Nos. 20-55106, 20-55107

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA TRUCKING ASSOCIATION, *ET AL.*

Plaintiffs-Appellees,

v.

XAVIER BECERRA, *ET AL.*

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California
No. 3:18-cv-02458-BEN-BLM

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., ARIZONA TRUCKING ASSOCIATION, NEVADA TRUCKING ASSOCIATION, OREGON TRUCKING ASSOCIATION, WASHINGTON TRUCKING ASSOCIATIONS, INTERMODAL ASSOCIATION OF NORTH AMERICA, NATIONAL TANK TRUCK CARRIERS, AND TRUCKLOAD CARRIERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amici American Trucking Associations, Inc., Arizona Trucking Association, Nevada Trucking Association, Oregon Trucking Associations, Inc., Washington Trucking Associations, Intermodal Association of North America, National Tank Truck Carriers, Inc., and Truckload Carriers Association, certifies that each has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICI CURIAE [*]

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and was created to promote and protect the common interests of the national trucking industry. ATA regularly represents those interests in courts throughout the nation, including this Court.

The Arizona Trucking Association was established in 1937, to represent the trucking industry before legislative, regulatory and enforcement agencies, and to serve as the industry's primary voice on transportation and other public policy issues in Arizona.

The Nevada Trucking Association, established in 1932, is a member-driven organization dedicated to representing the trucking industry by advocating for laws and regulations that enhance the safety, efficiency, and profitability of the trucking industry in Nevada.

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[*] All parties have consented to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2). No counsel for either party authored this brief in whole or in part, and no party, party's counsel, or person other than the amici, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Oregon Trucking Associations, Inc. (OTA), is the Oregon trucking industry's only trade association. OTA advocates for Oregon's trucking industry by positively influencing laws and regulations, promoting public safety, enhancing the industry's image, and promoting a healthy business climate while continuing to reduce the industry's impact on the natural environment.

Washington Trucking Associations (WTA) was established in 1922 by a group of motor carriers to protect and promote the interests of all segments of Washington's trucking industry. WTA cooperates, and maintains regular contact, with departments of city, county, state, and federal governments, and regularly appears as a party or amicus curiae on trucking industry issues before state and federal courts.

The Intermodal Association of North America (IANA) is a leading transportation trade association representing the combined interests of the intermodal freight industry. IANA's membership includes not only intermodal and over-the-road motor carriers but also railroads, water carriers, port authorities, intermodal marketing and logistics companies, and suppliers to the industry. The association's members transport over 90% of the intermodal cargo moving throughout the

United States. As motor carriers are a crucial link in the nation's intermodal network, IANA highly values stability and predictability in the trucking sector of the industry.

The National Tank Truck Carriers, Inc. (NTTC), has represented the tank truck industry before Congress and various federal agencies since its founding in 1945. NTTC's membership includes over 600 companies that specialize in bulk transportation services by cargo tank throughout North America. The tank truck industry generates approximately 5% of all truck freight revenue, and represents some 30% of all truck freight in terms of tonnage.

The Truckload Carriers Association is the only national trade association whose sole focus is the truckload segment of the trucking industry. The association represents dry van, refrigerated, flatbed, and rail intermodal carriers operating in the 48 contiguous U.S. States, as well as Alaska, Mexico, and Canada. TCA and its trucking company members regularly comment on matters affecting the national transportation industry's common interests.

Amici each have members who regularly contract with independent owner-operators, and who regularly conduct operations in the State of

California as well as other States. Thus, they have an acute interest both in the preservation of the independent owner-operator model in the trucking industry, and in ensuring that the congressional policy establishing a deregulated trucking industry is not undermined by a patchwork of state-level impediments to the safe and efficient flow of commerce. Moreover, ATA has special familiarity with the issue of preemption under the Federal Aviation Administration Authorization Act (FAAAA), because it actively participated in the formulation of federal motor carrier deregulation and preemption policy in Congress. *See, e.g.*, H.R. Conf. Rep. No. 103-677, at 88 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760. Since that time, ATA has been involved, either as a party or as an amicus, in many of the cases before this Court and the U.S. Supreme Court interpreting and applying the FAAAA's preemption provision and the materially identical preemption provision of the Airline Deregulation Act, as well as cases before this Court concerning the use of independent owner-operators in the trucking industry.

ARGUMENT

A. The FAAAA Embodies a Congressional Policy Favoring Market-Driven Efficiencies in the Trucking Industry, Unimpeded by the Policy Preferences of Individual States.

The Federal Aviation Administration Authorization Act (FAAAA) preempts any "law related to a price, route, or service of any motor carrier … with respect to the transportation of property" or any "air carrier … transporting property … by motor vehicle." 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). This broad preemption provision was enacted in 1994 with the goal of eliminating the patchwork of burdensome state trucking regulations that had previously developed, and to ensure that States would not undo federal deregulation with policies of their own. As the Supreme Court has explained, a "state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008). To achieve its goal, Congress expressly incorporated the preemptive language and effect of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. § 41713(b)(1), as the Supreme Court had broadly interpreted it in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Accordingly,

like the ADA, the FAAAA preempts all laws that significantly affect a price, route, or service of any motor carrier, whether that effect is direct or indirect. *See Rowe*, 552 U.S. at 370. And that preemption is an essential component of the broader federal policy of uniformity in the trucking industry, as evidenced by the FAAAA's legislative history and the structure of federal motor carrier regulation as a whole.

1. Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, Congress has repeatedly expressed a strong federal policy favoring a trucking industry shaped above all by competitive market forces. At the time it began the process of deregulating the industry, Congress found that "[t]he existing regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and ha[d] failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. Rep. No. 96-1069 at 10 (1980); *see also, e.g.*, Michael J. Norton, Note, *The Interstate Commerce Commission and the Motor Carrier Industry—Examining the Trend Toward Deregulation*, 1975 Utah L. Rev. 709, 709 (reporting that federal motor carrier "regulation ha[d] recently come under attack for causing inefficiencies and wastefulness, and for repressing technological advances in the industry").

Thus, in order to remove obstacles to innovation and encourage efficiency, Congress significantly deregulated the industry at the federal level.

It soon became clear, however, that federal deregulation could not achieve its objectives as long as burdensome and inconsistent state regulation of the trucking industry persisted. As ATA testified regarding the need for national uniformity,

> [a] single shipment may begin in one state and pass through several other states on the way to its destination. The shipper and receiver of the goods may be located in different states. Without uniform federal laws and regulations governing the provision of such services, the potential conflicts and confusion between and among state laws is beyond comprehension.

Hearing Before Subcomm. on Surface Transp. of the S. Comm. on Commerce, Sci., and Transp., 103d Cong., 2d Sess., at 225 (July 20, 1994) (statement of Thomas J. Donohue).

Congress agreed, finding in 1994 that state regulation continued to "impose[] an unreasonable burden on interstate commerce;" "impede[] the free flow of trade, traffic, and transportation of interstate commerce;" and "place[] an unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994). Specifically, Congress concluded that state regulation "causes

significant inefficiencies," "increase[s] costs," and "inhibit[s] … innovation and technology." H.R. Conf. Rep. No. 103-677 at 87. Indeed, despite deregulatory efforts at the federal level, "[t]he sheer diversity of [state] regulatory schemes [remained] a huge problem for national and regional carriers attempting to conduct ***a standard way of doing business***." *Ibid.* (emphasis added).

Therefore, in order to free carriers from this burdensome "patchwork" of state regulation, Congress concluded that "preemption legislation [was] in the public interest as well as necessary to facilitate interstate commerce." H.R. Conf. Rep. No. 103-677 at 87. To achieve its deregulatory goals, Congress adopted the language of the ADA. *Id.* at 83. Like the ADA, the FAAAA preempts any "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); *see also id.* § 41713(b)(1). Further, Congress specifically indicated its intent to incorporate "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677 at 83; *see Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 383 (1992) (these "words … ex-

press a broad pre-emptive purpose"). The FAAAA, in short, reflects Congress' concern that "state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations," which would be "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008).

2. The FAAAA's preemption provision is part of a comprehensive statutory framework which further reflects congressional intent to ensure that the interstate carriage of property is not burdened by a patchwork of rules. While the FAAAA's preemption provision is broad, it exempts state laws that regulate motor vehicle safety; that limit or control highway routes based on a vehicle's size or weight or the hazardous nature of its cargo; or that impose insurance or financial responsibility requirements. But consistent with the fundamental goal of promoting efficiency in the trucking industry through uniformity, each of these FAAAA carveouts is subject to a separate federal regulatory scheme, each with its own preemptive effect.

For example, the Motor Carrier Safety Act of 1984, Pub. L. No. 98-

554, 98 Stat. 2832, instructs the Secretary of Transportation to review state laws and regulations "on commercial motor vehicle safety," and to declare them preempted in a variety of circumstances: if they are more stringent than federal measures but have "no safety benefit;" if they are "incompatible" with federal law; or if they "would cause an unreasonable burden on interstate commerce." 49 U.S.C. § 31141(c)(4). As the Supreme Court has recognized, the power to review and preempt state safety laws "affords the Secretary … a means to prevent the safety exception [to FAAAA preemption] from overwhelming [Congress'] deregulatory purpose." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 441 (2002). "Under this authority, the Secretary can invalidate local safety regulations upon finding that their content or multiplicity threatens to clog the avenues of commerce." *Id.* at 441-42. Much the same is true with respect to the other exceptions.[1]

[1] State regulation of routes based on vehicle size and weight must conform to federal guidelines under a separate statutory scheme. *See* Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, 96 Stat. 2097 (1983), 49 U.S.C. §§ 31111, 31113, 31114. *See also Nat'l Freight, Inc. v. Larson*, 760 F.2d 499, 506-07 (3d Cir. 1985) ("[o]ne of the main purposes of Congress in passing the STAA was to enhance interstate commerce" and "improve the productivity of truckers by establishing more uniform weight and length limits on federal roads across the

Thus, in each category where Congress specifically exempted state laws from preemption under the FAAAA, it did so with the understand-

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country"); *United States v. Connecticut*, 566 F. Supp. 571, 576 (D. Conn. 1983) ("it is manifest that the STAA reflects a congressional interest in establishing uniform regulations governing the size, weight, and arrangements of trucks used in interstate commerce"), *aff'd mem.*, 742 F.2d 1443 (2d Cir. 1983), *aff'd mem.*, 465 U.S. 1014 (1984). The Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Pub. L. No. 101-615, 104 Stat. 3244, authorizes the Secretary to establish standards and guidelines for state laws governing the routing of hazardous materials, which may be enforced only if they comply with those standards. 49 U.S.C. §§ 5112, 5125(c); *id.* § 5125(d) (allowing affected parties to petition the Secretary to determine whether a state hazmat regulation is enforceable); *see also* HMTUSA § 2, 104 Stat. at 3245 (finding that state and local laws were "creating the potential for … confounding … carriers which attempt to comply with [their] multiple and conflicting … requirements"); S. Rep. No. 93-1192 at 37 (1974) (noting that the prior version of the statute was intended "to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation"); *Colo. Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991) ("uniformity was the linchpin in the design of the [HMTUSA] statute"). And Congress created the Uniform Carrier Registration System (UCRS) to act as a clearinghouse and depository for, *inter alia*, proof of insurance and financial responsibility so that interstate motor carriers would not be subject to the varying requirements of individual States. *See* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, §§ 4301-08, 114 Stat. 1144, 1761-74 (2005). The UCRS replaces and improves upon the former "Single-State Registration System," which required interstate motor carriers to register with one State and provided that "such single State registration [would] be deemed to satisfy the registration requirements of all other States." *See Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 40 (2002) (internal quotation marks omitted, alteration in original).

ing that a separate federal regulatory structure would act as a preemptive check on any burdensome state regulation and thereby provide the necessary degree of uniformity. *See, e.g.*, *Ours Garage*, 536 U.S. at 441. Even where States have retained a role within Congress' structure, they have done so within limits and subject to federal preemption: the overall scheme reflects Congress' decision to leave no loose ends that would allow States unfettered discretion to impose their idiosyncratic policy preferences on any aspect of the industry.

3. The Supreme Court has explained that "Congress' overarching goal" in enacting the ADA and FAAAA preemption provisions was to "help[] assure transportation rates, routes, and services that 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). And Congress' "overarching deregulatory purpose" means that "***States may not seek to impose their own public policies*** … on the operation of a … carrier." *Am. Airlines v. Wolens*, 513 U.S. 219, 229 n.5 (1995) (emphasis added, internal quotation marks omitted).

This federal policy permits motor carriers to implement efficient,

standard business practices nationwide. And those standard practices—along with the timely, efficient, and cost-effective delivery of goods and raw materials they enable—in turn are essential not only to carriers themselves but also to the customers who rely on them for shipments and, by extension, to the national economy as a whole. *See* ATA, American Trucking Trends (2019) 5 (trucking carried 80.3% of the nation's 2018 freight bill, and 71.4% of tonnage). The national uniformity favored by Congress helps ensure that disruptions or price increases caused by a patchwork of state laws and regulations do not have a cumulative effect that will ultimately be borne by consumers and the economy as a whole. California's AB-5, by prohibiting motor carriers from contracting with independent owner-operators to provide services—a widespread business practice that is banned in no other State—impermissibly undermines that federal policy.

B. Outside of California, Motor Carriers Nationwide May Provide Services by Contracting with Independent Owner-Operators.

In the trucking industry, the use of "owner-operators"—independent businesspersons who contract their services and lease their motor vehicle equipment to trucking companies pursuant to 49 U.S.C. § 14102 and related regulations set forth at 49 C.F.R. § 376—is widespread and eco-

nomically crucial. Their role in trucking operations has a history essentially as long as the industry itself. *See* Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) ("Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them, commonly referred to as owner-operators."). Nearly seventy years ago, the Supreme Court noted the trucking industry's extensive use of leased equipment and drivers supplied by owner-operators. *Am. Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 303 (1953) ("Carriers … have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands."). Given that long history, and the crucial role that owner-operators play in efficiently allocating freight capacity and other resources, *see* Ans. Br. 5-11, California's idiosyncratic policy decision to eliminate the independent owner-operator model represents a massive disruption to Congress' intent in the FAAAA to allow "national and regional carriers … to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677 at 87.

That disruption is all the more stark in light of the fact that every-

where else in the nation, motor carriers remain free to contract with independent owner-operators to provide freight-hauling services. To amici's knowledge, no other State has erected the kind of prohibition that California has—with the exception of Massachusetts, whose similar barrier was preempted under the FAAAA. *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 437 (1st Cir. 2016). To be sure, California is by no means the only State to use *some* kind of ABC test for *some* worker classification purposes. But nowhere else does a State's worker classification law compel motor carriers to provide services exclusively with employee drivers, for a number of reasons.

1. First, the ABC test adopted by the California Supreme Court in *Dynamex Operations W. v. Sup. Ct.*, 416 P.3d 1 (Cal. 2018), and codified by the California legislature in AB-5 is far more restrictive than the prevailing form of the test as historically implemented elsewhere. Specifically, while the "B" element of California's ABC test can only be satisfied if the service performed is "outside the usual course of the hiring entity's business," Cal. Lab. Code § 2750.3(a)(1)(B), in most jurisdictions that element can be satisfied "by establishing *either* (1) that the work provided is outside the usual course of the business for which the work

is performed, *or* (2) that the work performed is outside all the places of business of the hiring entity." *Dynamex*, 416 P.3d at 34 n.23. *See, e.g.*, Alaska Stat. § 23.20.525(a)(8); Conn. Gen. Stat. § 31-222(a)(1)(B); Del. Code Ann. tit. 19 § 3302(10)(K); Haw. Rev. Stat. § 383-6; 820 Ill. Comp. Stat. 405/212; La. Rev. Stat. Ann. § 23:1472(12)(E); Md. Code Ann., Lab. & Empl. § 8-205(a); Neb. Rev. Stat. § 48-604(5); Nev. Rev. Stat. § 612.085; N.H. Rev. Stat. Ann. § 282-A:9(III); N.J. Stat. Ann. § 43:21-19(i)(6); N.M. Stat. § 51-1-42(F)(5); 21 Vt. Stat. Ann. § 1301(6)(B); Wash. Rev. Code § 50.04.140(1); W. Va. Code § 21A-1A-16(7).

This difference is crucial in the trucking context. As the district court put it, owner-operators "necessarily perform work *within* 'the usual course of the [motor carrier] hiring entity's business,'" ER013-14 (alteration in original), and thus will never satisfy California's version of the test. *See also id.* at ER014 n.9 (noting that defendants could not meaningfully explain how an owner-operator could satisfy California's ABC test). The more common version of the test is a different story altogether, because the alternative criterion of performing work outside the hiring entity's places of business is not foreclosed to owner-operators. *See United Delivery Serv. v. Didrickson*, 659 N.E.2d 82, 85 (Ill. Ct. App.

1995) (delivery drivers satisfied the "B" element of Illinois' ABC test because they "did not perform their services within the place of [the putative employer's] business"); *see also Bedoya v. Am. Eagle Express*, 914 F.3d 812, 824 (3rd Cir. 2019) ("[n]o part of the New Jersey [ABC] test categorically prevents carriers from using independent contractors," because the test's "B" element could be satisfied "by demonstrating that the worker provides services outside of the putative employer's 'places of business'"). In short, the ABC test as commonly articulated simply does not constitute the kind of "'all or nothing' rule," *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 964 (9th Cir. 2018), that California's version does. Indeed, some States have gone further and rejected the "B" element altogether, instead embracing an "AC" test that looks just to the "control or direction" and "independently established trade" criteria in rendering a determination. *See, e.g.*, Colo. Rev. Stat. § 8-70-115; Ga. Code Ann. § 34-8-35(f)(1); Idaho Code Ann. § 72-1316(4); Pa. Stat. Ann. tit. 43, § 753(l)(2)(B); Or. Rev. Stat. § 670.600(2); S.D. Codified Laws § 61-1-11; Utah Code Ann. § 35A-4-204(3).

2. Second, while California has adopted the ABC test for purposes of the State's employment laws generally, other States that have adopted

an ABC test have typically done so for narrow purposes. In particular, the ABC test has been most widely adopted to provide state administrative agencies with criteria governing unemployment insurance (UI) programs, rather than the full range of state wage and hour laws. *See* U.S. Dep't of Labor, Comparison of State Unemployment Insurance Laws (2019) at 1-4 ("[m]any of the states provide criteria commonly called the 'ABC' test" to determine whether a worker is an employee for unemployment insurance purposes), *available at* https://oui.doleta.gov/unemploy/pdf/uilawcompar/2019/complete.pdf. *See also, e.g.*, *Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor*, 593 A.2d 1177, 1184 (N.J. 1991) (noting that "[a] minority of states adopted the federal [common-law] definition of employee" for unemployment insurance purposes, but "a majority of states … use the ABC test").

Beyond this, a handful of States have adopted ABC tests to govern worker classification outside the administrative-program context in which they historically arose. For example, some States have adopted some form of ABC test in establishing penalties for misclassification, but limited to certain specific industries where it presumably deemed independent contracting to be especially problematic. *See, e.g.*, Md.

Code Ann., Lab. & Empl. §§ 3-902 *et seq.* (enacting penalties for misclassification, determined by narrow ABC test, in the construction and landscaping industries); N.J. Stat. Ann. § 34:20-4 (adopting traditional ABC test for broad employment law purposes in construction industry); N.Y. Lab. Law § 861-c(1)(a) (narrow ABC test for construction industry); Pa. Stat. Ann. tit. 43 § 933.3(a)(1) (modified ABC test for construction industry). Others have adopted the traditional form of the ABC test (whose "B" element can be satisfied not only if the worker performs services outside the hiring entities usual course of business, but also if the services are performed outside its places of business) for various wage and hour purposes. *See, e.g.*, 820 Ill. Comp. Stat. 115/2; 21 Vt. Stat. Ann. § 341. But to amici's knowledge, with the (preempted) exception of Massachusetts, no other State has done what California has done with AB-5: imposed the restrictive, "all or nothing" version of the ABC test on the trucking industry for the full range of state employment law, making it effectively impossible for motor carriers to contract with independent owner-operators.

3. Quite the contrary. In fact, a majority of States have explicitly clarified that they do not intend to prohibit independent owner-

operators by enacting express statutory provisions excluding them from the default test for employment, much as California did for a wide range of other occupations when it enacted AB-5. *See* Cal. Lab. Code § 2750.3(b), (c), (d), (f). These statutory owner-operator exceptions have the same virtues the California Supreme Court saw in the ABC test: they provide "an easily and consistently applied standard," compared to a multifactor test that "often leaves both businesses and workers in the dark with respect to basic questions." *Dynamex*, 416 P.3d at 33. The difference, of course, is that these exceptions consistently *embrace* the independent owner-operator model rather than prohibit it.[2]

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[2] That clarity can be particularly important in the trucking industry, where federal law makes motor carriers just as responsible for the safety performance of independent owner-operators as they are for employee drivers, and charge the carrier with ensuring their adherence to the federal motor carrier safety regulations. 49 U.S.C. § 14102(a)(2); 49 C.F.R § 376.12(c)(1). While such government-mandated supervision does not, properly understood, constitute the kind of "control" indicative of an employment relationship, it is sometimes nevertheless so construed. *Compare N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) ("employer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status") *with W. Ports Transp., Inc. v. Emp. Sec.*, 41 P.3d 510, 517 (Wash. Ct. App. 2002) ("federally mandated controls" can be considered as evidence of an employment relationship). The statutory exceptions many

States have taken different approaches in formulating their exceptions. For some, the exception is categorical. For example, in both its workers' compensation and UI statutes, Missouri excludes from the definition of "employee" any "individual who is the owner … and operator of a motor vehicle which is leased or contracted with a driver to a for-hire motor carrier." Mo. Rev. Stat. §§ 287.020(1), 288.035. Other States condition their exception on specifically enumerated, objective criteria that are tailored to the practicalities of motor carrier/owner-operator relationships. For example, Virginia's UI statute recognizes that "[i]n the trucking industry, an owner-operator or lessee of a vehicle which is licensed and registered as a truck, tractor, or truck-tractor … is an independent contractor, not an employee, while performing services in the operation of his truck," provided that "[t]he individual owns the equipment or holds it under a bona fide lease;" "is responsible for the maintenance of the equipment;" "bears the principal burdens of the operating costs;" "is responsible for supplying … personal services to operate the equipment;" is compensated "based on factors related to the work per-

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States have enacted ensure that the owner-operator model is protected against such misapplication of an abstract standard.

formed … and not on the basis of … time expended;" "generally determines the details and means of performing the services" while taking into account "regulatory requirements, operating procedures of the carrier and specifications of the shipper;" and "enters into a contract that specifies the relationship to be that of an independent contractor." Va. Code Ann. § 60.2-212.1. *See also* Ala. Code § 25-5-1(4); Colo. Rev. Stat. § 8-40-301(5); Fla. Stat. § 440.02(15)(d)(4); Ga. Code Ann. § 34-8-35(n)(17); *id.* § 34-9-1(2); *id.* § 40-2-87(19); 820 Ill. Comp. Stat. 405/212.1; Ind. Code Ann. § 22-3-6-1(b)(8); *id.* § 22-4-8-3.5; Iowa Code § 85.61(11)(c)(3); Kan. Stat. Ann. § 44-503c; *id.* § 44-703(i)(4)(Y); La. Rev. Stat. Ann. § 23:1021(10); Me. Rev. Stat. Ann. tit. 26, § 1043(11)(F)(33); Md. Code Ann., Lab. & Empl. § 8-206(f)(2); *id.* § 9-218; Minn. Stat. § 176.043; *id.* § 268.035(25b); Neb. Rev. Stat. § 48-604(6)(q); N.J. Stat. Ann. § 43:21-19(i)(7)(X); N.D. Cent. Code § 65-01-03; Ohio Rev. Code Ann. § 4111.03(D)(3)(i); *id.* § 4123.01(A)(1)(d); *id.* § 4141.01(B)(2)(m); Okla. Stat. tit. 40, § 1-208.1; *id.* § 2.18(b)(9); Or. Rev. Stat. § 656.027(15); *id.* § 657.047(1)(b); S.C. Code Ann. § 42-1-360(9); S.D. Codified Laws § 62-1-10; *id.* § 62-1-11; Tenn. Code Ann. § 50-6-106(1)(A); *id.* § 50-7-207(e)(1); Tex. Lab. Code Ann. § 406.122(c);

Utah Code Ann. § 34A-2-104(5)(d); Wash. Rev. Code § 51.08.180; Wyo. Stat. Ann. § 27-3-108(a)(x); *id.* § 27-14-102(a)(vii)(O).

Whatever the precise form of the exception, each represents the judgment of the respective state legislature to ensure its general worker classification tests do not overly inhibit the ability of motor carriers and owner-operators to enter into independent contracting arrangements. Especially given this widespread embrace of the independent owner-operator model, AB-5 profoundly interferes with the ability of motor carriers to "conduct a standard way of doing business" throughout the nation, as Congress intended when it enacted the FAAAA. H.R. Conf. Rep. No. 103-677 at 87.

C. Under the FAAAA, Preemption of Generally Applicable State Laws Does Not Turn on Whether They "Bind" a Motor Carrier to a Particular Price, Route, or Service.

In their amicus brief, the California Employment Lawyers Association (CELA) argues that AB-5 is not preempted under the FAAAA because it does not "bind motor carriers to *particular* prices, routes, or services." CELA Br. 14. Plaintiffs have correctly explained that, in fact, AB-5 "does 'bind [motor carriers] to a particular method of providing services,'" by requiring carriers to provide services exclusively using

employees. Ans. Br. 54 (quoting *Bedoya*, 914 F.3d at 824).

CELA is wrong for an important additional reason: the FAAAA preempts state laws that *relate* to a motor carrier's prices, routes, or services in a manner that is more than "tenuous, remote, or peripheral," *Rowe*, 552 U.S. at 375—not merely those that *bind* carriers to a particular price, route, or service. To be sure, several of this Court's cases have looked at whether a generally applicable law challenged under the FAAAA (or the ADA) had such a binding effect, as part of its inquiry into the degree to which the law related to prices, routes, or services. *See Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014); *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011), *rev'd* 569 U.S. 641 (2013); *Air Transp. Ass'n of Am. v. City & Cty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001). But this Court has never held that a generally applicable state law is *only* preempted when it binds carriers to specific prices, routes, and services. The Court should not do so here: such a test would give short shrift to the plain language of the statute—as a practical matter, exempting *all* generally applicable laws from preemption under the FAAAA and ADA—and would conflict with binding Supreme Court precedent.

1. CELA's argument relies primarily on this Court's opinion in *Dilts*, which held that California's generally applicable meal- and rest-break rules for employees did not relate to a motor carrier's prices, routes, or services, and thus were not preempted. As CELA would have it, *Dilts* "held that California's generally applicable employment laws do not have a 'significant impact' *unless* they 'bind' carriers to a 'particular' rate, route, or service." CELA Br. 11 (citing *Dilts*, 769 F.3d at 646) (emphasis added). In reality, while *Dilts* raised the issue of whether a general law had such a binding effect, it did so merely as one possible indication of an impermissible effect: "[T]he mere fact that a motor carrier must take into account a state regulation when planning services is not sufficient to require FAAAA preemption, so long as the law does not have an impermissible effect, *such as* binding motor carriers to specific services." *Dilts*, 769 F.3d at 649 (emphasis added). In other words, the Court simply recognized that in cases involving generally applicable laws—where the impact on a carrier's operations may be less immediately apparent than in cases involving laws targeted at the industry—it would certainly cross the preemption threshold if they were to specifically bind carriers in that way. As the Court put it, "laws *mandating*

motor carriers' use (or non-use) of *particular* prices, routes, or services in order to comply with the law are preempted." *Id.* at 646 (emphasis added).

It does not follow, however, that such laws are *only* preempted if they do so. Accordingly, the Court in *Dilts* thoroughly examined a wide range of asserted effects of the challenged break laws on carrier prices, routes, and services to determine whether they were more than "tenuous, remote, or peripheral," *id.* at 647-650, an inquiry that would have been pointless if CELA were correct that, under the law of this Circuit, the test for preemption of generally applicable laws is whether they bind the carrier to particular prices, routes, or services. The Court in *Dilts* based its holding not on that purported test, but on its conclusion that the meal and rest break rules at issue in that case did not have a sufficiently "significant effect" on the defendant's prices, routes, or services. Dilts, 769 F.3d at 649-50. *See also id.* at 650 (Zouhary, J., concurring) (explaining that case turned on defendant's failure to offer evidence of "the actual effects of the California law on [its] own routes or services."). In short, the "binding" discussion in *Dilts* stands for nothing more than the proposition that it is a *sufficient* condition to trigger preemption,

but not a *necessary* one.[3]

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[3] The same is true of the other cases in which this Court has looked to whether a challenged law *bound* carriers. In *Am. Trucking*, the Court suggested that in a "borderline" case where "a State does not directly regulate (or even specifically reference) rates, routes, or services"—in other words, with respect to laws of general applicability—the "proper inquiry is whether the provision, *directly or indirectly*, 'binds the . . . carrier to a particular price, route or service and thereby interferes with competitive market forces within the . . . industry.'" 660 F.3d at 397 (emphasis added) (quoting *Air Transp. Ass'n*, 266 F.3d at 1072). But as the Court's further discussion reveals, that bottom-line nature of the inquiry in that case was whether "the conditions … impose costs that compel the carrier to change rates, routes, or services (for example by forcing the carrier to cease doing business with the State)"—a far cry from literally *binding* the carrier to a *particular* price, route, or service. *Id.* at 398. And, just as it did in *Dilts*, the Court in *Am. Trucking* went on to conduct a thorough examination of whether the effects of the challenged measures had an effect on carrier prices, routes, or services that was more than tenuous, remote, or peripheral. *See id.* at 404-409. In that case, though, the Court found that two of the challenged provisions *did* cross the FAAAA's preemption threshold, including an off-street parking provision as to which there was no suggestion it *bound* carriers to *particular* prices, routes, or services. (The Court held that the measure nevertheless escaped preemption under a putative "market participant" exception, a holding that was rejected by the Supreme Court. 569 U.S. at 651-52.) And in *Air Transp.*, where this Court first articulated a "binds to" analysis in the context of the ADA, the actual question was whether the "state law's effect on price, route or service is 'too tenuous, remote, or peripheral'" to trigger preemption. 266 F.3d at 1071 (quoting *Morales*, 504 U.S. at 390). Noting that the Supreme Court had held state measures preempted under ERISA because they bound plan administrators to particular courses of action, this Court observed that "a local law will have a prohibited connection with a price, route or service if the law binds the air carrier to a particular price, route or service and thereby interferes with competitive market forces." *Id.* at 1072. But that

2. More to the point, CELA's contention that laws of general applicability are only preempted under the FAAAA if they have this kind of specific binding effect would fail to give full effect to the language of the statute, and is foreclosed by Supreme Court precedent.

a. CELA's "binding" test for generally applicable laws is nowhere to be found in the text of the statute, and is patently narrower: only a small subset of laws that "relate to" a carrier's prices, routes, or services will *bind* it to a *specific* price, route, or service. For this reason, the Supreme Court long ago rejected the argument that the ADA (and, by the same token, the FAAAA) "only preempts the States from *actually prescribing* rates, routes, or service," because that would "simply read[] the words 'relating to' out of the statute." *Morales*, 504 U.S. at 385 (emphasis added).

Similarly, nothing in the text of the statute suggests that the standards for preemption are different for industry-targeted laws on the one hand, and laws of general applicability on the other. On the contrary, whatever form the law takes, the proper inquiry is whether it has a re-

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did not stop the Court from inquiring whether the challenged measure impermissibly related to the carrier's prices, routes, or services in other respects. *Id.* at 1072-75.

lationship to prices, routes, or services that is more than "tenuous, remote, or peripheral." *Rowe*, 552 U.S. at 375. The Supreme Court has refused to treat generally applicable laws as a separate category, because to do so would "creat[e] an utterly irrational loophole (there 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)." *Morales*, 504 U.S. at 386. And the loophole created by CELA's putative test would, as a practical matter, be so large as to swallow the rule altogether when it comes to generally applicable state laws: after all, it is difficult to imagine how a law of general applicability, which by this Court's definition does not so much as "*refer* directly to rates, routes, or services," *Dilts*, 769 F.3d at 646 (emphasis added), could nevertheless somehow *bind* carriers to *specific* rates, routes, or services.

b. The Supreme Court squarely rejected even a watered-down version of the purported "binding" test that this Court invoked in *Ginsberg v. Northwest, Inc.*, 695 F.3d 873 (9th Cir. 2012), which involved a common-law claim against an airline for breach of the implied covenant of good faith and fair dealing in terminating the plaintiff from its fre-

quent-flier program. This Court concluded that the claim was not preempted because "enforcement of the covenant is not 'to *force* the Airlines to *adopt or change* their prices, routes or services—the prerequisite for ADA preemption,'" *id.* at 880 (quoting *Air Transp.*, 266 F.3d at 1074) (emphasis added), a formulation that stops short of binding to *particular* prices, routes, or services. But a unanimous Supreme Court specifically rejected that approach. *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014). It began by specifically noting that this Court's decision had "[r]el[ied] on pre-*Wolens* Circuit precedent" for the proposition that a state law is not preempted if it "does not '*force* the Airlines to *adopt* or *change* their prices, routes or services.'" *Id.* at 279 (quoting *Ginsberg*, 695 F.3d at 880) (emphasis added). Instead, the Supreme Court held, the proper inquiry to determine whether a particular state law "relates to" "rates, routes, or services" is merely whether "it has 'a connection with, or reference to, airline' prices, routes, or services.'" *Id.* at 284 (quoting *Morales*, 504 U.S. at 384). All nine Justices agreed that a claim for breach of the implied covenant of good faith and fair dealing necessarily had such a connection—despite the fact that the background law did not force the airline to do anything, much less *bind* it to a *particular*

price, route, or service—because it was invoked to apply "state policy" preferences to a dispute about the terms of the airline's frequent flyer program. *Id.* at 288. *See also Wolens*, 513 U.S. at 228 (holding that the ADA preempted claims under the generally applicable Illinois Consumer Fraud Act).

D. The "Business-to-Business" Exception Does Not Rescue AB-5 from Preemption.

The IBT, and the Cities of Los Angeles and Oakland as amici, argue that AB-5's "business-to-business" (B-to-B) exception rescues the statute from preemption under the FAAAA, because (in their view) it provides an alternative route to independent contractor status that owner-operators can satisfy. IBT Br. 35-42; Cities Br. 4-11. Plaintiffs have explained at length why this is incorrect, and that in reality the B-to-B exception no more allows motor carriers to engage independent owner-operators than AB-5's default ABC test does. Ans. Br. 63-66. Amici agree—and, as the plaintiffs point out, so, apparently, does California, which nowhere argues that owner-operators can satisfy the B-to-B exception. Ans. Br. 31. But even if, counterfactually, the exception provided a narrow opportunity for motor carriers to contract with independent owner-operators, it *still* would not rescue AB-5 from preemption.

The B-to-B exception enumerates twelve specific criteria, *each* of which must be met for the *Borello* standard, rather than the ABC test, to apply to the relationship. Cal. Lab. Code § 2750.3(e). For example, the exception only applies if the "service provider maintains a business location that is separate from the business or work location of the contracting business," *id.* at (e)(1)(E), the "service provider actually contracts with other businesses to provide the same or similar services," *id.* at (e)(1)(G), and the "service provider advertises and holds itself out to the public as available to provide the same or similar services," *id.* at (e)(1)(H).

But arbitrary conditions like these are antithetical to "Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, 552 U.S. at 373. Rather, they represent California "seek[ing] to impose [its] own public policies … on the operation of a … carrier," contrary to Congress' "overarching deregulatory purpose." *Wolens*, 513 U.S. at 229 n.5. Requiring owner-operators to maintain offices that they do not need, or to run advertisements and cultivate customers that are unnecessary for their businesses to thrive, would force them "to offer … services that the market does

not now provide (and which [they] would prefer not to offer)," substantially relating to their services in violation of the FAAAA. *Rowe*, 552 U.S. at 372. And by introducing artificial costs, it would "ensure transportation rates, routes, and services" do *not* "reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices." *id.* at 371. Accordingly, even if owner-operators could satisfy all twelve of the B-to-B exception's criteria—which plaintiffs have shown they cannot—AB-5 would nevertheless impermissibly relate to motor carrier operations in precisely the manner Congress sought to preclude.

CONCLUSION

The Court should affirm the preliminary injunction.

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Respectfully submitted,

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