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
The Honorable Roger T. Benitez, Judge

Brief for The American Chemistry Council, Consumer Brands Association, Institute of Scrap Recycling Industries, Inc., National Industrial Transportation League, National Shippers Strategic Transportation Council, and The Fertilizer Institute as *Amici Curiae* in Support of Plaintiffs-Appellees

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CORPORATE DISCLOSURE STATEMENTS

The American Chemistry Council is a nongovernmental corporation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Consumer Brands Association is a nongovernmental corporation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

The Institute of Scrap Recycling Industries, Inc. is a nongovernmental corporation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

National Industrial Transportation League is a nongovernmental corporation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

National Shippers Strategic Transportation Council is a nongovernmental corporation. Its parent corporation is Council of Supply Chain Management Professionals, and no publicly held corporation owns 10% or more of NASSTRAC's stock.

The Fertilizer Institute is a nongovernmental corporation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae are six trade associations that represent a broad cross-section of U.S. businesses that depend on competitive and efficient trucking services. *Amici's* members ship goods in interstate commerce, including within or through California, and have varied demands for trucking capacity and specialized services and equipment. Simply stated, *Amici* represent the customers of the trucking industry and are comprised of the following organizations:

- The American Chemistry Council ("ACC"). ACC represents the leading companies in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $553 billion enterprise and a key element of the nation's economy.
- The Consumer Brands Association ("CBA") champions the industry whose products Americans depend on every day. From household and personal care to food and beverage products, the consumer-packaged goods industry plays a vital role in powering the U.S. economy, contributing $2 trillion to U.S. gross domestic product and supporting more than 20 million American jobs. The CPG industry accounts for one-fifth of all freight shipping in the United States, making it a key

stakeholder and expert voice on supply chain issues.

- The Institute of Scrap Recycling Industries, Inc. ("ISRI") represents approximately 1,300 companies operating in nearly 4,000 locations in the United States and 41 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles.
- The National Industrial Transportation League ("NITL") was founded in 1907 and is one of the nation's oldest associations representing purchasers of transportation services, i.e. shippers, in domestic and international commerce. Its mission is to advance the views of shippers on freight transportation issues and enhance their professional development.
- National Shippers Strategic Transportation Council ("NASSTRAC") is an association for transportation and logistics professionals who manage freight across all modes. Its member companies range from consumer products, retail, pharmaceutical, chemicals, and cosmetics to machinery, medical, printing, publishing, durable goods, and food and beverage. NASSTRAC provides education, advocacy, and provider relations opportunities to its members.
- The Fertilizer Institute ("TFI") represents the nation's fertilizer

industry, which includes companies that are engaged in all aspects of the fertilizer supply chain. TFI's members play a key role in producing and distributing vital crop nutrients, such as nitrogen, phosphorus, and potassium. These products are used to replenish soils throughout the United States and elsewhere to facilitate the production of healthy and abundant supplies of food, fiber, and fuel. Fertilizer is a key ingredient in feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all food grown around the world today is made possible by the use of fertilizer.

Amici submit this brief in support of affirmance of the District Court's Order enjoining enforcement of the "ABC" test under California Assembly Bill 5 ("AB-5"), as applied to motor carriers. *Amici* have a strong interest in preserving the competitive, efficient, and flexible trucking services that Congress afforded U.S. businesses by deregulating the trucking industry. AB-5 will disrupt the universal operating model of motor carriers who contract with independent truck operators to meet fluctuating demand for trucking services. Enforcement of AB-5 on motor carriers will substantially increase their prices and reduce service quality and scope to the detriment of *Amici's* members who ship goods in or through California. These undue burdens on interstate commerce conflict directly with the deregulatory and pro-competitive intent of preemption under the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c)(1).

Amici have received authorization to submit this brief from all parties to this proceeding. No counsel of any party to this proceeding drafted any part of this brief. No party or its counsel, or any other person other than *Amici* and its members, contributed money intended for preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress first deregulated the trucking industry in 1980, it wisely recognized that regulatory burdens inflate motor carrier rates and reduce motor carrier service quality, harming U.S. businesses and consumers and the U.S. economy. *See* Motor Carrier Act of 1980 § 2, 3(a), Pub. L. 96-296, 94 Stat. 793 (stating that Congress' purpose was to "reduce unnecessary regulation" and finding that a "competitive . . . motor carrier system is vital to a strong national economy" and "protective regulation has resulted in some [carrier] operating inefficiencies and some anticompetitive pricing") (hereafter the "1980 Act"); *see also id.* § 4 (the national transportation policy concerning motor carriage is to encourage efficient, competitive trucking services and facilitate varied price and service options to meet the shipping public's needs).

In furtherance of deregulation and to reduce burdens on the efficient movement of goods in interstate commerce, Congress preempted state regulation related to motor carrier prices, routes, and services when it adopted the FAAAA. 49 U.S.C. § 14501(c)(1). This enabled market forces to shape trucking rates and service offerings, thereby promoting efficiency in the national supply chain and encouraging lower prices, innovation, and improved services for motor carrier customers. In turn, businesses that rely on motor carriers would have more flexibility to compete in their respective industries, benefiting commerce.

AB-5 runs afoul of FAAAA preemption by effectively prohibiting the owner-operator service model that enables carriers to satisfy the varied needs of their customers by classifying such operators as employees under its ABC test. Cal. Lab. Code § 2750.3(a)(1)(B). The trucking industry has long relied upon owner operators, which are drivers who own their own trucks and provide services to motor carriers as independent contractors. Motor carriers must meet fluctuating demands for varied services. With approximately 90% of carriers having 10 or fewer drivers and 10 or fewer tractors, many motor carriers are unable to satisfy customer demand without hiring owner operators to supplement their employee drivers and fleet. Fed. Motor Carrier Safety Admin., Analysis & Information Online, https://ai.fmcsa.dot.gov/RegistrationStatistics/CustomReports.aspx (last visited May 11, 2020).

Prong B of the ABC test requires employee classification of any person unless that person performs work that is outside the usual course of the hiring entity's business. Cal. Lab. Code § 2750.3(a)(1)(B). Since a motor carrier's business is providing truck transportation, a carrier would have to classify any owner operator it uses as an employee pursuant to the California Labor Code, the California Unemployment Insurance Code, and wage orders of the California Industrial Welfare Commission. The burdens associated with complying with these labor laws to use owner operators would be so substantial that they would impact carrier prices, routes, and services. *See* Pls.-Appellees' Br. at 18-25, 38-40.

The impact of AB-5 on carrier prices, routes, and services would substantially harm businesses with supply chains that touch California. AB-5 will increase operating and compliance costs for trucking companies operating in California. Pls.-Appellee's Br. at 22-23. This will lead to increases to motor carrier rates and, thus, supply chain cost, which businesses must either assume or pass onto customers. This will make businesses linked to California less competitive domestically and globally and may cause certain low margin businesses, such as scrap metal recyclers, to reduce their California footprint to remain viable. AB-5 will also likely reduce the variety and quantity of available truck capacity. Businesses that rely on truck transportation with a nexus to California may not be able to find the capacity or specialty services they need at cost-effective prices to support their operations. The capacity impact of AB-5 will also reduce businesses' ability to adjust their supply chains when faced with unpredictable disruptive events. Businesses that rely on specialized truck services, like hazardous materials transportation, refrigerated transportation, and expedited transportation, for movements involving California are likely to face significant and disruptive capacity shortages if motor carriers (particularly smaller carriers) decide to exit the California market to avoid AB-5.

If AB-5 is not preempted and other states adopt tests that require owner operators to be classified as employees, interstate commerce will be substantially disrupted and the harm to motor carrier customers will be widespread. Carriers will likely weave shipments around states that require employee drivers. Clusters of states requiring employee drivers could isolate states that do not, forcing motor carriers to hand off traffic at state borders. All motor carrier traffic would be impacted by higher rates and increased transit times, and U.S. exporters who rely on trucking would become less competitive in the global marketplace.

ARGUMENT

I. Congress passed FAAAA to prevent states from adopting regulations that interfere with competition in setting trucking rates, routes, and services.

Against the backdrop of a regulatory scheme that resulted in "operating inefficiencies" and "anticompetitive pricing," Congress enacted the 1980 Act. *Id.* § 3(a). The 1980 Act promoted more efficient interstate truck transportation by removing restrictions on routing, commodities, and territories that a carrier could serve. *Id.* § 6. It included measures to achieve "more competitive pricing." H.R. Rep. No. 96-1069, at 28. It also clarified that the U.S. government's policy for truck transportation of property is to "promote competitive and efficient transportation services" to, among other objectives, "meet the needs of shippers, receivers, and consumers [and] allow a variety of quality and price options to meet the changing market demands and the diverse requirements of the shipping public." 1980 Act § 4 (codified as amended at 49 U.S.C. § 13101(a)(2)). Thus, the thrust of the 1980 Act was to eliminate regulation that resulted inefficient service and uncompetitive rates for motor carrier customers.

Congress revisited trucking deregulation nearly 15 years later when it enacted the FAAAA, which preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The FAAAA flows from Congress' recognition that state regulation of trucking harmed the interests of motor carrier customers and consumers because it "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." FAAAA § 601(a)(1), Pub. L. 103-305, 108 Stat. 1569, 1605. In crafting the FAAAA, Congress made other findings that reflected its concerns about the adverse impacts state regulation has on U.S. businesses that depend on competitive and efficient interstate trucking services, because it "causes significant inefficiencies, increased costs, reduction of competition, [and] inhibition of innovation and technology" and "curtails the expansion of markets." H.R. Rep. No. 103-677, at 87. It also saw a regulatory patchwork as a "huge problem for national and regional carriers attempting to conduct a standard way of doing business," because it forces them to engage in inefficient operations that are peculiar to individual states. *Id.*

These harmful consequences of state regulation on trucking efficiency, service quality, and service choice demonstrate that FAAAA preemption was a measure to protect not only carriers but also their customers who are the lifeblood of the American economy.

II. AB-5's impact on trucking rates, routes, and services will substantially harm businesses that rely on competitive and efficient motor carriage.

The District Court correctly found that AB-5 will substantially impact motor carrier prices, routes and services (Order at 18) and cause irreparable harm to the trucking industry. Order at 21. Specifically, the District Court stated: "Here, motor 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 obtaining trucks, hiring and training employee drivers, and establishing administrative infrastructure compliant with AB-5." *Id.* It is obvious that the effect of AB-5 will be to increase capital costs (trucks), operating expenses (drivers and fleet maintenance), and compliance costs (CA labor laws) for motor carriers operating in California. It is also obvious that a restructured business model will impact motor carrier services available to customers for shipments that transit California. Thus, if AB-5 is applied to the trucking industry, carriers providing services in California must increase prices to cover higher operating expenses, reconfigure their interstate routes to prevent owner operators from entering the state, and modify or curtail services that required the use of owner operators. Pls.-Appellees' Br. at 22-25, 38-40. Other carriers may choose to avoid such costs by exiting the California market, thereby reducing motor carrier capacity, competition, and service. *Id.* at 18-20; 38-29.

The impact that AB-5 will have on motor carrier prices and services will be substantial as illustrated by the fact that approximately 95% of U.S. motor carriers employ 10 or fewer drivers and nearly 90% have 10 or fewer tractors. Fed. Motor Carrier Safety Admin., Analysis & Information Online, https://ai.fmcsa.dot.gov/RegistrationStatistics/CustomReports.aspx (last visited May 11, 2020). With so few employee drivers, these carriers must rely heavily on owner operators to handle the dynamic demands that businesses have for a variety of motor carrier services. Pls.-Appellee's Br. at 8. Replacing owner operators with employees to comply with AB-5 will be costly for these carriers and may cause them to close down, continue operating in California without increasing size, or exit the California trucking market. *Id.* at 18-19. Owner operators will have a strong incentive to depart the California market to avoid stranding their investment in trucks and to preserve their entrepreneurial spirit and free choice to operate as independent contractors. *Id.* at 8-9. Also, the trucking market will exert a strong gravitational pull on owner operators due to an ongoing driver shortage, which will lead them to jurisdictions that allow them to operate as independent contractors. *See* Mark Collette, Trucker Shortage Grips Economy; Prices of Consumer Products Expected to Rise as Shipping Crisis Throttles Shale Fields, Ports, Hous. Chron., Sept. 3, 2018, at A1 ("The country is short more than 50,000 tractor-trailer drivers, a number expected to swell to more than 174,000 in eight years . . . .").

Increases in motor carrier prices and reductions in capacity and services for truck transportation touching California will make supply chains linked to California more costly and less capable. It will also cause the cost of goods produced from these supply chains to be higher than similar goods that have no California connection, resulting in domestic and global competitive disadvantages for impacted businesses. The overall impact on business will likely be significant considering that California is the nation's largest economy and world's 5th largest economy by gross domestic product. Bureau of Econ. Analysis, Gross Domestic Product by State, 4th Quarter & Annual 2019 tbl. 3 (2019), https://www.bea.gov/system/files/2020-04/qgdpstate0420.pdf; Jonathan J. Cooper, California Now World's 5th Largest Economy, Surpassing UK, USA Today, May 5, 2018, https://www.usatoday.com/story/news/nation-now/2018/05/05/california-now-worlds-5th-largest-economy-beating-out-uk/583508002/. Because trucking moves 71% of all freight in the United States, a high proportion of businesses that ship goods to, from, or through California will be impacted. Bureau of Transp. Statistics, 2012 Commodity Flow Survey 1 tbl. 1a (2015), https://www.bts.gov/archive/publications/commodity_flow_survey/2012/united_states/index. Congress' concern about state regulation having these types of impacts, which "imped[e] the free flow of trade, traffic, and transportation of interstate commerce" and "place an unreasonable cost on the American consumers," was why it decided to enact the FAAAA. FAAAA § 601(a), 108 Stat. 1605. Thus, AB-5 fits squarely within the box of state regulation related to rates, routes, and services that Congress preempted under FAAAA.

A. AB-5 will reduce available motor carrier capacity necessary to support the variable market demands for trucking services.

The broad cross-section of industries represented by *Amici* have varying needs for trucking capacity, with some industries having relatively stable needs throughout the year and others having seasonal or unpredictable needs, such as the retail, scrap, fertilizer, and paper industries. Additionally, as explained below, *Amici*'s members have varying service needs: ACC and TFI's members ship hazardous materials which require special handling and driver licensing; NASSTRAC's grocery members ship temperature controlled shipments that require refrigerated equipment, drivers trained to operate that equipment, and special handling to ensure food safety; ISRI's members require steel bottom trucks and high-powered tractors due to the weight and characteristics of scrap metal shipments; NITL's paper industry members have seasonal trucking demand; and CBA's members require expedited services to meet the immediate delivery expectations of modern consumers.

Due to the wide fluctuation in trucking demand and variety of service needs, motor carriers in California and across the nation rely on the flexible additive capacity, equipment, and drivers that the owner-operator business model provides. Pls.-Appellants' Br. at 10. However, AB-5 will disrupt this model and reduce such flexibility. *Id.* at 9. Because AB-5 effectively mandates employee drivers for trucking services in California, *Amici's* members whose supply chains touch California will likely incur additional costs due to reduced and potentially scarce trucking capacity, such as inventory costs associated with buffer stock stored to cover supply chain disruptions or increased prices to secure a truck. When demand for trucking service cannot be met, *Amici's* members may also experience costly supply chain disruptions, such as plant shutdowns or slowdowns, and may not be able to meet their customers' expectations.

For many industries, flexible truck capacity is critical to support seasonal or varying business operations or customer demand. These industries may require large short-term increases in truck capacity to support a single peak shipping season, multiple peak seasons, short shipping windows each month or quarter, or on-demand requirements. Small trucking companies that use owner operators are essential to the movement of cyclical or varying freight lanes; whereas large fleets dedicate little, if any, of their trucks and drivers to freight lanes that do not have stable weekly demand. Industries represented by *Amici* with varying truck capacity needs include:

- **The Recycling Industry**. Scrap metal recyclers generally require high volumes of truck capacity on short notice. Scrap metal's price fluctuates daily based on domestic and foreign markets. This price fluctuation makes scrap transactions and resulting shipments unpredictable. Moreover, because scrap metal is sold at low margins, transactions usually involve large scrap quantities that may require multiple trucks to transport.
- **The Paper Industry**. Businesses in the paper industry experience a high seasonal demand for paper products in the summer months for the back-to-school season and in the fall leading into the December holiday season. They also experience a high demand for paper

products to support agricultural harvest operations with packaging products.

- **The Fertilizer Industry**. The fertilizer industry has high trucking demands during narrow seasonal windows. Farmers need to apply fertilizers within a tight 4-6 week planting window. This results in a 50 percent rise in trucking movements during the Spring planting season. There can also be unforeseen spikes in motor carrier demand when disruptions occur in other transportation modes. By depriving farmers of fertilizer when they need it, insufficient truck capacity can reduce crop yields and impact food security. If just-in-time deliveries by motor carriers are more limited, it could also affect the environment because fertilizer must be applied in the right amount, at the right time, and in the right conditions to reduce nutrient loss to the environment.
- **The Chemical Industry**. The chemical industry includes specialty chemistry, which involves the production of chemicals that are sold on the basis of their performance or function and have niche applications. Examples of specialty chemicals include adhesives and sealants, coatings, cleaners, and water treatment chemicals. Although some specialty chemicals are produced continuously, they are

typically manufactured in batches. To support these batch production runs, specialty chemical manufacturers need to source raw materials and distribute product in short windows. Chemical manufacturers also produce chemicals that are crucial to the agriculture industry, such as crop protection chemicals like fungicides, herbicides, insecticides, miticides, pesticides, disinfectants, and rodenticides. Demand for truck transportation of these products fluctuates, coinciding with growing seasons.

- **The Grocery Industry**. Grocery stores purchase many items cyclically or seasonally based on consumer demands. They also may have a sudden high trucking demand to restock stores during local, regional, or national emergencies that cause consumers to stockpile grocery items.
- **The Consumer Packaged Goods Industry**. Consumer packaged goods experience varying seasonal demand. They also experience demand spikes associated with promotional campaigns, which are common in the industry.

Flexible truck capacity is also important to protect industries with relatively steady volumes of truck shipments from business disruptions. Businesses frequently encounter unpredictable events that can disrupt their supply chains.

Natural disasters like floods, fires, and hurricanes, which occur often in the United States, can suddenly increase demands for essential goods, unexpectedly shut down highways or rail service, and damage or destroy production and distribution facilities. *See* U.S. Dep't of Homeland Security, Supply Chain Resilience Guide 1 (2019) (explaining that disasters disrupt preexisting networks of demand and supply and can cause a surge in demand and loss of critical infrastructure that complicate distribution capacity). Unexpected commercial events, like production delays, shutdowns or slowdowns, inventory and/or storage shortages also occur frequently, causing disruption to inbound and outbound goods. In recent years, bottlenecks at California ports have also created supply disruptions. *See* U.S. Gov't Accountability Office, West Coast Ports 27-28 (2016). Minimizing disruption from these types of events typically requires short-term truck capacity to satisfy increased demand or supplement existing supply routes that the event may have compromised.

Certain industries also have a heightened need for flexibility to address supply disruptions. For example, flexible truck capacity is critical to the chemical industry. Chemical companies create products that are crucial to public welfare, like water treatment chemicals. Even a short disruption in supply of these types of chemicals, whether caused by a customer error or natural disaster, can have serious consequences for the public. Chemical companies also create products that are manufacturing inputs for a wide variety of goods. *See* ACC, 2019 Guide to the Business of Chemistry vi (2019), https://www.americanchemistry.com/GBC2019.pdf (stating that more than 96% of all manufactured goods are directly touched by the business of chemistry). Because consumption of these products can unexpectedly change to match varying demands for finished goods, chemical companies may need to truck these products on short notice to prevent costly disruptions to their customers' manufacturing processes.

Supply chain challenges during the COVID-19 pandemic illustrate the importance of flexible truck capacity. At the beginning of the U.S. outbreak, demand for medical supplies, food, paper, and paper products skyrocketed. Empty shelves were common among grocery stores throughout the country. Within days of the first state stay-at-home orders, the Federal Motor Carrier Safety Administration (FMCSA) issued a national emergency declaration providing drivers with relief from the rules that limit the amount of time drivers can be on duty and drive. FMCSA Emergency Declaration No. 2020-002 (March 13, 2020), https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-03/FMCSA%20Emergency%20Declaration%203.13.20.pdf. The FMCSA recognized that this would "help America's commercial drivers get [] critical goods to impacted areas faster and more efficiently."[1] Press Release, FMCSA, US Dep't of Transp. Issues Nat'l Emergency Declaration for Commercial Motor Vehicles Delivering Relief in Response to the Coronavirus Outbreak (March 13, 2020), https://www.fmcsa.dot.gov/newsroom/us-department-transportation-issues-national-emergency-declaration-commercial-vehicles. It is evident that during the COVID-19 crisis and the onset of the nation's recovery, dependable supply chains are vital to fulfilling the needs of Americans. *See* Ellen Rosen, Battered by Demand, Nation's Supply Chain Struggles to Deliver, N.Y. Times, Apr. 6, 2020, at B3 (noting that well-functioning supply chains are critical to meeting demand for essential goods). The owner operator model has been crucial to ensuring that adequate truck capacity and efficient service options are available to fulfill emergency needs for shipments of personal protective equipment and pharmaceutical supplies and to restock grocery stores.

[1] The FMCSA also took various other measures to ensure adequate truck capacity to keep essential goods moving and address supply chain challenges created by COVID-19. *E.g.*, FMCSA, Notice of Enforcement Policy Regarding Expiring Driver's Licenses & Medical Examiner's Certificates During COVID-19 Nat'l Emergency (March 24, 2020), https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-03/Enforcement_Notice_on_Expiring_CDLs_3.24.20.pdf; FMCSA, Notice of Enforcement Discretion Determination (March 20, 2020), https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-03/Notice%20of%20Enforcement%20Discretion%20-%20Emergency%20Declaration%202020-002%20-%20COVID-19%20-%2003-20-2020.pdf.

B. AB-5 will impair competitive and efficient service offerings by motor carriers.

Businesses also need flexible truck capacity to fulfill their demand for specialized truck services. These services may involve special equipment and specially trained drivers. Examples of specialized services used by *Amici* include:

- **Hazardous Materials Services**. The Hazardous Materials Regulations (49 C.F.R. §§ 171-180) impose marking, placarding, packaging, handling, reporting, and training requirements in connection with the transportation of hazardous materials, which are items the Secretary of Transportation has identified pursuant to 49 U.S.C. § 5103(a) as posing an unreasonable risk to health and safety or property when transported in a particular amount. For example, 49 C.F.R. § 177.816 requires special driver training; § 177.817 requires drivers to maintain prescribed shipping papers in a certain location; Part 177 subpart B prescribes loading and unloading requirements on carriers; and Part 180 prescribes various requirements for maintaining cargo tanks affixed to truck chassis. The Federal Motor Carrier Safety Regulations (49 C.F.R. §§ 350-399) require drivers to obtain a hazardous materials endorsement on their commercial driver's license (CDL) to haul hazardous materials. 49 C.F.R. § 383.93(b). Thus, the various industries that ship hazardous materials require special trucking services. Industries with these needs are wide ranging and include the chemical, fertilizer, and consumer packaged goods industries.

- **Overweight Services**. Shipment that exceed weight limits for standard trailers and tractors require specialized equipment. For example, they may require trailers with reinforced bottoms and chassis. They also may require tractors with additional horsepower and axles. Industries that require these types of services include the paper industry and recycling industry.
- **Refrigerated Services**. Some goods may need to be shipped under refrigeration. This requires a specialized trailer or truck with a refrigeration unit. Drivers also may need to be specially trained on the operation of the unit. Industries that have a high demand for these services include the grocery industry, food manufacturing industry, and chemical industry.
- **Expedited Services**. In the Amazon era where immediate delivery is expected, shipments of consumer goods often involve expedited trucking services to compete for customers. These services may involve multi-driver teams so that a trip can be completed without the

stops normally required for hours-of-service compliance if a single driver was involved.

Motor carriers have used the owner operator service model to efficiently provide these varied service options. Pls.-Appellee's Br. at 19-20. They have also used it to meet demands for new service offerings, such as by adjusting to a two-day transit model to support online retail needs, which model is rapidly evolving to same-day service for online retail customers. By upending the owner-operator model, AB-5 interferes with the market forces that have secured competitive service offerings for motor carrier customers.

The owner-operator model has benefited trucking customers, like the members of *Amici*, by enabling motor carriers to meet fluctuating demand for varied services. California's attempt to prevent carriers from using this model is inconsistent with the deregulatory intent of FAAAA inasmuch as it "substitut[es] . . . its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 263 (2013); *see also Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367-68 (2008) (stating that the Airline Deregulation Act (ADA), which Congress extended to trucking under FAAAA, intended for maximum reliance on competitive market forces to further service options);[2] H.R. Rep. No. 103-677, at 88. (stating that, under FAAAA, "[s]ervice options will be dictated by the marketplace"). It will also disrupt the flexible truck capacity and varied services that motor carriers currently provide. Congress' concern about state regulation impact on prices, routes, and services in this manner, which would interfere with the flow of goods in interstate commerce, is why FAAAA exists. FAAAA § 601(a)(1), 108 Stat. 1605.

III. If states can adopt employee classification tests like the ABC test, the resulting patchwork of regulation would interfere with the free flow of interstate commerce contrary to the intent of Congress.

If the district court ruling is reversed, applying AB-5 to trucking services in California will create the patchwork of state regulation that Congress sought to prevent in adopting the FAAAA. *Rowe*, 552 U.S. at 373 (holding that a patchwork of state regulations "is inconsistent with Congress' major legislative effort to leave [service-offering] decisions, where federally unregulated, to the competitive marketplace"); *see also*, *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 2014) ("The principal purpose of the FAAAA was to prevent States from undermining federal deregulation of interstate trucking through a patchwork of

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[2] Both the Supreme Court and this Court interpret the FAAAA as adopting ADA preemption in the trucking context and apply ADA preemption precedent in FAAAA cases. *Rowe*, 552 U.S. at 370; *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 2014).

state regulations.") (internal quotations omitted). It would also encourage other states considering employee classification laws like AB-5 to contribute to the patchwork.

FAAAA targets state regulation impacting motor carrier prices, routes, and services because it unreasonably burdens interstate commerce. *See* FAAAA § 601(a)(1), 108 Stat. 1605 (finding that state regulation has "imposed an unreasonable burden on interstate commerce" and "impeded the free flow of trade, traffic, and transportation of interstate commerce"); H.R. Rep. No. 103-677, at 87 (stating preemption is "necessary to facilitate interstate commerce"). If compliance with these regulations require motor carriers to shift their business models with every state border they cross, a situation would arise where "the sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *See id.*

AB-5's effectual requirement that all owner-operators be classified as employees imposes such a burden. The burden is apparent in the impact this requirement is likely to have on motor-carrier routing. To mitigate the impact of AB-5 on their networks and preserve the owner operator model outside California, motor carriers will likely reroute interstate shipments that cut through California to circumvent the state or hand off shipments at the California border. Rerouting shipments will increase transit times and, thus, unnecessarily tie up equipment and drivers. Carrier handoffs would have the same result because of the time needed to conduct the handoff and the routing deviations needed to reach the handoff points. If more states adopt similar ABC tests that require owner operators to be classified as employees, these inefficiencies would increase exponentially. Not only would handoffs affect more shipments, but a shipment may require multiple handoffs. Routing would become more circuitous to weave around states that require owner-operators to be classified as employees.

These circuitous routing practices would result in the inefficiencies and burdens on interstate commerce that Congress sought to eliminate with FAAAA. *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 960 (9th Cir. 2018) ("Congress believed deregulation would address the inefficiencies, lack of innovation, and lack of competition caused by non-uniform state regulations of motor carriers."). Tellingly, they are like the cross-border shipping practice that Congress cited in the FAAAA legislative history as an undesirable consequence of patchwork state legislation. *See* H.R. Rep. No. 103-677, at 87-88. Under that practice, shippers would have carriers transport intrastate shipments across state lines and back to avoid intrastate rates that exceeded total interstate rates for the out and back movement. *Id.* Also, as explained, the harmful consequences of AB-5 will be borne not only by motor carriers but also by the many thousands of trucking customers, like *Amici's* members, whose supply chains have a nexus to California and who depend on competitive, efficient and cost-effective trucking services. Such consequences are inconsistent with Congress' intent to place maximum reliance on market forces to shape carrier prices, routes, and service and, thus, foster lower prices, increased service options, and better service quality for motor carrier customers. *Rowe*, 552 U.S. at 371.

Finally, the spread of the ABC test would also disadvantage U.S. businesses in the global marketplace. As the ABC test spreads, avoiding its impact on the trucking industry becomes more difficult. Thus, the trucking costs associated with the ABC tests will increase for U.S. exporters that depend on trucking services, making these exporters less competitive globally. Congress enacted FAAAA in response to such impediments to the free flow of trade. FAAAA § 601(a)(1), 108 Stat. 1605.

Accordingly, this Court should affirm the district court's order to fulfill the important procompetitive and deregulatory policies of FAAAA preemption and avoid the unreasonable burdens on interstate commerce and patchwork state regulation that would result from enforcement of California's AB-5 law.

CONCLUSION

For the foregoing reasons and the reasons set forth by Plaintiffs-Appellees, *Amici* respectfully request that this Court uphold the District Court's order granting Plaintiff-Appellee's motion for preliminary injunction.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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