No. 20-1453

In the

Supreme Court of the United States

CAL CARTAGE TRANSPORTATION EXPRESS, LLC, et al.,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, et al.,

Respondents.

On Petition for Writ of Certiorari To The California Court of Appeal

Brief Amicus Curiae of Western States Trucking Association as Amicus Curiae In Support of Petitioner

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INTEREST OF AMICUS CURIAE[1]

The Western States Trucking Association ("WSTA") is a nonprofit trade association incorporated in 1941 that represents nearly 1,000 construction industry related trucking companies, and an additional 5,000 affiliated member motor carriers engaged in multiple modes of trucking from construction-related to general freight operations. Our diversified group of member motor carriers operate in intrastate commerce, interstate commerce, and foreign commerce and operate many different types and classes of commercial motor vehicles, including dump trucks, concrete pumpers and mixers, water trucks, port and border dray trucks, heavy-haul trucks, and class 8 over-the-road tractors. Member companies range in size from one-truck owner-operators to fleets with over 350 trucks. The business of WSTA members constitutes over 75% of the hauling of dirt, rock, sand, and gravel operations in California and other western states.

The mission of WSTA is to advance the professional interests of construction trucking companies that are based in, and/or perform work in California. WSTA advocates on behalf of its members, all of whom have a strong interest in regulations that affect the transportation industry.

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[1] All parties received timely notice of intent to file this brief at least 10 days in advance of the brief's due date. Blanket consent letters are on file with the clerk. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission.

WSTA members generally are exempt from state and local regulation pursuant to 49 U.S.C. § 14501(c)(1), also known as the Federal Aviation Administration Authorization Act of 1994 (the FAAAA). WSTA has an interest in ensuring that its members can continue doing business without having to navigate a patchwork of state and local regulation which Congress saw fit to preempt.

Materials hauled by WSTA members include dirt, sand, rock, gravel, asphalt and heavy equipment. WSTA members typically transport construction material from aggregate plants, asphalt and cement plants to construction sites. Dirt is primarily hauled from a barrow or construction site to another construction site.

WSTA's member employers provide work for approximately 5,000 drivers, mechanics, support personnel and managers. Approximately 40% of WSTA's members are sole proprietors – small one-truck independent contractor owner-operators motor carriers. In addition to dump truck operators, WSTA also represent a large segment of the construction industry that hauls oversized and overweight off-road vehicles and materials, plus a specialized segment that operates pneumatic bulk trucks, water trucks and flatbed construction trucks within this state. All operators of such trucks are motor carriers, and the vast majority of WSTA members are motor carriers as that term is defined in 49 U.S.C. § 13102.

WSTA and its members are directly impacted by the decision of the California Court of Appeal in this case because the decision will operate to reclassify thousands of independent businesses as employees of the companies they currently do business with.

California's enactment of an "ABC" test for determining worker classification will force all of WSTA's members to radically change their business

models by forcing independent contractor truckers to be treated as employees. Some fortunate companies that survive will increase their existing staff of employee drivers, and will increase their prices to make up for the increased expenses. Other companies will be forced to dramatically reduce the services they provide, and the routes they service. For many small owner-operators, the result will be that they will no longer be able to work as independent contractors by marketing their trucks and their skills as drivers, because the employment mandate will be cost-prohibitive. As a result, many will be forced to close their businesses and leave the industry. WSTA urges this court to grant the petition to resolve an important question of law that has generated numerous conflicting decisions in the lower courts.

SUMMARY OF ARGUMENT

WSTA is filing this amicus brief to illustrate the particular impacts of California's recently-enacted ABC test on one significant segment of the trucking industry in California, and to amplify certain points that are particularly relevant to WSTA members.

Specifically, this brief's primary focus is to help inform this Court on the way trucking services are delivered, by fleets of employee drivers as well as subcontracted trucking companies, in order to demonstrate why the ABC test codified in California Labor Code section 2775 et seq. mandates an employment relationship between trucking companies. Second, the brief explains the catastrophic impact on the trucking industry if the law is enforced. Finally, the brief debunks the notion that the business-to-business exception in

California's law has any applicability to the trucking industry.

ARGUMENT

I. CALIFORNIA'S ABC TEST AB 5 WILL CONVERT ALL INDEPENDENT CONTRACTOR TRUCKING COMPANIES INTO EMPLOYEES

A. Brief Overview of WSTA Members and the Trucking Services They Provide

WSTA members engage in a wide variety of trucking services, including both inter- and intrastate hauling. Many members are in the construction trucking industry, although WSTA membership has grown to include members from other types of trucking as well. Member companies range in size from large fleets of 300 trucks and employee drivers, to small, one-truck owner-operators, with companies of all sizes in between. Our members generally work on construction projects hauling material and/or equipment to and from the worksite. However, they also engage in traditional freight and cargo transport as well.

For a trucking company, business volume tends to fluctuate wildly. Some work, especially in the construction industry, is seasonal. Volume can also fluctuate based upon changing consumer demand, new construction developments in particular geographic areas, overseas shipping levels, and even the general economic conditions.

For established regular routes that do not vary with the season, or the weather, companies can easily staff

up with employee drivers to service those routes. However, much of trucking involves fluctuating demand for trucking services. It is simply not commercially practicable for a company to rely entirely on employee drivers, because customers will occasionally need services that outstrip the capacity of a trucking company's fleet of trucks and staff of drivers. In the modern on-demand economy, when a trucking company wins a contract for trucking services that exceeds its available supply of trucks and employee drivers, there is no time to go out and purchase new trucks and hire and train new drivers. The customers want – demand – the delivery of the cargo to be completed immediately. Indeed, one of the keys to winning bids on trucking services is the ability of the trucking company to reliably and quickly complete the job.

In addition to the critical ability to have a rapid response time, trucking companies do not have the capital or resources to rapidly increase and decrease their fleet of trucks and employee drivers as their volume ebbs and flows. As to the truck, our members regularly spend anywhere from $150,000 to $300,000 on a single truck, depending on how the truck is equipped. The only way it is commercially viable to invest that much money on a truck is to guarantee that the truck will be transporting goods every day, because if the truck is not moving, the company is losing money on that capital investment. But obviously, if a company only needs an excess of trucks for a single temporary job, it would go out of business if it purchased enough trucks to service that one job and then parked those trucks after the job was completed, simply because it would not be earning any revenue to service the debt on those newly-purchased trucks.

The same is true for employee drivers. Drivers need to be hired, trained, sent to a medical screening,

enrolled in a drug and alcohol testing program, and then educated on the employer's particular routes and operational policies. It can take days or weeks from the hiring of an employee driver to the point in time they are ready to actually haul a load for their employing trucking company.

Because of these realities inherent in the business of trucking, virtually all of commercial trucking relies on "brokering" to one degree or another. "Brokering" is when a trucking company has obtained work from a customer and is giving some or all of that work to other trucking companies via subcontracting agreements. Trucking companies will subcontract with other trucking companies when their volume exceeds their own internal fleet/employee resources because it is a more commercially practical method of responding to fluctuations in business volume. These subcontracting companies may be other large or mid-sized fleets that have excess capacity, or they may be individual owner-operators who own their own truck and trailer and routinely hire themselves out to whichever larger trucking company needs extra capacity on a temporary or per-job basis. The trucking company may complete a job for a customer using only its own fleet of trucks and employee drivers, or it may use a mixture of its own fleet/employees combined with other subcontracted trucking companies to supplement its workforce, or it may subcontract the entire job if its own workforce is entirely occupied with work for other customers.

When this subcontracting occurs, it is common in the trucking industry to charge a brokering fee – typically 5% to 8%. Thus, if a customer for a particular hauling job is paying the trucking company $100/load, the trucking company may broker some or all of that job to other trucking companies, paying them $95 per load. Often, the

subcontracting companies are companies that were the losing bidders on the contract in question, so they are happy to get at least some of the work.

It is common for Company A to broker work to Company B one day, and then on another day, Company B will broker work to Company A. Through these subcontracting transactions, trucking companies are able to bid on multiple jobs, even if the sum total of all the jobs will exceed their in-house supply of trucks and drivers, because they can usually broker the excess work to others in the trucking industry. Indeed, smaller owner-operators thrive on this practice. One-truck owner-operators, and to a certain extent small and medium trucking companies, do not always have the skills, experience, or relationships to successfully bid and win large contracts for trucking services. They simply don't have the resources to pay for the staff and overhead necessary to go out and bid jobs. Instead, they benefit from the work that larger companies do in winning the contracts, because they will often be called upon to handle the overflow work that exceeds the capacity of the winning bidder trucking company.

Studies have demonstrated that self-employed independent owner-operators running their own businesses do quite well financially. In fact, the vast majority of independent owner-operators make more money than their counterparts employed as company drivers, even accounting for union wages. Median income for independent owner-operators is, on average, approximately 40% higher than the median income for employee drivers. See, e.g., John Husing, Ph.D., *Owner Operator Driver Compensation* (2015). It is also well known that many workers wish to be independent contractors for specific non-employment benefits. Research shows that less than one in ten

independent contractors would prefer a more "regular" nine-to-five type of work arrangement. See, e.g., Peter Tran, *The Misclassification of Employees and California's Latest Confusion Regarding Who Is an Employee or an Independent Contracto*r, 56 Santa Clara L. Rev. 677, 701 (2016).

Because of the manner in which trucking services are bid, won, and subcontracted, it is an undeniable fact that all of the trucking companies – whether large fleets or small one-truck businesses – are all engaged in the same "usual course of business" when they subcontract with each other. This factual reality is critical because the "B" prong of the ABC test states provides that the worker must perform work that is outside the usual course of the hiring entity's business.

B. The ABC Test AB 5 Makes It Illegal to Subcontract with Other Trucking Companies as Independent Contractors

The California Legislature has codified the ABC test announced in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) as follows:

> Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an

> independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Dynamex, *supra*, 4 Cal.4th at 916-917. The new ABC test announced in *Dynamex* mandates that the "hiring entity" must prevail on all three prongs, to show that the "worker" is an independent contractor. *Id*. at 955. Failing to prevail on even one prong means that the "worker" will be considered an employee, even though the "worker" is an independent business. This test is now codified at California Labor Code section 2775, et seq.

As discussed earlier, in the trucking business, both the "hiring entity" and the "worker" are invariably both independent trucking companies, and thus, a defendant in any action would almost certainly fail the B-prong of the test, as both are in the same business.

Thus, under the California's ABC test, independent companies will be deemed to be the employees of one another, rather than the independent contractors they truly are. For these reasons it is plain that the trial court below was correct that the law makes it impossible for a trucking company to contract with a motor carrier as an independent contractor. For this reason, California's ABC test creates direct impacts on prices, routes and services of motor carriers and is therefore preempted by federal law.

II. THE ENFORCEMENT OF CALIFORNIA'S ABC TEST WOULD CAUSE IRREPARABLE HARM TO THE TRUCKING INDUSTRY

The possibility that any WSTA member trucking company could be subject to a misclassification suit by

any one (or all) of the various trucking companies with whom it subcontracts is an intolerable risk, because the ABC test makes it a virtual certainty that the defendant will lose any such action brought against it. In California, most of the myriad wage and hour claims and other Labor Code violations have statutes of limitations of three to four years, which means the "tail" of liability for trucking companies is enormous. For an average-sized company, the potential liability could easily exceed tens of millions of dollars. This exposure far exceeds the risks that a trucking business can manage.

Even worse than the threat of private civil litigation is the fact that California law expressly allows enforcement by public agencies. New Labor Code section 2786 expressly authorizes the Attorney General and city attorneys of certain large cities to prosecute claims against employers for alleged misclassification. The State of California and several large city attorneys recently used this new grant of prosecutorial authority to file suit against Uber and Lyft, alleging they violated the ABC test by misclassifying drivers as independent contractors. *California v. Uber Techs., Inc.*, No. CGC20584402 (Cal. Super. Ct. May 5, 2020). This is a precursor to the catastrophic effect that California's law could have on the trucking industry if it is not found to be preempted.

III. THE BUSINESS-TO-BUSINESS EXCEPTION IN CALIFORNIA LAW OFFERS NO RELIEF TO THE TRUCKING INDUSTRY

In the Court below, the State of California argued that motor carriers can avail themselves of the business to business exception in the law. See *People v. Superior Court*, 57 Cal.App.5th 619, 634 (2020). That exception is codified at California Labor Code section 2776. However,

this exception is entirely untethered to the reality of the trucking industry described above, and the argument must be rejected.

In fact, the 12 elements that must be met to avail oneself of the business-to-business exception are extensive and detailed. See California Labor Code section 2776, subd. (a)(1)-(12). While it would be difficult or impossible for most trucking businesses to meet many of the 12 criteria – let alone all of them – there is only one that need be discussed for present purposes, as it makes it *impossible for any trucking* company to fit within the exception. Subdivision (a)(2), the second of the 12 elements, sets forth the following requirement: "The business service provider is providing services directly to the contracting business rather than to customers of the contracting business."

Trucking companies, by definition, carry loads for their customers. As set forth above, when subcontracting occurs in the trucking industry, the subcontracting trucking company is, by definition, providing a service to the customers of the original trucking company. Thus, there is no way for a trucking company to credibly argue that their subcontractor was providing services to the trucking company as opposed to the trucking company's end customer. A simple example illustrates the point. Assume a trucking company won a contract to haul fifty loads of material for a customer at a given price on a certain date. The trucking company opts to use its own fleet of 25 trucks and employee drivers for half of the loads, and subcontracts out the other half of the work to several different trucking companies. If one or all of those subcontracting companies sued for misclassification, the trucking company defendant would have to argue that while its own employee drivers were clearly providing services to the customer, the subcontracted trucks were

providing services to the trucking company, even though all the trucks carried identical loads of cargo and went to exactly the same place on the same date. Such an argument would be patently unavailing.

Thus, subdivision (a)(2) is similar to the B prong of the ABC test in that it is impossible for trucking companies to satisfy. The court below dismissed this concern by ignoring the statutory requirement that the services be provided "directly to the contracting business rather than to customers of the contracting business." Instead, the court below simply concluded without analysis that a trucking company could contract with another business entity, direct their actions, and pay them. See *People v. Superior Court*, *supra, 57* Cal.App.5th at p. 634. But as the example above illustrates, factors like direction and control, or source of payment, do not figure in to subdivision (a)(2). That focuses solely on to whom the services are being provided, and it is undeniably the customer that is receiving the service, whether the service is performed by an employee driver or an independent contractor trucking company. Because there is no way to satisfy either the B prong of the ABC test, or the second prong of the business-to-business exception, California law is essentially mandate that all relationships in the trucking industry be that of employer-employee rather than independent subcontractor.

IV. CALIFORNIA'S ABC TEST IS PRECISELY THE TYPE OF LAW THAT CONGRESS INTENDED TO BE PREEMPTED BY FAAAA

Approximately 20% of WSTA members operate in locations on or near the California border with another state. They regularly cross state lines to engage in

interstate trucking of all types, sometimes crossing the border multiple times per day doing several short-haul runs for a customer. This practical real-world example highlights why California's ABC test is exactly the type of law that is subject to preemption by the FAAAA,[2] as it impermissibly impacts the prices, routes and services that such motor carriers can provide.

The relevant provision of the FAAAA provides:

> (1) General Rule. Except as provided in paragraphs (2) and (3), a State [or] political subdivision of 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). The phrase "related to" in this general preemption provision is "interpreted quite broadly." *Independent Towers of Washington v. Washington*, 350 F.3d 925, 930 (9th Cir.2003). The principal purpose of the FAAAA was "to prevent States from undermining federal deregulation of interstate trucking" through a "patchwork" of state regulations. *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 395–96 (9th Cir.2011). Yet AB 5 creates the exact type of patchwork that will severely restrict the free flow of commerce between states.

There are many WSTA member companies located in places like Ehrenberg Arizona (just across the border

[2] Federal Aviation Administration Authorization Act of 1994, codified at 49 U.S.C. § 14501(c)(1).

from Blythe California) that regularly perform work in California and one or more other states, like Arizona. Some jobs will require the trucks to cross the border multiple times per day. For jobs performed outside of California, the trucking company can continue to contract with other trucking companies as it has for years, and neither company needs to worry about liability for misclassification. However, each time any of the drivers crosses back into California, the rules of the game change, such that now they must be deemed employees of the company with whom they are contracting, at least for the time they are inside California's borders. The impacts of this new legal reality would be far-reaching.

First, the trucking company would have to implement intricate and expensive GPS technology to precisely monitor the location of its trucks so that it could know precisely when and where the truck entered or exited California, so that it could keep track of the rules that apply in each state. The administrative overhead for this type of monitoring would be exorbitantly costly. The trucking company would have to hire one or more staff to not only monitor the geolocation of the trucks, but prepare and store the necessary documentation to record each truck's location for each day of work for four years. This new cost alone would be prohibitive to many companies, and many would simply stop providing service across state lines. For those companies that tried to continue their services, they would necessarily have to increase the prices charged to their customers and to other trucking companies with whom they contract.

Companies outside of California would be reluctant to send trucks into California for fear of being subject to the ABC test. But they would also be reluctant to contract with California trucking companies for cross-border work, because while any of the drivers were in

California for any part of the job, the out-of-state trucking company could be liable for misclassification. In order to protect themselves, they would seek either to minimize or eliminate their routes into California (thereby creating an immediate and obvious impact on the routes and the services they provide) or they would insist upon strong indemnification clauses in their contracts with California trucking companies. They would also likely demand access to the detailed geolocation data of the other California company's drivers in order to document and protect themselves. Thus, once again, the California company would be forced to dedicate time and resources to providing that documentation (thus mandating a new service they would have to provide) and would have to raise their prices to pay for the risk associated with the type of indemnification that out of state companies would demand.

Quarries and other businesses near the border that regularly ship material across state lines would have to radically alter the way they deliver their goods to customers. One likely scenario for an out of state company would be to contract with a California trucking company for shipments into California, but it would first use out-of-state trucks and drivers to ship the material to the border. Once there, they would unload the trailer, and a California trucker would attach the trailer and carry it into California. This is incredibly expensive and inefficient. Not only would such a load now require two trucks and drivers instead of one, but it also requires each truck to "dead-head[3]" for half of the trip. Moreover, it

[3] Deadheading is when a truck drives a route with no trailer or cargo attached. It is by definition a waste of money because the company has to pay the driver, pay

creates a loss of time for the process of unhooking the trailer and then attaching it to another truck. This would result in an incredible disruption to what is otherwise a relatively seamless interstate trucking marketplace. The cost of goods going into or out of California would dramatically increase to offset the new inefficiencies the ABC test would mandate. Many trucking companies would simply refuse to deal with cross-border cargo, thereby reducing the services they perform and the routes they service.

Because the very nature of trucking is its mobility, California's ABC test will create ripple effects well beyond the borders of California. Trucks will no longer be able to travel across state lines with the efficiency they currently enjoy. California's huge ports at Long Beach and Los Angeles are services by trucking companies that carry goods throughout the entire country. FAAAA was enacted to prevent precisely this type of state law from interfering with the efficient movement of goods throughout the country.

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for fuel, tires, etc. but is not earning any revenue from the trip.

CONCLUSION

For the foregoing reasons, WSTA respectfully urges that the petition for writ of certiorari be granted.

Respectfully submitted,

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