**Nos. 1-12-2809 and 1-12-2811 (consol.)**

**IN THE APPELLATE COURT OF ILLINOIS**
**FIRST JUDICIAL DISTRICT**

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| C.R. ENGLAND, INC., a foreign corporation,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an administrative agency of the State of Illinois, et al.<br><br>Defendants-Appellants. | ) | Appeal from the Circuit Court of Cook County Illinois, County Department, Law Division<br><br>Case Nos. 11-CH-14681, 11-CH-16972 (Transferred to Law Division)<br><br>The Honorable Margaret Ann Brennan |

# BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE TRUCKING INDUSTRY DEFENSE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

William D. Brejcha
SCOPELITIS GARVIN LIGHT HANSON & FEARY
30 West Monroe Street, Suite 600
Chicago, Illinois 60603
(312) 255-7200
(312) 422-1224 (fax)
wdbrejcha@scopelitis.com

*Attorney for* amici curiae

## POINTS AND AUTHORITIES

## IDENTITY AND INTEREST OF *AMICI CURIAE*

American Trucking Associations, Inc., ("ATA") is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Trucking Industry Defense Association ("TIDA") is an international organization comprised of motor carriers, transportation logistics companies, insurers of motors carriers, third party claims administrators, and defense counsel. The motor carrier members of TIDA include common carriers, private carriers, and private fleets. The insurance company members provide transportation liability insurance for the trucking industry.

TIDA provides assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, insurance and workers' compensation claims.

Through and on behalf of their members, amici have a strong interest in ensuring that the accepted legal standards for determining worker classification are employed reasonably, uniformly, and predictably by administrative agencies and courts. Worker classification determinations have a significant impact on motor carrier operations and carry serious financial and logistical consequences for the trucking industry and the national economy it serves. In light of their extensive involvement with many of the issues pertinent to this case, amici are uniquely positioned to explain the context in which worker classification issues in the trucking industry arise, and the practical implications of the issues raised in this case.

## ARGUMENT

### I. THE USE OF INDEPENDENT CONTRACTORS IN THE TRUCKING INDUSTRY MUTUALLY BENEFITS OWNER-OPERATORS AND MOTOR CARRIERS.

#### A. Independent Contractors Play A Crucial Role In The Trucking Industry.

In the trucking industry, the use of "owner-operators" - independent business persons who contract their services and lease their motor vehicle equipment to trucking companies pursuant to 49 U.S.C. § 14102 and related regulations set forth at 49 C.F.R. § 376 - is widespread and economically crucial. Their role in trucking operations has a history essentially as long as the industry itself. *See* Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) ("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."). Indeed, sixty years ago, the Supreme Court noted the trucking industry's extensive use of leased equipment supplied and operated by owner-operator truckers. *Am. Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 303 (1953) ("Carriers subject to [Interstate Commerce] Commission jurisdiction have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands.").

Accurate, recent estimates of the number of independent contractors and owner-operators are difficult to obtain, but there is no question that they constitute a large segment of the industry. The Owner-Operator Independent Drivers Association ("OOIDA") - the international trade association representing independent owner-operators and professional drivers - boasts over 150,000 members in the U.S. and Canada (*see* "OOIDA Timeline," *available at* http://www.ooida.com/Who_We_Are/About_Us/timeline.shtml). In the Census Bureau's 2002 Vehicle Inventory and Use Survey - the most recent inventory of trucks nationwide - there were approximately 390,000 owner-operators. *See* Terrance Nguyen, *Gauging the Owner-Operator Population,* Fleet Owner (Dec. 13, 2004), *available at* http://fleetowner.com/news/owner_ operator_population_121304/. What is clear, furthermore, is that independent contractors, including owner-operators, are used in most, if not all, sectors of the trucking industry, including long-haul carriage, movement of household goods, intermodal operations, agricultural transportation, and package delivery.

Equally clear are the reasons that independent contracting is attractive to trucking companies and independent contractors alike. For trucking companies, independent contractors provide a number of advantages. Independent owner-operators often are mature,

experienced drivers who are both highly skilled, with proven safety records, and highly motivated. The availability of such owner-operators and their equipment (through leases to carriers with operating authority) enables motor carriers to save on equipment and capital costs, and provides the flexibility necessary to meet fluctuations in demand for trucking services. As the Supreme Court has explained,

> [d]emand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then required by another carrier for its operations, and the latter will be pleased to accommodate. Each is thereby advantaged.

*Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975).[1] Independent contracting is, in other words, crucial to the ability of motor carriers to remain nimble and competitive in the face of inevitable fluctuation in demand for their services. Motor carriers - and the smooth functioning of the economy as a whole - require the ability to ramp up capacity on particular routes or for particular shippers on short notice. Independent contractors can provide an economically viable means of maintaining that ability.

Use of independent contracting allows carriers to make market-driven decisions on how to manage the significant costs of operating a trucking company, which include the capital costs of trucks, trailers, and other equipment; interest on those acquisitions;

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[1] In *Brada Miller*, the Court referred to leasing arrangements between two "carriers" - that is, firms with operating authority (certificates) under Federal law. *See* 49 C.F.R. § 376.2(a) (defining an "[a]uthorized carrier" as a "person or persons authorized to engage in the transportation of property as a motor carrier under the provisions of 49 U.S.C. §§ 13901 and 13902"). However, the same considerations apply equally in the many lease arrangements between an owner-operator who does not have his or her own operating authority and a carrier with such operating authority.

the costs of maintaining the equipment for safe and efficient operations; licensing and related fees; insurance; and labor. The existence of the independent contractor model provides a choice between an "embedded cost" approach (in which a carrier takes on the full cost of purchasing and maintaining its fleet and hiring drivers, in return for a particular capacity level on an ongoing basis) and an "incremental cost" approach (in which a carrier purchases the use of an independent contractor's equipment and services, at the capacity level called for at a given time subject to contractor availability) - or some combination of the two. By the same token, independent contractors can "follow the demand," selling their services and leasing their equipment wherever capacity is needed at a given time.

Motor carriers who are particularly subject to fluctuation in demand may find the "incremental cost" approach more economically sensible, or even economically *necessary* if their cumulative revenues could not support a fleet large enough to meet peak demand. And efficiency gains from the use of independent contractors mean lower costs for the carrier, which in turn means lower costs down the shipping chain and ultimately to the consumer.

### B. The Independent Contracting Model Offers Owner-Operators Opportunities To Benefit That Are Unavailable To Employee Drivers.

In addition, owner-operators and other independent contractors share the motor carrier's incentives to meet customer demand and increase revenues and profits. By successfully and skillfully managing operations, an independent contractor grows his or her own business - whether by productively performing services him or herself, or by hiring employees to provide additional services - and, at the same time, contributes to the success of the trucking company. *See, e.g.*, Philip J. Romero, *The Economic Benefits of Pre-*

*serving Independent Contracting* (Sept. 2011), 30, *available at* http://www.calchamber.com/governmentrelations/documents/economicbenefitsofpreserving-independentcontractingstudy.pdf. The value of this mutuality of interests, and of the energy and maturity independent contractors bring to their work, has not been lost on the trucking industry. Indeed, a number of carriers have made reliance on independent contractors a central feature of their business models.

For the independent contractor, this arrangement provides a number of advantages. Studies show high levels of job satisfaction among independent contractors generally. As one recent survey concluded, the vast majority of independent workers affirmatively chose that path, with "[o]nly 1 in 7 report[ing] that the decision to work independently was due to factors beyond their control." MBO Partners, *The State of Independence in America: Third Annual Independent Workforce Report*, Sept. 2013, at 6. The survey concluded that "the average independent has been walking this path for over 10 years," and that they are "getting what they want," with some 77% reporting that they intended to maintain an independent course, and 64% rating their satisfaction as 8 or higher on a 10-point scale. *Id. See also* Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements,* February 2005, at 4, *available at* http://www.bls.gov/news.release/conemp.nr0.htm ("Fewer than 1 in 10 independent contractors said they would prefer a traditional work arrangement."). In the trucking industry, owner-operators consistently report that they highly value the independence afforded them by their relationships with the carriers they offer their services to. *See* Upper Great Plains Transp. Inst., *Creating a Competitive Advantage Through Partnership with Owner-Operators* 12 (1992) (95% of the owner-operators surveyed rated "independent lifestyle"

as the most important aspect of their job).

Independent contractors in the trucking industry reap both the general benefits of independent contracting, and the benefits that arise from long-standing practices in the trucking industry. For one thing, owner-operators typically out earn similarly situated employee drivers by a significant margin: as one industry expert recently put it, "the average owner-operator fares better than company driver counterparts," with a net income of $51,912 compared to "about $40,000 per year for the same amount of work" by an employee driver. Rip Watson, *Owner-Operators Make More Income, Freight-Rate Gains, Industry Expert Says*, Transport Topics, Sept. 23, 2013, at 12.

But independent truckers have the opportunity to do far more than simply make more money by personally hauling freight. Because business start-up costs in the trucking industry are comparatively modest - consisting principally of the cost of a power unit and various licensing and insurance fees - trucking provides independent contractors an affordable opportunity to start and build their own businesses. In doing so, owner-operators sometimes receive assistance from trucking companies in locating the financing they may need to purchase trucks or other necessary equipment, and in obtaining insurance. Enterprising owner-operators can purchase additional trucks and trailers, and employ drivers and other staff to carry out and expand their business. Independent contracting in the trucking industry allows owner-operators to pursue their own version of the American dream, enabling them to be their own bosses, obtain capital and assistance necessary to succeed as independent businesspersons, and determine how much time they want to devote to work.

Owner-operators and independent contractors also benefit from the fact that truck-

ing companies have long recognized the value of having experienced drivers who understand company practices and the requirements imposed by regulations and customer demands. Faced with chronic shortages of such experienced drivers, trucking companies often offer a variety of programs and inducements to promote the viability and stability of the owner-operator workforce and to attract new operators and equipment to the trucking industry. This has been particularly true in recent years, as a shortage of experienced drivers has become one of the greatest challenges faced by the motor carrier industry nationwide - and one that shows signs of growing even more acute in the years to come. *See, e.g.*, *ATA Driver Shortage Analysis Warns of Longer-Term Trends*, Transport Topics, Nov. 6, 2012, *available at* http://www.ttnews.com/articles/basetemplate.aspx?storyid=30556; Bob Costello, *Truck Driver Shortage Update*, Nov. 2012, *available at* http://www.trucking.org/StateIndustry/Documents/Driver%20Shortage%20Update%20November%202012.pdf.

As a result, motor carriers have a vested interest in promoting the growth and stability of the owner-operator and independent contractor pool. Thus, as noted above, some trucking companies assist in locating financing for purchases of trucks. Similarly, trucking companies can use their superior size to assist independent contractors in obtaining lower-cost insurance than they might be able to obtain on their own, as well as other equipment and sundries that they need. The independent contractor clearly benefits from these practices, but so do the trucking companies, by helping to ensure an adequate supply of operators, and by helping to enable independent contractors to "complete their contracted tasks." *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 604 (D.C. Cir. 1989).

In light of the need to assure the continued availability of skilled drivers and the

flexibility that owner-operators and other independent contractors provide for addressing the changing demands of a dynamic marketplace, the steps taken by trucking companies to make the contracting relationship mutually beneficial make eminent sense. Worker classification decisions should be made against this background, lest they be skewed to discourage such win-win arrangements.

## II. THE NATURE OF TRUCKING OPERATIONS OFFERS ADDITIONAL CONTEXT AGAINST WHICH TO EVALUATE CLASSIFICATION QUESTIONS.

In resolving worker classification issues, the context of the relationships at issue must be given due consideration. As the Supreme Court has put it, "there is no shorthand formula or magic phrase that can be applied to find the answer" to whether a worker is a contractor or an employee, "but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) (footnote omitted). Accordingly, when this Court assesses the factors of the Illinois classification test, they "'should not merely be tallied but should be weighed according to their significance in the case.'" *JustMed, Inc. v. Byce*, 600 F.3d 1118, 1126 (9th Cir. 2010) (quoting *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992)).

### A. In Evaluating The Entrepreneurial Opportunities Of Independent Contractors In The Trucking Industry, The Primary Focus Should Be On Opportunities For Gain Rather Than Risks Of Loss.

In applying the Illinois Unemployment Insurance Act's independent contractor test, this Court considers whether the worker is "engaged in an entrepreneurial enterprise." *SMRJ, Inc. v. Russell*, 378 Ill. App. 3d 563, 574 (Ill. App. 1 Dist. 2007). Similar considerations inform many independent contractor inquiries, as the opportunity for a

worker to profit from efficiency and productivity is fundamentally aligned with the issue of whether an individual is in business for him- or herself, or is simply the employee of another. *See, e.g.*, *Bain v. Tax Reducers, Inc.*, 161 Cal. Rptr. 3d 535, 557 (Cal. Ct. App. 2013) ("The trier of fact may also consider . . . the opportunity for profit or loss.") (citing *S. G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 769 P.2d 399, 407 (Cal. 1989)); *C.L.E.A.N., LLC v. Div. of Employment Sec.*, 405 S.W.3d 613 (Mo. Ct. App. 2013) ("realization of profit or loss" among the "factors to be used as guides in determining whether sufficient control is present to establish an employer-employee relationship"); *Auto Owners Ins. Co. v. Motorists Mut. Ins. Co.*, 1992 WL 236861, at *4-5 (Ohio Ct. App. 1992) (looking to whether worker had "any opportunity to profit by her own managerial skills"); *Serv. Emp. Health & Welfare Trust Fund v. AAA Bldg. Maintenance, Inc.*, 704 P.2d 644, 647 (Wash. Ct. App. 1985) (workers' "potential for loss or profit . . . should be taken into consideration").

As we have explained in the previous section, a mutually beneficial pattern of promoting *successful* entrepreneurship among independent contractors and owner-operators has evolved in the trucking industry as a result of a dynamic marketplace driven by fluctuating demand, chronic or recurring shortages in experienced truck drivers, and longstanding practices of relying on the energy and enterprise of independent contractors and their leased equipment. Thus, trucking companies understandably undertake significant efforts to make the contracting endeavor mutually beneficial. These practices should not be discouraged or penalized, and they should not be viewed as inconsistent with the existence of entrepreneurial opportunity and independent contractor status.

With these considerations in mind, this Court should decline the Department of

Employment Security's invitation to find evidence of an employer-employee relationship in their allegation that Plaintiff provides owner-operators "with access to benefits and business consulting services," and subsidizes the cost of fuel and tolls. Dept. Br. at 33. Rather, the Court should follow the approach taken by, *e.g.*, the D.C. Circuit in a similar context, where that court held that a carrier's "support to drivers to allow them to finance the purchase of their cabs," its "provision of truck service centers" to assist drivers, and its "system of advancing funds to drivers for operating (and other) expenses" did not reflect an employer-employee relationship. *N. Am. Van Lines*, 869 F.2d at 603. On the contrary, the D.C. Circuit held, those practices reflected the carrier's "efforts to support the drivers' efforts to establish their businesses and complete their contracted tasks, as opposed to an effort to assert control over the details and manner of performance." *Id.* at 604.

### B. Restrictions On Work Performance Based On Customer Demands Are Not Indicative Of An Employer-Employee Relationship.

Courts routinely recognize the distinction between - on the one hand - control exercised over the manner and means of performance, and - on the other hand - steps taken to assure the achievement of shared performance goals. As the D.C. Circuit has held, "[i]t is important * * * to distinguish such company supervision from company efforts merely to monitor, evaluate, and improve the results or ends of the worker's performance." *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995) (internal quotation marks omitted). Similarly, "where a company's control over an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship because it is 'addressed to the ends to be achieved * * * rather than the means to achieve that result.'" *Id.* at 859 (quoting *Cent.*

*Transp., Inc., et al.*, 299 N.L.R.B. 5, 13, 1990 WL 122535, at *14 (1990)); *see also, e.g.*, *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1178 (11th Cir. 2012) (company's efforts to further the objectives of "having its packages delivered on time" and "serving its customers" may have "incidentally impacted Drivers' working conditions" but did not amount to "exert[ing] control as an employer would have"). Thus, when the Department alleges, for example, that Plaintiff "could require Park to perform services for it when . . . it was necessary in furtherance of Plaintiff's obligations to its customers," Dept. Br. at 32, nothing about that allegation is suggestive of the type of control an employer exercises over an employee - a high level of customer service is precisely what owner-operators contract to provide.

This insight is critical, because customer satisfaction is essential to success in the highly competitive trucking industry, and customer satisfaction is directly determined by the ability to meet customer demands. Customer requirements determine a broad range of practices and procedures. To take an obvious example, customer demand frequently determines the scheduling of pickups and deliveries, and thus affects the contractor's hours of work. Less obviously, but particularly true in a post-9/11 world where concerns about security are heightened, customers also frequently insist that personnel delivering and picking up shipments at office buildings, residences, and work sites arrive at specific times and locations and wear uniforms, badges, or other insignia. *Cf.*, *e.g.*, Internal Revenue Service, *Employment Tax Guidelines: Classifying Certain Van Operators in the Moving Industry* 23, *available at* http://www.irs.gov/pub/irs-utl/van-ops.pdf ("IRS Van Operator Tax Guidelines") ("Commonly, the company instructs the Van Operator and helpers to wear a uniform imprinted with its name or insignia in the presence of the cus-

tomer. Instructions on wearing uniforms or insignia generally originate with the Company's desire to assure the customer that the Van Operator and helpers are who they purport to be * * * . Thus, the instruction ordinarily is intended to ensure customer security rather than to control the operator. In view of the underlying purpose, an instruction to wear a uniform in the customer's presence is a neutral factor."). Contract conditions of this nature do not reflect the type of control over performance exercised by an employer over an employee.

### C. Restrictions On Work Performance Based On Regulatory Requirements Are Not Indicative Of An Employer-Employee Relationship.

Courts routinely recognize that "the fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship." *Sida of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975). *See also, e.g., N. Am. Van Lines*, 869 F.2d at 599 ("employer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status"). Simply put, when a carrier requires independent contractors' "compliance with the law," it "is not controlling the driver" - rather, "[i]t is the law that controls the driver." *Id. See also, e.g., Ruiz v. Affinity Logistics Corp.,* 697 F. Supp. 2d 1199, 1207 (S.D. Cal. 2010) (federal leasing regulations, including "exclusive possession, control, and use of the equipment" requirement do not affect whether owner-operator is an independent contractor or an employee); *Pouliot v. Paul Arpin Van Lines, Inc.,* 292 F.Supp.2d 374, 383 (D. Conn. 2003) (lease regulations have no impact on the type of relationship that exists between the parties to the lease); *Upshaw v. Hale Intermodal Transport Co.,* 480 S.E.2d 277, 278 (Ga. Ct. App. 1997) (federal leasing requirement that motor carrier have "full direction

and control of owner-operator leased vehicles" does not affect independent contractor relationship); *Hernandez v. Triple Ell Transport, Inc.*, 175 P.3d 199, 205 (Idaho 2007) ("adherence to federal law" was not evidence of motor carrier's control over owner-operator); *Universal Am-Can, Ltd. v. Workers' Compensation Appeal Board,* 762 A.2d 328, 336 (Pa. 2000) ("obligations imposed by law upon a motor carrier . . . when leasing equipment from an owner-operator are not probative" of the independent contractor determination); *Wilkinson v. Palmetto State Transportation Co.,* 676 S.E.2d 700, 705 (S.C. 2009) (federal regulation "is not intended to affect" the independent contractor determination under state law).

This consideration is crucial in cases involving worker classification in the trucking industry because the trucking industry is pervasively regulated, and the burden of assuring compliance rests almost entirely on the motor carrier under whose authority goods are moved rather than on the contractor. As the Internal Revenue Service has noted in its guidelines for classifying certain van operators in the moving industry, "federal and state regulations make the Carrier responsible for the compliance of the Van Operators and vehicles (including power units) in the Carrier's service. The Carrier may be subject to fines and penalties if it uses a Van Operator or vehicle that does not comply with governmental regulations. Accordingly, the Carrier must require a Van Operator to follow all governmental regulations covering such areas as inspection, repair, and maintenance of the vehicle, driving of the vehicle, maximum driving and on-duty time, weighing procedures, and testing for alcohol and controlled substances." IRS Van Operator Tax Guidelines at 21 (citations omitted).

The regulatory context in which trucking operations are conducted includes,

among others, safety, maintenance, and inspection rules; rules relating to receipts and bills of lading; equipment standards; placarding standards; leasing regulations; hours-of-service regulations; commercial drivers license standards; driver training regulations; driver qualification standards; requirements relating to minimum financial responsibility and insurance; rules relating to notification and reporting of accidents; rules governing drug and alcohol testing; and rules governing the identification and handling of hazardous materials. *See* 49 C.F.R. §§ 373, 376, 380, 382, 383, 385, 387, 390, 391, 392, 393, 395, 396, 397, 399; *see also, e.g.*, IRS Van Operator Tax Guidelines at 5-6.[2] Because of the pervasive regulatory matrix within which trucking operations must be conducted, independent contractors in the trucking industry cannot be expected to have the freedom of action that independent contractors in other, less extensively regulated industries may have. Accordingly, it is essential that supervision required to assure compliance with regulations not be conflated with the kind of supervision of the manner and means of performance that might be indicative of employee status.

## III. IF ILLINOIS LAW WERE TO PROHIBIT CARRIERS FROM USING THE OWNER-OPERATOR MODEL, IT WOULD BE PREEMPTED BY FEDERAL LAW.

Amici agree with the circuit court, and with Plaintiff, that William Park was an independent contractor under the proper application of the Illinois Unemployment Insurance Act's criteria. But if this Court were to construe Illinois law to prohibit the kind of independent contractor relationship that Plaintiff - and countless other carriers - maintain

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[2] There also are many additional regulations that apply to particular segments of the trucking industry. For example, transporters of household goods are subject to estimating rules; rules regulating weighing practices, reasonable dispatch, insurance for public liability and cargo, annual performance reports, packing and unpacking, shipping documentation, and dispute settlement; and regulations governing lease and interchange of vehicles. *See* 49 C.F.R. § 375; *see also* IRS Van Operator Tax Guidelines at 5.

with the owner-operators that move freight for them, that conclusion would run afoul of federal law that protects the interstate motor carrier industry from state regulation.

The Federal Aviation Administration Authorization Act ("FAAAA") preempts any "law related to a price, route, or service of any motor carrier" or any "air carrier * * * transporting property * * * by motor vehicle." 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). This broad preemption provision was enacted in 1994 with the goal of eliminating the patchwork of burdensome state trucking regulations that had previously developed, and to ensure that states would not undo federal deregulation with regulations of their own. As the Supreme Court has explained, a "state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008). To achieve its goal, Congress expressly incorporated the preemptive language and effect of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), as the Supreme Court had broadly interpreted it in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). *See* H.R. Conf. Rep. No. 103-677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755. Accordingly, like the ADA, the FAAAA preempts all laws that significantly affect a price, route, or service of any motor carrier - whether that effect is direct or indirect. *See Rowe*, 552 U.S. at 370; *Morales*, 504 U.S. at 384. And the Court has expressly recognized that the preemption threshold is a low one: so long as a state law has an effect on prices, routes, or services that is not "tenuous, remote, or peripheral," it is preempted. *Rowe*, 552 U.S. at 375.

FAAAA preemption is an essential component of the broader federal policy of uniform regulation of interstate motor carriers. As the Supreme Court has explained,

"Congress' overarching goal" in enacting the ADA and FAAAA preemption provisions was to "help[] assure 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*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378) (emphasis added). This Congressional policy permits motor carriers to implement efficient, standard business practices nationwide. And those standard practices - along with the timely, efficient, and cost-effective delivery of goods they enable - in turn are essential not only to carriers themselves but also to the customers who rely on them for timely shipments and, by extension, to the national economy as a whole.

### A. Congress Enacted The FAAAA's Preemption Provision To Protect Motor Carriers From A Burdensome, Inefficient Patchwork Of State Regulation.

Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, Congress has made a commitment to deregulate the motor carrier industry. At that time, Congress found that "[t]he existing regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and ha[d] failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. Rep. No. 96-1069, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2292; *see also, e.g.*, Michael J. Norton, *The Interstate Commerce Commission and the Motor Carrier Industry - Examining the Trend Toward Deregulation*, 1975 Utah L. Rev. 709, 709 (reporting that federal motor carrier "regulation has recently come under attack for causing inefficiency and wastefulness, and for repressing technological advances in the industry"). Thus, in order to remove obstacles to innovation and to encourage efficiency, Congress significantly deregulated the industry at the federal level.

It soon became clear, however, that federal deregulation could not achieve its objectives so long as burdensome and inconsistent state regulation persisted. As ATA testified in support of broad federal preemption:

> A single shipment may begin in one state and pass through several other states on the way to its destination. The shipper and receiver of the goods may be located in different states. Without uniform federal laws and regulations governing the provision of such services, the potential conflicts and confusion between and among state laws is beyond comprehension.

Hearing Before Subcomm. on Surface Transp. of the S. Comm. on Commerce, Sci., and Transp., 103d Cong., 2d Sess. (July 12, 1994) (statement of Thomas J. Donohue), 1994 WL 369290. Congress agreed, concluding that "the regulation of intrastate transportation of property by the States" continued to "impose[] an unreasonable burden on interstate commerce;" "impede[] the free flow of trade, traffic, and transportation of interstate commerce;" and "place[] an unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605. Specifically, Congress found that state regulation "causes significant inefficiencies," "increase[s] costs," and "inhibit[s] * * * innovation and technology." H.R. Conf. Rep. No. 103-677, at 87, 1994 U.S.C.C.A.N. 1759.[3] Indeed, despite deregulatory efforts at the federal level, "[t]he sheer diversity of [state] regulatory schemes [remained] a huge problem for national and regional carriers attempting to conduct ***a standard way of doing business***." *Id.* (emphasis added). Therefore, in order to free carriers from having to modify their business practices every time they crossed state lines, Congress concluded that

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[3] *See also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440–41 (2002) (referring to the same Conference Report for guidance as to Congressional intent in interpreting the preemption language).

"preemption legislation [was] in the public interest as well as necessary to facilitate interstate commerce." *Id.*

### B. If Illinois Law Were To Prohibit Motor Carriers From Contracting With Owner-Operators, It Would Be Preempted By The FAAAA.

A prohibition on the independent contractor model in the trucking industry would conflict with Congress' intent, in passing the FAAAA, to reap the efficiencies of adopting a "standard way of doing business" nationwide, H.R. Conf. Rep. No. 103-677, at 87, and would thus be preempted. At least two federal courts confronting this issue have held independent contractor bans preempted.

In *American Trucking Associations, Inc. v. City of Los Angeles*, 560 F.3d 384 (9th Cir. 2011), *rev'd in part*, 133 S. Ct. 2096 (2013), the Ninth Circuit held that the Port of Los Angeles - a division of the city - could not require carriers serving the Port to abandon the use of owner-operator drivers. *Id.* at 408. The district court had held that the requirement "would affect motor carrier's routes or services, by prohibiting trucks driven by independent owner-operators from" serving the Port, and by "significantly affecting costs of drayage services." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 2010 WL 3386436 at *19 (C.D. Cal. Aug. 26, 2010). Indeed, the City of Los Angeles did not challenge the district court's conclusion that the independent contractor prohibition related to a motor carrier's rates, routes, and services (and thus fell within the ambit of the FAAAA's preemption provision). It argued only (and unsuccessfully) that a purported "market participation" exception (with no relevance in the context of this case) saved the owner-operator ban. 660 F.3d at 407.

And in a recent decision in a case involving misclassification allegations similar to those in this case, the U.S. District Court for the Eastern District of Virginia held

preempted a state law that, in its view, had the effect of prohibiting the owner-operator model in the trucking industry. *Sanchez v. Lasership, Inc.*, __ F. Supp. 2d __, 2013 WL 1395733 (E.D. Va. April 4, 2013), involved a claim that independent owner-operators were misclassified under the Massachusetts Independent Contractor Statute. Like the Illinois statute at issue here, the Massachusetts statute purported to restrict the use of independent contractors to only those circumstances where the contracted services were performed "outside the usual course of the business of the employer." Mass. Gen. Laws ch. 149 § 148B(a)(2); *compare* 820 ILCS 405/212(B) (allowing an independent contractor relationship when the worker's service is "outside the usual course of the business for which such services is performed"); *see also Sanchez*, 2013 WL 1395733 at *9. And like the Department of Employment Security urges the Court to do here, the *Sanchez* plaintiffs argued that the defendant could not satisfy that prong of the statute's independent contractor test. *Sanchez*, 2013 WL 1395733 at *10; *see* Dept. Br. at 34-35. As the *Sanchez* court put it, this had the effect of "bind[ing] carriers to utilize a certain type of employment relationship to carry out their operations." *Id.* And the FAAAA does not permit states to "bind[] carriers . . . to a specific business model." *Id.* at *11.

Like the Massachusetts statute at issue in *Sanchez*, if this Court were to hold that the Illinois Unemployment Insurance Act prohibits Plaintiff's owner-operator model, it would amount to a "state regulation on the very business methods that carriers rely upon to efficiently operate and compete." *Sanchez*, 2013 WL 1395733 at *12. And by doing so, it would interfere with the "'maximum reliance on competitive market forces'" to "stimulat[e] 'efficiency, innovation, and low prices'" that Congress intended when it enacted the FAAAA's preemption provision. *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504

U.S. at 378). As the *Sanchez* court further observed, "Congress sought to relieve motor carriers from the absurd inefficiencies in their operations, which made it difficult to efficiently conduct a standard way of doing business and impeded their ability to compete and provide quality services to their customers." *Sanchez*, 2013 WL 1395733 at *12.

If Illinois law were to prohibit Plaintiff from contracting with owner-operators, it would amount to "a complete overhaul of a motor carrier's business model," would be "disruptive to the carriage itself," and would thus "fall[] within the scope of conduct the FAAAA intended to prevent." *Sanchez*, 2013 WL 1395733 at *12. And if Illinois could impose these burdens on motor carriers, so could any other state, which would "open the way for 'a patchwork of state service-determining laws, rules, and regulations.'" *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1780 (2013) (quoting *Rowe*, 522 U.S. at 372). This would radically circumvent Congress' market-driven approach to the industry, and threaten the price increases and service disruptions the FAAAA was intended to prevent.

## CONCLUSION

The circuit court's order should be affirmed.

Dated: October 28, 2013

Respectfully submitted,

William D. Brejcha
SCOPELITIS GARVIN LIGHT HANSON & FEARY
30 West Monroe Street, Suite 600
Chicago, Illinois 60603
(312) 255-7200
(312) 422-1224 (fax)
wdbrejcha@scopelitis.com
Attorney for *Amici Curiae*

Of Counsel:

Richard Pianka
ATA LITIGATION CENTER
Prasad Sharma
AMERICAN TRUCKING ASSOCIATIONS, INC.
950 North Glebe Road
Arlington, Virginia 22203

Of Counsel for *amicus* American Trucking Associations, Inc.

Sheldon Gilbert
National Chamber Litigation, Inc.
1615 H Street NW
Washington, DC 20062

Of Counsel for *amicus* Chamber of Commerce of the United States of America

Shimon B. Kahan
HAYNES, STUDNICKA, KAHAN, O'NEILL & POULAKIDAS LLC
200 West Adams Street, Suite 2175
Chicago, Illinois 60606

Of Counsel for *amicus* Trucking Industry Defense Association

**IN THE APPELLATE COURT OF ILLINOIS**
**FIRST JUDICIAL DISTRICT**

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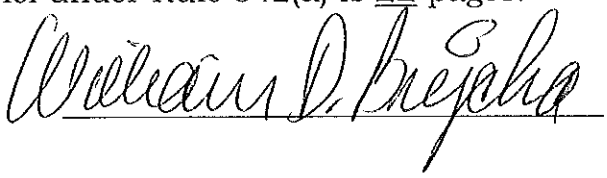
|---|---|
| C.R. ENGLAND, INC., a foreign<br><br>Plaintiff-Appellee,<br><br>v.<br><br>ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an administrative agency of the State of Illinois, et al.<br><br>Defendants-Appellants. | Appeal from the Circuit Court of Cook County Illinois, County Department Law Division<br><br>Case Nos.: 11-CH-14681<br>11-CH-16972<br>(Transferred to Law Division)<br><br>The Honorable Margaret Ann Brennan |

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is **22** pages.



William D. Brejcha
SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY
30 West Monroe Street, Suite 600
(312) 255-7200
Fax: (312) 422-1224
wdbrejcha@scopelitis.com

## PROOF OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that 3 copies of the foregoing ***Amici Curiae Brief of Brief Of American Trucking Associations, Inc. Chamber Of Commerce Of The United States Of America And The Trucking Industry Defense Association As Amici Curiae In Support Of Appellee*** was served on each of the below named parties on October 28, 2013, by depositing them in the United States mail at 30 West Monroe Street, Chicago, Illinois, before 5:00 p.m., in envelopes bearing sufficient postage.

Lisa Madigan
Michael Scodro
State of Illinois Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

William Park
Lake View YMCA
3333 North Marshfield Avenue
Suite 507
Chicago, Illinois 60657-2123

Garrett L. Boehm, Jr.
Johnson & Bell, Ltd.
33 West Monroe Street
Suite 2700
Chicago, Illinois 60603-5405

William D. Brejcha

**SUBSCRIBED and SWORN to before me**
**This 28th day of October, 2013 .**

**NOTARY PUBLIC**

"OFFICIAL SEAL"
MARTA I ROMO
Notary Public, State of Illinois
My Commission Expires June 14, 2016