrelevant whether a law affects a motor carrier's business model or corporate structure"). That argument is wrong (and circular). Requiring BeavEx to completely restructure its Illinois operations, but not those in other states that permit the owner-operator model, inherently and logically impacts BeavEx's prices and services. As the amicus brief argues, this "essentially restructur[es]" the motor carrier industry in all states with such laws. WTA Amicus Br. 12. It certainly has "a significant impact related to Congress' deregulatory and preempted-related objectives." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008).

The Seventh Circuit acknowledged, but improperly brushed aside, proof of significant concrete costs associated with this restructuring. It denied that $185,000 per year for human resources mattered, because the court lacked a "frame of reference" to conclude that nearly $1,800 per year per driver would be significant to BeavEx. App. 20. On top of that, the deductions here include the costs of uniforms, cargo and accident insurance, and administrative, scanner, and cell phone fees. On their face, these are significant. Plaintiffs themselves claim a loss of many thousands of dollars per driver, adding up to millions of dollars. Pet. 16; App. 134, 141–42. The Seventh Circuit admitted that the Illinois wage law would force BeavEx to either "absorb the costs it previously deducted," or "pass them along to its couriers through lower

wages," or "to its customers through higher prices." App. 20. No one has denied that these costs and structural changes will be unique to Illinois.

The Seventh Circuit seemed to think that the impact here would be insignificant because under federal law and *other* state employment laws, BeavEx drivers may remain independent contractors. *See* BIO 8. But this exact argument has been rejected in the First Circuit: "the logical effect of classification as an employee under [one law] . . . is to increase the likelihood of meeting the 'employee' definition provided in [other statutes]." *Mass. Delivery Ass'n v. Coakley (MDA II)*, 117 F.Supp. 3d 86, 95 (D. Mass. 2015), *aff'd*, __ F.3d ___, 2016 WL 2732054 (1st Cir. May 11, 2016). The BIO gives no example of such a system working in practice.

2. The alleged ability to seek consent for wage deductions does not matter.

Next, Plaintiffs attempt to undermine the impact of the Illinois law by urging that BeavEx can "seek consent for deductions" from wages. BIO 13, 6. But the claimed ability to seek the drivers' consent for deductions from their wages is a red herring.

Seeking consent is not actually "contracting around" the Illinois wage law. Pet. 29. In fact, the drivers' contracts *already* call for deductions, yet this lawsuit seeks to trump those contracts. *See O'Brien v. Encotech Construction Servs.*, 183 F. Supp. 2d 1047, 1049 (N.D. Ill. 2002) (noting that the Illinois wage law embodies "manifest public policy to limit

freedom of contract with respect to the payment of wages in order to serve more important public purposes.")

As addressed in the Petition, seeking consent from every driver for every deduction on each payment made would be a significant administrative task. Pet. 29 (citing 56 Ill. Admin. Code § 300.720). More importantly, the drivers, if they are "employees," *need not consent*. The whole point of "employee" status under the wage law is that every month the worker has the right to *refuse* to allow money to be taken from his paycheck.

The idea that BeavEx should, through significant effort, orchestrate a system of obtaining benevolent consent each pay period from every driver in order to take contracted-for deductions itself shows what an impact the Illinois wage law has. A "delivery company cannot be forced to conduct its business in reliance upon finding workers willing to waive their statutorily provided entitlements." *MDA II*, 117 F. Supp. 3d at 92; Pet. 30. The BIO has no response to this.

II. The First and Seventh Circuits are split.

1. Variance in the "scope" of the two state laws cannot support the admittedly opposite circuit rulings.

Plaintiffs argue that the alleged different "scope" of the Illinois and Massachusetts laws justifies the admittedly conflicting decisions of the two Circuits. BIO 5, 12–13, 15–16. But this is too

thin a reed to explain the conflicting reasoning and opposite outcomes below.

As an initial matter, the "scope" argument is a misnomer. The two state law provisions here are the same. *Compare* Mass Gen. Laws ch. 149, § 148B(a)(2) (a worker is an "employee" unless "the service is performed outside the usual course of business of the employer") *with* 820 ILCS 115/2(2) (a worker is an "employee" unless he "performs work which is either outside the usual course of business or is performed outside all of the places of business of the employer"). The Seventh Circuit recognized this. App. 14 (calling the laws "substantially similar"). Therefore, Plaintiffs cannot distinguish between the state statutes on their own terms.

Both laws also have the same immediate impact. They conclusively bar motor carriers from ever using independent contractors as drivers. Plaintiffs admit this. BIO 3 ("delivering packages is within the 'usual course of BeavEx's business'"). Thus, the two state laws both require the same structural change to motor carriers' businesses.

So any "scope" differences are at the periphery: they are really only about the ripple effect of one law on others. Plaintiffs argue that the Massachusetts law happens to trigger a greater number of other employment statutes than the Illinois wage law does. BIO 5, 12–13, 15–16. But that is not a reason why one law should be preempted while the other is not. *See* Pet. 30–32.

First, the other employment laws were not at issue either here or in *Schwann v. FedEx Ground Package Sys.*, 813 F.3d 429 (1st Cir. 2016). App. 18 ("Plaintiffs are only seeking to enforce the provision prohibiting wage deductions"); App. 126 n.5 (contending in *Schwann* that "other employment laws … are not at issue here because the Plaintiffs only seek to enforce the wage payment law found in M.G.L. c. 149, § 148"). The BIO does not deny this.

Second, accordingly, the "other employment laws" had nothing to do with the First Circuit's reasoning in holding Massachusetts law preempted. The *Schwann* court focused on Prong 2. It held that the "decision whether to provide a service directly, with one's own employee, or to procure the services of an independent contractor is a significant decision in designing and running a business." *Schwann*, 813 F.3d at 438. The First Circuit found it important that the Massachusetts law "define[s] the degree of integration that a company may employ by mandating that any service deemed 'usual' to its course of business be performed by an employee." *Id.* All of this applies equally to the Illinois law here.

Third, to the extent the ripple effect matters, it applies in both states. Illinois Attorney General Lisa Madigan conceded that, like the Massachusetts law, the "employee" definition in the Illinois wage law triggers at least one other significant law—unemployment insurance. *See* Pet. 31. Neither the Seventh Circuit nor the BIO had any answer to this.

2. Stopping just short of a "categorical rule" does not undercut the precedential legal holding here.

Next, Plaintiffs suggest that this Court should not take up this issue because the Seventh Circuit declined to adopt a "categorical rule exempting from preemption all generally applicable state labor laws." BIO 1, 5, 9, 14 (quoting App. 19). This argument is a red herring, for two reasons.

First, it does not matter whether the Seventh Circuit adopted any broadly applicable "categorical rule." This case merits certiorari because the Seventh Circuit upheld an Illinois law indistinguishable from a Massachusetts law held preempted by the First Circuit. Those laws are important to the way that motor carriers structure their businesses.

A cert-worthy circuit split on a preemption issue does not require either circuit to announce a "categorical rule exempting from preemption" entire classes of state law.

Even if set up narrowly, preemption is at heart a legal question. Here, the Seventh Circuit's decision is a precedent-setting ruling that the FAAAA does not preempt Illinois wage law as applied to motor carriers. After all, Illinois wage law cannot govern BeavEx but be preempted as against other motor carriers. Nothing in the FAAAA would support such a result. "If a state law is preempted as to one carrier, it is preempted as to all carriers." *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006). The point is, this case is not just about

BeavEx. Important state laws that say essentially the same thing are effective in one Circuit and not in another.

Second, to the extent it matters, the Seventh Circuit's comment that it was stopping short of a "categorical rule" indicates how far afield of the proper analysis that court strayed. App. 19. The Seventh Circuit categorized the Illinois wage law as a "background labor law," and opined that "there is a relevant distinction for purposes of FAAAA preemption" between labor laws and other types of laws. App. 16. This line of thinking—whether a "categorical rule" or just a "relevant distinction"—runs afoul of this Court's FAAAA jurisprudence.

Being "generally applicable" will not save a state law from preemption. In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992), this Court rejected the "notion that only state laws specifically addressed to the [air carrier or motor carrier] industry are pre-empted." This Court specifically held that the idea that the ADA/FAAAA "imposes no constraints on laws of general applicability" would "creat[e] an utterly irrational loophole" in preemption and "ignor[e] the sweep of the 'relating to' language." *Id.*

Nor is there anything special about labor laws. Comprehensive labor laws can be "related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1), as easily as any other type of regulation. This is no different than the consumer-protection, public health, and state tort laws preempted in

Morales, Wolens, Rowe, and *Northwest.* In those cases, the refrain that "this type of state law should be exempt from preemption" is a consistent loser. *See, e.g., Rowe*, 552 U.S. at 373–74 ("Despite the importance of the public health objective, we cannot agree with Maine that the [FAAAA] creates an exception on that basis . . . . the Act says nothing about a public health exception"); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1430 (2014) (holding an ordinary state business tort claim barred by ADA/FAAAA preemption).

III. The circuit split is important.

1. The fact that this split is about "Prong 2" does not diminish its importance.

Plaintiffs also point out that in both circuits, only "Prong 2" of three-prong "employee" definitions was challenged. BIO 10–12, 16–17. They suggest that "whether motor carriers in Massachusetts may classify their [drivers] as independent contractors has not been settled" because of the "two other prongs of the test." BIO 11. Plaintiffs imply that it is still uncertain whether this split matters. That is not correct.

Both states have three-prong tests for "employee" status. Both are written such that *any one* of the prongs can qualify a worker as an "employee." 820 ILCS 115/2; Mass. Gen. Laws ch. 149, § 148B.

No motor carrier can ever satisfy Prong 2 as to its owner-operator drivers. Drivers will always work "in the usual course of business" for motor carriers. So, in both states, as long as Prong 2 stands, it will always be the decisive one against the motor carrier.

Because Prong 2 makes all drivers for motor carriers employees, it is effectively a *per se* "no independent contractor-drivers rule." Thus, the Question Presented here asks whether the FAAAA preempts "generally-applicable State laws that *force* motor carriers to treat and pay *all* drivers as 'employees.'" Pet. i (emphasis added).

In this case, because Prong 2 has been upheld, the "employee" issue is over: all drivers are "employees." In *Schwann* and other First Circuit cases, Prong 2 has been erased. Of course, drivers may in some cases be wrongly classified. Further analyses are required under Prongs 1 and 3 (which are, incidentally, the same in Illinois as in Massachusetts). Motor carriers will have the opportunity to argue about the degree of control they exercise over their drivers, the flexibility of schedules, drivers' freedom to drive for other carriers, and all of the usual factors that divide employees from independent contractors.

None of this undercuts the importance of this issue. Motor carriers in Massachusetts, subject only to Prongs 1 and 3, have the opportunity to structure lawful independent contractor relationships with their drivers. Motor carriers in Illinois, still subject to Prong 2, do not.

2. This is a national problem, as the amicus brief observes.

Finally, Plaintiffs point out that only two circuits have addressed this specific issue. BIO 16. This cannot minimize the issue.

The suggestion that this issue is confined to two circuits ignores the "national wave of class action lawsuits" over driver classifications. App. 120; Pet. 32–34.

Moreover, Illinois and Massachusetts are not alone. Plaintiffs ignore the amicus brief, which points out that Washington state has an "employee" test nearly identical to the one at issue here. WTA Amicus Br. 10. As under Illinois and Massachusetts law, "[u]nder no conceivable grounds can owner/operators in Washington state ever be independent contractors under RCW 50.04.[140]." WTA Amicus Br. 6; *id.* at 12 ("forcing carriers to treat owner/operators as employees [is] essentially restructuring Washington State's trucking industry").

The fact that only a handful of states have laws precisely like those at issue here is not a reason to ignore this problem—it is part of the problem. Of course not every state has laws that match Illinois', Massachusetts', and Washington's. Both Congress and this Court have recognized that the states have a "sheer diversity" of laws in this field. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) (quoting H.R. Conf. Rep. No. 103–677, at 87). Congress sought to eliminate this

"patchwork" of state laws by establishing broad FAAAA preemption. *Rowe*, 552 U.S. at 373. The patchwork itself posed a "huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ours Garage*, 536 U.S. at 440.

Lastly, this case presents the cleanest split this Court could hope for. Two states' laws, which all agree are "substantially similar," App. 14, have been upheld in one Circuit and held preempted in another in precedential opinions. Both circuits are aware of the other circuit's opinion, and neither shows any sign of backing down. *Mass. Delivery Ass'n v. Healey (MDA III)*, __ F.3d __, 2016 WL 2732054, at *4 (1st Cir. May 11, 2016) (refusing to reconsider *Schwann* and noting that the Seventh Circuit's view had been "already considered by this Court" including in a petition for rehearing en banc, "which [was] . . . denied").

CONCLUSION

The petition should be granted.

Respectfully submitted,

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