APPEAL NOS. 20-55106, 20-55107

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
THE HONORABLE ROGER T. BENITEZ
CASE NO. 3:18-CV-02458-BEN-BLM

BRIEF OF AMICI CURIAE OFFICE OF THE LOS ANGELES CITY ATTORNEY AND THE CITY OF OAKLAND IN SUPPORT OF DEFENDANTS AND REVERSAL

OFFICE OF THE LOS ANGELES CITY ATTORNEY
Michael N. Feuer, City Attorney (SBN 111529)
Kathleen A. Kenealy, Chief Assistant City Attorney (SBN 212289)
Michael J. Bostrom, Assistant City Attorney (SBN 211778)
Danielle L. Goldstein, Deputy City Attorney (SBN 257486)
Christopher S. Munsey, Deputy City Attorney (SBN 267061)
200 North Spring Street, 14th Floor
Los Angeles, California 90012-4131
Telephone: (213) 978-1868
Facsimile: (213) 978-2286
danielle.goldstein@lacity.org

Attorneys for Petitioner
THE OFFICE OF THE LOS ANGELES CITY ATTORNEY

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae are governmental entities for whom no corporate disclosure is required.

Dated: March 18, 2020

By: */s/ Danielle L. Goldstein*
Danielle L. Goldstein

Attorney for Amicus Curiae *Office of the Los Angeles City Attorney*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

Rules

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT[1]

The Cities of Oakland and Los Angeles are responsible for maintenance of the health, safety, and welfare of nearly 4.5 million residents, and are home to a high concentration of jobs in the trucking industry. As of 2015, more than 40 percent of U.S. imports traveled through the Ports of Los Angeles and Long Beach, much of it carried by roughly 14,000 short-haul truck drivers.[2] The City of Oakland is home to the Port of Oakland, which hosts nearly 4,000 direct trucking jobs,[3] and Oakland International Airport, a major air cargo hub.

In addition, the Office of the Los Angeles City Attorney (the City Attorney) is responsible for supporting the City of Los Angeles in its mission and for policing unfair business practices, including employee misclassification, on behalf of the People of the State of California. *See* Cal. Bus. & Prof. Code § 17204. In this context, the City Attorney represents the People of the State of California in the litigation that produced *People v. Cal Cartage Transp. Express, LLC*, 2020 WL 497132 (Cal. Super. Ct. Jan. 8, 2020) (the Superior Court Order), on which the

---

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

[2] B. Watt, *For Truck Drivers at the Ports of Los Angeles and Long Beach, It's a Waiting Game*, KPCC (Jun. 2, 2015).

[3] Port of Oakland, The Economic Impact of the Port of Oakland 23 (Oct. 9, 2018).

District Court below relied.

Amici agree with the views set out in the California Attorney General's and International Brotherhood of Teamsters's (IBT) briefs urging this Court to reverse the District Court's preliminary injunction order (the District Court Order). Amici do not repeat those arguments here, but submit this brief to address three points on which amici have particular expertise: (1) the lower court's errors in interpreting California law, (2) its failure to consider significant harms to the People of the State of California, and (3) the pressing need for this Court to correct these errors.

First, Appellees cannot show a likelihood of success in this matter because there is no proper reading of California Assembly Bill 5 (2019-2020 Reg. Session) (AB5) that bars motor carriers from using independent contractors as drivers. As this Court has held, Appellees cannot establish preemption by the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501 (the F4A) without showing such a bar; this is a threshold showing. But under any reading that complies with California law, AB5 expressly permits the use of bona fide independent contractors. Indeed, its purpose is to *allow* the use of independent contractors while preventing the misclassification of individuals who are in fact employees; a categorical prohibition on the use of independent contractors would have been much simpler, but was never intended and certainly was not adopted by the Legislature.

All AB5 requires is that, to be classified as independent contractors, drivers operate legitimate independent businesses. The Superior Court Order finding that AB5's business-to-business exemption does not permit the use of independent contractors conflicts with California law, and the District Court therefore erred in its wholesale adoption of and reliance on it.

Limiting independent contractor status to those that operate legitimate independent businesses is exactly the aim of California's previous classification standard, articulated in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* 48 Cal.3d 341 (Cal. 1989). This Court confirmed that standard is not preempted by the F4A in *Cal. Trucking Ass'n v. Su*, 903 F.3d 953 (9th Cir. 2018). As the California Supreme Court has noted, however, because *Borello* lacked clear guidelines, California has been unable to reliably and effectively achieve its aims. AB5 was enacted to establish clear guidelines and effectively implement the underlying principles of *Borello*. For purposes of the preemption analysis, there is no relevant difference between AB5 and the *Borello* standard.

Second, the balance of harms and public interest do not favor an injunction here. In issuing its injunction, the District Court ignored the California Supreme Court's and Legislature's conclusion that the *Borello* standard is inadequate to address abusive employer practices—practices that are in fact facilitated by multi-factor, "totality of the circumstances" classification standards like the *Borello*

standard. *See Dynamex Operations W. v. Superior Court*, 4 Cal.5th 903, 955 (Cal. 2018). This abuse, the California Legislature found, "has been a significant factor in the erosion of the middle class and the rise in income inequality." AB5 § 1(c). These harms far outweigh the purported harms to trucking companies.

Finally, given California's current public health crisis, the balance of harms is even more lopsided today than it was when the issue was before the District Court. Misclassified workers are some of the most vulnerable in the state. They do not receive the protections and benefits of employees, but because they do not operate bona fide independent businesses, they are unlikely to have the resources to compensate for this gap. As a result, they are less likely to be able to ensure adequate care during the current pandemic and are more likely to be forced to work despite illness—with plain consequences to themselves and public health.

ARGUMENT

I. The Los Angeles Superior Court's Analysis of the Scope of the Business-to-Business Exemption Is Contrary to California Law, the District Court Erred in Adopting It, and This Court Should Not Follow It.

To prevail in a preemption challenge to a generally applicable law, motor carriers must show, at a minimum, "an impermissible effect, such as binding motor carriers to specific services, making the continued provision of particular services essential to compliance with the law, or interfering at the point that a carrier provides services to its customers." *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 965

(9th Cir. 2018) (quoting *Dilts*, 769 F.3d at 649). In other words, Appellees cannot prevail unless they show that they are barred from using independent contractors—this is the threshold showing that they must make in order to mount a preemption argument, and their argument depends upon this point.

They cannot do so here because of AB5's business-to-business exemption. The business-to-business exemption permits individual owner-operators to work as independent contractors whether or not they satisfy Prong B (or any other prong) of AB5's ABC test. It requires only that the worker operate a "bona fide" business and perform work free from the control of the contracting entity, rather than functioning as a misclassified employee.[4] AB5 § 2(e). Its factors are common-sense indicators of the operation of a bona fide business, including the requirements that a contracting worker have a written contract and be engaged in an independently established business. AB5 § 2(e)(1)(C), (F).

The District Court below, however, incorporating the reasoning of the Superior Court by reference, found that the business-to-business exemption does not permit the use of independent contractor drivers. ER109. However, the Superior Court Order is not binding authority on the federal courts, and it is at odds

[4] Sole proprietors are expressly permitted under the business-to-business exemption. AB5 § 2(e)(1).

with controlling California law.[5] The District Court's reliance on it is error that this Court should neither affirm nor join.

This Court is not bound by decisions of the California trial courts. *See, e.g.*, *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 161 (1948). Even in the case of decisions of the California Courts of Appeal, this Court only follows their decisions to the extent that they align with the decisions of the California Supreme Court. *See, e.g.*, *Munson v. Del Taco, Inc.*, 522 F.3d 997, 1002 (9th Cir. 2008). But the Superior Court Order cannot be squared with California Supreme Court precedent; it is at odds with both the statutory text and controlling case law in ways that it fails to acknowledge or address. As even the Superior Court itself acknowledged, there "is language in [controlling California Supreme Court case law] that can fully support a contrary result," Tr. of Jan. 9, 2020 Hr'g, *People v. Cal Cartage Transp. Express, LLC* (Cal. Super. No. BC689320) at 3 and it certified the decision for immediate review by the Court of Appeal given its uncertainty, *Cal Cartage*, 2020 WL 497132 at *10. That District

[5] The Superior Court Order adopted the trucking company defendants' proposed order without significant modification.

Court's wholesale reliance on the Superior Court Order is fatal to its order on appeal here.[6]

A. The Superior Court's Interpretation of the Business-to-Business Exemption Is Contrary to California Law.

The Superior Court's analysis of the business-to-business exemption violates several canons of California statutory interpretation. It construes the exemption in favor of preemption, creates unnecessary conflicts with federal regulation, fails to acknowledge portions of the statutory text, and contravenes controlling standards adopted by the California Supreme Court.

For example, California law requires that, to the extent there is any ambiguity in statutory interpretation, courts should not adopt interpretations that that lead to preemption. "State law should be construed, whenever possible, to be in harmony with federal law, so as to avoid having the state law invalidated by federal preemption." *Mabry v. Superior Court,* 185 Cal. App. 4th 208, 231 (Cal. App. 2010), *superseded by statute on other grounds* (citing *Greater Westchester*

[6] Amici agree with each of the points raised by Appellants in connection with the interpretation of the business-to-business exemption, and, in the interest of brevity, do not address each of the Superior Court's errors here. A complete discussion of those errors is set out in the People's Writ Petition regarding the Order, which is pending before the California Court of Appeal and attached here as Attachment A. Petition for Writ of Mandate, *People of the State of California v. Superior Court*, B304240 (Cal. Court of Appeal, 2d Dist. Feb. 18, 2020).

Homeowners Assn. v. City of Los Angeles, 26 Cal. 3d 86, 93 (1979)). The Superior Court not only failed to follow this rule, it failed even to acknowledge it.

The Superior Court's interpretations cannot survive the rule's application. As the IBT brief points out, in the case of each of the Superior Court's quibbles with the business-to-business exemption, there is, at a minimum, a perfectly plausible reading that permits motor carriers to engage independent contractors while imposing sensible limitations on their use. Defendants, however, prefer to construe the exemption as maximally in conflict with federal law, in order to avoid AB5 in its entirety. The rules of California statutory construction do not permit this approach.

The Order also creates an unnecessary conflict between federal law and the exemption's requirement that the contractor have the opportunity to negotiate his own rates. This requirement, the Superior Court found, is inconsistent with a federal regulation that requires the rates that trucking companies pay to drivers to be explicitly stated in their contracts. *Cal Cartage*, 2020 WL 497132 at *7 (citing 49 C.F.R. § 376.12(d)). But the regulation at issue says nothing about negotiation of rates. It requires only that "the amount to be paid by the authorized carrier for equipment and driver's services [must] be clearly stated on the face of the lease or in an addendum which is attached to the lease." 49 C.F.R. § 376.12(d). The fact that the regulations require the rate to be stated in the contract has nothing to do

with whether that rate is negotiated—the contract simply cannot be silent on the rate to be paid.[7]

Moreover, the Superior Court failed to acknowledge or address portions of the statutory text that conflict with its interpretations. For example, the Superior Court found that AB5 does not allow a driver to be an independent contractor because the business-to-business exemption "does not apply to an individual worker, as opposed to a business entity." *Cal Cartage*, 2020 WL 497132 at *7. But the exemption expressly applies to sole proprietors.[8] AB5 § 2(e)(1) ("If a business entity formed as a sole proprietorship . . . contracts to provide services to

[7] If there was any ambiguity in the text—and there is not—the purpose of the regulations makes clear that the Superior Court's reading is incorrect. The regulations are intended to "'protect independent truckers from motor carriers' abusive leasing practices.'" *Goyal v. CSX Intermodal Terminals, Inc.*, 2018 U.S. Dist. LEXIS 164643 (N.D. Cal. Sep. 25, 2018, No. 17-cv-06081-EMC), at *10, (citation omitted). The Superior Court's view would have the perverse effect of promoting the power of motor carriers to unilaterally impose rates, to the detriment of drivers.

[8] The simultaneous exclusion of individuals and coverage of sole proprietorships ensures that only individuals who are operating an actual business are classified as independent contractors. This requirement is no more than an echo of the *Borello* factors and Prong C of the ABC analysis. Both standards inquire as to whether the contractor operates a truly independent business. *See*, *e.g., Garcia v. Border Trans. Group, LLC*, 28 Cal. App. 5th 558, 575 (Cal. App. 2018) (employer failed to satisfy Prong C where it "presented no evidence ... that [the worker] in fact provided services for other entities or otherwise established a business 'independent' of his relationship with [the employer]"); *Borello,* 48 Cal.3d at 345 ("In no practical sense are the 'sharefarmers' entrepreneurs operating independent businesses for their own accounts[.]"). Neither has been held to be independently preempted.

another such business . . . the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied . . . "). The Superior Court's approach violates the principle of California statutory construction that "statutory language must . . . be construed in the context of the statute as a whole and the overall statutory scheme." *People v. Rizo*, 22 Cal. 4th 681, 685 (Cal. 2000).

The Superior Court Order also essentially creates its own standard for evaluating F4A preemption, in violation of both California Supreme Court and this Court's precedent. The Superior Court found that the business-to-business exemption constructs barriers to entry for independent contractors, which "contradict the rationale for enacting the F4A preemption provision," and therefore cause preemption. *Cal Cartage*, 2020 WL 497132 at *8. This new preemption standard fails, however, because it is contrary to the standards adopted by this Court and the California Supreme Court and because it would doom *any* regulation of motor carriers. All laws, from taxes to zoning, impose some burden on business. *See People ex rel. Harris v. Pac Anchor Transportation, Inc.*, 59 Cal.4th 772, 786 (Cal. 2014) ("nothing in the congressional record establishes that Congress intended to preempt states' ability to tax motor carriers, to enforce labor

and wage standards, or to exempt motor carriers from generally applicable insurance laws"); *Su,* 903 F.3d at 960-61.

Indeed, all classification laws impose barriers to entry for independent contractors to ensure that they legitimately operate independent businesses; this is precisely what this Court approved in *Su* and the California Supreme Court approved in *Pac Anchor.* The legislative history and case law make clear that Congress did not intend to preempt all classification laws; the fact that a law imposes barriers to entry has never been, standing alone, enough to establish preemption. *See, e.g.*, *Pac Anchor,* 59 Cal.4th at 786, *Su,* 903 F.3d at 960-61.

The factors that the Superior Court objected to as unacceptable barriers to entry—maintenance of other clients, advertising, and a separate business location—are exactly those that have traditionally been examined under the *Borello* standard approved in *Su* and *Pac Anchor* to identify "an individual who *independently* has made the decision to go into business for himself or herself." *Dynamex,* 4 Cal.5th at 962. "Such an individual generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like." *Id*. *See also id*. at 962, n. 31 (pointing to maintenance of separate location as a factor).

B. AB5 Is No Different, from a Preemption Standpoint, than Standards that Are Routinely Upheld.

Under any reading of AB5's business-to-business exemption that complies with California law, the exemption permits individual owner-operators to work as independent contractors so long as there are objective indicia that they operate a bona fide and independent business. AB5 § 2(e). There is nothing novel or objectionable about this requirement; the requirement that an independent contractor operate a bona fide business without control by the contracting entity is a key element of the common-law test of *Borello*, 48 Cal.3d 341. Both this Court and the California Supreme Court have concluded that *Borello* is not preempted by the F4A. *Su*, 903 F.3d at 957; *Pac Anchor,* 59 Cal.4th at 786.

Indeed, many of the elements of the business-to-business exemption that the industry has claimed make it impossible to use independent contractors—including the requirements of advertising, separate location, and incorporation—are factors considered in the *Borello* test. *See, e.g.*, *Dynamex*, 4 Cal.5th at 962 (*Borello* inquiry has focused on whether purported contractor takes the "usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers,

and the like."); *id*. at 962, n. 31 (maintenance of separate location is a factor).[9] Federal courts have consistently approved ABC tests that include requirements of operation of a legitimate business and freedom from control. *See, e.g.*, *Bedoya v. Am. Eagle Express*, 914 F.3d 812, 816 (3d Cir. 2019) (F4A does not preempt New Jersey ABC test requiring contractor's freedom from control and operation of independent business).

The requirements that (1) an independent contractor operate a bona fide business, (2) without control from the contracting entity are also prongs A and C of AB5's ABC test—prongs that Appellees do not challenge. To the People's knowledge, no court has ever held that Congress intended to preempt Prongs A or C of the ABC test, and defendants did not argue that it was preempted here. In fact, these prongs have been left in place as *not* preempted by decisions cited approvingly by both the District Court below and the Los Angeles Superior Court. *See, e.g.*, *Cal Cartage*, 2020 WL 497132 at *9 (citing *Valadez v. CSX Intermodal Terminals, Inc.*, 2019 WL 1975460 (N.D. Cal. Mar. 15, 2019); ER105 (same).

[9] The Legislature's findings and declarations underscore the continuity between *Borello* and the provisions of AB5, stating the Legislature's intent to ensure the rights of those "*currently exploited by being misclassified* as independent contractors . . . " AB5 § 1(e) (emphasis added).

II. The Harms of Enjoining Enforcement of AB5 Are Significant and Increasing.

At base, the ABC test and the business-to-business exemption are attempts to define the elements of the traditional standards against the backdrop of California's experience that multi-factor, "totality of the circumstances" standards cause significant misclassification and harm. *See Dynamex*, 4 Cal.5th at 954-955. Although the *Borello* standard overlaps in substance with the ABC test, its structure differs in ways that have a significant impact on enforcement—and employers' ability to escape consequences for misclassification.

As the California Supreme Court observed, "a multifactor, 'all the circumstances' standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision." *Dynamex*, 4 Cal.5th at 954. Relatedly, such a standard "affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law[.]" *Id*. In contrast, "a simpler, more structured test for distinguishing between employees and independent contractors—the so-called "ABC" test— . . . minimizes these disadvantages." *Id*. The court also noted, unsurprisingly, that misclassification has remained a profound and ongoing problem, despite *Borello*.

Id. at 913.

The Legislature echoed these findings in passing AB5, which codified and clarified the reach of the *Dynamex* decision. The Legislature pointed to misclassification as "a significant factor in the erosion of the middle class and the rise in income inequality." AB5 § 1(c). It emphasized its intent "to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law[.]" *Id*. § 1(e).

The District Court nonetheless rejected the notion that its Order will cause irreparable injury, citing the availability of the *Borello* standard. But the significant harm to the State that results from the *Borello* standard is precisely what the Legislature was attempting to address in adopting AB5. The District Court identified no reason to think that the California Supreme Court and Legislature were incorrect in their assessment of this harm. As a result, the District Court's analysis of the balance of harms and the public interest was flawed.

These flaws have only become more pressing. In the current public health crisis, reliable access to health coverage, sick days, and unemployment benefits are critical to ensuring that sick workers can remain at home and cared for if they are sick, preventing further spread of disease. For misclassified workers, this is an especially salient concern. *See, e.g.*, D. Wagner, D. Wagner, *Coronavirus Is*

Hitting Port Of Los Angeles Truckers Hard — Some Harder Than Others, LAist (March 12, 2020), available at https://perma.cc/QLD4-K2CQ (identifying disparities in resources and ability to remain at home between drivers classified as employees and those classified as independent contractors). AB5 is designed to ensure that only those operating legitimate independent businesses are classified as independent contractors; legitimate businesses (including sole proprietorships) are more likely to be able to compensate for the lack of benefits resulting from the independent contractor classification. Misclassified employees, on the other hand, are less likely to be able to do so—or to take measures to protect their own and the public health.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's preliminary injunction order.

Respectfully submitted,

Dated: March 18, 2020

OFFICE OF THE LOS ANGELES CITY ATTORNEY

By: */s/ Danielle L. Goldstein*
DANIELLE L. GOLDSTEIN

MICHAEL N. FEUER, SBN 111529
Los Angeles City Attorney
KATHLEEN A. KENEALY, SBN 212289
MICHAEL J. BOSTROM, SBN 211778
DANIELLE L. GOLDSTEIN, SBN 257486
CHRISTOPHER S. MUNSEY, SBN 267061
200 North Spring Street, 14th Floor
Los Angeles, CA 90012
Telephone: (213) 978-1868
Email: danielle.goldstein@lacity.org

Attorneys for Amicus Curiae
OFFICE OF THE LOS ANGELES CITY ATTORNEY

BARBARA J. PARKER, SBN 069722
Oakland City Attorney
MARIA BEE, SBN 167716
ERIN BERNSTEIN, SBN 231539
MALIA MCPHERSON, SBN 313918
CAROLINE WILSON, SBN 322389
NICHOLAS DEFIESTA, SBN 327777
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612
Telephone: (510) 238-3601
Email: ndefiesta@oaklandcityattorney.org

Attorneys for Amicus Curiae
CITY OF OAKLAND, CA

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,703 words, exclusive of the portions of the brief that are exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: March 18, 2020

By: */s/ Danielle L. Goldstein*
Danielle L. Goldstein

CERTIFICATE OF SERVICE

I, Danielle L. Goldstein, hereby certify that I electronically filed this Brief of Amici Curiae Office of the Los Angeles City Attorney and the City of Oakland in Support of Defendants and Reversal 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 March 18, 2020. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed March 18, 2020, at Los Angeles, California.

/s/ Danielle L. Goldstein
Danielle L. Goldstein