

No. 20-1453

In The
Supreme Court of the United States

—◆—
CAL CARTAGE TRANSPORTATION
EXPRESS, LLC, et al.,

Petitioners,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA, et al.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The California Court Of Appeal**

—◆—
**BRIEF FOR NATIONAL MOTOR FREIGHT
TRAFFIC ASSOCIATION, INC., AS
AMICUS CURIAE SUPPORTING PETITIONERS**

—◆—
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INTEREST OF AMICUS CURIAE¹

The National Motor Freight Traffic Association, Inc. (“NMFTA” or “Association”) is a nonprofit membership organization headquartered in Alexandria, Virginia, with a membership comprised of approximately 450 motor carriers operating in interstate, intrastate, and foreign commerce, primarily specializing in the movement of less-than-truckload quantities of freight (“LTL”). NMFTA promotes the welfare and interest of its members by presenting their positions in relevant judicial, regulatory, and legislative proceedings. NMFTA’s Board of Directors has authorized the Association to participate in this case as an amicus curiae, beginning with the submission of a brief in support of the petition for certiorari filed April 16, 2021, in *Cal Cartage Transportation Express, LLC, et al. v. California, et al.*, No. 20-1453, because of its member carriers’ interest in the Federal Aviation Administration Authorization Act (“FAAAA”) preemption issue that Petitioners have asked this Court to decide.

LTL carriers typically move freight shipments ranging from 150 to 10,000 pounds that are too large

¹ Pursuant to this Court’s Rule 37.2(a), all parties have agreed to blanket consent for the filing of all amicus briefs. Counsel of record for all parties received notice at least 10 days prior to the due date of NMFTA’s intent to file this brief. Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NMFTA, its members, or its counsel made a monetary contribution to its preparation or submission.

for small parcel carriers, like FedEx and UPS, but too small for truckload carriers. To efficiently transport these relatively small shipments of freight, LTL carriers most often use ‘hub and spoke’ operations with large regional hub terminals as well as smaller local terminals scattered throughout their service areas. Pickup drivers collect local freight from various shippers and bring it back to local terminals where it is consolidated onto trailers for transport to larger hub terminals. The freight will be further sorted and consolidated for linehaul transport with other shipments moving on the same route. This process could be repeated multiple times for single shipments. Eventually, the freight will be deconsolidated for transport to local terminals, where it will be loaded onto local trucks for delivery. Any given shipment will be handled by multiple drivers, often crossing one or more state lines. Many of NMFTA’s member LTL carriers have both hub and spoke terminals in California from which they provide freight transportation services within the state and in interstate commerce between California and other states.

As described more fully below, some of these LTL carriers use owner-operator truck drivers in their day-to-day business operations. Those drivers own and operate their own truck-tractors, and sometimes the trailers they pull as well, and lease them to authorized motor carriers. In a small number of companies, the carrier exclusively uses owner-operator truck drivers, but more often there is a mix of employees and owner-operators, with each type of driver used where it

operationally makes the most business sense. Both carriers and owner-operators assume that the owner-operators are independent contractors, a status they both find beneficial.

Accordingly, while NMFTA's members are not drayage companies like the Petitioners in the present case, they are trucking companies that are directly affected when California enacts legislation like AB5 restricting the ability of their truck drivers to qualify as independent contractors. Indeed, the adverse impact on their LTL businesses could be more substantial than the impact on drayage drivers operating primarily at local ports, because LTL drivers are frequently moving freight in interstate commerce between California and other states with different independent contractor rules.² They are suddenly transformed at the border from independent contractors into employees that are subject to an entirely different compensation and benefits regime. Further, this transformation occurs whether the carriers or the drivers themselves are

² In fact, because of the substantial burden imposed by AB5 on the predominantly interstate operations of these motor carriers, as discussed more fully in Section IV of this brief, it would appear that AB5, even if not preempted, violates the Interstate Commerce Clause of the U.S. Constitution when applied to the trucking industry. Indeed, it was Congress's finding that state regulation "imposed an unreasonable burden on interstate commerce" and "impeded the free flow of trade, traffic, and transportation of interstate commerce . . ." that led to the adoption of the FAAAA's preemption provision. *See* Public Law 103-305, Title VI, § 601(a)(1).

headquartered in California or in states with different rules.

Because of NMFTA members' ongoing interest in and concern regarding recent developments in preemption law, the Association has been monitoring the *Cal Cartage* case below as well as other worker-classification cases involving FAAAAA preemption. The Association also recently submitted comments to the Department of Labor when that agency proposed a rule that would define independent contractors for purposes of the Fair Labor Standards Act, which rule provided a definition that diverged substantially from the ABC test in California's AB5 law. *See Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date*, RIN 1235-AA34, WHD-2020-0007-1802 (Feb. 23, 2021). The Association has also submitted comments in other proceedings involving federal preemption of California rules affecting LTL drivers, such as the state's meal and rest break rules. *See Petitions for Determination of Preemption: California Meal and Rest Break Rules*, Docket No. FMCSA-2018-0304, FMCSA-2018-0304-0014 (Oct. 29, 2018). The same concerns have prompted the Association to participate in this proceeding.

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SUMMARY OF ARGUMENT

The issue before the Court is whether a state worker-classification law setting out the test in California's AB5 law for determining whether a worker

qualifies as an independent contractor, when applied to the trucking industry, is preempted by the provision in the FAAAA that expressly preempts any state laws “related to a price, route, or service of any motor carrier. . . .” 49 U.S.C. § 14501(c)(1). The Petitioners have, in support of their petition filed April 16, 2021, clearly shown that the California Court of Appeal decision below relies upon legal principles that conflict with Supreme Court precedent and is totally inconsistent with FAAAA preemption decisions rendered by other state and federal courts. In fact, the California Court of Appeal itself acknowledged the split. *See People of the State of California v. Superior Court of Los Angeles County; Cal Cartage Transportation Express, LLC, et al.*, No. B304240, Judgment and Order, n.10 (Cal. Ct. App. Nov. 19, 2020). Petitioners have also demonstrated that this split pertains to an important and recurring legal issue in the trucking industry. Finally, Petitioners have thoroughly explained why the caselaw supports a finding that the FAAAA preempts the ABC test for independent contractor qualification status set out in California’s AB5 because it precludes motor carriers from hiring owner-operator truck drivers who operate as independent contractors. Accordingly, those legal arguments will not be restated in this brief.

Rather, NMFTA is submitting this amicus brief to illustrate for the Court how owner-operators historically, and at present, are used in the important LTL segment of the trucking industry. NMFTA also describes the dramatic impact that AB5 could have upon

its members' California intrastate and cross-border operations between California and other states. As explained more fully below, from the inception of the trucking industry and to the present time, owner-operators have fulfilled an essential role in keeping freight moving throughout the country. The owner-operator model has not only served motor carriers well, but is favored by many truck drivers who value the independence it gives them. Finally, the existence of a patchwork of state worker-classification laws, including AB5, would likely have the precise adverse impact on the prices, routes, and services of motor carriers that Congress was trying to eliminate when it enacted the FAAAA.

In sum, when combined with the split in the lower courts on the preemption issue, the prohibition on the use of owner-operators in these LTL businesses provides ample reason for this Court to grant certiorari on this critical trucking industry issue.



ARGUMENT

I. Owner-operator truck drivers play an essential role in trucking, recognized by both the courts and Congress.

Owner-operators have played an essential role in the trucking industry from its inception through the present time. As noted by this Court in *American Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 303 (1953), motor carriers, using a variety of business

arrangements, “have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands.” The Interstate Commerce Commission (“ICC”), the agency charged with regulating the economics and services provided by motor carriers offering interstate transportation services prior to its abolition in 1995, has also recognized the critical role of owner-operators. “Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them, commonly referred to as owner-operators.” *See Final Rules*, Ex Parte No. MC 43 (Sub-No. 12), 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) (modifying regulations pertaining to lease and interchange of vehicles).

The use of such owner-operators has continued through to the present time. Census Bureau statistics show approximately 350,000 owner-operator truck drivers actively operating today. *See* www.census.gov/library/stories/2019/06/america-keeps-on-trucking.html. As many as 70,000 of those owner-operators work in California. *See* Bill Mongelluzzo, *ARO 2020: Trucking industry seeks clarity on driver classification issues* (Dec. 23, 2019), www.joc.com/trucking-logistics/labor/aro-2020-trucking-industry-seeks-clarity-driver-classification-issues_20191223.html. These owner-operators have always been treated as independent contractors by all involved parties.

Recognizing this work status, these owner-operators have for decades been afforded specific

protections, which were authorized by Congress at 49 U.S.C. § 14102 (Leased Motor Vehicles) and were set out in regulations originally adopted by the ICC that are commonly known as the Truth-in-Leasing regulations. *See* 49 C.F.R. Part 376, *Lease and Interchange of Vehicles* (originally at 49 C.F.R. Part 1057). In contrast to other industries where independent contractors may be subject to one-sided form contracts that do little to protect such workers, these regulations require certain terms and conditions to be included in motor carrier contracts with owner-operators. Among those terms and conditions that must be set out in owner-operator lease agreements are the names of the parties, the lease term, the responsibilities of each party with respect to the leased equipment and the various costs associated with operation of that equipment, the amount the owner-operator will be paid and the timeframe for issuing payment, items that may be charged back to owner-operators, and the carrier's legal obligation to maintain liability insurance. *See* 49 C.F.R. § 376.12. Because these regulations "shall be adhered to and performed by the authorized carrier," owner-operators have a right of action to recover damages when this detailed set of rules is violated. *Id.*

Importantly, the Truth-in-Leasing regulations specifically provide that none of the required terms and conditions affect the status of the involved owner-operator as an independent contractor or employee of the involved carrier, by expressly stating that "An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. § 14102

and attendant administrative requirements.” *Id.* at § 376.12(c)(4). In short, the regulations expressly acknowledge the ability of drivers leased to motor carriers to be treated as independent contractors, provided the various regulatory requirements are satisfied.

II. Owner-operators are used when it makes sense from a business perspective.

While a small number of LTL carriers operate entirely on an owner-operator model, the majority use only company employee drivers or use owner-operators in limited circumstances. When owner-operators alone are used, it is commonly because the involved carrier has chosen to invest its available capital in terminal facilities plus the equipment and employees needed to run those facilities, not to purchase, maintain, and insure truck-tractors (and sometimes trailers) plus the associated human resources, payroll, and accounting staff that would be required if only company drivers were used. When carriers use both employees and owner-operators as drivers, each type of driver is typically used in the parts of the particular business where it makes the most operational sense. Doing so allows carriers to adapt their work force to meet the changing or varied needs of the shipping public.

First and foremost, owner-operators are one way that motor carriers can efficiently meet the fluctuating seasonal demands for their transportation services. They allow carriers to expand their workforce as the holiday buying and shipping season approaches, or to

procure the extra drivers needed to move other seasonal merchandise during times of high demand. If the carriers were instead required to hire additional employee drivers during these busy seasons, they would likely have to lay off those workers during the down seasons. Similarly, truck-tractors purchased or leased to meet peak demand would be idle at other times.

Owner-operators also allow carriers the flexibility to transport cargo requiring specialized equipment or occasionally specially-trained drivers. Common examples include food, medicine, and other items that require refrigerated trailers; and munitions or other potentially dangerous cargo that require added security. Other cargo might need specialized equipment because of its unusual size, shape, or weight. Census records show that nearly half of the drivers moving specialized freight are owner-operators. *See* Jennifer Cheeseman Day & Andrew W. Hait, *America Keeps On Truckin'* (June 6, 2019), www.census.gov/library/stories/2019/06/america-keeps-on-trucking.html.

III. Owner-operators benefit from and favor independent contractor status.

Owner-operator truck drivers may also prefer an independent contractor arrangement because of the benefits it offers.³ Because these drivers are in

³ It is worth noting that this case was not filed by the owner-operators working for Petitioners. Rather, it was brought by a government entity that supports an employee-based business model.

business for themselves, they own and maintain their truck-tractors, which can be customized to suit their particular needs. In addition, they exercise substantial control over key aspects of their work. This typically includes determining which loads to accept or reject based upon their desired work schedule and routes, and the ability to work for more than one carrier. This gives owner-operators greater flexibility in home time and time on the road. When driving, they get to decide when and where to purchase fuel, eat, and stop for the night. In some cases, owner-operators also negotiate rates for their services. They are most often paid a per mile rate, or sometimes a per load rate, that provides an ample net profit margin after covering all costs.

This independence and control over the work performed gives owner-operators a direct financial stake in their operations derived from the opportunity to increase their earnings based upon personal initiative and investment. Indeed, owner-operators can earn more than employee truck drivers. Carrier members who use both employees and owner operators have reported that their owner-operators' net compensation after payment of expenses for which they are personally responsible is comparable to or greater than the pay of their company employee drivers. This anecdotal evidence is echoed by American Truck Business Services, a company that has provided financial assistance and advice to more than 150,000 owner-operators, found that its clients averaged \$65,000 net income in 2018. See Noi Mahoney, *ATBS CEO: Owner-operators should prepare for a 'freight cliff'*, Freightwaves (March

26, 2020), www.freightwaves.com/news/atbs-ceo-owner-operators-should-prepare-for-a-freight-cliff. This compares with an average annual wage for heavy and tractor-trailer truck drivers of \$46,850 in 2018 according to the U.S. Bureau of Labor Statistics. *See* U.S. Bureau of Labor Statistics, Occupational Employment Statistics (May 2019), [www.bls.gov/oes/current/oes533032.htm#\(1\)](http://www.bls.gov/oes/current/oes533032.htm#(1)).

For all these reasons, many owner-operators will not accept company employee driver status. This, of course, leaves them with only one option if AB5 is allowed to stand: to cease providing transportation services in California and transfer their operation to a state that would allow them to continue their owner-operator business.

IV. The prevalence of multiple independent contractor tests, including the California ABC test, has a dramatic adverse impact on LTL motor carriers.

As discussed above, the use of owner-operator truck drivers, who are presumed to be independent contractors, is a well-established industry practice. Yet there is no consistent test for confirming whether these drivers are in fact independent contractors. California has imposed a three-prong ABC test in its caselaw and AB5, a test that effectively precludes those driving for motor carriers from qualifying as independent contractors. Different courts have applied various overlapping five and six factor tests, and no particular factors have

consistently been found to be dispositive. *See Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168, 1169-1171 (Jan. 7, 2021). The Department of Labor’s Wage and Hour Division, prior to the adoption of a regulation imposing a five-factor test including two core factors for determining independent contractor status, issued a fact sheet that identified seven factors to be considered in evaluating whether a worker is an employee or independent contractor under the Fair Labor Standards Act. *See WHD Fact Sheet #13, “Employment Relationship under the Fair Labor Standards Act (FLSA)”* (July 2008).

The existence of multiple independent contractor standards, and the inconsistent decisions on whether those standards are preempted by the FAAAA as applied to the trucking industry, has created great uncertainty for motor carriers trying to comply with the steps that must be taken to properly qualify their drivers as independent contractors. In short, carriers are facing the exact “patchwork” of laws that Congress intended to put an end to with the FAAAA’s preemption provision. *Rowe v. New Hampshire Motor Transp. Ass’n*, 552 U.S. 364, 373 (2008); H.R. Conf. Rep. No. 103-677 (1994), at 87.

Further, decisions like that of the California Court of Appeal below, finding that the ABC test in AB5 is not preempted by the FAAAA, have broad ramifications for motor carriers. They totally upend one long-standing business model, undermining the carriers’ ability to efficiently and effectively structure their businesses using owner-operators. Based upon the myriad of

burdensome California regulations, including AB5, some LTL carriers have responded by simply withdrawing from California. Others have imposed a per shipment California compliance surcharge to cover the added costs of providing service in that state.⁴ Thus, AB5 and earlier litigation adopting a similar independent contractor test in California, have already caused changes to the prices, routes, and services that LTL carriers operating in California are offering.

Further, carriers exploring the possible elimination of owner-operators from their business model have found that hiring employee drivers may not be an easy fix. While carriers could hope to keep many of the same drivers, simply changing their status, compensation, and benefits model (at least when they operate in California), as discussed in Section III above, many of those owner-operators like the independence that running their own trucking business offers and do not want to be tied as employees to the rules and requirements of a particular carrier. Finding new drivers also could be difficult because AB5 has come at a time when the market is experiencing a serious shortage of qualified truck drivers. *See, e.g.,* Bob Costello & Alan Karickhoff, *Truck Driver Shortage Analysis 2019* (July 2019), www.trucking.org/sites/default/files/2020-01/ATAs_Driver_Shortage_Report_2019_with_cover.pdf (trucking

⁴ *See, e.g.,* ABF Freight surcharge, <https://arcb.com/sites/default/files/Resources/ABF%20111-AO%2001-25-2021Modified.pdf>; Estes Express Lines surcharge, <https://www.estes-express.com/dA/ea677fdb-3bfa-45fb-9ef8-511174177f84/EstesRulesTariff.pdf>; Old Dominion Freight Line surcharge, <https://www.odfl.com/Tariffs/TariffPDFServlet?text=375.pdf>.

industry was short roughly 60,800 drivers in 2018, up nearly 20% from 2017's figure of 50,700. Current trends indicate that shortage could swell to over 160,000 by 2028); William Cassidy, *Top of Form US truck driver pay rises, but shortages persist* (July 20, 2018), www.joc.com/trucking-logistics/truckload-freight/con-way-truckload/us-truck-driver-pay-rises-shortages-persist_20180720.html.

Second, some NMF TA member carriers have been advised by their attorneys that they must purchase, maintain, and insure truck-tractors for these employee drivers and cannot legally lease equipment from the drivers, whether the drivers are new workers hired away from other companies or existing owner-operators. Since truck-tractors already owned by these drivers would vary in model, age, and other specifics, carriers would in all likelihood choose to purchase a fleet of new trucks that meet their particular specifications, come with warranties, and have uniformly longer lifespans. The outlay is not insubstantial. A new 2020 model truck-tractor can cost anywhere between \$74,000 at the low end to \$205,000, with most models falling in the middle range *See TruckDriversSalary, How Much Do Semi Trucks Cost?*, www.truckdriverssalary.com/semi-truck-cost/ (providing prices for many 2020 truck-tractor models).

Third, some member carriers are contemplating major structural changes, including dividing up their company into distinct units or companies, one for California that does not recognize owner-operators as independent contractors and another for their

operations in other states that would allow them to continue with the current owner-operator model. Having two separate operations would obviously come with increased administrative costs. Alternatively, to avoid the need to hire employee drivers and purchase trucks entirely, members with California operations have also considered adopting an entirely new business form, such as a freight forwarder. Forwarders are one type of intermediary that provide a range of services for shippers (e.g., warehousing or consolidation), but arrange for transportation to be provided by third-party carriers instead of in their owned or leased fleet of trucks. Either way, the carrier would be making major changes to the services offered.

In sum, the structural changes to California LTL motor carrier operations, whether they take the form of hiring employee drivers and purchasing truck-tractors, imposing a California surcharge, separating California operations, leaving California, or otherwise modifying the business model, will be substantial and costly. Moreover, the ultimate impact of such changes on prices, routes, and services indicates that AB5, by its prohibition on the use of independent contractors, is expressly preempted by the FAAAA.



CONCLUSION

For the foregoing reasons, and the reasons stated in the petition for certiorari, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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