STACEY M. LEYTON (SBN 203827)
Email: sleyton@altber.com
SCOTT A. KRONLAND (SBN 171693)
Email: skronland@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

Attorneys for Intervenor-Defendant International Brotherhood of Teamsters

Additional counsel listed on next page

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA TRUCKING ASSOCIATION, RAVINDER SINGH, and THOMAS ODOM,

Plaintiffs,

v.

ROB BONTA, in his official capacity as the Attorney General of the State of California; NATALIE PALUGYAI, in her official capacity as Secretary of the California Labor Workforce and Development Agency; KATRINA HAGEN, in her official capacity as the Acting Director of the Department of Industrial Relations of the State of California; and LILIA GARCIA BROWER, in her official capacity as Labor Commissioner of the State of California, Division of Labor Standards Enforcement, NANCY FARIAS, in her official capacity as the Director of the Employment Development Department,

Defendants,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant.

Case No. 3:18-cv-02458-BEN-DEB

INTERVENOR-DEFENDANT INTERNATIONAL BROTHERHOOD OF TEAMSTERS' MEMORANDUM OF CONTENTIONS OF FACT AND LAW

Trial Date: November 13, 2023
Time: 10:30 a.m.
Courtroom: 5A
Action Filed: October 25, 2018

Additional Counsel:

JULIE GUTMAN DICKINSON
(SBN 148267)
Email: JGD@bushgottlieb.com
HECTOR DE HARO (SBN 300048)
Email: HDeharo@bushgottlieb.com
BUSH GOTTLIEB, ALC
801 N. Brand Boulevard, Suite 950
Glendale, CA 91203
Telephone: (818) 973-3200
Facsimile: (818) 973-3201

Attorneys for Intervenor-Defendant International Brotherhood of Teamsters

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

Federal Statutes and Regulations

California Statutes and Regulations

Other Authorities

INTRODUCTION

Plaintiffs seek to obtain through litigation what they could not achieve through the political process: a carve-out to California Assembly Bill 5 ("AB 5") for the trucking industry. The Court should reject all of Plaintiffs' legal challenges. The Ninth Circuit has already held that Plaintiffs' Federal Aviation Administration Authorization Act ("F4A") preemption claim lacks merit because AB 5 is a "law[] of general applicability that affect[s] a motor carrier's relationship with its workforce" and is "not significantly related to rates, routes or services." *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 656-59 (9th Cir. 2021) ("*CTA*"). Plaintiffs' F4A preemption arguments cannot get around this binding precedent. Plaintiffs' dormant Commerce Clause claim fails because AB 5 does not discriminate against out-of-state companies or impose a substantial burden on interstate commerce that is clearly excessive in relation to AB 5's local benefits. Plaintiffs' equal protection claim fails because there are rationally conceivable reasons for AB 5's distinctions. Accordingly, the Court should grant judgment for Defendants.

BACKGROUND

A. California updates its test for "employee" status.

California law provides protections for employees, including minimum wages, overtime, unemployment insurance, workers' compensation, and reimbursement for work expenses. Because only employees are entitled to these protections, "the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public." *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 912 (2018) ("*Dynamex*").

Before 2018, California's test for "employee" status came from *S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations*, 48 Cal.3d 341 (1989) ("*Borello*"), which set out factors to weigh in determining whether a worker is an employee. *See Dynamex*, 4 Cal.5th at 921-22. Plaintiff California Trucking Association

argued unsuccessfully that the F4A preempts the *Borello* test, as applied to motor carriers. *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 961-67 (9th Cir. 2018).

In 2018, the California Supreme Court decided *Dynamex*, a case brought by truck drivers challenging their re-classification as independent contractors. A unanimous Court held that the easy-to-apply "ABC test" determines whether a worker is an employee for purposes of California's wage orders, which guarantee protections like minimum wages and overtime. *Dynamex,* 4 Cal.5th at 955-56. Under the ABC test, a hiring entity claiming that a worker is an independent contractor must demonstrate that the worker "(a) … is free from the control and direction of the hirer … (b) … performs work that is outside the usual course of the hiring entity's business; and (c) … is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." *Id*. at 955-56. The *Dynamex* Court concluded that multi-factor, totality-of-the-circumstances tests of employee status (like the *Borello* test) are hard to enforce, thereby making it too easy for employers to misclassify workers who should be receiving employee protections. *Id.* at 955.

In 2019, the California Legislature enacted AB 5 to codify *Dynamex* and apply the ABC test to California's Labor Code and Unemployment Insurance Code. 2019 Cal. Stat., ch. 296; Cal. Labor Code §2775 (formerly §2750.3). The Legislature found that "misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class," AB 5 §1(c), and stated that its intent was "to ensure workers … have the basic rights and protections they deserve," *id.* §1(e).

While AB 5 was under consideration, CTA unsuccessfully lobbied to exempt the trucking industry from the ABC test. Dkt. 54-3 (Yadon Decl.) ¶¶17-18. Although that proposed exemption was not adopted, AB 5 does contain a general exception for "bona fide business-to-business contracting." Cal. Labor Code §2776 (formerly §2750.3(e)). If the requirements of that business-to-business ("B2B")

exception are met, then the question whether a contract between two businesses creates an employment relationship is governed by the *Borello* test. Cal. Labor Code §§2775(b)(3), 2776(a), 2778(a). AB 5 also contains some industry-specific exceptions, but "the overwhelming majority" of California workers are now covered by the ABC test rather than the *Borello* test.[1]

B. Misclassification is a pervasive problem in the trucking industry that harms drivers, the public, and competitors.

Prior to *Dynamex*, trucking companies were often found to have misclassified their drivers as independent contractors under the *Borello* test. *See*, *e.g.*, Analysis of SB 1402, Cal. Senate Committee on Appropriations (May 7, 2018) (between 2010 and 2018, DLSE found in 97% of cases that hiring entity had misclassified driver as independent contractor). Misclassified drivers and their families are left without a safety net for an injury or a lost job. *Dynamex,* 4 Cal.5th at 912-13 & n.2; Dkt. 173-13 (Second Tate Decl.) ¶¶7, 10; Dkt. 173-4 (Arambula Decl.) ¶10; Dkt. 173-10 (Mayorga Decl.) ¶¶11-12. Because companies that misclassify drivers do not pay for drivers' work expenses, such as truck maintenance and gasoline, these drivers' compensation often falls below the minimum wage. Dkt. 173-1 (Second Belzer Decl.) ¶¶22-23; Dkt. 173-13 (Second Tate Decl.) ¶¶8-10; *see also* Dkt. 173-6 (Garcia Decl.) ¶9; Dkt. 173-10 (Mayorga Decl.) ¶10. Some drivers "earn so little revenue that their expenses outpace their revenues, putting them in a money-losing position throughout the year." Dkt. 173-1 (Second Belzer Decl.) ¶¶60-64.

Companies that use misclassified "independent contractor" truck drivers also do not pay into the workers' compensation or unemployment systems. *Dynamex*, 4 Cal.5th at 912-13 & n.2. This not only imposes costs on the public, which must shoulder the financial burden if a misclassified driver later has to file a

[1] Ken Jacobs et al., "The Vast Majority of California's Independent Contractors are Still Covered by the ABC Test," UC Berkeley Labor Center 2 (June 2023), at https://laborcenter.berkeley.edu/ab2257-employment-status.

claim for benefits, but also makes it difficult for the companies that are complying with state employment law to remain competitive. *See* Dkt. 173-11 (Peratt Decl.) ¶11; Dkt. 173-12 (Ta Decl.) ¶14; Dkt. 173-13 (Second Tate Decl.) ¶12.

AB 5 was enacted to make it easier for hiring entities, workers, and state enforcement agencies to determine who is an employee, and therefore to reduce the social harms from the misclassification of workers as independent contractors. AB 5 §1; *see also supra* at 2 (discussing rationale of *Dynamex*).

C. Most "owner-operators" lack any true independence from the motor carriers for which they work.

Plaintiffs use the term "owner-operator" to refer to any driver who owns or leases the truck being driven. As experts explain, however, the term "owner-operator" more accurately refers to only those drivers who operate under their own independent FMCSA motor carrier operating authority. Dkt. 173-1 (Second Belzer Decl.) ¶¶17, 26-28, ¶34 (stating that such individuals constitute approximately 15% of U.S. truck drivers who own their own trucks); *see also* Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 11.

Drivers who own and operate their own trucks, but lack independent operating authority, are more accurately referred to as "owner-drivers." Dkt. 173-1 (Second Belzer Decl.) ¶¶17, 26-28. Drivers who lease their trucks from the motor carrier for whom they drive (and do not own the truck outright) are more accurately referred to "lease-operators," a category that includes a large portion of the "owner-operators" Plaintiffs refer to here. Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 11-12, 14-15. Nonetheless, this brief will use the same terminology as Plaintiffs and refer to all drivers who own or lease their trucks as "owner-operators" even if they lack independent operating authority.

Most of these owner-operators are under long-term contracts with one motor carrier, from which the owner-operator often leases the truck. Dkt. 58-1 (First Belzer Decl.), Exh. B at 2-3; Dkt. 58-2 (First Viscelli Decl.), Exh. B at 1-2; Dkt.

173-3 (Second Viscelli Decl.), Exh. B at 11, 14-15. These drivers typically cannot independently pick up and deliver freight for a customer for a number of reasons, including because they generally do not have their own motor carrier authority, are closely supervised by the motor carrier that does have such operating authority, lack access to insurance and equipment such as trailers, and do not communicate with customers or coordinate non-driving tasks. Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 11-12, 14-15; Dkt. 173-1 (Second Belzer Decl.) ¶¶28-29, 33-36.

Simply put, these drivers are not able to compete as truly "independent" entities, and they depend on motor carriers for operating authority and business. Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 12. Nor do they have true "flexibility" to set their own schedules and choose which loads to pick up. *See* Dkt. 173-6 (Garcia Decl.) ¶14; *see also* Dkt. 173-13 (Second Tate Decl.) ¶¶14-15; *cf.* Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 16 (explaining that while so-called independent contractor lease-operators "are promised and nominally have the right to refuse to haul a load … carriers can easily get them to behave like employee drivers by controlling all the immediately available work").

Contrary to Plaintiffs' assertions, the term "owner-operator" is not synonymous with "independent contractor." Rather, for purposes of state and federal employment laws, "owner-operators" may be employees (in which case they enjoy the protections of these laws) or independent contractors (in which case they do not), depending on the applicable statutory or regulatory definition of "employee" and the particular relationship between a company and driver. *See* Dkt. 58-3 (Tate Decl.) ¶¶9-10; Dkt. 173-1 (Second Belzer Decl.) ¶34.

D. After *Dynamex*, many motor carriers have complied with California law by treating drivers as employees.

In the five years since *Dynamex,* many motor carriers have brought their operations into compliance with California law by treating drivers as employees. For example, Pacific Nine Transportation (Pac9) converted its entire workforce to

employee drivers beginning in 2018, and about one-third of its drivers continue to use trucks they own (*i.e.*, they are still "owner-operators" as Plaintiffs use the term). Dkt. 173-12 (Ta Decl.) ¶¶4-5; *see also* Dkt. 173-5 (Fuentes Decl.) ¶3. Southern Counties Express (SCE) has similarly converted its drivers to employees, including drivers who continue to own their own trucks. Dkt. 173-7 (Glackin Decl.) ¶¶5-6; *see also* Dkt. 173-4 (Arambula Decl.) ¶7. And motor carriers like A1 Dedicated Transport have exclusively hired employees to drive trucks that the company owns or leases. Dkt. 173-11 (Peratt Decl.) ¶¶5-6.

In circumstances in which employee drivers own or lease their own trucks, motor carriers typically use a simple and practical "two-check system," whereby drivers receive one check as payment for their work and a second check for the use of their trucks. Dkt. 173-1 (Second Belzer Decl.) ¶¶18, 51-56, 71; Dkt. 173-13 (Second Tate Decl.) ¶¶17-21; *see, e.g.*, Dkt. 173-12 (Ta Decl.) ¶7; Dkt. 173-4 (Arambula Decl.) ¶¶5-8.

Companies have been able to recruit and retain drivers to work as employees. Dkt. 173-11 (Peratt Decl.) ¶¶5-6. *See, e.g.*, *id.* ¶10. As Pac9's Chief Operations Officer explains, the company has seen relatively low turnover since converting drivers (including those who own their own trucks) to employee status. *See* Dkt. 173-12 (Ta Decl.) ¶12. So long as the compensation is adequate, most drivers prefer to be classified as employees. *See, e.g., id.*; Dkt. 173-5 (Fuentes Decl.) ¶¶9-10 (driver's conversion to employee status has been "very beneficial for me and my family"); Dkt. 173-6 (Garcia Decl.) ¶¶10, 13 ("I am much happier as a [employee] driver …."); Dkt. 173-9 (Islas Decl.) ¶20 ("I would like to be properly classified as an employee."); Dkt. 173-10 (Mayorga Decl.) ¶¶16, 18 ("me and my coworkers are generally extremely happy with being employee drivers … and we can see how much better it is to be an employee"); Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 35.

California's adoption of the ABC Test has not caused any shortage of drivers willing to work for motor carriers or any disruption of commerce. *See infra* at 14-15. To the contrary, longstanding nationwide issues with recruiting and training sufficient truck drivers are caused by poor treatment of the drivers. *Id.*

PROCEEDINGS BELOW

CTA[2] filed this case in October 2018 as a challenge to the *Dynamex* decision's adoption of the ABC test. Dkt. 1. The International Brotherhood of Teamsters ("IBT") intervened on the side of State Defendants. Dkt. 21.

After AB 5 was signed into law in September 2019, the Court granted Defendants' motions to dismiss, without prejudice, explaining that AB 5's passage "raise[d] … questions of mootness and standing." Dkt. 46. Several months later, CTA filed a second amended complaint, claiming that the ABC test codified in AB 5 is preempted by the F4A, violates the dormant Commerce Clause, and is preempted by Federal Motor Carrier Safety Administration (FMCSA) regulations. Dkt. 47. CTA moved for a preliminary injunction. Dkt. 54. Defendants moved to dismiss the second amended complaint, Dkts. 62, 63.

This Court granted a preliminary injunction in January 2020, reasoning that the F4A likely preempts AB 5 because AB 5 "prevents motor carriers from exercising their freedom to choose between using independent contractors or employees." Dkt. 89 at 13. The Court rejected the argument that motor carriers could avail themselves of the B2B exemption from the ABC test, relying on a then-recent Los Angeles Superior Court decision about the B2B test. *Id.* at 19. That Superior Court decision was subsequently overturned on appeal. *People v.*

---

[2] "CTA" refers to all California Trucking Association plaintiffs, and "OOIDA" refers to plaintiff-intervenors Owner-Operator Independent Drivers Association et al. "Plaintiffs" refers to both CTA and OOIDA. "CTA PI Br." refers to Dkt. 172-1; "OOIDA PI Br." refers to Dkt. 171-1; "CTA Supp. PI Br." refers to Dkt. 172-7; "OOIDA Supp. PI Br." refers to Dkt. 171-7; "CTA PI Reply Br." refers to Dkt. 180; "OOIDA PI Reply Br." refers to Dkt. 181. Page numbers are internal page numbers, not ECF page numbers.

Superior Court (*Cal Cartage Transportation Express*), 57 Cal.App.5th 619 (2020).

Defendants appealed the Court's preliminary injunction ruling. Meanwhile, this Court granted in part Defendants' motions to dismiss, dismissing the dormant Commerce Clause and FMCSA claims, leaving only the F4A claim. Dkt. 110.

The Ninth Circuit reversed the preliminary injunction, holding that CTA lacked any likelihood of success on its preemption claim. Judge Ikuta's opinion reasoned that circuit precedent on F4A preemption "draw[s] a line between laws that are significantly related to rates, routes, or services, even indirectly, and thus are preempted, and those that have only a tenuous, remote, or peripheral connection to rates, routes, or services, and thus are not preempted." 996 F.3d at 656 (quoting *Dilts v. Penske Logistics*, 769 F.3d 637, 643 (9th Cir. 2014) (citing *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008))). Applying that test, the Ninth Circuit concluded that the F4A does not preempt AB 5's application to motor carriers, because AB 5 is a generally applicable law that regulates companies' relationship with their *workforces*, not *consumers*. *Id.* at 656-59.

CTA's petition for en banc rehearing was denied without any circuit judge requesting a vote, Dkt. 131, and CTA's petition for certiorari was denied. *Cal. Trucking Ass'n v. Bonta*, 142 S. Ct. 2903 (2022). On August 30, 2022, this Court dissolved the preliminary injunction. Dkt. 144. The Court also reinstated CTA's dormant Commerce Clause claim, Dkt. 144, and granted OOIDA's motion to intervene, Dkt. 147. CTA did not seek to reinstate its FMCSA claim, *see* Dkt. 115-1, at 3 n.1, and CTA is no longer pursuing that claim.

About five months later, Plaintiffs filed new preliminary injunction motions. Dkts. 155, 156. Several months later, Plaintiffs obtained permission to amend their complaints to add claims under the federal and state Equal Protection Clauses and filed preliminary injunction briefs addressing these equal protection claims. Dkts. 171-7, 172-7. Defendants filed oppositions to Plaintiffs' preliminary injunction motions, Dkts. 173-75, and Plaintiffs filed replies. Dkts. 180, 181.

This Court consolidated the preliminary injunction hearing with the trial on the merits. Dkt. 176. The parties stipulated to a pre-trial schedule and that the trial would be based on the pretrial and preliminary injunction briefing, supporting declarations, and oral argument, rather than live witness testimony. Dkt. 182. This Court approved the stipulation. Dkt. 183.

LEGAL STANDARD

Plaintiffs seek declaratory relief that AB 5 is invalid and a permanent injunction preventing enforcement of AB 5. Dkts. 166, 168. Plaintiffs bear the burden of proof on all factual issues. A federal court's decision to entertain a declaratory judgment action "is discretionary, for the Declaratory Judgment Act is 'deliberately cast in terms of permissive, rather than mandatory, authority.'" *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (citation omitted). "To be entitled to a permanent injunction, a plaintiff must demonstrate: (1) actual success on the merits; (2) … irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction." *Edmo v. Corizon*, *Inc.,* 935 F.3d 757, 784 (9th Cir. 2019). Additionally, "injunctive relief must be no 'more burdensome to the defendant than necessary to provide complete relief to the plaintiff,'" *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1002 (9th Cir. 2023) (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)), and "must be tailored to remedy the specific harm alleged," *Melendres v. Arpaio*, 784 F.3d 1254, 1265 (9th Cir. 2015) (quoting *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)).

Plaintiffs' facial challenges to AB 5 under the F4A and the dormant Commerce Clause require them to prove that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 746 (1987). They must therefore "demonstrate that every application" of AB 5 is unlawful. *See MetroPCS Cal., LLC v. Picker*, 970 F.3d 1106, 1122 (9th Cir. 2020).

ARGUMENT

I. The F4A Does Not Preempt AB 5.

The Ninth Circuit already ruled that AB 5 "is not preempted by the F4A." *CTA*, 996 F.3d at 649. Plaintiffs cannot get around that ruling.

A. The Ninth Circuit already rejected Plaintiffs' arguments.

Plaintiffs attempt to resurrect their F4A claim by asserting that the Ninth Circuit did not understand that "AB-5 will result in trucking companies offering fewer services." CTA PI Br. 14. But they made this very argument to the Ninth Circuit. *See* Answering Br., 9th Cir. Case Nos. 20-55106, 20-55107, at 18 (arguing that AB 5 "will change not only how trucking services are provided, but the extent to which they are offered at all"). And the Ninth Circuit held that even if AB 5 resulted in trucking companies offering fewer services, that would not matter. The Ninth Circuit reasoned that "laws of general applicability that affect a motor carrier's relationship with its workforce ... are not significantly related to rates, routes or services" and, therefore, are not preempted. *CTA*, 996 F.3d at 657. That is true even if a law increases motor carriers' costs and therefore affects carriers' allocation of resources and business decisions, because that does not amount to "a binding or freezing effect" on rates, routes, or services. *Id.* at 657-58.

The Ninth Circuit held that, in deciding whether a law has the type of impact on "rates, routes, or services" that triggers F4A preemption, courts must consider "'where in the chain of a motor carrier's business it is acting to compel a certain result ... and what result it is compelling.'" 996 F.3d at 656 (quoting *Cal. Trucking Ass'n v. Su*, 903 F.3d at 966). The court reasoned that "AB-5 is a generally applicable labor law that affects a motor carrier's relationship with its workforce and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers." *Id.* at 649. The Ninth Circuit rejected Plaintiffs' argument that AB 5 is preempted because it may have a "significant" impact on rates, routes, or services—for example, by prompting the elimination of certain

routes, 150% increases in costs, and reductions in services—because such "indirect effects" do not establish F4A preemption. *Id.* at 659-60.

Plaintiffs have thus already argued to the Ninth Circuit that the F4A would preempt a law requiring all motor carriers' drivers to be classified as employees, and the Ninth Circuit has already rejected this argument. *Id.* at 662-63.[3] Plaintiffs offer a different version of the same argument in their preliminary injunction briefing: Because (they have alleged) AB 5 effectively requires motor carriers to use employee drivers, and (they have contended) motor carriers are not readily able to "convert[] owner-operators to employee drivers" or "find owner-operators who will accept th[e]se positions," they speculate that "AB-5 will result in trucking companies offering fewer services, or not meeting available demand, or going out of business entirely." CTA PI Br. 12-14 & n.5. Therefore, they argue, AB 5 is preempted. As the Ninth Circuit already held, however, even if Plaintiffs' premises about AB 5's impact are correct (and they are not), AB 5 is not preempted.

Plaintiffs criticize the Ninth Circuit for "appear[ing] to have presumed that motor carriers could reclassify owner-operators as employee drivers." *Id.* at 12. They also assert in their preliminary injunction briefing that the Ninth Circuit "did not consider what would happen if motor carriers were unable to convert owner-operators to employee drivers." CTA PI Reply Br. 8. But the Ninth Circuit's holding that AB 5 is not preempted rested on its conclusion—well-supported in the case law—that "indirect effects" of generally applicable laws that regulate motor carriers' relationships with their workforce do not suffice to establish F4A preemption. *CTA*, 996 F.3d at 659-60. This Court should reject Plaintiffs' attempt to repackage the same argument that the Ninth Circuit already rejected.

[3] Because the Ninth Circuit concluded that AB 5 would not be preempted even if AB 5 requires motor carriers to classify all drivers as employees, the Ninth Circuit did not decide whether AB 5's B2B exception allows motor carriers to use independent contractor drivers. *CTA*, 996 F.3d at 659 n.10.

B. AB 5 has not led to a reduction in trucking services.

Even if the Ninth Circuit's decision were not dispositive, Plaintiffs cannot show that AB 5 will prevent motor carriers from offering services in California. The evidence demonstrates that trucking services in California have *not* decreased relative to those in comparable markets; that motor carriers have successfully hired employee drivers (including owner-operators); and that "since AB-5 has gone into effect, California has led the nation in the number of new motor carrier authorities" granted. Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 29.

Plaintiffs' evidence of such a reduction thus far consists of the conclusory and unsupported assertion by one of CTA's officers that motor carriers cannot find employee drivers to hire, Dkt. 172-6 (Sauer Decl.) ¶10 (asserting that "there is no other way to provide [trucking] services, which are just dropped"); a declaration from one motor carrier asserting that *it* could not hire as many employee drivers as it wished, Dkt. 172-5 (Stefflre Decl.) ¶¶7-9, 12; and anecdotes from a few drivers stating that *they* do not want to work as employees.[4] On the other hand, and as explained below, Defendants have presented evidence from two expert witnesses, motor carriers, and drivers, demonstrating conclusively that motor carriers can and do hire drivers (including owner-operators) as employees, and that many drivers prefer to work as employees provided that they are offered adequate compensation.[5]

Even the little evidence that Plaintiffs have presented is based largely on

---

[4] Dkt. 171-4 (Hemerson Decl.) ¶¶8, 12; Dkt. 171-5 (McElroy Decl.) ¶13; Dkt. 171-6 (Williams Decl.) ¶16; Dkt. 172-4 (Estrella Decl.) ¶¶4, 16; Dkt. 172-3 (Medina Decl.) ¶¶5, 14; Dkt. 172-2 (Odom Decl.) ¶16. These declarations are entirely speculative, and lack foundation, as to whether the drivers in fact will be required to "become employees"—they merely state that it is their understanding that AB 5 will require this as a matter of law, which is not true.

[5] Dkt. 173-7 (Glackin Decl.) ¶¶5-6 (SCE); Dkt. 173-11 (Peratt Decl.) ¶¶4-5, 8-9 (A1 Dedicated); Dkt. 173-12 (Ta Decl.) ¶¶4-5, 11-12 (Pac9); *see also* Dkt. 173-4 (Arambula Decl.); Dkt. 173-5 (Fuentes Decl.); Dkt. 173-6 (Garcia Decl.); Dkt. 173-9 (Islas Decl.); Dkt. 173-10 (Mayorga Decl.).

misinformation. CTA officer Eric Sauer restates the fallacy that motor carriers cannot use employees who own their own trucks, but instead must "acquire every possible type of truck, trailer, and equipment that might possibly be needed at any given time." Dkt. 172-6 ¶14. In fact, drivers classified as employees *can and do* own their own trucks and are compensated through the "two-check" system.[6] Mr. Sauer further represents that routes will need to be reconfigured to comply with California's meal and rest break mandates. Dkt. 172-6 ¶18. But those mandates will not even apply because they have been held preempted by the FMCSA's own meal and rest break requirements. *See Int'l Bhd. of Teamsters, Local 2785 v. Federal Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021). Meanwhile, Plaintiffs' driver declarants presume that if they worked as employees, they would not be allowed to own and maintain their own truck and they would lack scheduling flexibility.[7] But numerous employee drivers, including some who own their own trucks, have explained that drivers often lack "flexibility" as misclassified independent contractors and *gain* flexibility when motor carriers treat them as employees.[8]

Plaintiffs have so far provided no evidence that motor carriers that offer sufficient compensation cannot hire employee drivers, whether to drive company trucks or the drivers' own trucks. The evidence shows the contrary. A1 Dedicated hired approximately 120 commercial truck drivers as employees, and its CEO

---

[6] Dkt. 173-1 (Second Belzer Decl.) ¶¶18, 51-56, 71; Dkt. 173-13 (Second Tate Decl.) ¶¶19-21; *see also, e.g.*, Dkt. 173-12 (Ta Decl.) ¶7; Dkt. 173-4 (Arambula Decl.) ¶¶5-8.

[7] Dkt. 171-4 (Hemerson Decl.) ¶¶8-9, 16; Dkt. 171-5 (McElroy Decl.) ¶13; Dkt. 172-2 (Odom Decl.) ¶16.

[8] Dkt. 173-4 (Arambula Decl.) ¶¶7, 11 (driver now treated as employee owns his truck and has similar flexibility to when he was treated as an independent contractor); Dkt. 173-5 (Fuentes Decl.) ¶¶3, 9 (driver now treated as employee has flexibility to take time off for vacation and medical appointments); Dkt. 173-6 (Garcia Decl.) ¶14 (driver now treated as employee has "flexibility to come in earlier or later" and can take time off when he needs it).

"believe[s] so strongly in [the employee] model" that he is planning to start another company "using employee drivers … [and] a two-check system." Dkt. 173-11 (Peratt Decl.) ¶¶4-5, 8-9. Pac9 successfully converted to a hybrid employee driver model in which all drivers are classified as employees and some own their own trucks, and Pac9 found that drivers and customers prefer Pac9's model. Dkt. 173-12 (Ta Decl.) ¶¶4-5, 11-12; *see also* Dkt. 173-7 (Glackin Decl.) ¶¶5-6. Notably, the declaration from Mr. Stefflre, Plaintiffs' witness who states that his company cannot recruit enough employee drivers, contains no information about how much his company offered to pay those drivers. Dkt. 172-5.

AB 5 has not caused or contributed to a "shortage" of drivers. Dr. Belzer, an industry expert, explains that there are a number of options for motor carriers to hire employees who own their own trucks, and that the perceived labor shortage in the trucking industry is in fact a recruitment and retention problem based on inadequate compensation and predatory motor carrier practices within the industry. *See* Dkt. 173-1 (Second Belzer Decl.) ¶¶69-79, 81. Dr. Viscelli, another industry expert, has explained that "there is no support for the idea there is a shortage of workers interested in being truck drivers," but rather, "available evidence suggests an oversupply of workers that has put downward pressure on wages and working conditions for entry level jobs." Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 30.

There are 500,000 active Class A drivers' license holders in the state of California, more than three times the number needed to meet the State's trucking needs in the next several years. *Id.* at 31. As Plaintiffs' own declarants have admitted previously, the problem is the lack of good jobs in the industry. *Id.* at 35-36. The "lease-operator" and "owner-driver" models are arrangements that serve the economic interests of motor carriers and make it nearly impossible for drivers to get ahead, which causes these drivers to leave the labor market. Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 11-13. Mr. Mayorga, a driver previously misclassified as an independent contractor, explains that the experiences of

misclassified drivers—who have a hard time making money and are "completely out of luck" if their truck breaks down—deter workers from the industry, and that "there would be a lot more interest in [sic] there were more employee jobs like mine available for drivers." Dkt. 173-10 (Mayorga Decl.) ¶¶16-18.

Driver supply has improved or remained steady in California since AB 5's enactment. As Dr. Viscelli explains, the available data show that California has "similar or greater supply (i.e. trucks) than most other states relative to demand (i.e. loads)." Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 23. "If there were a shortage of trucks or drivers," this data would show "increased load-to-truck ratios on load boards as shippers and freight brokers sought last minute options to move freight stranded by a lack of service." *Id.* But the load-to-truck ratios in May 2023—long after the preliminary injunction in this case was dissolved and during the time that AB 5 has been in effect—showed that California maintained its relative similarity to other states in available trucking services (as shown by load-to-truck ratios). *Id.* at 23-26, figs. 5-7. Moreover, if AB 5 were causing a decline in the availability of trucking services, one would expect rates to rise. But as Dr. Viscelli explains, California saw rate *declines* for refrigerated loads comparable to those experienced by neighboring states after AB 5 went into effect, further undermining Plaintiffs' insistence there is a shortage. *Id.* at 22-23 & fig.4. This data provides a far better measure of the availability of trucking services than a few anecdotal accounts.

C. Plaintiffs ignore the potential availability of the B2B exception.

Plaintiffs' argument that motor carriers will be unable to hire employee drivers also fails because it assumes that there is no way for motor carriers to maintain independent contractor relationships with owner-operators. *E.g.*, CTA PI Br. 13 ("California has effectively told all of those owner-operators that they must

become employee drivers"). Throughout the life of this case,[9] Plaintiffs have strategically ignored the B2B exception. Finally, in their reply in support of their preliminary injunction motion, Plaintiffs asserted for the first time that it is impossible for owner-operators to satisfy the requirements of the B2B exception. OOIDA PI Reply Br. 2-4. They are wrong.

Plaintiffs contend that federal Truth-in-Leasing regulations, which require leases to provide for motor carriers' exclusive possession and control of vehicles, necessarily defeat the prong of the B2B exception requiring that the business be free from the control of the hiring entity. OOIDA PI Reply Br. 3-4. But Plaintiffs themselves submitted declarations stating that drivers can work—and are working—as independent contractors by obtaining and operating under the drivers' *own* motor carrier operating authority.[10]

The Truth-in-Leasing regulations also say on their face that they are not dispositive of employee status. 49 C.F.R. §376.12(c)(4). Moreover, many court decisions, including California court decisions, reason that the "paper" control required by government regulation is not dispositive of employee status. *See, e.g.*, *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492 (D.C. Cir. 2009); *Linton v. Desoto Cab Co., Inc.*, 15 Cal.App.5th 1208, 1223 (2017) ("A putative employer does not exercise … control merely by imposing requirements mandated by government regulation."); *Valadez v. CSX Intermodal Terminals, Inc.*, 298 F.Supp.3d 1254, 1281 (N.D. Cal. 2018) ("restrictions … that Defendant imposed based solely on

---

[9] E.g., Dkt. 171-1 (OOIDA PI Br.); Dkt. 171-7 (OOIDA Supp. PI Br.); Dkt. 172-1 (CTA PI Br.); Dkt. 172-7 (CTA Supp. PI Br.).

[10] Dkt. 171-5 ¶¶7, 13 (explaining that driver previously had independent motor carrier authority for about 10 years but then let it lapse and "believe[s] that the risks outweigh the benefits"); Dkt. 171-6 ¶12 (driver states that motor carrier offered to keep engaging him as independent contractor if he obtained such authority); Dkt. 172-2 ¶¶17-18; *see also* Dkt. 172-5 ¶4 (motor carrier "began to use licensed interstate motor carriers to continue to provide freight delivery services" since AB 5); Dkt. 173-1 (Second Belzer Decl.) ¶¶48, 72-74; Dkt. 173-13 (Second Tate Decl.) ¶25.

applicable law are not evidence of control"), *abrogated on other grounds by Hamilton v. Wal-Mart Stores, Inc.*, 39 F.4th 575 (9th Cir. 2022); *Sw. Research Institute v. Unemployment Ins. Appeals Bd.*, 81 Cal.App.4th 705 (Cal. Ct. App. 2000). The same argument can be made about the B2B exception.

Thus, Plaintiffs' arguments that it is not possible for owner-operators to be hired as independent contractors rest on multiple fallacies. Accordingly, even if the Ninth Circuit had not already rejected Plaintiffs' argument that a law that requires motor carriers to classify all drivers as employees would be preempted by the F4A, Plaintiffs' preemption argument still would fail because AB 5 is not such a law.

D. AB 5 is not impliedly preempted.

In a last-ditch effort to save its rejected F4A preemption claim, CTA asserts that AB 5 is *impliedly* preempted because AB 5 purportedly presents an obstacle to Congress's "overarching goal." CTA PI Br. 20-21. But CTA's implied preemption argument boils down to its contention that AB 5 has an impermissible impact on rates, routes, or services—and the 9th Circuit already rejected that contention.

"Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that pre-empts state law.' ... '[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal act.'" *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110-11 (1992)). Additionally, in areas of historic police power, including worker-protection regulations like those at issue here, courts apply a presumption against preemption. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1212 (9th Cir. 2020) ("The Supreme Court has found obstacle preemption in only a small number of cases."); *see also Nexus Pharms., Inc. v. Cent. Admixture Pharmacy Servs., Inc.*, 48 F.4th 1040, 1045 (9th Cir. 2022) ("We have been instructed to 'start with the

assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (citation omitted). AB 5, a worker-protection law, clearly falls within the State's historic police power, so it is entitled to this well-established presumption against preemption. *See Dilts*, 769 F.3d at 643 (explaining that "[w]age and hour laws constitute areas of traditional state regulation").

Moreover, Congress's inclusion of an express preemption provision in a statute like the F4A establishes that Congress intended to leave room for other state laws *outside* the scope of that express preemption provision. *See Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009); *see also POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 114 (2014). Of course, "an express pre-emption provision" does not "bar[] the ordinary working of conflict preemption principles." CTA PI Reply Br. 9 (quoting *Buckman Co. v. Plaintiffs' Legal Com.*, 531 U.S. 341, 352 (2001)). But under ordinary conflict preemption principles, including the presumption against preemption of state laws governing health and safety, AB 5 is not preempted. The F4A's legislative history reinforces that Congress assumed states would still impose safety, insurance, liability, and "standard transportation rules" in the background. *See Dilts*, 769 F.3d at 644 (quoting H.R. Conf. Rep. No. 103–677). AB 5, which addresses companies' relationship with their workers, is the sort of law that Congress assumed would operate in the background.

Equally to the point, courts analyzing the F4A's express preemption clause, which preempts state laws "related to a price, route, or service of any motor carrier ... with respect to the transportation of property," 49 U.S.C. §14501(c)(1), have reasoned that "related to" is ambiguous and therefore *already* have looked to the F4A's general purposes as a guide to the sort of laws Congress intended to preempt. *See, e.g.*, *Dilts*, 769 F.3d at 643-44; *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187-88 (9th Cir. 1998). In other words, courts already consider the F4A's general purposes when determining

whether a state law is expressly preempted. And they have concluded that it was *not* Congress' general purpose in adopting the F4A to free trucking companies from having to comply with varying state labor standards that apply to drivers. *See Dilts*, 769 F.3d at 646-47; *Mendonca*, 152 F.3d at 1188. Rather, Congress intended to allow "generally applicable laws [that] impact *motor carriers' relationship with their workforce*." *CTA*, 996 F.3d at 657 (emphasis supplied). CTA's implied preemption argument is that having to comply with California's employment laws would be an obstacle to achieving a federal purpose that the courts have already held that Congress did *not* have.

The cases cited in CTA's preliminary injunction briefing do not change the result here. *Rowe* was an express preemption case. *See* 552 U.S. at 376-77. *Buckman* and *Geier* involved state-law tort claims that the defendants alleged were preempted by a detailed federal scheme, but there is no such tort claim—nor any detailed federal regulatory scheme or enforcement mechanism—at issue here. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (holding that state-law "fraud-on-the-FDA" claim was preempted by "the FDA's detailed regulatory regime"); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881-82 (2000) (state tort action that sought to impose liability on manufacturer for making a choice that was expressly allowed by federal regulations was preempted). Nor does AB 5 conflict with any federal regulations that "expressly contemplate" that motor carriers may deny owner-operators certain benefits of employees under California law. *Cf. Valadez v. CSX Intermodal Terminals, Inc.*, No. 15-cv-05433-EDL, 2017 WL 1416883, at *9-10 (N.D. Cal. Apr. 10, 2017) (finding California law preempted where it would conflict with regulations that "expressly contemplate" availability of certain terms of lessor-lessee relationship in motor carrier-independent contractor relationships).

Therefore, just as AB 5 is not expressly preempted by the F4A, it is not impliedly preempted either.

E. Even if AB 5 were preempted, it would not be preempted as applied to all employment laws.

There is an additional flaw in Plaintiffs' F4A preemption challenge. As State Defendants and IBT have pointed out since the beginning of this case, AB 5 (and its predecessor, the *Dynamex* decision) does not itself impose any substantive requirements on motor carriers. Dkts. 28-1, 29-1. Rather, AB 5 provides a test for whether a worker is treated as an employee for the purpose of substantive California employment protections. Even if the application of some labor standards to owner-operators were preempted (which they are not), other requirements like unemployment insurance contributions and workers' compensation coverage would not even arguably have a significant impact on motor carrier rates, routes or services. Plaintiffs have failed to present any evidence about the impact of applying particular employment laws to motor carrier drivers. Plaintiffs' broad-brush preemption challenge must be rejected for this reason as well.

II. AB 5 Does Not Violate the Dormant Commerce Clause.

The so-called dormant Commerce Clause "prohibits the enforcement of state laws 'driven by … "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."'" *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008)).[11] A state law that discriminates against out-of-state entities is invalid unless the law is "demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988).

By contrast, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), held that when a state law "regulates even-handedly to effectuate a legitimate local public

[11] Several Supreme Court Justices, including Justices Thomas, Gorsuch, and Scalia, "have authored vigorous and thoughtful critiques" of caselaw creating a "dormant" Commerce Clause that can invalidate state law. *Nat'l Pork Producers Council*, 598 U.S. at 370 (quoting *Tennessee Wine & Spirits Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019)).

interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." State laws have rarely failed *Pike* scrutiny. *Davis*, 553 U.S. at 339. Further, in *National Pork Producers*, the Supreme Court clarified that the purpose and application of the *Pike* test are closely tied to the dormant Commerce Clause's "antidiscrimination precedents," and focus on the effects of the law in order to determine whether they "disclose the presence of a discriminatory purpose." *Nat'l Pork Producers*, 598 U.S. at 377.

AB 5 does not discriminate against out-of-state businesses, and AB 5 does not impose a burden on interstate commerce that is "clearly excessive" relative to the law's putative benefits, so AB 5 does not violate the Commerce Clause.

A. AB 5 does not discriminate against out-of-state motor carriers.

CTA contends that AB 5 discriminates against out-of-state businesses because AB 5's burden falls "disproportionately" on such businesses. CTA PI Br. 19-20; CTA PI Reply Br. 10-11. OOIDA similarly argues that AB 5 "imposes a *per se* violation of the Commerce Clause" by discriminating against interstate commerce. OOIDA PI Reply Br. 5-6. But AB 5 does not discriminate within the meaning of the Commerce Clause because AB 5 does not adopt different rules based on the location of a trucking company.

As the Ninth Circuit already explained in rejecting a Commerce Clause challenge to California's employment laws: "There is no plausible Dormant Commerce Clause argument when California has chosen to treat out-of-state residents equally with its own." *Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011); *see also Nat'l Pork Producers*, 598 U.S. at 370 (explaining that there was no discrimination-based dormant Commerce Clause claim where petitioners "d[id] not allege that California's law seeks to advantage in-state firms or disadvantage out-of-state rivals"); *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009) (California law

treating out-of-state opticians same as in-state opticians was not discriminatory).

Plaintiffs point out in their preliminary injunction briefing that AB 5 treats certain professions like doctors, lawyers, and real estate agents differently from truck drivers. CTA PI Br. 19; CTA Supp. PI Br. 1, 5-6; CTA PI Reply Br. 10-11. But "any notion of discrimination assumes a comparison of substantially similar entities." *Davis*, 553 U.S. at 342 (quoting *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007)). Doctors, lawyers, and real estate agents are not "substantially similar" to truck drivers—indeed, Plaintiffs appear to have conceded this. *See* CTA PI Reply Br. 11 ("The fact that an out-of-state lawyer may come to California to argue a motion on a pro hac vice basis is *not comparable* to an interstate truck driver . . .") (emphasis added).

Plaintiffs' contention in their preliminary injunction briefing that AB 5 only (or disproportionately) affects "interstate" truck drivers as opposed to "intrastate" truck drivers is unfounded. Plenty of "intrastate" drivers are subject to the ABC test under AB 5. Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 12-13 (affected drivers in California "work for both intrastate and interstate carriers").

OOIDA contends that, because of the federal Truth-in-Leasing regulations that apply to drivers who cross state lines and who lease their truck from a motor carrier, interstate drivers will not be eligible for the B2B exception—unlike drivers who travel only within California, who OOIDA apparently concedes *would* be eligible for this exception. OOIDA PI Reply Br. 6, 11-12. But, as discussed above (*see supra* at 16-17), OOIDA incorrectly assumes that the "paper" control required under the Truth-in-Leasing regulations would prevent motor carriers from showing a particular driver is free from their control for purpose of the B2B exception.

Even if AB 5 subjected more interstate drivers than intrastate drivers to the ABC test (which it does not), that still would not establish that AB 5 discriminates within the meaning of the Commerce Clause. The Ninth Circuit rejected a similar argument in *International Franchise Association v. City of Seattle*, where an

industry group argued that Seattle's minimum wage law defining "large employers" to include franchisees had the effect of discriminating against out-of-state businesses because "96.3 percent of Seattle franchisees are affiliated with out-of-state franchisors, and [those] in-state franchisees will be placed at a competitive disadvantage." 803 F.3d 389, 406 (9th Cir. 2015). The Ninth Circuit concluded that such a showing "does not prove that the ordinance will have a discriminatory effect on out-of-state firms" because the plaintiff had not established that out-of-state businesses would be at a competitive disadvantage with respect to similarly situated in-state businesses. *Id.* The same is true here, where AB 5 treats in-state and out-of-state trucking companies the same.

Finally, CTA's contention that AB 5's sponsor displayed "discriminatory intent" toward the trucking industry, CTA PI Br. 20, does not show impermissible discrimination against *out-of-state businesses*. The dormant Commerce Clause is focused on rooting out economic protectionism. To that end, "statutes struck down for their impermissible [discriminatory] purpose have contained language promoting local industry or seeking to level the playing field." *Int'l Franchise Ass'n*, 803 F.3d at 401. There is no such language in AB 5. That the bill's sponsor identified the trucking industry as a whole as rife with misclassification says nothing about discrimination against out-of-state businesses. For all these reasons, AB 5 does not discriminate in violation of the Commerce Clause.

B. AB 5 does not impose a significant burden on commerce.

Because AB 5 does not discriminate, Plaintiffs cannot prevail on a dormant Commerce Clause challenge unless they establish that AB 5 imposes a "significant burden" that is "clearly excessive" in relation to its benefits (the *Pike* test). *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Bonta*, 33 F.4th 1107, 1119 (9th Cir. 2022). Moreover, the Ninth Circuit's dormant Commerce Clause precedents "preclude any judicial 'assessment of the benefits of [a state] law[ ] ... unless the state statute … imposes a 'significant burden on interstate commerce.'"

Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1146 (9th Cir. 2015) (citations omitted). Thus, Plaintiffs here must show that AB 5 imposes a "significant burden" on interstate commerce before the Court even looks at the law's stated benefits. They cannot do so.

As an initial matter, Plaintiffs' assertion that motor carriers will need to change their business models or expend resources to comply with AB 5 is insufficient to establish a significant burden for the purpose of the Commerce Clause. Additionally, Plaintiffs make assumptions about how AB 5 will operate that are unsupported by the record—which Plaintiffs have now had *four years* to develop—and therefore cannot establish a dormant Commerce Clause violation.

1. Plaintiffs' assertion that some motor carriers will need to "change their business models" is not sufficient to demonstrate a significant burden on interstate commerce.

Plaintiffs have argued that, under AB 5, motor carriers that use owner-operator drivers are forced to "change their business model" and face "substantial costs" to operate in the California market. OOIDA PI Br. 12-13; CTA PI Br. 17 (arguing that "motor carriers must overhaul their business, terminate contracts, and abandon the … use of independent owner-operators to transport the nation's freight"). OOIDA also has asserted that drivers must expend significant resources if they wish to obtain their own motor carrier operating authority to qualify for the B2B exemption. OOIDA PI Reply Br. 8-12. These arguments are irrelevant as a matter of law. Neither "absolute amount of economic impact" nor the fact that a law "proscribe[s] a business's preferred method of operation" is sufficient to establish a substantial burden for purposes of the dormant Commerce Clause. *Int'l Fur Trade Fed'n v. City & County of S.F.*, 472 F.Supp.3d 696, 702 (N.D. Cal. 2020) (holding that plaintiffs' showing that city's ban on fur sales would cost retailers $45 million did not demonstrate significant burden); *see also Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154 (9th Cir. 2012)

("Supreme Court precedent establishes that there is not a significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating."). Only "laws which prevent the operation of those businesses outright" may satisfy this demanding test under the Commerce Clause. *Int'l Fur Trade Fed'n*, 472 F.Supp.3d at 702. That some motor carriers are currently operating with employees negates any claim that AB 5 is outright preventing motor carrier operations by mandating use of the ABC test.

Additionally, Plaintiffs' assertions about the burden of treating owner-operators as employees are false or overblown. For example, Plaintiffs' assumption that drivers classified as employees cannot own their own trucks, and so companies that reclassify their drivers will need to purchase fleets of trucks, is simply not true. Motor carriers can and do use the two-check system to hire owner-operators as employees and separately pay for the use of their trucks. *See supra* at 6; *see also* Dkt. 58-1, Exh. B at 3; Dkt. 173-11 (Peratt Decl.) ¶7 ("I know first-hand that it is possible to operate a trucking company with employee drivers in California, and to do so successfully while complying with California laws."). Although Plaintiffs have asserted that drivers will not want to work as employees due to perceived loss of flexibility and independence, CTA PI Br. 12-13, the evidence shows the opposite. As Dr. Belzer explains, "[i]f AB 5 had caused a disruption of interstate trucking services, … we would see evidence in the data and such evidence would be in the commercial news." Dkt. 173-1 (Second Belzer Decl.) ¶80; *see also supra* at 14. Any purported "labor shortage" of truck drivers (which predates AB 5) is a function of inadequate compensation, not the ABC test.[12]

In response to extensive evidence that motor carriers can and do hire owner-operators as employees using the two-check system, and that such owner-operators

[12] Dkt. 173-1 (Second Belzer Decl.) ¶¶20-25, 65, 79; Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 30-32; *see also* Dkt. 173-12 (Ta Decl.) ¶19; Dkt. 173-13 (Second Tate Decl.) ¶¶13, 22-24.

can retain their flexibility to choose which loads they haul,[13] Plaintiffs' response in the preliminary injunction briefing has been only that "this 'two-check' arrangement may work for some individuals, but it does not preserve the discretion and flexibility of the independent contractor business that a driver would have to sacrifice to become an employee driver." OOIDA PI Reply Br. 9. Plaintiffs' acknowledgement that motor carriers can operate under AB 5 confirms that AB 5 does not impose a substantial burden on interstate commerce. For this reason alone, the Court should reject Plaintiffs' dormant Commerce Clause claim. *See Chinatown Neighborhood Ass'n*, 794 F.3d at 1146.

2. AB 5 does not require all owner-operators to be classified as employees, further undermining Plaintiffs' significant-burden argument.

For the reasons stated above, Plaintiffs' significant burden argument fails on its own terms. Separately, the argument also fails because it is premised on Plaintiffs' unsupported assumption that AB 5 requires that *all* owner-operators be classified as employees. This assumption pervades Plaintiffs' argument that motor carriers and owner-operators will find it too costly to do business in California. *See* OOIDA PI Br. 13 ("Should a carrier wish to continue serving the California market, it must incur the substantial costs associated with using employee drivers."); CTA PI Br. 18 ("Now, if the law is followed, [an] owner-operator must be treated as an employee during the California leg of [a] journey."). Even if the cost of doing business were relevant to the dormant Commerce Clause—which it is not, *see Int'l Fur Trade Fed'n*, 472 F.Supp.3d at 702—not all owner-operators would necessarily be subject to the ABC test.

As previously stated, after this Court's previous preliminary injunction ruling, the California Court of Appeal held that truck drivers *could* qualify for AB 5's business-to-business exemption. *See Cal Cartage,* 57 Cal.App.5th at 632-

[13] *See supra* at 6, 13 n.8; Dkt. 173-1 (Second Belzer Decl.) ¶¶51-56; Dkt. 173-12 (Ta Decl.) ¶¶4-5, 7.

34. Yet Plaintiffs refused to even acknowledge the potential availability of the B2B exemption, which provides that certain bona fide business contracting relationships are subject to the *Borello* test, until their preliminary injunction reply briefs. CTA PI Reply Br. 5-6; OOIDA PI Reply Br. 2-5.

In those reply briefs, Plaintiffs speculated that federal regulations requiring motor carriers to assume "exclusive possession, control, and use" of a leased truck during the time of the lease would prevent drivers from meeting the requirements of the B2B exemption. OOIDA PI Reply Br. 2-4; CTA PI Reply Br. 6. But that speculation is incorrect. *See supra* at 16-17 (explaining that such government-mandated "paper" control is generally not dispositive of employee status). Second, Plaintiffs have opined that it would be too difficult for owner-operators to obtain their own independent motor carrier operating authority such that they could operate as their own businesses under the B2B exemption. OOIDA PI Reply Br. 10-11. Plaintiffs' own declarations, however, acknowledge that owner-operators *could* obtain and operate under independent motor carrier authority and, Plaintiffs say, thereby operate as independent contractors. Their declarations show only that some drivers have *chosen* not to do so.[14]

In fact, Plaintiffs submitted a company owner's declaration stating that *two-thirds* of that company's drivers have obtained operating authority and continue to seek work in an independent contractor relationship as "brokered carriers." Dkt. 172-5 ¶11. As Dr. Viscelli explains, this is part of a larger trend in the industry: Increasing numbers of drivers in California have obtained their own motor carrier

[14] Dkt. 171-4 ¶13 ("I have chosen not to obtain my own DOT authority to become a motor carrier because the added expenses outweigh the revenue I derive from hauling to California."); Dkt. 171-5 ¶¶7, 13 (explaining that driver previously obtained independent motor carrier authority for about 10 years but then let it lapse and "believe[s] that the risks outweigh the benefits"); Dkt. 171-6 ¶12 (driver states that motor carrier offered to keep engaging him as independent contractor if he obtained such authority); Dkt. 172-2 ¶¶17-18; *see also* Dkt. 172-5 ¶4 (motor carrier "began to use licensed interstate motor carriers to continue to provide freight delivery services" since AB 5); Dkt. 173-1 (Second Belzer Decl.) ¶¶48, 72-74; Dkt. 173-13 (Second Tate Decl.) ¶25.

authority since AB 5's enactment, a trend that has accelerated since the preliminary injunction was dissolved. Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 28-30 & tbl. 1 (more than 54,000 new motor carrier authorities granted to California drivers between 2018 and March 2023). "[S]ince AB-5 has gone into effect, California has led the nation in the number of new motor carrier authorities." *Id.* at 29.

Because AB 5 does not require motor carriers to treat all drivers as employees, Plaintiffs' significant-burden argument fails for this reason as well.

3. AB 5's application to out-of-state drivers is subject to conflict-of-laws analysis, further undermining Plaintiffs' assertion of a significant burden.

Plaintiffs have made a further assumption that AB 5 requires treatment of drivers based out-of-state as employees any time that they are operating within California, and that treating drivers as employees necessarily means that out-of-state drivers will be covered by all substantive employment protections in the California Labor Code and Unemployment Insurance Code. *See, e.g.*, CTA PI Br. 7 (AB 5 "effectively requires motor carriers … if the driver drives into California from another state, to comply with the full panoply of California laws governing the employment relationship"). OOIDA's dormant Commerce Clause argument depends almost entirely on this assumption. *See* OOIDA PI Br. 10-13. But whether a driver based outside of California is subject to the ABC test of employee status, and whether each of the substantive California employment protections apply to that driver, requires a conflict-of-laws analysis that will differ based on which states a driver spends time in and which specific employment protections are at issue. *See Haynie v. Team Drive-Away, Inc.*, No. 20-cv-00573-RS, 2021 WL 4916708, at *3 (N.D. Cal. May 10, 2021).

A conflict-of-laws analysis looks to whether the relevant state laws differ, whether a true conflict exists, and which state's interests would be more impaired if its law were not applied. *See Sullivan v. Oracle Corp.*, 51 Cal.4th 1191, 1202 (2011). No court has yet conducted this conflict-of-laws analysis as to out-of-state

truck drivers like Plaintiffs' declarants.[15] Plaintiffs cannot simply assume, as they do in their preliminary injunction briefing, that all protections that California law grants to employees will apply to all drivers the minute they enter California, regardless of whether they are based outside of California or spend the majority of their time here. *See* CTA PI Br. 7; OOIDA PI Br. 10-12.

As an initial matter, a conflict-of-laws analysis may show that a different state's test of employee status, rather than California's ABC test, should apply to a particular driver. Moreover, even with respect to drivers who are employees, the "the proper reach of [California] Labor Code provisions can differ because the provisions regulate different conduct and implicate different state interests." *Oman v. Delta Airlines,* 889 F.3d 1075, 1079 (9th Cir. 2018) ("*Oman I*"); *see also Oman v. Delta Air Lines*, 9 Cal.5th 762, 776-77 (Cal. 2020) (California's wage payment and paystub requirements did not apply to non-California-based flight attendants who worked in California "episodically and for less than a day at a time") (citation omitted). Thus, determining whether the ABC test impacts a particular driver would require a conflict-of-laws analysis based in part on which specific employment protection is at issue (*e.g.*, minimum wage or workers' compensation) and how much time the driver spends in California. *Oman I*, 889 F.3d at 1079. Plaintiffs cannot show a substantial burden based on evidence regarding out-of-state drivers who sometimes drive within California's borders—because a conflict-of-laws analysis should address any concerns about the application of state worker-protection laws to nonresident drivers with only tenuous connections to the state. Moreover, Plaintiffs cannot prevail on a facial challenge by speculating about the potential application of AB 5 to a subset of drivers. *See supra* at 9 (discussing

[15] Dkt. 171-4 ¶¶3, 7 (Mr. Hemerson lives in Iowa and spends approximately 10-12% of his driving time in California); Dkt. 171-6 ¶11 (Mr. Williams lives in Arizona and spends "far less than 50%" of working time in California); Dkt. 172-2 ¶24 (Mr. Odom has moved to Texas).

facial challenge standard). Nothing would prevent motor carriers from asserting defenses to a hypothetical enforcement proceeding.

4. If the Court concludes that Plaintiffs' Commerce Clause claim requires resolution of unsettled state law issues, the Court should abstain from deciding that claim.

Pullman abstention doctrine dictates that federal courts should abstain from hearing constitutional claims that depend on the resolution of unsettled state law issues. *See Gearing v. City of Half Moon Bay*, 54 F.4th 1144, 1147 (9th Cir. 2022). *Pullman* abstention is appropriate where "(1) the federal constitutional claim 'touches a sensitive area of social policy,' (2) 'constitutional adjudication plainly can be avoided [or narrowed by] a definitive ruling' by a state court, and (3) a 'possibly determinative issue of state law is doubtful.'" *Id.* (citations omitted); *see Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

If the Court concludes that it must reach Plaintiffs' significant-burden argument and that the argument depends on the resolution of unsettled California law issues regarding the B2B exception and how a conflict-of-laws analysis would apply to drivers based outside California, the Court should abstain from addressing Plaintiffs' dormant Commerce Clause challenge.

5. Plaintiffs also fail to separately analyze the impact of individual employment standards.

As with Plaintiffs' F4A preemption claim, Plaintiffs' dormant Commerce Clause claim is also flawed because Plaintiffs fail to separately analyze the impact of applying particular employment standards (*e.g.,* workers' compensation coverage) to motor carrier drivers. *See supra* at 20.

C. AB 5 has substantial in-state benefits for workers and the public.

Even if Plaintiffs could show that AB 5 significantly burdens interstate commerce, they still cannot show that AB 5's burdens are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Nor do the effects of AB 5 disclose a discriminatory purpose. *See Nat'l Pork Producers*, 598 U.S. at

379. Plaintiffs' dormant Commerce Clause claim fails for this reason as well.

Because *Pike* instructs court to weigh "putative" benefits, not "actual benefits," courts need not decide whether "nondiscriminatory regulations" actually accomplish the benefits to which they aspire. *See Nat' Ass'n of Optometrists*, 682 F.3d at 1155. In other words, the doctrine does not empower courts to make their own "assessment of the benefits of … laws and the State's wisdom in adopting them." *Id.* at 1156 (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987)); *see also Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 984 (9th Cir. 1991) (*Pike* does not allow courts to "ma[k]e quasi-legislative judgment[s]"). Even if Plaintiffs had shown a significant burden, they could not establish that the "putative" benefits outweigh that burden.

AB 5 was adopted to address very serious problems caused by worker misclassification. *See* AB 5 §1(c) (finding that "misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class"), §1(e) (expressing "intent of the Legislature … to ensure workers … have the basic rights and protections they deserve under the law"); *see also Dynamex*, 4 Cal.5th at 935 (explaining that worker misclassification is a "continuing serious problem"). Misclassification has been a significant problem in the trucking industry in particular. *See* Dkt. 173-1 (Second Belzer Decl.) ¶¶59, 79; Dkt. 173-3 (Second Viscelli Decl.), Exh. B at 16-17. Misclassification has a significant impact on drivers, their families, and their finances, as well as the safety of the public.[16]

In *Dynamex*—a case that involved truck drivers—the California Supreme Court explained that the ABC test "provide[s] greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis." 4 Cal.5th at 964. Thus, AB 5 addresses this serious issue of

[16] *See, e.g.*, Dkt. 173-9 (Islas Decl.) ¶¶14-16; Dkt. 173-6 (Garcia Decl.) ¶¶8-9; Dkt. 173-10 (Mayorga Decl.) ¶¶8-11; *see also* Dkt. 173-12 (Ta Decl.) ¶¶16-17; Dkt. 173-13 (Second Tate Decl.) ¶¶7-11.

misclassification. "For a facially neutral statute to violate the commerce clause, the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational." *Alaska Airlines*, 951 F.2d at 983. The dormant Commerce Clause does not give courts "freewheeling power" to make "their own assessment of the relevant law's 'costs' and 'benefits.'" *National Pork Producers*, 598 U.S. at 380 (Gorsuch, J., joined by two justices). That is not the situation here. Any burden imposed by AB 5 is not "clearly excessive" in relation to the important benefits of providing a clear, administrable test to prevent misclassification. *See Nat'l Ass'n of Optometrists & Opticians v. Brown*, 709 F.Supp.2d 968, 973 (E.D. Cal. 2010) ("Local laws and regulations are rarely struck down under the *Pike* test.").

Plaintiffs argue that AB 5 could have *more* benefits if fewer industries had been exempted, *see, e.g.*, CTA PI Br. 19. But "maximum benefits to the State" is not the *Pike* standard. OOIDA argues that AB 5's benefits are limited because motor carriers will not "bring [owner-operators] into the employee fold." OOIDA PI Br. 10. In fact, motor carriers have reclassified owner-operators as employees.[17]

Plaintiffs do not dispute that only a handful of nondiscriminatory state laws have *ever* been invalidated under *Pike*. OOIDA PI Reply Br. 7; *see Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (state law regulating shape of mud guards); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (state law regulating train length). The Ninth Circuit has already rejected the claim that California's labor laws "are similar in character and effect to Illinois's mudflaps decree and Arizona's train-length limitation." *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127, 1135-36 (9th Cir. 2021). In those cases, an interstate carrier had to comply with "*incompatible* state requirements." *Id.* (emphasis added). By contrast, state employment law protections are not typically

[17] *See* Dkt. 173-13 (Second Tate Decl.) ¶¶18-21; Dkt. 173-12 (Ta Decl.) ¶¶4-5; Dkt. 173-7 (Glackin Decl.) ¶¶5-6.

incompatible, and such incompatibility would be addressed through a normal conflict-of-laws analysis that considers the interest of multiple states in determining whether (1) the driver is considered an employee and (2) particular substantive employment protections apply. *See supra* at 28-29.

Plaintiffs also rely on *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), in which a state tax threatened interstate commerce by "placing a financial barrier around the State." CTA PI Br. 16-17 (citing *Scheiner*, 483 U.S. at 284). But the problem with the state tax in *Scheiner* was that it "impos[ed] a heavier tax burden on out-of-state businesses that compete in an interstate market than it impose[d] on its own residents who also engage in commerce among States." 483 U.S. at 282. In other words, the state tax in *Scheiner* had an impermissible discriminatory effect—which, for the reasons discussed above, is not true of AB 5. The *Scheiner* decision also made clear that state taxes on things like fuel consumption, which are "simply payments for traveling a certain distance that happens to be within [the state]," are permissible. *Id.* at 283. By analogy, so are state employment protections that apply to workers in California.

III. AB 5 Does Not Violate Equal Protection.

Plaintiffs contend that AB 5 violates the federal and state Equal Protection Clauses by applying the ABC test to the trucking industry while applying the *Borello* test to certain professions and providing a time-limited exception from the ABC test for construction trucking. But classifications in economic legislation are subject only to rational-basis review. AB 5 easily satisfies such review.

Under the rational-basis test, a classification is valid "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (Thomas, J.); *see also ArchitectureArt, LLC v. City of San Diego*, 231 F.Supp.3d 828, 843-44 (S.D. Cal. 2017) (California equal protection standard is same as federal standard). "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason

for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. Nor must a legislature state the reasons for a particular legal classification. *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). Rather, "[s]o long as the law rests upon some rational basis [the court's] inquiry is at an end." *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 965 (9th Cir. 2021) (upholding AB 5 under rational-basis review).

Plaintiffs' equal protection argument, as set out in their preliminary injunction briefing, relies heavily on *Olson v. California*, 62 F.4th 1206, 1219-20 (9th Cir. 2023), in which the Ninth Circuit held that app-based rideshare and delivery companies plausibly alleged that AB 5 irrationally targeted *those* companies. CTA PI Reply Br. 14; OOIDA PI Reply Br. 16. Like the *Olson* plaintiffs, Plaintiffs argue that AB 5's distinctions lack a rational basis. But the *Olson* case came before the Ninth Circuit on review of a motion to dismiss, so the panel decided only whether the plaintiffs' allegations "*plausibly state*[*d*] a claim." OOIDA Supp. PI Br. 6 (emphasis added); *see also* CTA Supp. PI Br. 6. That is not the standard for a trial on the merits. Rather, at a trial on the merits, Plaintiffs "have the burden to negative every conceivable basis which might support" the distinctions they challenge. *Beach Commc'ns*, 508 U.S. at 315. They cannot do so.

A. AB 5 rationally treats some occupations differently.

Plaintiffs point out that AB 5 applies the *Borello* test to certain occupations, like doctors and real estate agents, and the ABC test to most other occupations, including motor carrier drivers. But the Legislature might rationally have believed that workers in those occupations are less subject to exploitation or are more likely to have true independence. Legislation necessarily involves line-drawing. Legislators are not required to "draw the perfect line," only a "rational line." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012). The legislature's decisions "may be based on rational speculation" and are "not subject to courtroom fact-finding." *Beach Commc'ns*, 508 U.S. at 315.

Plaintiffs are wrong that AB 5's exemptions are irrational because they undermine the policy goal of preventing worker misclassification. No legislation pursues a single policy goal at the expense of all others. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). "[S]tate substantive labor standards … are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market." *Assoc. Builders & Contractors of S. Cal., Inc. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004), *amended*, No. 02-56735, 2004 WL 292128 (9th Cir. Feb. 17, 2004). Exemptions within economic and social legislation are commonplace. The Fair Labor Standards Act (FLSA) was adopted for the stated purpose of improving "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. §202, but excludes many workers and industries from its minimum wage and overtime mandates, including executive, administrative, and professional employees; certain small newspapers; fishermen; and certain farmworkers.[18] A legislature may "implement [its] program step by step ... adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *see also Beach Commc'ns*, 508 U.S. at 316.

In their preliminary injunction briefing, Plaintiffs cite *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), for the proposition that "[a]statute fails rational basis review when its exemptions contradict the justification put forward by its proponent." CTA PI Reply Br. 14. *Merrifield* is inapposite. There, the state enacted a pesticide-related licensing requirement that applied to certain pest controllers who did *not* use pesticides. 547 F.3d at 981-82. The government's rationale for

[18] U.S. Dept. of Labor, Handy Reference Guide to the Fair Labor Standards Act 5-6 (Sept. 2016), available at www.dol.gov/whd/regs/compliance/wh1282.pdf.

defending the licensing requirement against a due process challenge (that these controllers might encounter pesticides or need to recommend pesticides) contradicted the government's rationale, offered in response to the equal protection challenge, for exempting the non-pesticide pest controllers who were most likely to be in this situation. That is what made the proffered distinction irrational. But there is no such inconsistency here. The legislature simply chose to apply different tests for employee status to different occupations. *See,* e.g., *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1064, 1066 (9th Cir. 2018) ("Unlike in *Merrifield*, there is no suggestion that classifying ready-mix drivers as distinct from other drivers actually contradicts the purposes of the prevailing wage law.").

Plaintiffs are wrong that AB 5's exceptions irrationally undermine the *Dynamex* decision. *See* CTA Supp. PI Br. 5. *Dynamex* adopted the ABC test with respect to wage orders, which do not apply to professionals. *See, e.g.*, Cal. Labor Code §515(a); 8 Cal. Code Regs. §11010(1)(A)(1). AB 5 expanded the reach of *Dynamex* to the Labor Code, and AB 5's exemptions largely reflect the professions that were treated differently under wage orders. *Contra* CTA PI Reply Br. 13-14. Only about 8% of independent contractors work in occupations that are exempted from application of the ABC test under AB 5, which refutes Plaintiffs' suggestion that AB 5's exceptions swallow its rule. *See supra* at 3 n.1 (citing Jacobs article). The Legislature was not required to apply *Dynamex* across-the-board.

B. AB 5 rationally provides a time-limited exemption for contracts with construction contractors.

Plaintiffs also point to Labor Code §2781(h), which provides a time-limited exemption (until January 1, 2025) from application of the ABC test for certain construction trucking services provided directly to licensed construction contractors, if specified criteria are met. Plaintiffs assert that the Legislature should not have treated construction trucking differently. *See* OOIDA Supp. PI Br. 3-4; CTA Supp. PI Br. 5-6. But this type of ordinary legislative line-drawing is not

subject to judicial second-guessing.

The Legislature might rationally have determined that construction contractors in particular needed more time to adjust to AB 5. Because construction contractors often enter into fixed-price contracts years before their work on a project ends, the contractors may not be able to pass on increased costs to customers. Dkt. 173-8 (Hannan Decl.) ¶6; Borjas Decl. ¶5. That is a rational reason for delaying implementation of a legislative change that may increase contractors' costs. Even if some other businesses enter into long-term contracts, and some construction contractors do not enter into long-term contractors, legislators are not required to "draw the perfect line." *Armour,* 566 U.S. at 685. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

OOIDA urges that the "business needs" of the construction industry cannot be a rational basis for treating construction differently, because AB 5 is meant to improve working conditions and prevent misclassification. OOIDA Supp. PI Br. 1-2. To the contrary, legislatures must weigh competing policy concerns. *Rodriguez*, 480 U.S. at 526-27 ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."). A legislature may rationally decide to "implement [its] program step by step." *Dukes*, 427 U.S. at 303. OOIDA also complains that the Legislature did not provide reasons for the time-limited construction exemption. OOIDA Supp. PI Br. 5. But the Legislature was not required to do so. *Nordlinger*, 505 U.S. at 15.

Nor does *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809 (9th Cir. 2016), help Plaintiffs. The challenged legislation in that case contained a pinpoint exemption allowing one union's claims against three employers to proceed when all others were extinguished. *Id.* at 812-13; *see Allied Concrete*, 904 F.3d at 1066 (explaining that in *Fowler*, the "carve outs came in the form of cut-off dates that

corresponded almost exactly to the filing dates of the labor union's cases against certain employers," which was "specific evidence … that clearly suggests improper favoritism"). And the defendant failed to offer any rationale for the "carve-out." *Fowler,* 844 F.3d at 816. Further, *Fowler* involved a motion to dismiss rather than a merits determination. Here, this case is at the merits stage, the time-limited construction exemption applies to an entire industry, and IBT has offered a rational reason for the exemption.

Finally, even if the time-limited construction exemption were irrational, the correct remedy would be to strike down the time-limited exemption, not the general rule. *See Epic Games*, 67 F.4th at 1002; *see also Heckler v. Mathews*, 465 U.S. 728, 740 (1984) ("when the right invoked is that of *equal* treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class") (citation, internal quotation marks omitted; emphasis in original).

C. AB 5 cannot be invalidated as the product of animus.

Plaintiffs point out that Assemblymember Lorena Gonzalez made statements about the need to address misclassification in the trucking industry. Plaintiffs assert that such statements show impermissible "animus" toward owner-operators. This argument is wrong for four independently dispositive reasons.

First, under the rational basis test, even if a law *was* motivated by animus, the law must be upheld unless it serves no legitimate government purpose. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200-01 (9th Cir. 2018). AB 5 serves the legitimate purposes of preventing misclassification, providing an easy-to-administer test of employee status, and providing minimum employment protections to more workers. As such, purported animus is irrelevant.

Second, a legislator's public comments identifying problems in a certain industry are not evidence of impermissible animus against that industry. Legislators frequently make statements explaining the perceived problems they are

seeking to address in a proposed law. *See Int'l Franchise Ass'n*, 803 F.3d at 407 n.10 (explaining that "a legislative debate about the merits of" a particular business model by policymakers is distinct from a "bare [ ] desire to harm a politically unpopular group," and rejecting plaintiffs' animus-based equal protection claim) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

Third, Assemblymember Gonzalez discussed perceived problems in *many* industries during the public debates about AB 2257 and AB 1850 (which was incorporated into AB 2257).[19] Plaintiffs cherry pick statements (without context) as evidence of purported animus in their preliminary injunction briefing. *See* CTA Supp. PI Br. 2-3; OOIDA Supp. PI Br. 7-8. Most California workers are in occupations where the ABC test now applies, including janitors, maids, and other cleaners; retail workers; grounds maintenance workers; and childcare workers. *See supra* at 3 n.1 (citing Jacobs article). The trucking industry was not singled out.

Fourth, Plaintiffs erroneously conflate one legislator's remarks with the motivation of the legislative body. Even if the Legislature's actual motive were relevant to rational basis review—which it is not—"[s]tray remarks of individual legislators are among the weakest evidence of legislative intent." *Tingley v. Ferguson*, 47 F.4th 1055, 1087 (9th Cir. 2022); *see Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 (2022) ("Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole."). For that reason as well, Assemblymember Gonzalez's comments about

[19] *See* Remarks of Assemblymember Lorena Gonzalez, Assembly Labor and Employment Committee Hearing, at 1:44:50-1:45:27 (May 20, 2020), available at https://www.assembly.ca.gov/media/assembly-labor-employment-committee-20200520; Remarks of Assemblymember Lorena Gonzalez, Assembly Floor Session, at 1:57:10-1:57:25 (June 11, 2020), available at https://www.assembly.ca.gov/media/assembly-floor-session-20200611; Remarks of Assemblymember Lorena Gonzalez, Senate Labor, Public Employment & Retirement Committee Hearing, at 2:56:34-2:57:35 (August 5, 2020), available at https://www.senate.ca.gov/media/senate-labor-public-employment-retirement-committee-20200805.

misclassification problems in the trucking industry do not demonstrate impermissible animus by the Legislature against "interstate motor carriers," CTA Supp. PI Br. 5, 9-10; OOIDA Supp. PI Br. 5-8.

Nor is Assemblymember Gonzalez's statement that "I am a Teamster" evidence of impermissible animus. CTA Supp. PI Br. 1; OOIDA Supp. PI Br. 8. The Equal Protection Clause does not prevent legislators from stating they are proud of their backgrounds. If it did, then statements by legislators such as "I am a small business owner" or "I am a gun owner" would taint the lawmaking process. Moreover, Assemblymember Gonzalez was just one legislator. Other lawmakers would come from different backgrounds.

For all these reasons, Plaintiffs' equal protection challenge fails.

IV. Plaintiffs' F4A and Commerce Clause Claims Would More Appropriately be Considered as Defenses to a State Proceeding.

As stated above, the Court has discretion whether to entertain a declaratory judgment claim; issuance of a permanent injunction requires consideration of the equities and public interest; and Plaintiffs are asserting industry-wide facial challenges under the F4A and Commerce Clause. *See supra* at 9. Moreover, California courts have not yet had the opportunity to consider the application of the B2B test after the *Cal Cartage* decision (*see supra* at 27) or to apply a conflict-of-laws analysis. The Court should therefore conclude that AB 5 is not, on its face, preempted by the F4A or invalid under the dormant Commerce Clause, and leave to the state courts the opportunity to consider any federal defenses to the enforcement of AB 5 in the context of an enforcement proceeding.

CONCLUSION

The Court should enter judgment for Defendants.

DATED: September 29, 2023

Respectfully submitted,

STACEY M. LEYTON
SCOTT A. KRONLAND
ALTSHULER BERZON LLP

JULIE GUTMAN DICKINSON
HECTOR DE HARO
BUSH GOTTLIEB, ALC

By: */s/ Stacey M. Leyton*
Stacey M. Leyton

Attorneys for Intervenor-Defendant
International Brotherhood of Teamsters