**CASE NO. 20-55106; 20-55107**

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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CALIFORNIA TRUCKING ASSOCIATION, ET AL,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, ET AL.,

Defendants-Appellants,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant-Appellant.

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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

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# BRIEF OF AMICUS CURIAE WESTERN STATES TRUCKING ASSOCIATION IN SUPPORT OF APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, proposed Amicus Curiae, Western States Trucking Association is a 501 (c)(6) trade association, and has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Western States Trucking Association ("WSTA") is a nonprofit trade association that represents nearly 1,000 construction industry related trucking companies ranging in size from 1 truck to over 350 trucks whose business constitutes over 75% of the hauling of dirt, rock, sand, and gravel operations in California. The mission of WSTA is to advance the professional interests of construction trucking companies in California. Materials hauled by members include dirt, sand, rock, gravel, asphalt and heavy equipment. WSTA members typically transport construction material from aggregate plants, asphalt and cement plants to construction sites. Dirt is primarily hauled from a barrow or construction site to another construction site.

WSTA's member employers provide work for approximately 5,000 drivers, mechanics, support personnel and managers. Approximately 40% of WSTA's members are sole proprietors – small one-truck independent contractor owner-operators motor carriers.[2] In addition to dump truck operators, WSTA also

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[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.

represent a large segment of the construction industry that hauls oversized and overweight off-road vehicles and materials, plus a specialized segment that operates pneumatic bulk trucks, water trucks and flatbed construction trucks within this state. All operators of such trucks are motor carriers, and the vast majority of WSTA members are motor carriers as that term is defined in 49 U.S.C. §13102.

The mission of WSTA is to advance the professional interests of construction trucking companies in California.[3]

AB 5 will force all of WSTA's members to radically change their business models by forcing independent contractor truckers to be treated as employees. Some fortunate companies that survive will increase their existing staff of employee drivers, and will increase their prices to make up for the increased expenses. Other companies will be forced to dramatically reduce the services they provide, and the routes they service. For many small owner-operators, the result will be that they will no longer be able to work as independent contractors by marketing their trucks and their skills as drivers, because the employment mandate will be cost-prohibitive. As a result, many will be forced to close their businesses and leave the industry. WSTA urges this court to uphold the injunction and reject the appellants' arguments.

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

## ARGUMENT

## I. INTRODUCTION

WSTA joins in the arguments made in Appellees' Answering Brief (see Dkt. 39) and files this amicus brief to illustrate the particular impacts of AB 5 on one segment of the trucking industry in California, and to amplify certain points that are particularly relevant to WSTA members.

Specifically, this brief's primary focus is on the way trucking services are delivered, by fleets of employee drivers as well as subcontracted trucking companies, in order to demonstrate why the ABC test codified in AB 5 mandates an employment relationship between trucking companies. Second, the brief identifies recent legal developments that make clear that the trucking industry is indeed in danger of irreparable harm if the injunction is lifted and AB 5 is enforced. Finally, the brief debunks the notion that the business-to-business exception in AB 5 has any applicability to the trucking industry.

## II. AB 5 WILL CONVERT ALL INDEPENDENT CONTRACTOR TRUCKING COMPANIES INTO EMPLOYEES

### A. Brief Overview of WSTA Members and the Trucking Services They Provide

WSTA members engage in a wide variety of trucking services, including both inter- and intrastate hauling. Many members are in the construction trucking industry, although WSTA membership has grown to include members from other

types of trucking as well. Member companies range in size from large fleets of 300 trucks and employee drivers, to small, one-truck owner-operators, with companies of all sizes in between. Our members generally work on construction projects hauling material and/or equipment to and from the worksite. However, they also engage in traditional freight and cargo transport as well.

Virtually all of commercial trucking relies on brokering to one degree or another. For established regular routes that do not vary with the season, or the weather, companies can easily staff up with employee drivers to service those routes. However, much of trucking involves fluctuating demand for trucking services. It is simply not commercially practicable for a company to rely entirely on employee drivers, because customers will occasionally need services that outstrip the capacity of a trucking company's fleet of trucks and staff of drivers. In the modern on-demand economy, when a trucking company wins a contract for trucking services that exceeds its available supply of trucks and employee drivers, there is no time to go out and purchase new trucks and hire and train new drivers. The customers want – demand – that the delivery of the cargo be completed immediately. Indeed, one of the keys to winning bids on trucking services is the ability of the trucking company to reliably and quickly complete the job.

In addition to the critical ability to have a rapid response time, trucking companies do not have the capital or resources to rapidly increase and decrease

their fleet of trucks and employee drivers as their volume ebbs and flows. As to the truck, our members regularly spend anywhere from $150,000 to $300,000 on a single truck, depending on how the truck is equipped. The only way it is commercially viable to invest that much money on a truck is to guarantee that the truck will be transporting goods every day, because if the truck is not moving, the company is losing money on that capital investment. But obviously, if a company only needs an excess of trucks for a single temporary job, it would go out of business if it purchased enough trucks to service that one job and then parked those trucks after the job was completed, simply because it would not be earning any revenue to service the debt on those newly-purchased trucks.

The same is true for employee drivers. Drivers need to be hired, trained, sent to a medical screening, enrolled in a drug and alcohol testing program, and then educated on the employer's particular routes and operational policies. It can take days or weeks from the hiring of an employee driver to the point in time they are ready to actually haul a load for their employing trucking company.

Because of these realities inherent in the business of trucking, trucking companies will subcontract with other trucking companies when their volume exceeds their own internal fleet/employee resources. These subcontracting companies may be other large or mid-sized fleets that have excess capacity, or they may be individual owner-operators who own their own truck and trailer and

routinely hire themselves out to whichever larger trucking company needs extra capacity on a temporary or per-job basis. The trucking company may complete a job for a customer using only its own fleet of trucks and employee drivers, or it may use a mixture of its own fleet/employees combined with other subcontracted trucing companies to supplement its workforce, or it may subcontract the entire job if its own workforce is entirely occupied with work for other customers.

When this subcontracting occurs, it is referred to as "brokering," because the trucking company has obtained work from a customer, and is giving some or all of that work to other trucking companies. It is common in the trucking industry to charge a brokering fee – typically 5% to 8%. Thus, if customer for a particular hauling job is paying the trucking company $100/load, the trucking company may broker some or all of that job to other trucking companies, paying them $95 per load. Often, the subcontracting companies are companies that were the losing bidders on the contract in question, so they are happy to get at least some of the work.

It is common for Company A to broker work to Company B one day, and then on another day, Company B will broker work to Company A. Through these subcontracting transactions, trucking companies are able to bid on multiple jobs, even if the sum total of all the jobs will exceed their in-house supply of trucks and drivers, because they can usually broker the excess work to others in the trucking

industry. Indeed, smaller owner-operators thrive on this practice. One-truck owner-operators, and to a certain extent small and medium trucking companies, do not always have the skills, experience, or relationship to successfully bid and win large contracts for trucking services. They simply don't have the resources to pay for the staff and overhead necessary to go out and bid jobs. Instead, they benefit from the work that larger companies do in winning the contracts, because they will often be called upon to handle the overflow work that exceeds the capacity of the winning bidder trucking company.

Because of the manner in which trucking services are bid, won, and subcontracted, it is an undeniable fact that all of the trucking companies are all engaged in the same "usual course of business" when they subcontract with each other.

B. AB 5 Makes It Illegal to Subcontract with Other Trucking Companies as Independent Contractors

AB 5 codified the ABC test announced in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) as follows:

> Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily

> engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

*Dynamex*, *supra*, 4 Cal.4th at 916-917. The new ABC test announced in *Dynamex* mandates that the "hiring entity" must prevail on all three prongs, to show that the "worker" is an independent contractor. *Id*. at 955. Failing to prevail on even one prong means that the "worker" will be considered an employee, even though the "worker" is an independent business. As discussed earlier, in the trucking business, both the "hiring entity" and the "worker" are invariably both independent trucking companies, and thus, a defendant in any action would almost certainly fail the B-prong of the test, as both are in the same business.

Thus, under the ABC test of AB 5, independent companies will be deemed to be the employees of one another, rather than the independent contractors they truly are. For these reasons it is plain that the district court below was correct that AB 5 is "an all or nothing" law that "categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees." See ER 013. For this reason, AB 5 creates direct impacts on prices, routes and services of motor carriers as explained by Appellees. See Dkt. 39 at 17-25, 36-40.

## III. AB 5 THREATENS IRREPARABLE HARM TO THE TRUCKING INDUSTRY, WHILE THE INJUNCTION CREATES NO UNDUE BURDEN FOR THE STATE

A. The Exposure to Liability is High

The possibility that any WSTA member trucking company could be subject to a misclassification suit by any one (or all) of the various trucking companies with whom it subcontracts is an intolerable risk, because the ABC test makes it a virtual certainty that the defendant will lose any such action brought against it. In California, most of the myriad wage and hour claims and other Labor Code violations have statutes of limitations of three to four years, which means the "tail" of liability for trucking companies is enormous. For average-sized company, the potential liability could easily exceed tens of millions of dollars. This exposure is undeniably "irreparable harm" of the type contemplated by the relevant case law:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

*Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Even worse than the threat of private civil litigation is the fact that AB 5 expressly allows enforcement by public agencies. New Labor Code section 2750.3, subdivision (j) expressly authorizes the Attorney General and city attorneys of certain large cities to prosecute claims against employers for alleged

misclassification. And the State of California did not waste much time in acting on this new grant of prosecutorial authority. Just last week, the Attorney general and several large city attorneys filed suit against Uber and Lyft, alleging they violated the ABC test of AB 5 by misclassifying drivers as independent contractors. *California v. Uber Techs., Inc.*, No. _____ (Cal. Super. Ct. May 5, 2020).

B. The Equities Tip Strongly in Favor of Appellees

But for the injunction issued by the lower court in the instant case, WSTA members would be subject to similar prosecutorial actions as those facing Uber and Lyft. This fact rebuts the claims of appellants that there is no threat of imminent and irreparable injury to the appellees. See Dkt. 21 at 42-45, and Dkt. 23 at 32. Indeed, the Attorney General, a party in this action, should not be heard to argue that there is no threat of irreparable harm to appellees while at the same time announcing at his press conference last week that he would zealously enforce AB 5 against all employers who misclassify their employees. In short, appellees and WSTA members, and indeed the entire trucking industry, is justifiably fearful that the next action will be filed against them.

Conversely, neither the State nor the People of California will suffer any harm from the injunction. In enacting AB 5, the Legislature expressly contemplated the possibility that courts might overturn all or part of the new law,

and accounted for it by ensuring that the old, pre-*Dynamex* law would apply in those situations. Labor Code section 2750.3, subdivision (a)(3) provides:

> If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*).

Thus, contrary to appellants' claims, the *Borello* standard which served for decades as the legal framework for analyzing misclassification claims, will necessarily be in place to protect workers during the pendency of the injunction.

## III. THE BUSINESS-TO-BUSINESS EXCEPTION IN AB 5 OFFERS NO RELIEF TO THE TRUCKING INDUSTRY

Appellant IBT argues that motor carriers can avail themselves of the business to business exception in AB 5. However, this entirely untethered to the reality of the trucking industry described above. And must be rejected.

Tellingly, the IBT brief relegates the elements of business-to business exception to a mere footnote. See Dkt. 21 at 9, fn. 2. And even in the footnote, the statutory language is characterized, rather than quoted directly. In fact, the 12 elements that must be met to avail oneself of the business-to-business exception are set forth in Labor Code section 2750.3, subdivision (e)(1)(A) through (L). While it would be difficult for some trucking businesses to meet many of the 12

criteria, there is only one that need be discussed for present purposes, as it makes it *impossible for any trucking* company to fit within the exception. Subdivision (e)(1)(B), the second of the 12 elements, sets forth the following requirement: "The business service provider is providing services directly to the contracting business rather than to customers of the contracting business."

Trucking companies, by definition, carry loads for their customers. As set forth above, when subcontracting occurs in the trucking industry, the subcontracting trucking company is, by definition, providing a service to the customers of the original trucking company. Thus, there is no way for a "trucking company to credibly argue that their subcontractor was providing services to the trucking company as opposed to the trucking company's end customer. A simple example illustrates the point. Assume a trucking company won a contract to haul fifty loads of material for a customer at a given price on a certain date. The trucking company opts to use its own fleet of 25 trucks and employee drivers for half of the loads, and subcontracts out the other half of the work to several different trucking companies. If one or all of those subcontracting companies sued for misclassification, the trucking company defendant would have to argue that while its own employee drivers were clearly providing services to the customer, the subcontracted trucks were providing services to the trucking company, even

though all the trucks carried identical loads of cargo and went to exactly the same place on the same date. Such an argument would be patently unavailing.

Thus, subdivision (e)(1)(B) is similar to the B prong of the ABC test in that it is impossible for trucking companies to satisfy. It is notable that even the Attorney General refuses to argue that the business-to-business exception applies. See Dkt. 23 at 13-14, and fn. 9. That is because a fair reading of the statute makes it clear that the trucking industry could never satisfy the test. IBT's argument to the contrary should be rejected.

## IV. AB 5 IS PRECISELY THE TYPE OF LAW THAT CONGRESS INTENDED TO BE PREEMPTED BY FAAAA

Approximately 20% of WSTA members operate in locations on or near the California border with another state. They regularly cross state lines to engage in interstate trucking of all types, sometimes crossing the border multiple times per day doing several short-haul runs for a customer. This practical real-world example highlights why AB 5 is exactly the type of law that is subject to preemption by the FAAAA,[4] as it impermissibly impacts the prices, routes and services that such motor carriers can provide.

The relevant provision of the FAAAA provides:

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

> (1) General Rule. Except as provided in paragraphs (2) and (3), a State [or] political subdivision of a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The phrase "related to" in this general preemption provision is "interpreted quite broadly." *Independent Towers of Washington v. Washington*, 350 F.3d 925, 930 (9th Cir.2003). The principal purpose of the FAAAA was "to prevent States from undermining federal deregulation of interstate trucking" through a "patchwork" of state regulations. *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 395–96 (9th Cir.2011). Yet AB 5 creates the exact type of patchwork that will severely restrict the free flow of commerce between states.

There are many WSTA member companies located in places like Ehrenberg Arizona (just across the border from Blythe California) that regularly perform work in California and one or more other states, like Arizona. Some jobs will require the trucks to cross the border multiple times per day. For jobs performed outside of California, the trucking company can continue to contract with other trucking companies as it has for years, and neither company needs to worry about liability for misclassification. However, each time any of the drivers crosses back into California, the rules of the game change, such that now they must be deemed employees of the company with whom they are contracting, at least for the time they are inside California's borders. The impacts of this new legal reality would be far-reaching.

First, the trucking company would have to implement intricate and expensive GPS technology to precisely monitor the location of its trucks so that it could know precisely when and where the truck entered or exited California, so that it could keep track of the rules that apply in each state. The administrative

overhead for this type of monitoring would be exorbitantly costly. The trucking company would have to hire one or more staff to not only monitor the geolocation of the trucks, but prepare and store the necessary documentation to record each truck's location for each day of work for four years. This new cost alone would be prohibitive to many companies, and many would simply stop providing service across state lines. For those companies that tried to continue their services, they would necessarily have to increase the prices charged to their customers and to other trucking companies with whom they contract.

Companies outside of California would be reluctant to send trucks into California for fear of being subject to the ABC test. But they would also be reluctant to contract with California trucking companies for cross-border work, because while any of the drivers were in California for any part of the job, the out-of-state trucking company could be liable for misclassification. In order to protect themselves, they would seek either to minimize or eliminate their routes into California (thereby creating an immediate and obvious impact on the routes the service and the services they provide) or they would insist on upon strong indemnification clauses in their contracts with California trucking companies. They would also likely demand access to the detailed geolocation data of the other California company's drivers in order to document and protect themselves. Thus, once again, the California company would be forced to dedicate time and resources to providing that documentation (thus mandating a new service they would have to provide) and would have to raise their prices to pay for the risk associated with the type of indemnification that out of state companies would demand.

Quarries and other businesses near the border that regularly ship material across state lines would have to radically alter the way the deliver their goods to customers. One likely scenario for an out of state company would be to contract with a California trucking company for shipments into California, but it would first

use out-of-state trucks and drivers to ship the material to the border. Once there, they would unload the trailer, and a California trucker would attach the trailer and carry it into California. This is incredibly expensive and inefficient. Not only would such a load now require two trucks and drivers instead of one, but it also requires each truck to "dead-head[5]" for half of the trip. Moreover, it creates a loss of time for the process of unhooking the trailer and then attaching it to another truck. This would result in an incredible disruption to what is otherwise a relatively seamless interstate trucking marketplace. The cost of goods going into or out of California would dramatically increase to offset the new inefficiencies AB 5 would mandate. Many trucking companies would simply refuse to deal with cross-border cargo, thereby reducing the services they perform and the routes they service.

Because the very nature of trucking is its mobility, AB 5 will create ripple effects well beyond the borders of California. Trucks will no longer be able to travel across state lines with the efficiency they currently enjoy. FAAAA was enacted to prevent precisely this type of state law from interfering with the efficient movement of goods throughout the country.

[5] Deadheading is when a truck drives a route with no trailer or cargo attached. It is by definition a waste of money because the company has to pay the driver, pay for fuel, tires, etc. but is not earning any revenue from the trip.

## CONCLUSION

For the foregoing reasons, Amicus WSTA urges this Court to affirm the preliminary injunction.

ELLISON, WHALEN & BLACKBURN
Dated: May 13, 2020
/s/ Patrick Whalen
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## 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 4,553 words.

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