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

PETITIONER'S BRIEF IN RESPONSE TO THE UNITED STATES

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ARGUMENT

The Government's brief raises nothing new. It spots no hidden vehicle problems. Nor does it deny the importance of the root FAAAA preemption issue at hand.

Instead, the Government spends two-thirds of its argument section asserting that the Seventh Circuit's decision below is correct. Brief of the United States as Amicus Curiae (U.S. Br.) 10-18. Four pages at the end deny the circuit split. U.S. Br. 18-22. According to the Government, the Illinois wage law is "narrow," and therefore, the Seventh Circuit rightly found no preemption, and no real split with the First Circuit occurred.

But no matter how narrowly the Government views the Illinois wage law, the parallel law in Massachusetts has been held preempted, while the Illinois version has not. Regardless of anything else, as a matter of state wage law, motor carriers in Illinois *cannot* have couriers who are independent contractors—and those in Massachusetts *can*. At least one judge outside both circuits has recently acknowledged and described this circuit split.

On the merits, the Government's preference for the Seventh Circuit's side of this split provides no real reason to deny certiorari. Nor is it surprising. As a policy preference, for years the Department of Labor has openly aimed to broaden who is an "employee" and narrow who is an "independent contractor." That it would want to see the Illinois law upheld is therefore not surprising. But that has nothing to do with the FAAAA, or whether a state's laws have "a significant impact related to Congress' deregulatory and pre-

emption related objectives" as to motor carriers. *Rowe v. N.H. Motor Transp. Ass'n.*, 552 U.S. 364, 371 (2008).

This Court should grant certiorari to resolve this undisputedly important issue that has split the First and Seventh Circuits: can a generally-applicable state law force motor carriers to treat and pay all drivers as "employees" rather than as independent contractors? Pet. i.

I. The problem for motor carriers is real.

BeavEx uses thousands of couriers in dozens of states. The couriers are independent contractors. Their contracts say so repeatedly, and the company structures itself to ensure that this legal description fits its actual practice. Accordingly, under the FLSA and state law, the couriers qualify as contractors. They receive contracted-for payments based on routes or deliveries, not hourly wages, and the company deducts costs for uniforms, equipment, and insurance as a fraction of each check.

Unlike the vast majority of other states, Illinois makes this system illegal. The Illinois Wage Payment and Collection Act ("Illinois wage law") defines BeavEx's couriers as "employees," not contractors, as a matter of state law. As "employees," they are entitled to a number of benefits they do not receive as independent contractors, including the right to avoid deductions from their pay. 820 ILCS 115/9; 56 Ill. Admin. Code § 300.720(b).

The Government theorizes that this Illinois wage law does not inflict enough burden on motor carriers

to invoke FAAAA preemption. U.S. Br. 15-16. That is wrong, for several reasons.

1. Illinois wage law cannot be contracted around, and it entitles workers to claim pay beyond their contracts.

First, the Government badly underestimates the scope and force of the Illinois wage law. To be clear: the Illinois law does not permit "contracting around" whether workers qualify as "employees" under the law. If it did, this case would not exist.

BeavEx's couriers sign contracts that state explicitly that they are independent contractors. The contracts ask the couriers to write out that they are "independent contractors," and "not employees," that they are "self-employed and . . . responsible for [their] own taxes." *Costello v. BeavEx Inc.*, 12-cv-7843, E.D. Ill., dkt. 77-17 at p. 5 of 8 (contract signed and written by a plaintiff courier). The plaintiffs' theory of this case is that, because couriers "perform work" inside the "usual course of business" for a motor carrier, they are "employees" under Illinois law, regardless of their contracts. 820 ILCS 115/2(2).

On that ground, the couriers have repudiated their contracts and seek millions of dollars in damages. Their contracts do not call for them to receive the money they now claim—this is not a breach of contract case. *But see* U.S. Br. 3, 15 (asserting that the Illinois wage law does not support claims for wages beyond what worker contracts call for, but omitting that the wage law's ban on deductions effectively means that those it covers can claim money far beyond what their contracts call for).

Nor can the parties effectively "contract around" the provisions barring most deductions from wages. 820 ILCS 115/9. As "employees," the couriers are entitled to avoid deductions from their pay. 820 ILCS 115/9. Any deductions taken must be agreed to "freely at the time the deduction is made." 56 Ill. Admin. Code § 300.720(a). Agreements for deductions can be made in advance, but only if the "employee" retains a right to "voluntary withdrawal," if the exact length of time the deductions will be taken is laid out, and if the exact same amount of deduction occurs each pay period. 56 Ill. Admin. Code § 300.720(b) (2014). On its face this provision appears designed to permit companies to loan an employee money, such as advances on pay, and take repayment from the employee's paychecks (identical amounts per pay period over a pre-set period of time).

These rules still fundamentally bar a common motor carrier business model in Illinois. Motor carriers cannot rely on benevolent consent each pay period to take the deductions they have contracted for. *See* 820 ILCS 115/9. Likewise, motor carriers cannot rely on advance consent that can be revoked at any time. 56 Ill. Admin. Code § 300.720(b). As one court has recognized, "a delivery company cannot be forced to conduct its business in reliance upon finding workers willing to waive their statutory entitlements." *MDA v. Healey*, 117 F. Supp. 3d 86, 92 (D. Mass. 2015), *aff'd*, 821 F.3d 187 (1st Cir. 2016). Moreover, BeavEx's system of deductions by design goes on indefinitely, not for a pre-set amount of time, and the amount of deductions is a fraction of each payment, and so it varies. It is therefore impossible

for BeavEx to use its nationwide business model within the Illinois statute.

This case is thus much like *Northwest v. Ginsberg*, 134 S. Ct. 1422, 1431-32 (2014); U.S. Br. 16. In *Northwest*, the Court held that the ADA preempted Minnesota's implied covenant of good faith and fair dealing. The Court observed that Minnesota forced the implied covenant into every contract as a matter of law, and did not allow it to be repudiated by contract. 134 S. Ct. at 1432. That observation is equally true here: Illinois does not permit parties to contract around "employee" status. It only permits "contracting around" the bar on wage deductions so narrowly that it is of no use to the motor carrier industry. In *Northwest*, the Court stated that if the parties could easily contract around the state law by simply excluding it from their frequent flyer contracts, then it would not be preempted. 134 S. Ct. at 1433. Here, BeavEx and its couriers have contracted for their exact arrangement—yet, Illinois law trumps those contracts. *Northwest* supports reversal in this case.

2. *The Government oddly assumes couriers will be employees for some purposes, yet independent contractors for others.*

Next, the Government brushes off the undisputed fact that the Illinois wage law makes all couriers for motor carriers "employees," regardless of any imaginable contract. The Government theorizes that this does not matter because other state and federal laws have different definitions of "employee," so the same couriers can be "employees" for some purposes and contractors for others. U.S. Br. 13.

But the basic assumption that couriers are "employees" for some purposes yet can be "independent contractors" for others makes hash of a major division in the law. The Government accuses BeavEx of "cit[ing] no authority" for why such a system would not work. U.S. Br. 13; *but see* Pet. 31. On the contrary, at least one court has rejected the Government's exact suggestion. "The Attorney General suggests a hybrid model where workers are considered to be employees under some statutes and independent contractors under others. This notion imposes a significant burden on employers who must determine how to classify each worker with respect to each statute. The Attorney General provides no examples of such an arrangement operating in practice." *MDA II*, 117 F. Supp. 3d at 95.

Further, as the court in *MDA II* recognized, the "logical effect of classification as an employee" under one statute is to make the same classification under other statutes more likely. *Id.* at 95. In fact, the couriers in this case *already* have claimed other "accoutrements of employment" attributable to other employment statutes. Pet. 16 (quoting the complaint).

Even the Attorney General of Illinois admits the definition of "employee" under the Illinois wage law is not confined to that statute alone. Pet. 31 (quoting the Attorney General admitting that anyone who is an "employee" under the wage law will also qualify under the state's unemployment insurance law). The Attorney General of Illinois herself made this point directly to the Seventh Circuit. Madigan Amicus Br., 2015 WL 2091856, at *17.

3. The Illinois wage law alone imposes "significant impact related to Congress' ... objectives"—which the Government ignores.

Finally, the Government ignores the objectives of Congress that make preemption obvious here. The Illinois wage law alone imposes "a significant impact related to Congress' deregulatory and pre-emption related objectives." *Rowe*, 552 U.S. at 371.

Congress sought deregulation: "maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices." *Id.* at 371. The Illinois wage law seeks to regulate: to overcome contracts and replace them with state law that aims to provide greater supposed protections for workers. The impact of this, which even the Seventh Circuit called an "increased labor cost," is tremendous. App. 20. Record evidence shows an added cost of some $1,800 per courier per year. Pet. 15. The Government ignores Congress's deregulatory purpose. It simply parrots the Seventh Circuit's odd assertion that without a frame of reference it could not tell if that "increased labor cost" was significant to BeavEx. U.S. Br. 16.

Congress also sought to eliminate the "patchwork" of state regulations that posed a "huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Rowe*, 552 U.S. at 373. Undisputedly, BeavEx and other motor carriers use independent contractors nationwide, in a "standard way of doing business." *Id.* Yet, Illinois wage law labels every courier an "employee"—and

vests them accordingly with a panoply of rights, including the right to trump their contracts and seek a return of the wage deductions taken under them. The Government does not respond to the fact that Illinois (and Massachusetts) law is unlike most other states' in this way, creating a "patchwork" problem.

II. The Government's view on the merits is not a reason to deny certiorari.

Whether the Seventh Circuit got preemption right is ultimately the merits question in this case. Lengthy analysis from the Government on that point itself suggests that this case merits certiorari.

Moreover, the Department of Labor favors upholding the Illinois wage law because, as a matter of policy, it takes a broad view of who is an "employee" and a narrow view of who is an "independent contractor." As one commentator described it, "[i]n furtherance of its agenda to extend minimum wage and other wage-hour protections as broadly as possible, on July 15, 2015, the Department of Labor issued a far-reaching interpretive memorandum expressing the DOL's belief that 'most workers [classified as independent contractors] are employees under the FLSA's broad definitions.'" Sheppard Mullin, *DOL Says Most Independent Contractors are Actually Employees*, July 20, 2015.

This guidance was criticized as attempting to define every worker as an "employee" under the FLSA. B. Means & J. Seiner, *Navigating the Uber Economy*, 49 U.C. Davis L. Rev. 1511, 1532 (2016) (criticizing the 2015 guidance, calling it "erroneous" and opining that it could "make it nearly impossible

for on-demand businesses to argue that their workers are independent contractors"); *id.* ("[I]t appears that the DOL's overall intent is to stack the deck against on-demand businesses, thereby supporting a pre-determined result."). *See also* O. Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. Rev. 51, 63 (2017) ("The DOL's guidance effectively expands the worker protections included in the FLSA by narrowing the grounds under which a worker qualifies as an independent contractor.").

Labor lawyers have warned that the Government's agenda to expand employee protections could crush the way the motor carrier industry has operated for decades. *See* Shumaker, Loop & Kendrick, *Your Drivers are Now Your Employees* 1 Autumn 2015 Newsletter (observing that the DOL guidance "has opted to ignore the long-standing policy and practice" of the motor carrier industry, and noting that the DOL's "[e]fforts to attack and destroy this historical [independent contractor/owner-operator] model in the motor carrier industry, if successful, will substantially increase the cost of transportation of our nation's goods; which cost will ultimately . . . be borne by consumers").

The bottom line is, on policy grounds the Government wants every worker to be an "employee." *E.g.,* U.S. Br. 4 ("petitioner employed approximately 104 couriers in Illinois, whom petitioner classified as independent contractors"). FAAAA preemption of Illinois law threatens that agenda within the motor carriage industry. Therefore, the Government's view that the Seventh Circuit rightly found no preemption is not surprising. It creates no real reason—certainly no new reason—to deny certiorari here.

III. The Circuit split is real.

The Government's assertion that there is no meaningful split relies on its merits argument. The Government essentially urges that the Illinois wage law is narrow, whereas the Massachusetts law is broader, implicates more "employee" rights, and thus may warrant preemption. U.S. Br. 19-20. This ground has been thoroughly plowed, both in prior briefs and above. *See supra,* at 3-8; Pet. Reply Br. 5-7 (explaining why "variance in the scope of the two state laws cannot support the admittedly opposite circuit rulings"). But there are two additional problems with the Government's position.

1. Undisputedly, existing circuit decisions permit motor carriers to operate in Massachusetts in a way they cannot in Illinois.

No one disputes the heart of the circuit split in this case. All agree that the relevant Massachusetts and Illinois definition of "employee" are the same. *See* Pet. 25. All agree that the First Circuit found that law preempted and the Seventh Circuit did not. As a result of these rulings, motor carriers in Illinois *cannot* use drivers who are independent contractors without violating state wage law, while motor carriers in Massachusetts *can*. That much is not disputed—and that much is enough. The different preemption rulings in these two circuits creates a circuit split on an important legal question.

2. The split has been recognized recently by at least one more court.

Courts have also recently commented on the divide between the First and Seventh Circuits. In *Lupian v. Joseph Cory Holdings, LLC*, the court noted that "there appears to be a split between the First Circuit and the Seventh, Ninth, and Eleventh Circuits, concerning the limit of federal preemption over state wage laws." 2017 WL 896986, at *3 (D.N.J. Mar. 7, 2017); *id.* at *5 (discussing this case and *Schwann*).

The *Lupian* court faced the exact issue in this case below: whether the FAAAA preempted the Illinois wage act. The court ultimately granted an interlocutory appeal under 28 U.S.C. § 1292(b) because whether to follow the First or Seventh Circuit posed a dispositive legal question with a "substantial ground for difference of opinion." 2017 WL 1483313, at *2 (D.N.J. Apr. 20, 2017). The court observed that "the First Circuit's 'logical effect' test stands in contrast to the Seventh Circuit's test, which focuses on whether the law in question regulates a motor carrier's relationship with its consumers or with its employees." *Id.* at *1; *id.* at *2 ("the Court finds that there is a clear difference of opinion as evidenced by the differing tests applied by the First and Seventh Circuits in analyzing the same question.").[1]

[1] The § 1292(b) petition remains pending at the Third Circuit. The *Lupian* plaintiffs have suggested to that court that it await the outcome of this Petition.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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