B304240

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent.

CAL CARTAGE TRANSPORTATION EXPRESS LLC; CCX2931, LLC, K&R TRANSPORTATION CALIFORNIA LLC; KRT2931, LLC, CMI TRANSPORTATION LLC; AND CM2931, LLC,
Defendants and Real Parties in Interest.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
CASE NOS. BC689320, BC689321, BC689322
WILLIAM F. HIGHBERGER, JUDGE • TELEPHONE NO. (213) 310-7010

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS; [PROPOSED] ORDER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Chamber of Commerce of the United States of America requests permission under California Rules of Court, rule 8.200(c), to file the attached amicus curiae brief in support of defendants and real parties in interest Cal Cartage Transportation Express LLC; CCX2931, LLC; K&R Transportation California LLC; KRT2931, LLC; CMI Transportation LLC; and CM2931, LLC.[1]

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country—including throughout California. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the California business community.

The Chamber has a strong interest in this case because it raises important and recurring questions concerning the extent to which states may interfere with the prices, routes, and services of

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[1] No party or counsel for a party in the pending appeal authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

motor carriers. A substantial number of the Chamber's members are motor carriers or rely on the services of motor carriers in their day-to-day business. The motor carrier industry also affects nearly every business in the United States, whether directly or indirectly, along with American consumers. Affirming the order below is necessary so that motor carriers can continue to compete freely and efficiently, with prices, routes, and services dictated by the marketplace, instead of by state regulation. Affirmance would also ensure that, consistent with Congress's goals, individuals and businesses continue to enjoy a full range of services at prices determined only by the free market.

For these reasons, and those more fully expressed in its brief, the Chamber respectfully requests leave to file its amicus curiae brief in support of defendants and real parties in interest.

August 20, 2020

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AMICUS CURIAE BRIEF

INTRODUCTION

The Federal Aviation Administration Authorization Act of 1994 (FAAAA) expressly preempts any state "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 plain language of this express preemption provision is broad, and it operates to " ' "prevent States from undermining federal deregulation of interstate trucking" through a "patchwork" of state regulations.' " (*California Tow Truck Ass'n v. San Francisco* (9th Cir. 2015) 807 F.3d 1008, 1018; see *American Trucking Ass'ns, Inc. v. City of Los Angeles* (9th Cir. 2009) 559 F.3d 1046, 1053 (*American Trucking*) [Congress "broadly preempt[ed] state laws . . . . to avoid the spectacle of state and local laws reregulating what Congress had sought to deregulate"].)

This broad preemption serves the FAAAA's "overarching goal" to "ensure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.' " (*Rowe v. New Hampshire Motor Transport Ass'n* (2008) 552 U.S. 364, 371 [128 S.Ct. 989, 169 L.Ed.2d 933] (*Rowe*), quoting *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 378 [112 S.Ct. 2031, 119 L.Ed.2d 157] (*Morales*).)

California Assembly Bill 5 (AB 5) frustrates Congress's aims by prohibiting motor carriers from hiring the independent owner-operators they have historically relied on to transport property in American commerce, with drastic impacts on carriers' prices, routes, and services (See Lab. Code, § 2750.3.)

Under AB 5, a worker "shall be considered an employee rather than an independent contractor" unless all three conjunctive requirements of the so-called "ABC" test are satisfied:

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(Lab. Code, § 2750.3, subd. (a)(1).)

The superior court determined that AB 5 "prohibits motor carriers from using independent owner-operator truck drivers" because, contrary to the "B" prong, independent-contractor drivers necessarily perform work within the usual course of a motor carrier's business. (*People v. Cal Cartage Transp. Exp. LLC* (Super. Ct. L.A. County, 2020, No. BC689320) 2020 WL 497132, at p. *12 (*Cal Cartage*).) This prohibition is backed by the threat of criminal and civil penalties. (See, e.g., Lab. Code, §§ 225, 226.6, 227, 553, 1199; Unemp. Ins. Code, §§ 1088.5, subd. (e), 1112, subd. (a), 1126.1; see also Penalty Reference Chart, Cal.

Employment Development Department <https://www.edd.ca.gov/pdf_pub_ctr/de231ep.pdf> [as of Aug. 17, 2020].)

After concluding that AB 5 would prevent the use of independent contractors, the superior court held that the FAAAA preempts AB 5 as applied to motor carriers. The superior court was correct to do so. Other courts properly have recognized the "obvious proposition" that a law like AB 5—"an 'all or nothing' rule requiring services be performed by certain types of employee drivers and motivated by a State's own [policy] goals" (*California Trucking Association v. Su* (9th Cir. 2018) 903 F.3d 953, 964 (*Su*))—is "highly likely to be shown to be preempted" by the FAAAA. (*American Trucking*, *supra*, 559 F.3d at p. 1056; see also *People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 775 (*Pac Anchor*) [noting that a state "may not prevent [businesses] from using independent contractors"]; *Schwann v. FedEx Ground Package System, Inc.* (1st Cir. 2016) 813 F.3d 429, 437-440 (*Schwann*) [the FAAAA preempts the "B" prong of Massachusetts's materially identical ABC test].) AB 5 "produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." (*Rowe*, *supra*, 552 U.S. at p. 372, quoting *Morales*, *supra*, 504 U.S. at p. 378.)

If AB 5 is not preempted, then nothing would prevent the 49 other states and innumerable municipalities from passing their own restrictions, which will create a "confusing patchwork"

of conflicting or duplicative worker-classification laws (*In re Korean Air Lines Co., Ltd.* (9th Cir. 2011) 642 F.3d 685, 694), choking the free and uniform flow of interstate commerce in the nationwide marketplace that Congress established in the FAAAA. The already far-reaching harms to California businesses and workers will be exponentially magnified throughout the United States should other states follow suit.

Petitioner asserts that AB 5 is not preempted because it is a generally applicable law that does not prohibit motor carriers from using independent contractors. Not so. AB 5 is not a law of "general applicability," though it would still be preempted, even if it were, because of the FAAAA's broad preemption provision. Petitioners also assert that AB 5 might not apply to motor carriers because of its business-to-business exception. But the state officials tasked with enforcing AB 5 have not agreed that motor carriers can avail themselves of the law's business-to-business exception. In any event, that exception cannot save AB 5 from preemption because it is incompatible with the longstanding motor-carrier business model that the FAAAA protects.

The superior court correctly applied controlling precedent and assessed the governing factors to conclude that AB 5 is preempted as applied to motor carriers operating in California. AB 5 exerts an impermissible significant impact on motor carriers' prices, routes, and services. Allowing California to impose its own preferred model for driver classification would

thwart the FAAAA's core deregulatory purpose and resurrect the very problems Congress sought to eliminate.

ARGUMENT

The Superior Court correctly held that the FAAAA preempts AB 5 as applied to motor carriers.

The FAAAA's preemption clause made deregulation of the motor-carrier industry real. Congress had already abolished the old regulatory regime, in which a federal agency (the Interstate Commerce Commission) oversaw motor carriers' "prices, routes, and services."

Congress recognized the need to ensure that individual states did not try to re-impose something like the old regime—not only because Congress favored deregulation as a policy matter, but because motor-carrier regulation should be uniform nationwide (with specified exceptions not relevant here) to facilitate interstate commerce, efficiency, and competition. The U.S. Supreme Court, the Ninth Circuit, and other courts have followed Congress's directive, repeatedly holding state laws invalid where those laws "relate[ ] to" a protected "price, route, or service" (49 U.S.C. § 14501(c)(1)), even if they take "the guise of some form of unaffected regulatory authority." (H.R.Rep. No. 103-677, 2d Sess., p. 84 (1994) [1994 WL 440339].) This court should follow that well-worn path in this case.

A. Congress adopted the FAAAA preemption clause to effectuate its successful deregulation of the motor-carrier industry.

Congress enacted the FAAAA's preemption clause as an integral part—indeed, the culmination—of a long-term effort to deregulate air and motor carriage. Congress recognized that, if individual states remained free to impose regulations like those that federal and state agencies had imposed under the regulatory system that Congress abolished, the benefits of deregulation would be lost. Indeed, state regulation was in one key respect *worse* than the federal regulation Congress did away with: "[t]he sheer diversity of [state] regulatory schemes" was itself "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." (H.R.Rep. No. 103-677, 2d Sess., p. 87 (1994) [1994 WL 440339].)

Congress's deregulatory effort began in 1978 with the Airline Deregulation Act which deregulated domestic air transportation. (See 49 U.S.C. § 41713.) " 'To ensure that the States would not undo federal deregulation with regulation of their own,' the Airline Deregulation Act included a preemption clause" materially identical to the one at issue in this case. (*American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219, 222 [115 S.Ct. 817, 130 L.Ed.2d 715] (*Wolens*), citing *Morales*, *supra*, 504 U.S. at p. 378.)

In 1980, two years after its successful airline deregulation, "Congress deregulated trucking." (*Rowe*, *supra*, 552 U.S. at p. 368.) Congress did not adopt a preemption clause in the 1980 legislation, but it was well aware that certain "individual State

regulations and requirements . . . [we]re in many instances confusing, lacking in uniformity, unnecessarily duplicative, and burdensome." (Motor Carrier Act of 1980, Pub. L. No. 96-296, § 19 (July 1, 1980) 94 Stat. 793.) Congress directed the relevant federal agencies to conduct a study and develop legislative recommendations. (*Ibid.*)

After 14 years of grappling with the challenges of non-uniform state regulation, Congress decided in 1994 to make a clean break. In enacting the FAAAA, Congress adopted a preemption rule for trucking modeled on the successful preemption clause for air carriers.

Although it made narrow, specified exceptions (not relevant here) tailored to the motor-carrier industry, Congress drew the "*[g]eneral* rule" of preemption in the FAAAA very broadly, exactly as it had in the Airline Deregulation Act. (49 U.S.C. § 14501(c)(1), emphasis added, boldface omitted. As the Conference Report for the FAAAA stated, Congress thus forestalled states' "attempt[s] to de facto regulate prices, routes or services of intrastate trucking *through the guise of some form of unaffected regulatory authority*." (H.R.Rep. No. 103-677, 2d Sess., p. 84 (1994) [1994 WL 440339], emphasis added.)

Therefore, in both the Airline Deregulation Act and the FAAAA, Congress specified that states may not adopt laws or regulations "related to" the deregulated aspects of the air and motor-carrier industries. (49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A).) In the case of motor carriers, the preemption clause specifies that state law may not relate to "a price, route, or

service of any motor carrier . . . with respect to the transportation of property." (*Id.*, § 14501(c)(1).)

This provision is appropriately "interpreted quite broadly: [a] state or local regulation is related to the price, route, or service of a motor carrier if the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services." (*Independent Towers, Wa. v. Washington* (9th Cir. 2003) 350 F.3d 925, 930, internal quotation marks omitted.)

B. Settled legal principles confirm that AB 5 is preempted.

The FAAAA preempts state laws that, like AB 5, require motor carrier services to be performed by employees rather than independent contractors, because such a restriction significantly impacts the prices, routes, and services of motor carriers. "Allowing each state and local government to enact diverse laws regulating" driver classification in the trucking industry "would implicate the same evils that Congress was seeking to cure in enacting section 14501(c)." (*Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040, 1048, abrogated on other grounds in *City of Columbus v. Ours Garage & Wrecker Service, Inc.* (2002) 536 U.S. 424 [122 S.Ct. 2226, 153 L.Ed.2d 430].)

In *American Trucking*, for example, the plaintiffs sought to enjoin enforcement of a state law that, among other provisions, required truck drivers at the Port of Los Angeles to "transition over the course of five years from independent-contractor drivers to employees of each licensed motor carrier." (*American*

Trucking, *supra*, 559 F.3d at p. 1049.) As the Ninth Circuit recognized, it "can hardly be doubted" that such a law "relate[s] to prices, routes or services of motor carriers" within the meaning of the FAAAA. (*Id.* at p. 1053.) The court accordingly held that "the independent contractor phase-out provision is one highly likely to be shown to be preempted" because it "insist[s] on [a] particular employment structure" governing the relationship between motor carriers and truck drivers and remanded with instructions to issue a preliminary injunction against the law's enforcement. (*Id.* at p. 1056.)

Similarly, in *Su*, the Ninth Circuit reaffirmed that "*American Trucking* stands for the obvious proposition that an 'all or nothing' rule requiring services be performed by certain types of employee drivers and motivated by a State's own [policy] goals [is] likely preempted." (*Su*, *supra*, 903 F.3d at p. 964.)

That "obvious proposition" resolves this case. "Like [the law enjoined in] *American Trucking*," AB 5 "effectively compel[s] a motor carrier to use employees for certain services." (*Su*, *supra*, 903 F.3d at p. 964.) That is "because, under the 'ABC' test, a worker providing a service within an employer's usual course of business will *never* be considered an independent contractor." (*Ibid.*, emphasis added.)

First, AB 5 impermissibly "bind[s] motor carriers to specific services." (*Dilts v. Penske Logistics, LLC* (9th Cir. 2014) 769 F.3d 637, 649 (*Dilts*).) Indeed, this sort of "service-determining law[ ]" (*Rowe*, *supra*, 552 U.S. at p. 373), which directly "insist[s] on" a "particular employment structure" favored by the state for policy

reasons (*American Trucking*, *supra*, 559 F.3d at p. 1056) is at the core of what the FAAAA preempts. As the Ninth Circuit acknowledged in *Su*, "other States have adopted the 'ABC' test to classify workers, the application of which courts have then held to be preempted" under circumstances indistinguishable from this case. (*Su*, *supra*, 903 F.3d at p. 964, citing *Schwann*, 813 F.3d at pp. 437-440 (the FAAAA preempts the "B" prong of Massachusetts's materially identical ABC test)).)

Because AB 5 has the effect of dictating an "independent contractor phase-out," it makes no difference that the law achieves that end without using those express words. (Cf. *American Trucking*, *supra*, 559 F.3d at p. 1056.) "What is important" for FAAAA preemption purposes "is the *effect* of a state law, regulation, or provision, not its form." (*Northwest, Inc. v. Ginsberg* (2014) 572 U.S. 273, 283 [134 S.Ct. 1422, 188 L.Ed.2d 538] (*Northwest*) (emphasis added).) "[I]t defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry." (*Id.* at p. 284, internal quotation marks omitted.)

The FAAAA's "related to" preemption clause is framed in " 'deliberately expansive' " language—" 'conspicuous for its breadth' " (*Morales*, *supra*, 504 U.S. at p. 384)—precisely because Congress was mindful that states would "attempt to de facto regulate prices, routes or services . . . through the guise of some form of unaffected regulatory authority." (H.R.Rep. No. 103-677, 2d Sess., p. 84 (1994) [1994 WL 440339].) The Court must

accordingly scrutinize whether a state law "[i]n fact" relates to the federally deregulated sector, based on a consideration of "the dynamics of the . . . transportation industry." (*Morales*, at p. 389.) And petitioner cannot dispute that AB 5 impermissibly "require[s] carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer)." (*Rowe*, *supra*, 552 U.S. at p. 372.) Specifically, AB 5 "insist[s]" that motor carriers use the "particular employment structure" of employee-drivers rather than independent owner-operators. (*American Trucking*, *supra*, 559 F.3d at p. 1056.)

Second, AB 5 is independently preempted because it significantly impacts motor carriers' routes. These impacts include both direct regulatory requirements, such as route changes to ensure drivers can comply with the meal and rest breaks that California mandates for employees, and significant economic impacts, such as route consolidations to offset the increased costs of the employee-driver model.

The FAAAA preempts state laws that "as an economic matter . . . have the forbidden significant effect" on motor carriers, which would offend Congress's deregulatory objectives no less than laws "actually prescribing rates, routes, or services." (*Morales*, *supra*, 504 U.S. at pp. 385, 388.)[2] For example, the

[2] Any attempt to restrict FAAAA preemption to the core category of price-, route-, and service-*determining* laws "simply reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes, and services.' " (*Morales*, *supra*, 504 U.S. at p. 385, citing *Pilot Life*

FAAAA forbids the application to motor carriers of "a State's general consumer protection laws" (*id.* at p. 383) or "state-law claim[s] for breach of the implied covenant of good faith and fair dealing . . . [that] seek[ ] to enlarge the contractual obligations that the parties voluntarily adopt" (*Northwest*, *supra*, 572 U.S. at p. 276) due to those laws' significant impact on motor carriers.

AB 5's requirements will predictably cause motor carriers to consolidate and reconfigure their routes. To take one example, in order to comply with California's mandated meal and rest breaks for employees, drivers would need to repeatedly alter their routes to find one of the limited places where they are legally allowed to park. This will inevitably reduce and alter the routes that the free market provides, resulting in serious negative consequences for amicus's members. That is simply "freshman-year economics." (*Sanchez v. Aerovias de Mexico, S.A. de C.V.* (9th Cir. 2010) 590 F.3d 1027, 1030, internal quotation marks omitted.)

Third, AB 5 is also independently preempted because it significantly impacts motor carriers' prices. Congress, in enacting the FAAAA, expressed particular concern that "[s]tate economic regulation of motor carrier operations causes . . . increased costs," among other "significant inefficiencies." (H.R.Rep. No. 103-677, 2d Sess., p. 87 (1994) [1994 WL 440339].)

AB 5's mandated replacement of independent owner-operators with a fleet of employee-drivers may nearly triple

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Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 50 [107 S.Ct. 1549, 95 L.Ed.2d 39].)

carriers' costs. (See *Cal Cartage*, *supra*, 2020 WL 497132 at p. *10.) This significant impact of AB 5 on the industry falls well within the bounds of FAAAA preemption. For example, the Ninth Circuit held that the economic effect of California's prevailing wage law on carriers—allegedly "increas[ing] prices by 25%"—was insufficiently significant, without more, to justify preemption under the FAAAA. (*Californians For Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1189.) But the three-fold price increase imposed by AB 5 (and inevitably passed on to consumers and other businesses) dwarfs that figure, in both degree and kind. This onerous economic regulation is obviously a far cry from those laws that, the U.S. Supreme Court has noted, the FAAAA "might not pre-empt" due to their " 'tenuous, remote, or peripheral' " impact on carriers, "such as state laws forbidding gambling" (*Rowe*, *supra*, 552 U.S. at p. 371), or "prostitution" (*Morales*, *supra*, 504 U.S. at p. 390).

Fourth, AB 5's collective impact on motor carriers' services, routes, and prices impedes national uniformity and holds back competitive market forces, thwarting the FAAAA's core deregulatory purpose. The potential benefits of an independent-contractor relationship, as opposed to an employer-employee relationship, are substantial. That is why " 'competitive market forces' "—which Congress wanted to be the primary factor in "determining . . . the services that motor carriers will provide" (*Rowe*, *supra*, 552 U.S. at p. 372, quoting *Morales*, *supra*, 504 U.S. at p. 378)—have led numerous delivery businesses in

California, in other states, and in the nationwide market to adopt independent contractor models. It is often simply more efficient for a logistics company not to be in the business of delivering packages over the "last mile" from distribution center to doorstep.

Yet California now asserts the right to preclude carriers from choosing to contract with individual delivery drivers. Motor carriers could also decide not to take on additional workers as employees, causing severe disruption in supply and distribution chains and leaving business customers that rely on trucking services in a lurch. Sustaining California's position would not only require carriers to adopt California's preferred business model, even when it artificially increases the price that those carriers must charge, but also permit the re-emergence of just the kind of inconsistent, economically disruptive "patchwork of state service-determining laws, rules and regulations" that Congress sought to eradicate in enacting the FAAAA. (*Rowe*, *supra*, 552 U.S. at p. 373.)

Here, the superior court correctly determined—in accord with persuasive authority from the Ninth Circuit and other jurisdictions—that AB 5 is preempted by the FAAAA. Any other conclusion would enable California to erect a new and anticompetitive barrier to the interstate transportation of property—precisely the type of rule that Congress abolished twenty-six years ago.

C. Petitioner's counterarguments are unavailing.

1. AB 5 is not "generally applicable," although that makes no difference.

Petitioner suggests that AB 5 is a law of "general applicability," such that the standard for finding preemption is somehow heightened. (Petition 35-41; see Br. of Amicus Curiae Attorney General Xavier Becerra 21-24.) This characterization is both incorrect and irrelevant.

To begin with, AB 5 is not a law of general applicability. The law is riddled with dozens of exemptions for millions of workers in various occupations spanning all kinds of vocations, skill levels, income, education and sophistication that somehow found favor with the state legislature. Indeed, the vast majority of the statute's text is spent delineating these intricately gerrymandered exceptions. (See Lab. Code, § 2750.3, subds. (b)(1)-(6), (c)(2)(B)(i)-(xi), (d)(1)-(2), (e)-(h).) This Court should accordingly reject petitioner's counterfactual characterization of AB 5 as "generally applicable."

Regardless, there is no exception from FAAAA preemption for state laws of general applicability. The U.S. Supreme Court, nearly three decades ago, rejected that proposed "loophole" as "utterly irrational" because "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." (*Morales*, *supra*, 504 U.S. at p. 386.) The argument for an implied exception also "ignores the sweep of the 'relating to' language" in the statutory text (*ibid.*), which defines the scope of

preemption by a state law's relation to the *federal* domain at stake—"price[s], route[s], or service of any motor carrier . . . with respect to the transportation of property"—not the state's objective in interfering with those interests (49 U.S.C. § 14501(c)(1)). Pursuant to these principles, the U.S. Supreme Court "ha[s] often rejected efforts by States to avoid preemption by shifting their regulatory focus." (*American Trucking Ass'ns v. Los Angeles* (2013) 569 U.S. 641, 652 [133 S.Ct. 2096, 186 L.Ed.2d 177]; *see Su*, *supra*, 903 F.3d at p. 966 ["the general applicability of a law" is neither "dispositive" nor "sufficient to show it is not preempted"].)

Instead, laws of general applicability, like all other laws, remain subject to the ordinary rules of FAAAA preemption. To be sure, the FAAAA may not preempt "a generally applicable background regulation in an area of traditional state power *that has no significant impact on a carrier's prices, routes, or services*." (*Su*, *supra*, 903 F.3d at p. 961, emphasis added; accord, *Dilts*, *supra*, 769 F.3d at p. 644 ["Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules *that do not otherwise regulate prices, routes, or services*" (emphasis added)].) But if a state law *does* exert an impermissible impact on prices, routes, or services, its general applicability cannot save it from preemption.

The FAAAA thus preempts many general laws as applied to motor carriers—including those with far more universal reach than AB 5, such as the "general consumer protection statutes" held preempted in *Morales*. (*Morales*, *supra*, 504 U.S. at p. 378;

see *Wolens*, *supra*, 513 U.S. at p. 240 (conc. & dis. opn. of O'Connor, J., joined by Thomas, J.) [emphasizing that "[t]he only 'laws' at issue in *Morales* were generally applicable consumer fraud statutes, not facially related to" the particular industry protected from state regulation].)

Petitioner relies heavily on *Pac Anchor* (Petition 35-40), but that decision is not contrary to these settled principles. Indeed, *Pac Anchor*'s discussion of *as-applied* challenges (the sort of arguments the defendants press here) makes clear that FAAAA preemption "calls for an analysis of the underlying state regulations to see if they relate to motor carrier prices, route, or services when enforced through the UCL." (*Pac Anchor*, *supra*, 59 Cal.4th at pp. 784-785.)

Although the Court also noted that "the FAAAA does not preempt generally applicable employment laws that affect prices, routes, and services" (*Pac Anchor*, *supra*, 59 Cal.4th at p. 783), it did so in the context of a *facial* challenge. But the defendants do not assert that AB 5 is facially invalid, and *Pac Anchor*'s discussion of as-applied challenges affirms that the ordinary rules of preemption apply. That the as-applied challenge to the UCL action in *Pac Anchor* failed has no bearing on the entirely different question whether the FAAAA preempts AB 5 as applied to motor carriers. The superior court correctly recognized as much. (See *Cal Cartage*, *supra*, 2020 WL 497132, at p. *10.)

2. AB 5's business-to-business exception does not save the law from preemption.

Petitioner also insists that AB 5 is not preempted because it does not prohibit motor carriers from using independent contractors. According to Petitioner, the trucking industry may fit within one of AB 5's gerrymandered exemptions, the business-to-business exception, thereby rescuing it from preemption under the FAAAA. AB 5 withholds application of the ABC test "to a bona fide business-to-business contracting relationship"—subject to a list of conditions and exceptions. (Lab. Code, § 2750.3, subd. (e).) Petitioner posits that a truck driver might be able to register as a "business" within the meaning of this provision and thereby escape reclassification as an employee under AB 5's broader rule. (See Petition 44-45, 48-49.) This argument fails.

As an initial matter, it is not clear that "motor carriers could, in fact, avail themselves of that exception." (*California Trucking Association v. Becerra* (S.D.Cal. 2020) 433 F.Supp.3d 1154, 1169.) In *California Trucking*, "the State Defendants [including the Attorney General of California and other state officials], who are tasked with enforcing AB-5," refused to "expressly concede that the [business-to-business] exception would apply." (*Ibid.*) And those defendants subsequently abandoned the argument on appeal. (See State's Br., *California Trucking Ass'n v. Becerra* (9th Cir., Mar. 11, 2020, No. 20-55106) 14, fn. 9; see also Br. of Amicus Curiae Attorney General Xavier Becerra 15, fn. 2 ["tak[ing] no position on the potential applicability of the statutory exemptions"].) Against that

backdrop, petitioner's apparent confidence that the business-to-business exception applies is baseless.

More fundamentally, the business-to-business model is not the longstanding owner-operator model that Congress had in mind when it passed the FAAAA. In the business-to-business model, a motor carrier would have to contract with another licensed business entity, rather than an individual owner-operator, to provide driver services. But the FAAAA's legislative history *specifically contemplates* that motor carriers may use owner-operators and makes clear that the FAAAA was aimed, in part, at preexisting California legislation discriminating against motor carriers who used owner-operators instead of employees. As one example of the "patchwork" of state regulation necessitating preemption, Congress identified a 1993 California law that targeted motor carriers "using a large proportion of owner-operators" for disfavored treatment relative to those using "company employees." (H.R.Rep. No. 103-677, 2d Sess., p. 87 (1994) [1994 WL 440339].) Indeed, the FAAAA's "central purpose" was to ensure "identical intrastate preemption" to *all* motor carriers, specifically including owner-operators. (*Id.* at p. 83.)

Thus, the significant regulatory hurdles the exception erects, even if theoretically surmountable by some truck drivers, would themselves contravene Congress's goals by impermissibly altering motor carriers' services. The FAAAA's preemption clause is not overridden merely because a state law may allow two distinct "system[s] of services that the market does not now

provide (and which the carriers would prefer not to offer)." (*Rowe*, *supra*, 552 U.S. at p. 372.) AB 5, even if interpreted as petitioner proposes, "is not any less of a regulation of [motor carriers] simply because there are two ways of complying with it." (*Egelhoff v. Egelhoff ex rel. Breiner* (2001) 532 U.S. 141, 150 [121 S.Ct. 1322, 149 L.Ed.2d 264].) The business-to-business exception does not save AB 5 from preemption under the FAAAA.

CONCLUSION

The Court should discharge the order to show cause and deny the petition for writ of mandate.

August 20, 2020

HORVITZ & LEVY LLP
JEREMY B. ROSEN

By: _____
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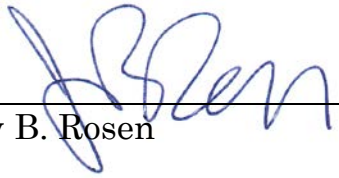
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.486(a)(6).)

The text of this petition consists of 4,631 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

Dated: August 20, 2020



Jeremy B. Rosen

B304240

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

CAL CARTAGE TRANSPORTATION EXPRESS LLC; CCX2931, LLC, K&R TRANSPORTATION CALIFORNIA LLC; KRT2931, LLC, CMI TRANSPORTATION LLC; AND CM2931, LLC,
Defendants and Real Parties in Interest.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
CASE NOS. BC689320, BC689321, BC689322
WILLIAM F. HIGHBERGER, JUDGE • TELEPHONE NO. (213) 310-7010

[PROPOSED] ORDER GRANTING LEAVE TO FILE AMICUS CURIAE BRIEF

IT IS HEREBY ORDERED that the application for leave to file an amicus curiae brief by The Chamber of Commerce of the United States of America is granted. Any answer to the amicus curiae brief may be served and filed by any party within __ days from the date of this order.

Dated: _____

_____
PRESIDING JUSTICE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On August 20, 2020, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS; [PROPOSED] ORDER** on the interested parties in this action as follows:

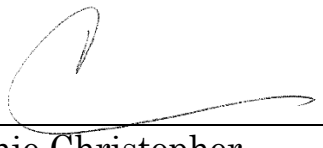
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons not registered on TrueFiling at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 20, 2020, at Burbank, California.



Connie Christopher

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Case No. B304240

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