

CASE NO. 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,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 3:18-CV-02458-BEN-BLM
The Honorable Roger T. Benitez, Judge

**BRIEF OF AMICUS CURIAE AMERICAN DREAM COALITION
IN SUPPORT OF APPELLEES**

PATRICK J. WHALEN, State Bar No. 173489
ELLISON, WHALEN & BLACKBURN
1201 K Street, Ste. 1960
Sacramento, CA 95814
Telephone: (916) 448-2187
Facsimile: (916) 448-5346
E-mail: attorneys@ellisonlawoffices.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, proposed Amicus Curiae, American Dream Coalition is an unincorporated association of independent contractor owner-operator motor carriers in the construction trucking industry.

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

The American Dream Coalition is a recently formed unincorporated organization of owner-operators² who first met and organized during the committee hearings as AB 5 was making its way into law at the California State Capitol in Sacramento. Its members are all small businesses, the vast majority of whom own only one tractor trailer truck, and all of whom work in the construction trucking industry. They make their living hauling construction material to and from construction sites. They carry dirt, concrete, aggregate, gravel, road base, and sometimes even debris. They typically work out of their home office, although for all practical purposes, their office is the cab of their truck, and their office infrastructure is their cell phone. They contract with other owner-operators, larger motor carriers, truck brokers, dispatch services, contractors, aggregate material producers and even municipalities who either need trucking or additional trucks and drivers for a particular job. American Dream Coalition represents hundreds of owner-operators across California.³

¹ Amicus certifies that no party or party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person made a monetary contribution to support the preparation or submission of this brief.

² Independent contractor owner-operator motor carriers is a term of art in the trucking industry, and denotes a business entity that owns one or more trucks and trailers, operates under its own authority, and contracts with other businesses to provide trucking services. This brief refers to these entities as owner-operators.

³ All parties have consented to the filing of this brief. See Fed. R. App. P. 29(a)(2).

AB 5 will put these small businesses out of business, because it makes it illegal for them to be treated as independent contractors as they have been for decades. Since the district court's injunction, American Dream Coalition members have been spared the drastic impacts of this new law. However, if AB 5 goes into effect, all of the other trucking companies that currently use their services will be required to treat them as employees, and many will simply refuse to hire them under those conditions. Their very livelihood is at stake in this litigation. They urge this court to uphold the injunction and reject the appellants' arguments.

ARGUMENT

I. INTRODUCTION

In all of the discussions about AB 5, including the discussions at the California Capitol while AB 5 was being heard in legislative committees, the focus of the discussion was always about how large companies were taking advantage of workers and misclassifying them as independent contractors, thereby denying them the protections that California law gives employees. Whether that is true in the gig economy or other industries is certainly debatable, but in the field of construction trucking, it is manifestly and demonstrably false. The independent contractor trucker model has provided decades of opportunities for non-

postsecondary educated entrepreneurs, including many people of color,⁴ to start their own business and provide a remarkably high income and standard of living for themselves and their families.

This amicus brief will emphasize the real-world economics of the construction trucking industry, and will highlight the perspective of one-truck owner-operators. These truckers invest enormous time and capital into starting their own businesses, and they enjoy the freedom and the lifestyle that their profession provides. They are the little guys who are supposedly going to be “protected” by AB 5. In reality, all AB 5 will do for them is “protect” them from making a good living and running a successful business.

II. THE REALITY OF CONSTRUCTION TRUCKING

A. What is Construction Trucking?

Virtually every construction project requires the hauling of material to and from the worksite. American Dream Coalition members provide that on-haul and off-haul service throughout the state. Our members haul dirt, gravel, concrete road base, aggregate, debris and many other materials to and from worksites as required by the general contractor. Our members own their own tractor-trailer power unit (the truck) and often they own one or more trailers or other pieces of equipment to haul behind the truck. Perhaps the most common example is the dump truck. Our

⁴ Approximately 42% of owner-operators represented by the Coalition are of Hispanic or Latino ethnicity. Another 20% are of East-Asian descent.

members have end dumps, bottom dumps, super dumps and many other varieties of trailers. The type of trailer required can depend on the material being hauled, the location of the worksite, and access for ingress and egress of large vehicles to the site.

In addition to dump trucks, our members drive water trucks, concrete pumpers, flatbed trailers, and numerous other varieties of trailers, many of which require specialized equipment to attach to the truck and to operate from within the truck, as well as special skills and experience to operate safely both at the worksite and on the roadways with the motoring public.

A typical truck can cost at least \$100,000 before adding specialized trailers, dump boxes, or other equipment. Our members typically invest in a truck (generally by taking out a loan) establish a legal business entity, apply for their own operating authority and purchase a rather expensive liability insurance policy (required by law). They then go into business for themselves, hiring out their skills and their truck to construction contractors who need material moved to or from a site. During one week, our members may drive a dump truck to haul dirt from a housing development worksite so the contractor can grade the land before building homes. The next week, the same member may be hauling a flatbed trailer loaded with spools or rebar to a worksite. The week after, the same member may haul road base material to a highway construction worksite. Each of these tasks requires

different trailers. Many members own multiple trailers themselves and will switch out their trailers as needed for a particular job. Other members own only one (or even no) trailer, but will rent trailers from third parties as needed for a particular job.

Jobs typically involve making multiple daily trips between the source of the material (for example, a rock quarry) and the location where the material is to be deposited. Alternatively, for off-haul, a job can involve hauling multiple loads of debris to a dump or other waste facility.

Our members are self-employed, and typically handle all of their own truck maintenance, as they have an interest in ensuring that their means of livelihood is continuously operational. In trucking, if the wheels are not moving, you are losing money, so our members have a keen interest in ensuring that their trucks are always ready for business. As small businesses, they are responsible for all of their own expenses, including fuel, tires, insurance, self-employment taxes, etc.

B. How Do Owner-Operators Get Work?

When construction contractors need hauling services performed as part of the project, they will typically contract with a single construction trucking company to provide all hauling necessary for the project. There are a many mid-size to large fleets whose primary business is contracting with large construction contractors. These companies typically have fleets of 20 to 200 trucks, lots of

trailers, all driven by company drivers who are paid as employees, typically in the neighborhood of \$25 per hour, with some regional variation.

These companies will submit a bid to the prime construction contractor. This typically involves the trucking company sending a professional estimator to a worksite, to calculate the volume of material to be moved, and the number and type of trucks and trailers needed to do so most efficiently. The trucking company also has to take into account the prime contractors timing and sequencing needs. For example, if the job requires removing 500 tons of dirt, it could be accomplished using 5 trucks per day over several weeks, or by using 50 trucks per day over just several days, as needed by the construction contractor so as to coordinate the other phases of the construction project. After making the necessary calculations and accommodating the needs of the construction contractor, the trucking company will then submit a bid to the contractor detailing the costs for the trucking services. If the bid is accepted, the trucking company is then obligated to perform the work.

The estimating function is crucial to making the bid profitable for the trucking company. While there is an obvious interest in ensuring that the bid is priced competitively, there is also great risk. If the estimator miscalculates the distance to be travelled, or forgets to account for time the trucks will be idling in traffic while burning diesel fuel, the winning bid could easily lose money. As

should be obvious, one-truck owner-operators have neither the time, means, or experience to conduct the crucial estimating function. They cannot spend days or weeks walking a job site and calculating the specifications for the job; they are in their truck hauling on other jobs. The larger companies get the work, but the owner-operators get the work done.

Another complicating factor is weather. Inclement weather may slow down the loading and unloading of trucks, and may make some worksites temporarily inaccessible for large trucks. Commonly, weather will delay other phases of the construction project, thereby requiring the start date for the trucking services to have to move accordingly. When this happens, the trucking company may be “double-booked” such that its fleet of employee drivers are already committed to another job at another location.

To accommodate the constantly fluctuating demand for trucking services on a daily basis, construction trucking companies typically have a roster of owner-operators with whom they can contract on a daily, weekly, or longer term basis, as required for a particular project. They will contact their owner-operators to find out if they are available, and if so, they will tell them the details of the job, the type of material being hauled and the trailer and equipment necessary for the job. The owner-operators then execute fairly standard independent contractor agreements with the trucking company and begin work.

Our members can be paid by the load, by the ton, or by the hour, depending on the nature of the job and the regional practices in the industry. Generally speaking, the trucking company will quote the rate to the owner-operator, who can decide whether to accept the job as offered, counter with a higher rate, or decline the offer and work on another job. Owner-operators make their decisions based on their own experience. They know how much fuel their trucks burn, and they generally have experience with commonly used trucking routes between worksites and source locations. They will be able to determine whether, for the job in question, the quoted rate is financially beneficial to them. If an owner-operator accepts the job, he or she then performs the services and invoices the construction trucking company. Virtually all job sites use freight bills to document the number and type of loads that each truck carries. Copies of these freight bills are given to the owner-operators at the jobsite, and are used to supplement the invoices submitted by the owner-operator to the construction trucking company.

In a given year, owner-operators may work for several or many different construction trucking companies. The construction trucking companies are “brokers” in the sense that they get the work from the construction contractor, and then farm it out to owner-operators if and when their own employee fleets are insufficient to perform the needed services. It is not uncommon for small, one-truck owner-operators to get 1099 income totaling more than \$200,000 per year.

And owner-operators also commonly serve as brokers as well. When services are in high demand, or when a project is very large requiring many trucks in a short period of time, construction trucking companies will typically ask their roster of owner-operators to contact other drivers in the area who may be willing to work. Owner-operators generally know their colleagues in the industry and thus, when a construction trucking company calls with an offer of work, they will generally quote the rate, and tell the owner-operator that they needs 10 other trucks in addition to the owner-operator. The owner-operator can then broker that work to other owner-operators. It is common for the broker in such a transaction to keep a small percentage as a fee for finding the work.

Thus, owner-operators are typically brokered and serve as brokers themselves, often on the same job. Moreover, it is common for Owner-Operator Smith to broker some work to Owner-Operator Rodriguez on one day, but then have Owner-Operator Rodriguez broker different work to Owner-Operator Smith on another day.

The construction trucking chain is an intricate, ever-changing series of relationships but it typically involves a prime construction contractor at the “top” of the chain, who contracts with a construction trucking company to perform construction trucking services. That trucking company then subcontracts with any number of owner-operators (or other smaller trucking companies) to perform the

work when the primary trucking company cannot perform all the work in-house. Those smaller trucking companies and owner-operators will then often subcontract with other owner-operators if necessary to provide enough trucks and drivers for a particular job.

C. Why Not Use All Employee Drivers?

The chain described above may seem complex, but it works remarkably efficiently in California – and has for over 75 years – to provide on demand construction trucking services safely and at a competitive price, which benefits not only the prime contractor, but all consumers, as the contractor’s costs inevitably get passed on to the marketplace. While it may make economic sense for some high-volume construction trucking companies to maintain a fleet of trucks and trailers, and a cadre of employee drivers, the employee-only model has some built-in inefficiencies that make it unprofitable and unworkable over the long run.

As just one example, certain trucks and trailers are highly specialized, and may only be used infrequently on particular types of construction projects. If a trucking company were to invest hundreds of thousands of dollars on such a specialized truck, and further invest the resources to train its employee driver to operate the truck, the reality is that truck would sit in the yard unused for the vast majority of time when it wasn’t needed. Rather than waste resources on such an investment, when the construction trucking company submits a winning bid on a

project calling for the specialized equipment, it makes more sense to call the local owner-operator who has the needed equipment. Owner-operators can and do contract with a wide variety of trucking companies, who only occasionally need to use the owner-operator's equipment and operating skills. Because the owner-operator is able to get work regularly from a wide variety of trucking companies, they can earn a steady stream of income and can do so at a competitive price. If the trucking company instead had to purchase the truck and let it sit unused in the yard, the trucking company would have to charge much higher rates on the rare occasions when the equipment was needed.

The market efficiencies from the owner-operator model are truly amazing. Truckers are, by definition, mobile, and thus whenever and wherever there is a demand for construction trucking services, our members will travel to the location to do the work, often staying in hotels on a weekly basis or even sleeping in the berth of the their truck. For example, in the aftermath of the latest string of Northern California wildfires, there was a huge demand for hauling away debris from burned out buildings and subdivisions, so many dump truck operators from Southern California relocated to Northern California for months in order to perform the necessary hauling. The volume of trucks and drivers domiciled in Northern California could not possibly meet the needs of this emergency.

D. The Benefits of Being an Owner-Operator Rather than an Employee

Studies have demonstrated that self-employed independent owner-operators running their own businesses do quite well financially. In fact, the vast majority of independent owner-operators make more money than their counterparts employed as company drivers, even accounting for union wages. Median income for independent owner-operators is, on average, approximately 40% higher than the median income for employee drivers. See, e.g., John Husing, Ph.D., *Owner Operator Driver Compensation* (2015). It is also well known that many workers wish to be independent contractors for specific non-employment benefits. Research shows that less than one in ten independent contractors would prefer a more “regular” nine-to-five type of work arrangement. See, e.g., Peter Tran, *The Misclassification of Employees and California's Latest Confusion Regarding Who Is an Employee or an Independent Contractor*, 56 Santa Clara L. Rev. 677, 701 (2016).

As independent contractors, owner-operators get to decide when they want to work, where they want to work, how often they want to work, and when they want to stay home with their sick child, and when they want to work extra hours to earn more money.

A common business model in California is for an independent owner-operator to work for himself or herself for a period of time to build up his or her experience and reputation in the industry. Then, as he or she is looking to expand

his or her business, that owner-operator will bid on jobs that require more than just the single truck that he or she owns. At that time, the owner-operator will subcontract with one or more other owner-operators to complete the job that he or she could not have completed alone.

Eventually, the owner-operator may have enough business to warrant buying more trucks and hiring one or more employee-drivers. In this way, small businesses are able to grow from one truck/one driver operations to larger fleets with multiple trucks and multiple employee drivers. This model has brought prosperity to thousands of independent owner-operators throughout the state, many of whom are minorities and people of color. The vast majority of medium and large size construction trucking companies now in California were started only a generation or two ago by entrepreneurial one-truck owner-operators who slowly built their business.

III. AB 5 WOULD DESTROY THE OWNER-OPERATOR MODEL

A. AB 5 Radically Altered the Rules for Classification of Employees and Independent Contractors

AB 5 was signed into law on September 18, 2019, with an effective date of January 1, 2020. AB 5 codified and expanded the application of the decision in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) (“*Dynamex*”). *Dynamex*, and in turn AB 5, establish a three-part test for determining whether a worker is an employee or an independent contractor. For

decades in California, the determination of whether a worker was classified as an independent contractor or an employee was governed by the test set forth in *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989) (“*Borello*”). The *Borello* test was abandoned by the decision in *Dynamex*, but was resurrected by the Legislature in the large number of exemptions and carveouts provided to various industries that can still operate under the *Borello* standard either by legislative fiat, or by meeting a series of criteria set out in AB 5.

The construction trucking industry nominally got an exemption in AB 5, but in fact it only benefits the prime contractor at the top of the chain, not the owner-operators at the “bottom” of the chain. AB 5 enacted new Labor Code section 2750.3. Subdivision (f) of that section makes the *Borello* standard applicable to the relationship between a contractor and a subcontractor in the construction industry, providing certain criteria are met. Subdivision (f)(8) appears to apply specifically to the construction trucking industry, and arguably allows contractors and construction trucking subcontractors to be governed by *Borello* assuming certain criteria are met.⁵ But that statutory carve-out only benefits contractors, who will have some assurance that their liability for misclassification claims is

⁵ The exact meaning of subdivision (f) is currently being litigated in a proceeding pending in the Central District of California. See *WSTA v. Becerra*, Case No. 5:19-cv-02447 CAS KKx. Counsel for the instant amicus represents WSTA in that action.

governed by the more workable test in *Borello* as opposed to the ABC test from *Dynamex*. That carveout provides no relief whatsoever to the relationship between the trucking subcontractor and the owner-operators with whom the trucking company contracts. Quite the opposite, AB 5 mandates that all the owner-operators will be treated as employees. Labor Code section 2750.3, subdivision (f)(8)(B) provides:

For work performed after January 1, 2020, any business entity that provides construction trucking services to a licensed contractor utilizing more than one truck *shall be deemed the employer for all drivers of those trucks*.

Emphasis added. Appellants in the instant case have taken the position in another court that the foregoing statutory language is not a mandate, and that owner-operators are still subject to the ABC test.⁶

But it ultimately makes no difference whether AB 5 mandates that owner-operators are deemed employees, or instead they are simply subject to the default ABC test. Either way, they will be deemed employees. This is so because the B prong of the ABC test requires “that the worker performs work that is outside the usual course of the hiring entity’s business.” *Dynamex, supra*, 4 Cal.4th at 916-917. And owner-operators are, by definition in the exact same business as the construction companies that hire them. As a result, they will necessarily fail the B

⁶ See *WSTA v. Becerra*, Case No. 5:19-cv-02447 CAS KKx, Dkt. #30 at 2, Dkt #31 at 4.

prong, and because the ABC test requires all three prongs to be met in order to be determined an independent contractor, owner-operators will be deemed employees every time the test is applied.⁷

B. The Consequences of Being Deemed an Employee

If AB 5 is not enjoined as preempted, owner-operators will no longer be able to effectively market their services. All of the efficiencies that they provide in the construction trucking industry will be destroyed, because all of the trucking companies that currently contract with them on a temporary basis will have to treat them as employees. This is bad for two reasons. First, from the point of view of the trucking company, having a fleet of employee drivers and trucks is expensive and inefficient. This is legally significant because the economic realities of the industry demonstrate exactly why AB 5 is preempted by the FAAAA⁸ as set forth more fully in the next section.

Second, from the perspective of the owner-operators, it takes away their freedom to run their own business. It takes away their freedom to decide when and where to work. It takes away their ability to benefit from investing their own capital, time, and expertise into maintaining a truck and running a business. It

⁷That is precisely what the district court below found. See ER 13-14.

⁸Federal Aviation Administration Authorization Act of 1994, codified at 49 U.S.C. § 14501(c)(1).

devalues the dollars they spent on purchasing their own truck, and the hours they spent maintaining it as their most important business tool. Most importantly, it robs them of their opportunity to pursue the American dream and relegates them permanently to the status of low-paid hourly worker with no hope of advancement, no hope of building their own company, and a diminished ability to provide the quality of life and standard of living for their families that made them choose their careers in the first place.

C. Requiring Owner-Operators to Be Employees Will Impact the Prices, Routes and Services of Motor Carriers

The FAAAA provides that states “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). This Court has recently interpreted this preemption provision broadly. “The phrase ‘related to’ embraces state laws ‘having a connection with or reference to’ carrier ‘rates, routes, or services,’ whether directly or indirectly.” *Cal. Trucking Ass’n v. Su*, 903 F.3d 953, 960 (9th Cir. 2018).

Keeping in mind the foregoing discussion of the economic realities of the construction trucking industry, there can be no doubt that eliminating independent owner-operators and forcing them to become employees – or not work at all – will

have direct and severe impacts on the prices, routes, and services. Because employees impose additional costs on employers that are not present with independent contractors, all construction trucking companies will be faced with an immediate and stark choice: do we raise our prices in order to continue to provide the current level of service, or do we cut our services in order to continue to operate profitably given the new expenses created by the employment mandate?

Different trucking companies will undoubtedly make different decisions, but there can be no denying that some trucking companies will raise their prices. And the price increase will be dramatic, as the costs of employee status can raise the employer's cost by up to 30% compared to a comparable independent contractor. Some companies will simply refuse to use owner-operators as employees, and thus they will not be able to provide certain services that they currently provide. They will be forced to manage their workload with only their employee drivers, which means many jobs will get delayed, and some work will not even be performed because it will be cost prohibitive for the trucking company to purchase and maintain specialized equipment in their fleet that is only used occasionally. Routes will also be affected, because certain routes are more economically efficient than others when dealing with hourly, employee drivers. For example, paying an hourly

driver to sit in rush-hour traffic is expensive. As such, rational trucking companies will only choose to service routes that minimize such delays.⁹

Appellees' Brief explains in detail the impacts on prices, routes and services. Dkt. 39 at 17-25. But it overlooks one real consequence of AB 5 that could have the most profound impacts on prices, routes and services. Of the thousands of owner-operators in California, many will no longer be able to get work and run their business. With their business model being effectively declared illegal, no trucking companies will want to hire them. As a result, thousands of small businesses will close, and those owner-operators will be forced to go into other industries. There will be a glut of used trucks for sale as owner-operators declare bankruptcy and sell their assets, but no one to purchase them. For those who want to stay in the industry and become employees, there will be a shortage of employee drivers after many of the current owner-operators exit the business altogether. With labor shortages, the cost of wages tends to increase, thereby further increasing the downstream impacts on prices, routes and services throughout the construction trucking industry. In short, if implemented, AB 5 will create an

⁹ Under the traditional independent contractor model, if the trucking company pays the owner-operators by the load, or by the ton, then it is the owner-operators who must bear the cost of fuel while sitting in traffic. The owner-operators can account for this in the price or refuse to take a job if they determine that their fuel expense will make the job unprofitable for them.

unprecedented sea change in the construction trucking industry. The magnitude of the impacts on prices, routes and services will be devastatingly huge.

CONCLUSION

For the foregoing reasons, American Dream Coalition urge this Court to affirm the preliminary injunction.

ELLISON, WHALEN & BLACKBURN
Dated: May 13, 2020
/s/ Patrick Whalen
Patrick Whalen
Attorneys for Amicus Curiae AMERICAN
DREAM COALITION

CERTIFICATE OF COMPLIANCE

This document complies with [the type-volume limit of Fed. R. App. P. 29(a)(4)(G) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 4,823 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word part of Office 365 in Times New Roman size 14.

ELLISON, WHALEN & BLACKBURN
Dated: May 13, 2020
/s/ Patrick Whalen
Patrick Whalen
Attorneys for Amicus Curiae AMERICAN
DREAM COALITION