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 Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

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

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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. 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.

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[1] Pursuant to Rule 37.2, all parties received timely notice of intent to file this brief at least 10 days in advance of the brief's due date, and all parties consented in writing to the filing of this brief. Pursuant to Rule 37.6, counsel for amicus curiae 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'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.

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.

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.

WSTA and its members are directly impacted by the decision of the Ninth Circuit Court of Appeals 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 secure uniformity of decision on an important question of federal law that has generated numerous conflicting decisions in the lower courts.

SUMMARY OF ARGUMENT

The divided panel opinion in this case contradicts prior decisions of this Court and prior published Ninth Circuit cases interpreting the preemptive scope of the FAAAA, specifically with regard to the significance of a law's character as one of "general applicability." In addition, the majority decision below contravenes prior Ninth Circuit authority regarding the issue of "compelled classification" in the context of evaluating whether a state law sufficiently impacts prices, routes and services under the FAAAA.

Finally, this brief will illustrate the particular impacts of the panel decision on WSTA members, using specific examples to show exactly how the implementation of California's ABC test will impact the prices, routes and services of WSTA members.

ARGUMENT

I. THE PANEL OPINION IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS REGARDING THE SIGNIFICANCE OF "GENERAL APPLICABILITY" TO THE FAAAA PREEMPTION ANALYSIS

A. The Focus on Whether a Law is One of "General Applicability" is Contrary to this Court's Precedents

In the panel decision in the instant case, the majority held

> A generally applicable law is one that affects individuals solely in their capacity as members of the general public and applies to hundreds of different industries. *When such generally applicable laws impact motor carriers' relationship with their workforce, they are not related to a price, route or service* even if they raise the overall cost of doing business . . . .

California Trucking Ass'n v. Bonta, 996 F.3d 644, 657 (9th Cir. 2021)(internal citations and quotation marks omitted, emphasis added.)

By determining that a generally applicable law relating to a company's workforce can never be related to a price route or service, the majority found that there could never be preemption of such a law. Thus, the panel decision in this case held that whether the state law in question is one of general applicability is dispositive.

This focus on the question of general applicability is contradicted by prior decisions of this Court. In *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 386 (1992) the Supreme Court specifically rejected the notion that laws of general applicability were exempted from preemption, noting that such a limitation would create "an utterly irrational loophole." *Id*. Lest there be any doubt, the Court stated explicitly:

> [T]here is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute.

Id. Nor did the Supreme Court's decision in *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) suggest that laws of general applicability were exempt from FAAAA preemption; quite the opposite. In *Rowe*, the Court noted that the solicitor general had argued that Maine "might pass other laws of general [] applicability" but did not opine that such laws would be exempt from preemption. *Id*. at 376-77. Instead, the Court immediately cited *Morales* (in which a generally applicable consumer protection law was preempted) and found that Maine's law – regardless of its general applicability – was preempted. *Id*. This Court has never held that a law's character as one of "general applicability" is dispositive in determining whether it is preempted under the FAAAA.

Accordingly, the court's decision below to conclude that the FAAAA does not preempt California's ABC test simply because it is a law of general applicability was inconsistent with this Court's precedents, and review should be granted to correct that error.

B. The Panel Decision in this Case Directly Conflicts with a Prior Published Decision of the Ninth Circuit, Creating a Split of Authority in Need of Definitive Resolution

Not only did the majority in the decision below contravene this Court's precedent, but it also contradicted a prior decision by the very same Ninth Circuit. In C*alifornia Trucking Ass'n v. Su*, 903 F.3d 953 (9th Cir. 2018) ("*Su*"), the panel discussed the importance of whether a law was one of general applicability when conducting a preemption analysis under the FAAAA. Specifically, that case held

> This is not to say that the general applicability of a law is, in and of itself, sufficient to show it is not preempted. [Citation.] While general applicability is not dispositive, *Dilts* and *Rowe* still instruct that it is a relevant consideration because it will likely influence whether the effect on prices, routes, and services is tenuous or significant.

Id. at 966. Thus, the *Su* case stands for the proposition that the general applicability of a law is "not dispositive." However, by determining that a generally applicable law relating to a company's workforce can never be related to a price route or service, the majority found that there could never be preemption of such a law. Thus, the panel decision in this case held that whether the state law in question is one of general applicability is dispositive. It is well settled that one panel of the Ninth Circuit cannot overrule a prior decision of the same court, absent some

intervening authority, none of which is present here. *United States v. Flores-Montano*, 424 F.3d 1044, 1050 (9th Cir. 2005). Certiorari review should be granted on this basis as well.

C. California's ABC Test is not a Law of General Applicability

Even if the majority in the decision below had not erred in finding a law's "general applicability" dispositive on the question of preemption, the plain fact is that California's law is far from being "generally applicable." Since this case was initiated back in 2018, the Legislature has revised the law several times. While AB 5 originally codified the decision in *Dynamex*,[2] subsequent legislation has amended that law to create numerous exceptions and move it to a separate article in the Labor Code. Currently, California's ABC test is codified in California Labor Code section 2775. However, following that code section are nine separate and very lengthy code sections, each of which begins with "Section 2775 and the holding in Dynamex do not apply to . . ." and each of which carves out multiple industries and sectors of the economy from the ABC test. See Cal. Lab. Code §§ 2776 through 2784. This is a case where the exceptions really do swallow the rule. The lengthy codified exceptions exempt all of the following:[3]

- business-to-business contracting relationships (Cal. Lab. Code § 2776);

[2] See *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018).

[3] Some of the exceptions require satisfying one or more conditions; others are just wholesale exemptions.

- relationships between a referral agency and a service provider (Cal. Lab. Code § 2777);
- professional services including marketing, human resources, travel agents, graphic design, grant writers, fine artists, enrolled agents licensed by the United States Department of the Treasury, payment processing agents, still photographers, photojournalists, videographers, or photo editors, digital content aggregators, freelance writers, translators, editors, copy editors, illustrators, newspaper cartoonists, content contributors, advisors, producers, narrators, cartographers, licensed estheticians, licensed electrologists, licensed manicurists, licensed barbers, licensed cosmetologists, appraisers, registered professional foresters, real estate licensees, home inspectors, licensed repossession agencies, and others (Cal. Lab. Code § 2778);
- Single engagement events (Cal. Lab. Code § 2779);
- occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions, including recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineers and mixers engaged in the creation of sound recordings, musicians engaged in the creation of sound recordings, vocalists, photographers working on recording photo shoots, album covers, and other press and publicity purposes, and independent radio promoters. (Cal. Lab. Code § 2780);
- the relationship between a contractor and an individual performing work pursuant to a

subcontract in the construction industry, (Cal. Lab. Code § 2781);

- the relationship between a data aggregator and an individual providing feedback to the data aggregator, (Cal. Lab. Code § 2782);
- insurance professionals, physicians and surgeons, dentists, podiatrists, psychologists, or veterinarians, lawyers, architects, landscape architects, engineers, private investigators, accountants, securities broker-dealers, investment advisers, direct sales salespersons, manufactured housing salespersons, commercial fishers working on an American vessel (Cal. Lab. Code § 2783);
- motor clubs (Cal. Lab. Code § 2784);

In addition to countless exemptions enacted by the Legislature summarized above, the People of California also enacted a ballot proposition creating additional exemptions. As noted in the majority opinion, Proposition 22 exempts app-based delivery drivers.[4] *California Trucking Ass'n v. Bonta*, *supra*, 996 F.3d at 651, n.5.

There are so many exceptions to the ABC test that to call it a law of "general applicability" strains the meaning of that term. The majority sidestepped this reality by asserting that the law

> does not single out motor carriers but instead affects them solely in their capacity as employers. [Citation.] Even if some businesses are exempt from AB-5, it

[4] Reports by Uber and Lyft indicate that they each have more than 200,000 drivers using their platform, although the total is likely less than 400,000 since some may use both apps.

> certainly applies "to hundreds of different industries."

California Trucking Ass'n v. Bonta, supra, 996 F.3d at 658-659. Given the lengthy list of exemptions, it is no exaggeration to say that millions of professions and business relationships are exempted from the law. In fact, it is more accurate to say that the vast majority of professions and business relationships in California are exempted from the law, and only a few are still covered. Accordingly, regardless of how the concept of "general applicability" should factor into the FAAAA preemption analysis, the instant law is not one of general applicability. Accordingly, even if the decision below correctly deduced – contrary to the prior precedent from this Court – that a law's character as one of general applicability were relevant and even dispositive on the question of preemption under the FAAAA, the decision below completely misapplied that newly found rule to this case.

II. THE DECISION BELOW CONFLICTS WITH PRIOR NINTH CIRCUIT DECISIONS ON THE ISSUE OF COMPELLED CLASSIFICATION

For the trucking industry, California's ABC test is an all-or-nothing rule in the sense that if a business fails any one of the three prongs, they are automatically deemed to be an employer of the business that are contracting with. The B-prong of California's test requires that "[t]he person performs work that is outside the usual course of the hiring entity's business" in order to avoid the designation of employee. (Cal. Lab. Code § 2775(b)(1)(B).)

In the trucking industry, many businesses routinely contract with other trucking business to provide hauling services that the contracting company would otherwise do itself, but for a variety of reasons elects to outsource the work to other trucking companies. Thus, 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. However, all of these routine transactions would, by definition, fail the B-prong of California's ABC test, because they all perform work that is in the usual course of each other's business.

As such, all trucking companies would be deemed employees of all other trucking companies whenever they subcontracted with them or brokered excess work. Under prior Ninth Circuit law, this "all-or-nothing" feature of California's law would compel a conclusion that the law was preempted.

However, the majority opinion below twists itself in knots trying to distinguish or explain away the language in prior binding decisions of the Ninth Circuit in both *Su* and *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) ("*ATA*"). In *Su*, the court evaluated whether the prior standard for employee classification was preempted by the FAAAA.[5] In

[5] Prior to the announcement of the ABC test in *Dynamex*, the law for decades in California relating to employee classification was the rule set forth *in S. G. Borello & Sons,*

finding that it was not preempted, the court first stated "the *Borello* standard does not, by its terms, compel a carrier to use an employee or an independent contractor." *Su*, *supra*, 903 F.3d at 964. The court then contrasted the facts before the court previously in *ATA*, which

> stands for the obvious proposition that an "all or nothing" rule requiring services be performed by certain types of employee drivers and motivated by a State's own efficiency and environmental goals was likely preempted.

Id. The *Su* court then explained:

> Like *American Trucking*, the "ABC" test may effectively compel a motor carrier to use employees for certain services because, under the "ABC" test, a worker providing a service within an employer's usual course of business will never be considered an independent contractor.

Id. Thus, both *Su* and *ATA* make it clear that an "all or nothing" rule which compels the use of employees rather than independent contractors is preempted.

The majority opinion below attempts to ignore that precedent by characterizing it as dicta, despite the fact that the very rationale for the holdings in those cases was the all-or-nothing compulsion of the rules and laws under discussion. By holding that the all-or-nothing ABC test is not preempted, the majority opinion completely

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Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello).

undercuts the rationale of *Su* and *ATA*, and the decision therefore must be reviewed by this Court to ensure uniformity of decisions.

III. CALIFORNIA'S ABC TEST WILL HAVE SEVERE IMPACTS ON THE PRICES, ROUTES AND SERVICES OF MOTOR CARRIERS

The new ABC test announced in *Dynamex* and codified in California Labor Code section 2775, mandates that the "hiring entity" must prevail on all three prongs, to show that the "worker" is an independent contractor. Failing to prevail on even one prong means that the "worker" will be considered an employee, even though the "worker" is an independent business. The "B prong" of the ABC test requires that "[t]he person performs work that is outside the usual course of the hiring entity's business." 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. Thus, 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.

Therefore, under 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 California's law is "an all or nothing" law that "categorically prevents motor carriers from exercising their freedom to choose between using independent

contractors or employees." See Appendix 66a. For this reason, the law creates direct impacts on prices, routes and services of motor carriers.

California's law will eliminate the independent contractor relationships that currently make the trucking industry operate with an amazing level of efficiency. Indeed, if the COVID pandemic has taught us anything, it is the fact that trucking can deliver almost any type of good to almost any doorstep in almost no time at all. That capability will be severely curtailed, or the prices will rise exorbitantly under the new law.

As pointed out by the dissent below, business volume in trucking tends to fluctuate wildly. *California Trucking Ass'n v. Bonta, supra*, 996 F.3d at 669. 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.

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.

In contrast, many WSTA members have invested hundreds of thousands of dollars into specialized trucks that may only be needed once per job, but because there are construction jobs going on all across the region in which they operate, they can contract with different contractors and perform work with their specialized truck on a consistent basis, whereas if that same truck was purchased by a large fleet company, it would sit idle most days. The dissent recognized the significance of this specialized equipment, and the significant costs associated with letting it sit idle. *Id*. at 668-669.

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.

California's ABC test will prohibit trucking companies from entering into independent contractor

relationships with other trucking companies without running the risk of misclassification lawsuits that could bankrupt them. This prohibition will inject significant inefficiencies into the industry, and will interfere substantially with how the marketplace currently operates. Under this law, there will either be a substantial increase in prices to pay for the inefficiencies mandated by the law, or there will be decreased competition, as some companies will simply stop providing services that they currently offer because it will not be profitable to do so. And as should be obvious, the lack of competition will also lead to an increase in prices.

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 law is exactly the type of law that is subject to preemption by the FAAAA. There are many WSTA member companies located in places like Ehrenberg, Arizona (just across the border 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.

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. Additionally, yhe 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, the period of possible liability under California's laws. 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 the service and the services they provide) or they would insist on 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 the 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, time consuming, 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[6]" for half of the trip. Moreover, it 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 law 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.

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

Because the very nature of trucking is its mobility, California's law 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. FAAAA was enacted to prevent precisely this type of state law from interfering with the efficient movement of goods throughout the country.

CONCLUSION

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

Respectfully submitted,

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