Nos. 20-55106; 20-55107

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA TRUCKING ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, et al.,

Defendants-Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
No. 3:18-cv-02458 | Hon. Roger T. Benitez

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, RETAIL LITIGATION CENTER, INC., AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

Steven P. Lehotsky
Emily J. Kennedy
U.S. CHAMBER LITIGATION CENTER
1615 H STREET, N.W.
WASHINGTON, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

Theane Evangelis
Blaine H. Evanson
Max E. Schulman
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071
(213) 229-7000
TEVANGELIS@GIBSONDUNN.COM

Counsel for Amici Curiae

[Additional Counsel Listed on Inside Cover]

Deborah White
Kathleen McGuigan
RETAIL LITIGATION CENTER, INC.
99 M STREET, S.E., SUITE 700
WASHINGTON, D.C. 20003

Counsel for Retail Litigation Center

Stephanie Martz
NATIONAL RETAIL FEDERATION
1101 NEW YORK AVE., N.W.,
SUITE 1200
WASHINGTON, D.C. 20005

Counsel for National Retail Federation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* the Chamber of Commerce of the United States of America, Retail Litigation Center, Inc., and National Retail Federation each certifies that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (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 nation's business community.

The Retail Litigation Center, Inc. (the "RLC") is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party contributed money intended to fund its preparation or submission. No person other than *amici*, their members, and their counsel contributed money intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief.

on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus* in more than 150 judicial proceedings of importance to retailers.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to the annual GDP. NRF regularly submits *amicus curiae* briefs in cases raising significant legal issues for the retail community.

Amici have 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 motor carriers. A substantial number of *amici*'s members are motor carriers themselves 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.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

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." *Cal. Tow Truck Ass'n v. City & Cty. of San Francisco*, 807 F.3d 1008, 1018 (9th Cir. 2015) (citation omitted); *see Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009) (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. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

California Assembly Bill 5 ("AB5") 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. Under AB5, 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.

Cal. Lab. Code § 2750.3(a)(1).

The district court held that "[b]ecause contrary to Prong B, independent-contractor drivers necessarily perform work *within* 'the usual course of the [motor carrier] hiring entity's business,' drivers who may own and operate their own rigs will *never* be considered independent contractors under California law." ER13-14 (alteration in original). The court held that AB5 therefore effectively "requires motor carriers to artificially reclassify all independent-contractor drivers as employee-drivers." *Id.* at 14. This mandate is backed by the threat of criminal and civil penalties. *See*, *e.g.*, Cal. Lab. Code §§ 225, 226.6, 227, 553, 1199; Cal. Unemp.

Ins. Code §§ 1088.5(e), 1112(a), 1126.1; *see also generally* Cal. Emp't Dev. Dep't, *Penalty Reference Chart* (2018), https://www.edd.ca.gov/pdf_pub_ctr/de231ep.pdf.

For these reasons, this Court has already twice recognized the "obvious proposition" that a law like AB5—"an 'all or nothing' rule requiring services be performed by certain types of employee drivers and motivated by a State's own [policy] goals" (*Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 964 (9th Cir. 2018))—is "highly likely to be shown to be preempted" by the FAAAA (*American Trucking*, 559 F.3d at 1056). AB5 "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*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378). If allowed to stand, AB5 will spur the 49 other States and innumerable municipalities to pass their own restrictions, which will create a "confusing patchwork" of conflicting or duplicative worker-classification laws (*In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 694 (9th Cir. 2011)), 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 America should other States be allowed to follow suit.

The district court correctly applied controlling precedent and assessed the governing factors to issue a preliminary injunction preventing the State from enforcing AB5 against motor carriers operating in California. "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). As Appellees demonstrate, all of these factors are satisfied here. To avoid repetition, *amici* will focus on the likelihood of success on the merits and the irreparable harm that would result in the absence of preliminary relief.

I. Appellees are likely to succeed on the merits because AB5 exerts an impermissible significant impact on motor carriers' prices, routes, and services, as this Court's precedent establishes. 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. Appellants' counterarguments fail: (1) AB5 is not a law of "general applicability," though it would still be preempted even if it were; (2) the district court correctly framed and analyzed plaintiffs' challenge to AB5, rather than a hypothetical challenge to different statutes whose preemption is not at issue here; and (3) AB5's "business-to-business" exception cannot save the law from preemption because it too is

incompatible with the longstanding motor-carrier business model that the FAAAA protects.

II. Motor carriers and the businesses that rely on them, including many of *amici*'s members, face irreparable harm from the imminent state-mandated restructuring of the entire motor carrier industry in California. If the injunction below is lifted, AB5 will impose an impossible choice between violating the law, backed by potential criminal penalties, and incurring unrecoverable costs from the forced restructuring of business operations. Moreover, lifting the injunction would irrevocably disrupt and harm companies' business reputation and goodwill; exert a negative impact on customers and businesses relying on motor carriers' services; encumber a national delivery and supply chain that is already operating under an enormous and unparalleled burden; and deprive individual workers of their livelihood at a time of unprecedented job insecurity for American workers.

ARGUMENT

This Court should affirm the district court's order preliminarily enjoining the enforcement of AB5 against motor carriers in California.

I. Appellees Are Likely To Succeed In Showing That The FAAAA Preempts AB5.

The FAAAA's preemption clause made deregulation of the motor-carrier industry real. Congress had already abolished the old regime, in which a federal agency oversaw motor carriers' "prices, routes, and services." But 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 Supreme Court and this Court 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. Conf. Rep. No. 103-677, at 84 (1994)). 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.

1. *The Deregulatory Background*: 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. Conf. Rep. No. 103-677, at 87.

Congress's deregulatory effort began in 1978 with the Airline Deregulation Act ("ADA"), which deregulated domestic air transportation. "'To ensure that the States would not undo federal deregulation with regulation of their own,' the ADA included a preemption clause" materially identical to the one at issue in this case. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995) (quoting *Morales*, 504 U.S. at 378).

In 1980, two years after its successful airline deregulation, "Congress deregulated trucking." *Rowe*, 552 U.S. at 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, 94 Stat. 811. Congress directed the relevant federal agencies to conduct a study and develop legislative recommendations. *Ibid.*

2. *The FAAAA Preemption Clause*: 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.

While it made narrow, specified exceptions tailored to the motor-carrier industry,[2] Congress drew the "*[g]eneral* rule" of preemption in the FAAAA very broadly, exactly as it had in the ADA. 49 U.S.C. § 14501(c)(1) (emphasis added). It did so to forestall 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. Conf. Rep. No. 103-677, at 84 (emphasis added).

Thus, in both the ADA 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." *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 930 (9th Cir. 2003) (internal quotation marks omitted).

[2] None of those exceptions is even arguably at issue in this case, and Appellants invoke none of them.

B. AB5 Is Preempted Under Binding Precedent.

The FAAAA preempts state laws that, like AB5, 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*, 219 F.3d 1040, 1048 (9th Cir. 2000), *abrogated on other grounds by City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002).

In *American Trucking*, 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." 559 F.3d at 1049. As this Court 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 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 1056. And in *Su*, the Court 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 was likely preempted." 903 F.3d at 964.

That "obvious proposition" resolves this case as a matter of binding precedent. "Like [the law enjoined in] *American Trucking*," AB5 "effectively compel[s] a motor carrier to use employees for certain services." *Su*, 903 F.3d at 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, AB5 impermissibly "bind[s] motor carriers to specific services." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014). Indeed, this sort of "service-determining law[]" (*Rowe*, 552 U.S. at 373), which directly "insist[s] on" a "particular employment structure" favored by the State for policy reasons (*American Trucking*, 559 F.3d at 1056) is at the core of what the FAAAA preempts. As this Court 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. 903 F.3d at 964 (citing *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 437 (1st Cir. 2016) (the FAAAA preempts the "B" prong of Massachusetts's materially identical ABC test)).

Because AB5 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*, 559 F.3d at 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*, 572 U.S. 273, 283 (2014) (emphasis added). "It 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 284 (internal quotation marks omitted).

The FAAAA's "related to" preemption clause is framed in "deliberately expansive" language—"conspicuous for its breadth" (*Morales*, 504 U.S. at 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. Conf. Rep. No. 103-677, at 84. The Court must accordingly scrutinize whether a state law "in fact" relates to the federally deregulated sector, based on a consideration of "the dynamics of the … transportation industry." *Morales*, 504 U.S. at 389. And Appellants cannot dispute that AB5 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*, 552 U.S. at 372. Specifically, AB5 "insist[s]" that motor carriers use the

"particular employment structure" of employee-drivers rather than independent owner-operators. *American Trucking*, 559 F.3d at 1056.

Second, AB5 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. *See* Appellees' Br. 20-22. 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*, 504 U.S. at 385, 388.[3] For example, the FAAAA forbids the application to motor carriers of "a State's general consumer protection laws" (*id.* at 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*, 572 U.S. at 276) due to those laws' significant impact on motor carriers.

---

[3] 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*, 504 U.S. at 385 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987)).

AB5 will predictably cause motor carriers to consolidate and reconfigure their routes. For example, drivers "must repeatedly change their routes to find one of the limited places where they are legally allowed to park" in order to comply with California's mandated meal and rest breaks for employees. SER154. This will inevitably reduce and alter the routes that the free market provides, resulting in serious negative consequences for *amici*'s members. That is simply "freshman-year economics." *Sanchez v. Aerovias de Mexico, S.A. de C.V.*, 590 F.3d 1027, 1030 (9th Cir. 2010) (internal quotation marks omitted).

Third, AB5 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. Conf. Rep. No. 103-677, at 87.

AB5's mandated replacement of independent owner-operators with a fleet of employee-drivers may raise carriers' costs by *150% or more*. *See* Appellees' Br. 22-25. This significant impact of AB5 on the industry falls well within the bounds of FAAAA preemption. For example, this Court 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, 152 F.3d 1184, 1189 (9th Cir. 1998). But the 150%+ price increase imposed by AB5 (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 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*, 552 U.S. at 371 (citation omitted)), or "prostitution" (*Morales*, 504 U.S. at 390).

Fourth, AB5'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*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 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*, 552 U.S. at 373.

Here, the district court correctly determined—following this Court's binding precedent as well as persuasive authority from other jurisdictions—that Appellees are likely to succeed on the merits of their claim that AB5 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. Appellants' Counterarguments All Fail.

In an attempt to evade the inexorable conclusion that AB5 is preempted, Appellants offer three unpersuasive counterarguments. All fail under the FAAAA and controlling precedent.

First, AB5 is not a law of "general applicability," and even if it were, that status would not allow it to escape preemption in light of its significant impact on motor carriers' prices, routes, and services. *Second*, the district court correctly

framed and analyzed the challenge that Appellees pleaded and litigated *to AB5*—not, as Intervenor-Defendant International Brotherhood of Teamsters ("IBT") argues, some other, hypothetical claim challenging different state laws. *Third*, AB5's business-to-business exception cannot save the law from preemption for several reasons, including that independent owner-operators cannot meet the exception's onerous requirements.

1. AB5 Is Not "Generally Applicable," Although That Makes No Difference.

Appellants argue strenuously that AB5 is a law of "general applicability" rather than a law "specifically target[ing] the trucking industry." IBT Br. 31-32; *see also* State Br. 25. This argument is both incorrect and irrelevant.

To begin with, the district court correctly held that AB5 is *not* a law of general applicability. ER17. To the contrary, the law is riddled with dozens of exemptions for various occupations that found favor with the state legislature. Indeed, the vast majority of the statute's text is spent delineating these intricately gerrymandered exceptions. *See* Cal. Lab. Code § 2750.3(b)(1)-(6), (c)(2)(B)(i)-(xi), (d)(1)-(2), (e)-(h). Far from being a generally applicable law, AB5 exempts millions of workers, spanning all sorts of vocations, skill levels, income, education, and sophistication.

This Court should accordingly reject the State's counterfactual characterization of AB5 as "generally applicable." Because FAAAA preemption is a question of federal law, the Court "need not defer to a state entity's characterization

of a state law purpose" in this inquiry. *Tillison v. Gregoire*, 424 F.3d 1093, 1104 (9th Cir. 2005). The Court may not simply "take the regulator at its word," but "need[s] to go further with the analysis" (*American Trucking*, 559 F.3d at 1054), and "should be wary" of "crediting post hoc [state] rationalizations that conflict with the contemporaneous legislative record" (*Cal. Tow Truck Ass'n v. City & Cty. of San Francisco*, 693 F.3d 847, 864 n.15 (9th Cir. 2012)).

Regardless, there is no exception from FAAAA preemption for state laws of general applicability. The 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*, 504 U.S. at 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 Supreme Court "ha[s] often rejected efforts by States to avoid preemption by shifting their regulatory focus." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 569 U.S. 641, 652 (2013); *see also Su*, 903 F.3d at 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*, 903 F.3d at 961 (emphasis added); *accord Dilts*, 769 F.3d at 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 AB5, such as the "general consumer protection statutes" held preempted in *Morales*. *See* 504 U.S. at 378; *see also Wolens*, 513 U.S. at 240 (opinion 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).

2. The District Court Correctly Framed And Analyzed Appellees' Challenge To AB5.

IBT argues that "the District Court's entire approach to the legal issue before it was error" because the court "wrongly analyzed whether AB 5's ABC test was

preempted" instead of addressing the "substantive requirements" imposed on the employer-employee relationship by various other provisions of California law. IBT Br. 3, 17. This confused argument lacks any legal basis.

There is no exception from FAAAA preemption analysis for laws defining the test to classify workers as employees or independent contractors. Indeed, IBT's argument is directly contradicted by this Court's decision in *Su*, which analyzed the preemption of the common-law worker-classification test previously applied under *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). As the Court explained in *Su*, "[t]he issue in this case is whether the [FAAAA] preempts the California Labor Commissioner's use of a common law test, often referred to as the *Borello* standard, to determine whether a motor carrier has properly classified its drivers as independent contractors." 903 F.3d at 957 (footnote omitted). The State of California framed the issue the same way: "Does the FAAAA preempt the use of California's generally applicable common law test for determining whether a person performing services (such as driving a truck) for another is an employee or independent contractor?" Appellee's Br., *Su*, 2017 WL 3926926 (9th Cir. Aug. 14, 2017), at *2. Other courts have framed and analyzed such issues in the same terms. *See*, *e.g.*, *Su*, 903 F.3d at 964 (noting that "other States have adopted the 'ABC' test to classify workers, the application of which courts have then held to be preempted"); *People v. Cal Cartage Transp. Express*

LLC, No. BC689320, 2020 WL 497132, at *2 (L.A. Super. Ct. Jan. 8, 2020) (holding that "the ABC Test as applied to motor carriers is preempted by the FAAAA"); *Alvarez v. XPO Logistics Cartage LLC*, No. 18-cv-3736, 2018 WL 6271965, at *5 (C.D. Cal. Nov. 15, 2018) (holding that "the ABC test … 'relates' to a motor carrier's services … and is therefore preempted by the FAAAA"); *Mass. Delivery Ass'n v. Healey*, 821 F.3d 187, 192 (1st Cir. 2016) (holding that "the FAAAA preempts the application of Prong [B]" of Massachusetts law's "three-prong [ABC] test to determine who is an 'employee'").

So too here. As IBT acknowledges elsewhere in its brief, "Plaintiffs' challenge is to the ABC test itself." IBT Br. 42. Plaintiffs-Appellees, as the masters of their complaint, have pleaded a claim that "the ABC test set forth in AB-5" is "preempted by federal law" because it impermissibly relates to motor carriers' prices, routes, and services. ER308. It is not error, much less reversible abuse of discretion, for a court to decide the case or controversy before it.

IBT cites this Court's decision in *California Tow Truck*, but that decision is inapposite here. The plaintiff in that case, an association of towing companies, sought to enjoin enforcement of an "entire permit scheme" for tow truck drivers, consisting of "two comprehensive ordinances" that, "[t]ogether, … set forth a comprehensive regulatory regime requiring tow truck drivers and towing firms to obtain permits to operate and conduct business in San Francisco." 693 F.3d at 850-

51. The nature of that particular claim thus "necessarily encompasse[d]" preemption analysis of "all of the permit scheme's components" that the plaintiff sought to invalidate (*id.* at 850), some of which this Court ultimately held preempted by the FAAAA (*see California Tow Truck*, 807 F.3d at 1014). In this case, by contrast, Appellees do *not* seek to invalidate the underlying components of California's labor law scheme governing bona fide employees. *Cf.*, *e.g.*, *Dilts*, 769 F.3d at 640 (preemption challenge to California's meal and rest break laws); *Mendonca*, 152 F.3d at 1185 (preemption challenge to California's prevailing wage law). Instead, they seek to enjoin only AB5's reclassification of independent owner-operator truck drivers as employees, based on that new law's distinct and independent effects on motor carriers. This claim does not depend on, or require the Court to resolve, the separate question whether the FAAAA also preempts California's substantive provisions regulating employees.

3. AB5's Business-To-Business Exception Does Not Save The Law From Preemption.

IBT also argues that the trucking industry may fit within one of AB5's gerrymandered exemptions, the business-to-business exception, thereby rescuing it from preemption under the FAAAA. AB5 withholds application of the ABC test "to a bona fide business-to-business contracting relationship"—subject to a list of conditions and exceptions. Cal. Lab. Code § 2750.3(e). IBT 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 AB5's broader rule. *See* IBT Br. 35-42. This argument fails.

For one thing, it does not appear that "the State Defendants, who are tasked with enforcing AB-5," share IBT's confidence that its proposed workaround complies with the law. ER19. In the district court, the State would "not expressly concede that the exception would apply" (*ibid.*), and on appeal, the State abandons any argument for reversal based on the exception (State Br. 14 n.9).

But 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. Conf. Rep. No. 103-677, at 87. Indeed, the FAAAA's "central

purpose" was to ensure "identical intrastate preemption" to *all* motor carriers, specifically including owner-operators. *Id.* at 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*, 552 U.S. at 372. AB5, even if interpreted as IBT 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*, 532 U.S. 141, 150-51 (2001). The business-to-business exception does not save AB5 from preemption under the FAAAA.

II. Motor Carriers And Businesses That Rely On Them Will Suffer Irreparable Harm Absent Preliminary Injunctive Relief.

As the district court correctly held, a preliminary injunction is necessary to prevent imminent and irreparable harm to motor carriers—and indeed, the countless businesses that rely on them—from the State's enforcement of AB5. This ruling followed controlling precedent in a precisely analogous context. *See American Trucking*, 559 F.3d at 1057.

AB5 will imminently inflict enormous harm not only on the members of Appellee California Trucking Association and their workers, but also on *amici*'s

members and their workers. The impossible choice that motor carriers will face between dramatically "restructur[ing] their business model[s]" or facing criminal and civil penalties (ER21; *see* Appellees' Br. 73) inflicts irreparable harm sufficient to support injunctive relief, as the Supreme Court and this Court have held (*see Morales*, 504 U.S. at 381; *American Trucking*, 559 F.3d at 1057). *Amici*'s members and their workers will face similar irreparable harm. For example, all retailers rely upon just-in-time delivery to efficiently manage inventory for retail operations. It takes years for retailers to create reliable, efficient, and cost-effective supply chains and distribution operations. Any disruption to motor carriers' services, routes, and pricing schemes would jeopardize, if not destroy, retailers' longstanding efforts. If the injunction below is lifted, retailers would be forced to change their operations to adapt to California's aberration in the national transportation marketplace. In addition to creating inefficiencies, implementing such costly and time-consuming changes would exacerbate stress on retail operations that are already stretched by the COVID-19 crisis.

Moreover, because any claims against the State for reimbursement of these costs would be barred by sovereign immunity (*see* Cal. Gov't Code §§ 815(a), 820.6), this state-mandated reclassification will result in financial harms that can never be remedied. *See*, *e.g.*, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009), *vacated on other grounds by Douglas v. Indep. Living Ctr.*

of S. Cal, Inc., 565 U.S. 606 (2012); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010). "If expenditures cannot be recouped, the resulting loss" is indeed "irreparable." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers). So, too, is the inevitable accompanying "harm to [motor carriers and retailers'] business reputation and goodwill." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 838 (9th Cir. 2001); *see also American Trucking*, 559 F.3d at 1058-59; *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

AB5 also threatens irreparable harm to affected businesses' workers. If enforced, AB5 will upend individuals' lives by depriving them of their livelihood, as well as the freedom, stability, and work satisfaction they now enjoy. "[T]he loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress" that are irreparable. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (alteration in original) (citation omitted). "No monetary award could ever compensate" these workers for their "uncertainty, stress, and inability to plan" to prevent "suffer[ing] an emotional injury—failure to provide for their loved ones." *Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 483, 484 (C.D. Cal. 2012). And the need for predictability to mitigate the "emotional damages and stress" of job loss (*Stormans*, 586 F.3d at 1138) has never been more acute given COVID-19's unprecedented and ongoing toll on the American job market. *See Rogers v. Lyft,*

Inc., No. 20-cv-1938, 2020 WL 1684151, at *2 (N.D. Cal. Apr. 7, 2020) (noting that AB5 threatens workers' "opportunity to obtain emergency assistance totaling thousands of dollars from the federal government," because the federal program of coronavirus relief for the self-employed expressly "excludes people who work for companies with 500 or more *employees*," among other obstacles (emphasis added)).

For all these reasons, the equities and public interest likewise counsel in favor of injunctive relief. That is especially true given that the injunction merely preserves the status quo. AB5, after all, expressly provides that the State may continue applying the common-law standard for worker classification, as it did for decades until recently, in the event that "a court of law rules that the [ABC test] cannot be applied to a particular context." Cal. Lab. Code § 2750.3(a)(3). This Court should not sanction California's request to obliterate the nationwide uniformity Congress intended to create through the FAAAA, particularly when doing so would impose such dramatic and irreversible harm on motor carriers and the countless businesses that rely on them.

CONCLUSION

The Court should affirm the district court's order granting Plaintiffs-Appellees' motion for a preliminary injunction.

Respectfully submitted.

Dated: May 13, 2020

/s/ Theane Evangelis

Steven P. Lehotsky
Emily J. Kennedy
U.S. CHAMBER LITIGATION CENTER
1615 H STREET, N.W.
WASHINGTON, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

Theane Evangelis
Blaine H. Evanson
Max E. Schulman
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071
(213) 229-7000
TEVANGELIS@GIBSONDUNN.COM

Counsel for Amici Curiae

Deborah White
Kathleen McGuigan
RETAIL LITIGATION CENTER, INC.
99 M STREET, S.E., SUITE 700
WASHINGTON, D.C. 20003

Counsel for Retail Litigation Center

Stephanie Martz
NATIONAL RETAIL FEDERATION
1101 NEW YORK AVE., N.W.,
SUITE 1200
WASHINGTON, D.C. 20005

Counsel for National Retail Federation

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-55106; 20-55107

I am the attorney or self-represented party.

This brief contains 6,456 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Theane Evangelis **Date** May 13, 2020

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 13, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 13, 2020

s/ *Theane Evangelis*
Theane Evangelis