No. 21-194

IN THE

Supreme Court of the United States

CALIFORNIA TRUCKING ASSOCIATION, INC., *et al.*,
Petitioners,
v.

ROBERT BONTA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *et al.*,
Respondents.

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

BRIEF OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Transportation Intermediaries Association, Inc. ("TIA") is a not-for-profit trade association that has, for over 40 years, provided leadership, education and training resources, and public policy advocacy to the $213 billion per year third-party transportation logistics industry, which includes freight brokerage.[1] TIA has over 1,700 member companies, ranging from small start-ups to international shipping companies, including large and small freight brokers.

TIA members' core service is to provide "freight brokerage" by arranging on behalf of their shipper customers interstate freight shipments and placing those shipments with interstate motor carriers for actual transportation from origin to destination. The Interstate Commerce Act defines "broker" as "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. § 13102(2). Freight brokers arrange transportation of goods on behalf of shippers from one point to another, either within, or across multiple states or internationally, according to the

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[1] Pursuant to Rule 37.2(a) of this Court's Rules of Practice, TIA states that all counsel of record received notice of TIA's intent to file this brief more than ten days before its due date, and that all counsel of record have consented to its filing. Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no party, party's counsel, or third-party (other than TIA and its members) made any monetary contribution intended to fund the preparation or submission of this brief.

specific needs of the shipper. These services may involve use of more than one transportation mode, such as air, rail, truck, and ship, and typically involve movements across multiple states, and frequently, multiple nations. In short, freight brokers are travel agents for freight and, thus, TIA members deal directly with motor carriers on a daily basis.

The use of independent contractor owner-operators has been the prevailing business model for a vast number of motor carriers for decades. Freight brokers engage motor carriers on a daily basis to provide transportation, but do not control the motor carriers' businesses, just as they do not control the businesses operating vessels, trains, and aircraft involved in transporting goods. Freight brokers do not themselves control or operate the trucks or other equipment involved in the shipments. Brokers do not maintain the vehicles or hire the drivers, and have no right to control or dictate the carriers' operations, businesses, or hiring practices. Their role is solely to arrange for the efficient, timely, and cost effective movement of the cargo. TIA members manage millions of transactions each year to, from, and across every state in the Union and countries and territories around the world. Much of the transportation arranged by TIA members is by over-the-road motor carriers.

Although freight brokers themselves do not operate as motor carriers, because motor carriers are a crucial link in the nation's supply chain, TIA members rely on stability and predictability in the trucking sector in order to provide effective solutions to their customers. For instance, how TIA members price their services is naturally contingent in large part upon what motor carriers charge for their services. The higher the cost of trucking, the higher the rates that freight brokers

must charge to their shipper customers (who are generally manufacturers, distributors, and retailers). Those higher costs are, of course, ultimately borne by consumers.

Economic stability in the trucking sector was provided by Congress' deregulation of the motor carrier industry in 1994 as part of the Federal Aviation Administration Authorization Act of 1994, Public Law 103-305, §601, 108 Stat. 1569, 1605 (Aug. 23, 1994), 49 U.S.C. §14501 ("FAAAA"), which included the broad federal preemption of state regulation of the industry. Congress expressly found that the states' myriad regulations on the intrastate transportation of property had "imposed an unreasonable burden on interstate commerce; . . . impeded the free flow of trade, traffic, and transportation of interstate commerce; and . . . placed an unreasonable cost on the American consumers . . . ." Public Law 103-305, §601(a)(1)(A)-(C), 108 Stat. 1569, 1605. "Congress' overarching goal" was to "help[ ] assure transportation rates, routes, and services . . . reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality,'" *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 371 (2008) (citation omitted), and to avoid "a patchwork of state service-determining laws, rules and regulations" that would be "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Id.* at 373 (citations omitted).

The stability in the trucking industry afforded by the FAAAA has been significantly undermined by California's adoption of Assembly Bill 5 ("AB-5") in September 2019. AB-5 enacted Cal. Lab. Code §2775(b)(1)(A)-(C), which sets forth the so-called ABC

test for determining whether a person providing labor or services must be considered an "employee" rather than an "independent contractor." "[U]nless the hiring entity demonstrates all" three of the listed conditions—subdivisions (b)(1)(A), (B), and (C)—"a person providing labor or services for remuneration must be considered an employee rather than an independent contractor." Subdivision (B), which requires a hiring entity to demonstrate that the worker "performs work that is outside the usual course of the hiring entity's business" to be able to classify the worker as an independent contractor, necessarily requires all of a motor carrier's driving workforce to be classified as employees under California law because persons driving trucks are always performing work *within* the carrier's usual course of business. Indeed, the State has firmly indicated that it intends to enforce AB-5 against motor carriers who presently classify their drivers as independent contractors.

AB-5 completely changes the way a majority of motor carriers have traditionally operated their businesses. The independent contractor model has been the primary model for motor carriers for decades. See *American Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 303 (1953). Now, motor carriers must classify their drivers who operate trucks in California as employees rather than independent contractors. Such reclassification completely disrupts the way these motor carriers operate their businesses and, therefore, how freight brokers arrange for and price their own services. AB-5 could force brokers to retain two pools of motor carriers, those that operate in California and those that do not, leading not only to a potential shortage in the motor carrier supply, but also to freight brokers charging higher rates to cover the much higher costs of doing business. Overall, AB-5

will naturally have the deleterious effect of reducing motor carrier capacity in California, and that reduction in capacity alone is highly likely to drive a certain number of freight brokers out of the market altogether.

Finally, many successful freight brokers use an "agent model" to operate their own businesses. Freight brokers operating under this model do not hire their own employees to develop business and arrange for transportation of goods with third-party motor carriers. Rather, these freight brokers enter into agency agreements with independent contractors to perform those functions. The agent model permits freight brokers to reduce overhead, which in turn benefits their shipper customers, ultimately facilitating the efficient movement of goods in interstate commerce.

Although the State has yet to express an intention to apply AB-5 to freight brokers operating under the agent model, that law, on its face could very well result in these agents in California being reclassified as employees. As with owner-operators working for a motor carrier, agents working for a freight broker may be considered as performing work within the same business as the freight broker. And, the preemption provision now before the court—49 U.S.C. §14501(c)(1)—expressly applies to "brokers:" "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 . . . or any motor private carrier, *broker*, or freight forwarder with respect to the transportation of property." 49 U.S.C. §14501(c)(1) (emphasis added).

Thus, TIA and its members are doubly concerned with the outcome of the petition now before the Court. Accordingly, TIA respectfully urges this Court to grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Congress intended to foster economic stability in the surface transportation industry by the adoption of 49 U.S.C. §14501(c)'s broad preemption of state law regulation of motor carriers. Congress concluded that the states' "patchwork" of regulations had "imposed an unreasonable burden on interstate commerce; . . ." and "placed an unreasonable cost on the American consumers . . . ." Public Law 103-305, §601(a)(1)(A)-(C), 108 Stat. 1569, 1605. To address this burden, Congress sought to "assure [that] transportation rates, routes, and services . . . reflect 'maximum reliance on competitive market forces . . . .'" *Rowe*, 552 U.S. at 371 (citation omitted). AB-5 severely undermines Congress' objectives in deregulating the trucking industry. It compels motor carriers to change their business model by reclassifying all of their driving workforce as employees rather than independent contractors. AB-5 also destabilizes the freight industry by reducing the specialized transportation services a motor carrier is able to offer and by impairing its ability to adapt to the ebb and flow in the demand for its services. In short, AB-5 is the very type of law Congress sought to preempt.

Moreover, California may attempt to apply AB-5 to freight brokers now operating under an agent model, forcing broker agents in the state to be reclassified as employees. The preemption provision at issue in this case—49 U.S.C. §14501(c)(1)—also expressly applies to "brokers." Thus, AB-5 and the Ninth Circuit's decision in this case upholding Cal. Lab. Code §2775(b)(1) create instability in both the motor carrier and the freight broker industries. TIA, therefore, respectfully urges this Court to grant the petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. CONGRESS PREEMPTED ANY "LAW RELATED TO A PRICE, ROUTE, OR SERVICE OF ANY MOTOR CARRIER . . . WITH RESPECT TO THE TRANSPORTATION OF PROPERTY," AND THIS COURT HAS CONSISTENTLY INTERPRETED THAT PROVISION AND THE NEARLY IDENTICAL PROVISION IN THE AIRLINE DEREGULATION ACT AS EXPRESSING A BROAD PREEMPTIVE PURPOSE.

As noted above, in enacting §601 of the FAAAA, Congress concluded that states had significantly burdened interstate commerce by adopting a myriad of frequently conflicting state regulations governing the trucking industry. Public Law 103-305, §601(a)(1)(A)-(C), 108 Stat. 1569, 1605. In response to this patchwork of divergent state regulations, motor carriers transporting property in interstate commerce were forced to modify their operations every time they left one state and entered another.

The broad preemption provision enacted as part of the FAAAA—now found at 49 U.S.C. §14501, as amended—was designed to alleviate this substantial impediment to interstate commerce by leaving most decisions to the free play of economic forces. That provision, which mirrored the preemption provision of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. §41713(b)(1), provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service of any motor carrier* . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. §14501(c)(1) (emphasis added).

This Court has consistently interpreted the preemption provisions of the ADA and the FAAAA as expansive:

> [T]he key phrase, obviously, is "relating to." The ordinary meaning of these words is a broad one—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,"—and the words thus express a broad pre-emptive purpose.

Morales v. Trans World Airlines, Inc, 504 U.S. 374, 383 (1992) (interpreting the ADA's preemption provision, now found at 49 U.S. Code §41713(b)(1)) (citation omitted).

Noting that Congress, when it enacted the FAAAA, "copied the language of the air-carrier pre-emption provision of the Airline Deregulation Act of 1978," *Rowe*, 552 U.S. at 370, this Court has interpreted 49 U.S.C. §14501 with the same breadth. As with the ADA, the Court has held that the FAAAA operates to invalidate a state law even if that law's "effect on rates, routes or services 'is only indirect,'" provided that the law has "a 'significant impact' related to Congress' deregulatory and pre-emption related objectives." *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 370-71)). Congress sought to "assure [that] transportation rates, routes, and services . . . reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality,'" *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378). The preemption provision was designed to undo the "patchwork of state service-determining laws, rules and regulations" and to "leave such decisions, where federally unregulated, to the competitive marketplace." *Id.* at 373 (citations omitted). With enumerated exceptions

not applicable here, only state laws and regulations that affect prices, routes, or services of a motor carrier "in . . . a 'tenuous, remote, or peripheral . . . manner' . . ." are saved from preemption. *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390).

AB-5 significantly impacts motor carriers' prices, routes, services, and is, therefore, preempted under §14501(c)(1). Because, under Cal. Lab. Code §2775(b)(1)(B), owner-operators can never be considered independent contractors, motor carriers doing any business in California will have to reclassify all independent-contractor drivers as employees for most purposes under California law, including the California Labor Code, Industrial Welfare Commission wage orders, and the Unemployment Insurance Code. See *California Trucking Ass'n v. Bonta*, No. 20-55106, slip op. at 45, Apx. at 36a (9th Cir. April 28. 2021) (Bennett, J., dissenting). As Judge Bennett noted in dissent, AB-5 thus "significantly impact[s] motor carriers' services by mandating the *means by which they are provided*," *Id.*, slip op. at 46, Apx. at 40a (Bennett, J., dissenting) (emphasis added), and, therefore, necessarily and significantly impacts "the services that CTA members are able to provide to their customers." *Id.*, slip op. at 45, Apx. at 38a (Bennett, J., dissenting). These are decisions Congress unquestionably intended to leave "to the competitive marketplace." *Rowe*, 552 U.S. at 373 (citation omitted).

TIA members frequently arrange for highly specialized forms of transportation. One of the most significant impacts of AB-5 will be the reduction of the specialized transportation services that motor carriers are able to provide to their customers through independent owner-operators. The evidence before the district court in this case established that individual

owner-operators often invest in specialized equipment and acquire the training and skills necessary to operate that equipment. Motor carriers themselves are thereby spared the expense of investing in perhaps infrequently used specialized equipment, and instead can engage their owner-operators on an as-needed basis. And, the owner-operator of specialized equipment can offer its services to a host of motor carriers ensuring that such equipment and service is available on a wider basis. See *California Trucking*, slip op. at 47, Apx. at 40a-41a (Bennett, J., dissenting). Because specialized equipment is usually quite expensive, a motor carrier is dissuaded from purchasing it absent a steady demand for its use from the carrier's customers. Rather, many motor carriers will simply cease offering specialized services, making it more difficult for TIA members to arrange shipments requiring specialized equipment.

Moreover, AB-5 will significantly impact motor carriers' ability to effectively respond to fluctuations in the demand for their services. The use of owner-operators allows carriers to engage these independent contractors as necessitated by the demand for the carriers' services. Because California law requires employers to supply tools and equipment to their employees, AB-5 will require a motor carrier operating in California to purchase or lease its own trucks, which in times of low demand, will sit unused, hurting the carrier's ability to make a profit. Carriers operating under the independent contractor model, on the other hand, can engage owner-operators as needed to satisfy the demand for the carrier's services. See *California Trucking*, slip op. at 48-49, Apx. at 41a-42a (Bennett, J., dissenting).

Moreover, as the First Circuit held in a decision that directly conflicts with the Ninth Circuit's decision in this case, state laws like AB-5 that mandate that a motor carrier's drivers be classified as employees will significantly impact "the actual routes followed for the pick-up and delivery" of property. *Schwann v. FedEx Ground Package Sys., Inc.* 813 F.3d 429, 439 (1st Cir. 2016). Motor carriers that, for numerous legitimate business reasons, operate their enterprises under the independent contractor model, will be forced to either stop their routes at the California border or to decline to accept any shipments to, from, or passing through California. Motor carriers that choose to operate under the independent contractor model will effectively be prevented from doing business in California. Given that California contains a number of the nation's largest and busiest ports, AB-5 will unavoidably have a significant impact on motor carriers' routes.

Finally, AB-5's substantial impacts on the services and routes of motor carriers will significantly impact the prices they charge for their services and, in turn, the prices that TIA's members, their shipper customers, and the consuming public must ultimately bear. "[M]otor carriers wishing to continue offering the same services to their customers in California must do so using only employee drivers, meaning they must significantly restructure their business model, including by obtaining trucks, hiring and training employee drivers, and establishing administrative infrastructure compliant with AB-5." *California Trucking Ass'n v. Becerra*, 433 F.Supp.3d 1154, 1170 (S.D.Cal. 2020). Obtaining trucks, whether purchased or leased, hiring and training employee drivers, and restricting their business model will subject motor carriers to increased costs, which will ultimately be borne by transportation intermediaries and shippers. AB-5 "impose[s] an

unreasonable burden on interstate commerce" and "place[s] an unreasonable cost on the American consumer," Public Law 103-305, §601(a)(1)(A) & (C), 108 Stat. 1569, 1605, which is why Congress sought to preempt it and laws like it. Contrary to the Ninth Circuit's decision in this case, AB-5 is preempted under 49 U.S.C. §14501(c)(1). Accordingly, this Court should grant the petition for certiorari.

II. AB-5 WILL SIGNIFICANTLY IMPACT THE PRICES AND SERVICES OF FREIGHT BROKERS AND IS, THEREFORE, PREEMPTED UNDER 49 U.S.C. §14501(c)(1).

As noted above, 49 U.S.C. §14501(c)(1) provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service of* any motor carrier . . . or *any* motor private carrier, *broker*, or freight forwarder with respect to the transportation of property." 49 U.S.C. §14501(c)(1) (emphasis added). This broad preemption thus applies equally to motor carriers and freight brokers.

First, as set forth above, motor carriers operating in California who must convert to an employee model will necessarily raise rates. As transportation intermediaries naturally base their rates on the actual cost of motor carrier service in a given market, AB-5 will—with mathematical certainty—substantially affect a freight broker's own prices.

Second, the disruption caused by forcing motor carriers operating in California to convert to an employee model radically affects *how* freight brokers will arrange for the transportation of freight to and from California. For example, absent this Court reversing the Ninth Circuit's decision, freight brokers

will only be able to offer their customers the most cost-effective transportation solution by using two separate motor carriers for loads entering or leaving California. Specifically, many freight brokers will have to retain one motor carrier (using the higher-cost employee model) to perform transportation of a load within California while then retaining a second motor carrier (having a lower-cost independent contractor model) to perform any transportation of the load outside of California (*i.e.*, involving an interchange of a container or trailer at the California border) if the freight broker is providing the most advantageous pricing to its customer. At the same time, having to use two motor carriers to interchange a load is plainly more complex, and requires a materially different level of service from a freight broker than if a single motor carrier could transport the entire load.

Third, with the increased costs that will necessarily accompany the application of AB-5 to motor carriers, many smaller carriers in particular will be less able to compete with the larger companies in the industry. Many small motor carriers operating in California will be confronted with the choice of either being absorbed by other carriers or going out of business. Quite simply, fewer motor carriers will remain for freight brokers to use when arranging for shipments on behalf of their customers. Many freight brokers—especially smaller and emerging freight brokers—are highly reliant upon a broad pool of small motor carriers. The massive reduction in motor carrier capacity caused by AB-5 will materially impair and jeopardize the ability of these small brokers to survive. Moreover, fewer choices among motor carriers means less competition, which will inevitably lead to higher shipping costs for freight brokers' customers even in the best of circumstances. AB-5 thus significantly skews the

competitive marketplace in a variety of ways, undermining the very purpose Congress sought to foster when it deregulated the motor carrier industry by adopting 49 U.S.C. §14501(c)(1).

Fourth, many of TIA's freight broker members operate under an "agent model." Such brokers do not employ persons to develop business and arrange for transportation of goods with third-party motor carriers, as well as third-party railroads, water carriers, and air freight companies. Instead, freight brokers using an agent model enter into agency agreements with independent contractors to perform those functions. These agency agreements typically grant the independent contractors the right to use the freight broker's license when making arrangements for the shipment of goods, while the freight broker provides support in terms of billing, accounting, carrier qualification, insurance, and other administrative functions such as load tracking and web services. The agent model permits freight brokers to reduce overhead, which in turn benefits their shipper customers, ultimately facilitating the efficient movement of goods in interstate commerce.

Although the State of California has not expressed its intention to apply AB-5 to freight brokers operating under the agent model, the possible application of the ABC test could very well result in these broker-agents in California being reclassified as employees. Like owner-operators working for a motor carrier, agents working for a freight broker are likely to be considered as performing work within the same business as the freight broker preventing them from satisfying subdivision (B) of the ABC test. See Cal. Lab. Code §2775(b)(1)(A) – (C). While the relationship between freight brokers and the broker-agents they engage

could legitimately be considered a "bona fide business-to-business contracting relationship" under Cal. Lab. Code §2776, meaning that broker-agents could continue to be classified as independent contractors, the State may very well reject such argument. The uncertainty surrounding the treatment of broker-agents under AB-5 itself warrants the Court's granting of the petition for certiorari in this case.

And, as with motor carriers, the mandatory reclassification of a freight broker's workforce as employees will have a significant impact on the price, routes, and services provided by the brokers. Because freight brokers' overhead costs will rise, the prices they charge their customers will rise, and likely, the services they are able to offer their customers will correspondingly be reduced.

As discussed above, AB-5 significantly impacts motor carriers' prices, routes, and services, but its considerable implications go far beyond the trucking industry itself to affect the entire transportation industry, including brokers who arrange interstate freight shipments on behalf of their customers and place loads with interstate motor freight carriers, railroads, water carriers, and air freight carriers. These forces will impose a significant burden on interstate commerce, the very reason Congress chose to deregulate the trucking industry and airline industries by broadly preempting state regulation. The Ninth Circuit's ruling that AB-5 is not preempted is erroneous, and this Court should, therefore, grant the petition for certiorari.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Petitioners' Petition for a Writ of Certiorari, Amicus Curiae Transportation Intermediaries Association, Inc., respectfully urges this Court to grant the Petition.

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