SPENCER C. SKEEN, CA Bar No. 182216
spencer.skeen@ogletree.com
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
4370 La Jolla Village Drive, Suite 990
San Diego, CA 92122
Telephone: 858.652.3100
Facsimile: 858.652.3101

[Additional Counsel on Following Page]

Attorneys for Plaintiffs
RAVINDER SINGH, THOMAS ODOM and
CALIFORNIA TRUCKING ASSOCIATION

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

MEMORANDUM OF CONTENTIONS OF FACT AND LAW

Date: November 13, 2023
Time: 10:30 a.m.
Place: Courtroom 5A

Complaint Filed: October 25, 2018
Trial Date: None
District Judge: Hon. Roger T. Benitez
Courtroom 5A, 221 W. Broadway, San Diego
Magistrate Judge: Hon. Daniel E. Butcher
Courtroom 2B, 221 West Broadway, San Diego

ROBERT R. ROGINSON, CA Bar No. 185286
robert.roginson@ogletree.com
ALEXANDER M. CHEMERS, CA Bar No. 263726
alexander.chemers@ogletree.com
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
400 South Hope Street, Suite 1200
Los Angeles, CA 90071
Telephone: 213.239.9800
Facsimile: 213.239.9045

Attorneys for Plaintiffs
RAVINDER SINGH, THOMAS ODOM and
CALIFORNIA TRUCKING ASSOCIATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

Federal Statutes

California Statutes

Other Authorities

Plaintiffs Ravinder Singh, Thomas Odom, and California Trucking Association ("CTA") (collectively, "Plaintiffs") submit this Memorandum of Contentions of Fact and Law pursuant to Rule 16.1(f)(2) of the Local Rules of the United States District Court for the Southern District of California. Pursuant to the Parties' Stipulation (ECF No. 182), Plaintiffs will not submit live testimony at the trial on the merits, but will instead rely on witness declarations.

I. INTRODUCTION

As previously set forth in Plaintiffs' Renewed Motion for Preliminary Injunction (ECF No. 172), motor carriers across the United States provide freight-transportation services through "owner-operators"—individuals who drive their own trucks and who operate as independent contractors. Congress has recognized the critical role that owner-operators perform in interstate commerce, including through the Federal Aviation Administration Authorization Act ("FAAAA"). In 2019, however, California passed Assembly Bill 5 ("AB-5"), now codified at California Labor Code §§ 2775 through 2785, which effectively eliminates owner-operators from any role in motor transport in California. The State Defendants have never articulated how a motor carrier can possibly satisfy the statute, including "Prong B" of the ABC test, and they remain intent on enforcing § 2775 against motor carriers. They thus continue to threaten irrevocable harm to Plaintiffs and the owner-operators who have built businesses in reliance on federal law.

Plaintiffs seek to enjoin enforcement of § 2775 on four grounds: (1) express preemption under the FAAAA; (2) the Dormant Commerce Clause; (3) implied preemption; and (4) the Equal Protection Clauses.

In January 2020, this Court agreed with Plaintiffs and enjoined enforcement of § 2775. *California Trucking Ass'n v. Becerra*, 433 F. Supp. 3d 1154 (S.D. Cal. 2020). The Court concluded that Plaintiffs were likely to prevail on the argument that the FAAAA expressly preempted § 2775. The Court's order granting the preliminary injunction relied on FAAAA express preemption, and thus did not address Plaintiffs'

Dormant Commerce Clause and implied preemption claims.[1] *Id*. at 1163-69. The Court further found that plaintiff California Trucking Association ("CTA") has Article III standing as to its motor carrier members, *id*. at 1162, that enforcement of § 2775 would cause irreparable harm to Plaintiffs, *id*. at 1162, that "on balance, the hardships faced by Plaintiffs significantly outweigh those faced by Defendants," and that "the public interest tips sharply in Plaintiff's favor." *Id*. at 1171.

The Ninth Circuit affirmed Plaintiffs' Article III standing, but, in a 2-1 decision, reversed this Court's finding that Plaintiffs were likely to succeed on the merits of their FAAAA express preemption claim. *California Trucking Ass'n v. Bonta*, 996 F.3d 644 (9th Cir. 2021), cert. denied 142 S. Ct. 2903 (2022). On appeal, neither party raised Plaintiffs' Dormant Commerce Clause and implied preemption arguments. The Ninth Circuit's opinion did not overturn this Court's findings in Plaintiffs' favor on irreparable harm, the balance of hardships, or that the public interest tilts in Plaintiffs' favor. *Id*.

As this Court previously found, the State's enforcement of § 2775 will cause Plaintiffs irreparable harm. Plaintiffs will also to prevail on the merits.

Express Preemption – Section 2775 limits the "services" that motor carriers are able to provide and thus triggers FAAAA preemption. As clarified by the Ninth Circuit, a rule restricting motor carriers from engaging owner-operators *as independent contractors* does not, in and of itself, run afoul of the FAAAA. The Ninth Circuit's decision, however, took for granted that motor carriers could continue providing the same services by reclassifying owner-operators as employees, such that the harms would be limited to increased costs and other "indirect effects" from an employee model. 996 F.3d at 659-660. The practical effect of § 2775, however, is to entirely eliminate services since thousands of owner-operators are not willing to work

[1] On February 10, 2020, the Court dismissed Plaintiffs' Dormant Commerce Clause claim. ECF 110. The Court reinstated that claim by minute order dated August 30, 2022. ECF 144.

as employees. As shown by declarations, recent protests at the ports, and surveys, owner-operators want the freedom to operate their own businesses. Because motor carriers can neither engage owner-operators as independent contractors (without running afoul of AB-5) nor hire them as employees (given that many owner-operators want to remain independent), § 2775 limits the services that motor carriers could otherwise provide.

Dormant Commerce Clause – Section 2775 also violates the Dormant Commerce Clause. It exempts several in-state professions and industries from the ABC test, while imposing increased burdens on motor carriers engaged in interstate commerce, disproportionately lowering the cost of doing business for intrastate businesses. There is no legitimate justification for the disparate treatment or for allowing California to erect barriers to a national market.

Implied Preemption – Section 2775 is impliedly preempted by Congress' activity in regulating and deregulating the motor carrier activity.

Equal Protection – Finally, Section 2275 violates the Equal Protection Clauses of the United States and California Constitutions. Through public statements, the sponsor of AB-5 and AB-2257 made her underlying motivation clear. She was not simply pro-union or pro-worker, but functioning like a labor organizer, proudly stating that "I am a Teamster" and "I am the union."[2] Such sentiments not only explain the presence of intervenor International Brotherhood of the Teamsters ("IBT") in this litigation, but the real intent behind the contested statutes. The claimed purpose of AB-5 was to "ensure [that] workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve." AB-5 § 1(e). Yet, the dozens of exceptions grafted onto AB-5 and then AB-2257 undermine this alleged goal.

[2] Message Posted May 30, 2019: "Dude. I am a Teamster. I ran for office as an organizer and labor leader. I believe in unions to my core. Stand in solidarity with workers every single day. Bought & paid for? No... I am the union." Available at: https://twitter.com/LorenaSGonzalez/status/1134087876390428672.

As the Ninth Circuit found earlier this year, "the exclusion of thousands of workers from the mandates of A.B. 5 is starkly inconsistent with the bill's stated purpose of affording workers the 'basic rights and protections they deserve.'" *Olson v. California*, 62 F. 4th 1206, 1219 (9th Cir. 2023).[3] Like the gig-economy workers in *Olson*, motor carriers and owner-operators were irrationally and unconstitutionally owner-operators targeted by AB-5 in a manner that violates their rights to Equal Protection.

For the reasons set forth here and at the trial on the merits, AB-5 and AB-2257 should be permanently enjoined.

II. FACTUAL BACKGROUND

A. The Role Of Independent, Owner-Operators In Trucking.

Motor carriers move property in interstate commerce by motor vehicle. *See* ECF No. 54-3, Yadon Decl., ¶¶ 6-15; ECF No. 54-2, Stefflre Decl. ¶¶ 4-8.[4] They operate pursuant to registration permits, issued by the Federal Motor Carrier Safety Administration, that confer federal "operating authority." 49 C.F.R. § 365.101T.

As this Court previously recognized, "[i]ndividual owner-operators use a business model common in both California and across the country." 433 F. Supp. 3d at 1158. "That model generally involves a licensed motor carrier contracting with an independent contractor driver to transport the carrier-customer's property." *Id.*; *see also* H.R. Rep. No. 95-1812, at 5 (1978) (describing the "independent owner-operator" as a "small businessman" who "owns and operates one, or a few, trucks for hire"). In many cases, owner-operators lack their own operating authority and instead "operat[e] under the * * * permit[s]" of the motor carriers with which they contract. *Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 303 (1953).

The owner-operator model encourages the types of efficiencies promoted by a

[3] The appellees in *Olson* are requesting a rehearing *en banc*, which the Ninth Circuit has not yet decided whether it will hear.

[4] Declarations previously submitted in this matter are referenced with the relevant ECF number. Declarations lacking an ECF number are submitted with this motion.

deregulated national market. "Motor carriers offer many types of trucking services" and the "volume of trucking services needed within different industries can vary over time based on numerous factors." 433 F. Supp. 3d at 1158. "For example, in the agriculture industry, demand for trucking services varies depending on the time of year, the price at which the produce can be sold, the available markets, the length of the growing season, and the size of the crop, which itself varies based on temperature, rainfall, and other factors." *Id.* "Motor carriers meet th[is] fluctuating demand for highly varied services by relying upon independent-contractor drivers." *Id.*

This model not only benefits motor carriers but owner-operators, who "typically work for themselves for some time to build up their experience and reputation in the industry. Once the owner-operator is ready to expand their business, they contract for or bid on jobs that require more than one truck, at which time, the owner-operator will subcontract with one or more other owner-operators to complete the job." 433 F. Supp. 3d at 1158. Owner-operators who expand their businesses in this way may ultimately obtain their own operating authority. *See* Douglas C. Grawe, *Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators Over Time*, 35 Transp. L.J. 115, 127 (2008). "Many individual owner-operators have invested in specialized equipment and have obtained the skills to operate that equipment efficiently." 433 F. Supp. 3d at 1158.

In light of these compelling forces, "[f]or decades, the trucking industry has used an owner-operator model to provide the transportation of property in interstate commerce." *Id.* As a result, "[t]here are hundreds of thousands of owner-operators in the United States, many of whom contract with various federally regulated motor carriers." *Owner-Operator Ind. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 367 F.3d 1108, 1110 (9th Cir. 2004).

B. <u>History Of Deregulation Of The Trucking Industry.</u>

The integral role played by owner-operators is not an accident, but an intended

result of Congress deregulating the trucking industry. In 1978, for example, a congressional report noted that owner-operators were "one of the most efficient movers of goods and account[ed] for approximately 40 percent of all intercity truck traffic in the United States." H.R. Rep. No. 95-1812, at 5. The facilitation of owner-operator transport is now federal policy. The Federal Truth-in-Leasing regulations, which govern contracts between motor carriers and owner-operators, were adopted to "promote the stability and economic welfare of the independent trucker segment of the motor carrier industry." Part 1057 – Lease and Interchange of Vehicles, 44 Fed. Reg. 4680, 4680 (Jan. 23, 1979).

In 1980, Congress passed the Motor Carrier Act ("MCA"), which deregulated interstate trucking so the rates and services offered by licensed motor carriers would be set by the market rather than by government regulation. 79 Stat. 793. In passing the MCA, Congress found that federal regulation of motor carriers had "inhibit[ed] market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry." Motor Carrier Act of 1980, Pub. L. 96-296, §§ 2, 3(a), 94 Stat. 793, 793. Congress therefore enacted the MCA to "reduce unnecessary regulation." *Id*. at § 2. Congress intended owner-operators to be among the intended beneficiaries of this deregulation. When signing the MCA, President Carter specifically stated that the law would "enhance business opportunities for independent truckers." Motor Carrier Act of 1980: Remarks on Signing S. 2245 Into Law, Pub. Papers of Jimmy Carter at 1266 (July 1, 1980).

As the Ninth Circuit noted in this case, despite Congress's efforts through the MCA, "state economic regulation of trucking continued to be a 'huge problem for national and regional carriers attempting to conduct a standard way of doing business.'" 996 F.3d at 655. As result, in 1994, Congress expanded its efforts by enacting the FAAAA "to ensure that the States would not undo federal deregulation with regulation of their own" (*Rowe v. New Hampshire Motor Transp. Ass'n*, 552

U.S. 364, 368 (2008)) and to prevent development of "a patchwork of state service-determining laws, rules, and regulations." *Id*. at 373. Congress recognized that "[t]he sheer diversity" of state regulatory schemes posed "a huge problem for national and regional carriers at-tempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677, at 87 (1994). Consequently, Congress declared in express legislative findings that state regulation of the trucking industry "imposed an unreasonable burden on interstate commerce" that "impeded the free flow of trade, traffic, and transportation of interstate commerce." FAAAA, Pub. L. No. 103-305, § 601(a)(1)(A)-(B), 108 Stat. 1569, 1605.

Congress therefore included in the FAAAA an express preemption clause providing that no state may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). It borrowed the FAAAA's preemption language from the earlier-enacted Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(1), which the Supreme Court already had held to "express a broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 383 (1992).

C. *Dynamex* And AB-5 Interfere With The Use Of Owner-Operators.

Despite Congress's efforts to deregulate the trucking industry and to provide opportunities for owner-operators, California seeks to superimpose its own belief that motor carriers should exclusively use employee drivers to transport goods.

For decades, the multi-factor test described in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989) governed the classification of California workers as independent contractors or employees and motor carriers clearly and lawfully treated owner-operators as independent contractors under that test. RJN, ECF 73-3, p. 35, 69. That changed starting in 2018 when the California Supreme Court established a new test for employment status, the so-called "ABC" test, which would apply to claims under state wage orders. *See*

Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1 (Cal. 2018). The California legislature subsequently codified the ABC test at § 2775, and expanded its applicability to reach the entire Labor Code and the Unemployment Insurance Code. 2019 Cal. Stat., ch. 296; Cal. Lab. Code §§ 2775(b)(1)(A)-(C), 2776-2784.

Under prong (B) of the ABC test, an employer must treat a worker as an "employee" unless the hiring entity establishes that "[t]he person performs work that is outside the usual course of the hiring entity's business." Cal. Lab. Code § 2775(b)(1)(B). Since both motor carriers and owner-operators are engaged in the act of trucking, this Court previously found and the Ninth Circuit confirmed as "self-evident" that "a worker providing a service within a motor carrier's course of business will never be considered an independent contractor." 996 F.3d 644, at 667-68, citing *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 964 (9th Cir. 2018).

Section 2775 therefore effectively requires motor carriers, when engaging any driver internally in California, or if the driver drives into California from another state, to comply with the full panoply of California laws governing the employment relationship.[5] Among other requirements, the motor carrier will have to hire drivers in compliance with California's Labor Code (Cal. Lab. Code § 2810.5); reimburse drivers for any cost incurred in operating and maintaining vehicles (*id.* § 2802(a)); record drivers' working hours (Wage Order No. 9, § 7(A)(3); Cal. Lab. Code § 1174(d)); provide and manage drivers' meal and rest periods (Wage Order No. 9, §§ 7 (A)(3), 11¬12); pay drivers as employees (*id.* § 4; Cal. Lab. Code §§ 204, 226, 246, 1197); furnish itemized wage statements (*id.* § 226); institute and supervise worker-safety programs (*id.* § 6401.7); and pay worker's compensation and unemployment insurance (*id.* §§ 3600, 3700; Cal. Unemp. Ins. Code § 976).

Section 2775 also impacts thousands of owner-operators, as shown by the

[5] California's laws impose numerous obligations on "employers" with respect to "employees." But the many laws governing the employer-employee relationship in California generally do not apply to independent contractors. *See, e.g., Skidgel v. Cal. Unemployment Ins. Appeals Bd.*, 234 Cal. Rptr. 3d 528, 533 (Ct. App. 2018).

involvement of intervenor OOIDA. Owner-operators who previously had the ability to own their own business, acquire multiple trucks, select their own jobs and their own working hours, choose their own routes, and to operate their own businesses must, as a practical matter, become employees if they wish to provide driving services in California for motor carriers.

D. Owner-Operators Are Unwilling To Become Employee Drivers.

Since the preliminary injunction in this case was lifted, it has become abundantly clear that motor carriers cannot simply reclassify existing owner-operators as employee drivers. Assuming *arguendo* that reclassification was administratively and financially achievable, this still requires owner-operators to accept employee positions, which they have publicly and prominently refused to do.

The tumult caused by AB-5 includes widespread protests by owner-operators in July 2022, which effectively closed the Port of Oakland and also impacted the Ports of Los Angeles and Long Beach.[6] As explained by Plaintiff Odom, "[f]or most of my adult life, I have worked for myself. I have decided the days and times that I want to work, the loads that I want to carry, and how to maximize my earnings." ECF No. 172-2, Further Odom Decl. ¶ 16. While "[t]here are a lot of reasons why I don't want to be an employee", "it fundamentally comes down to a question of freedom." *Id*. Other owner-operators confirm they feel the same. ECF No. 172-4, Estrella Decl. ¶¶ 10-12, 16; ECF No. 172-3, Medina Decl. ¶ 14 ("The whole reason that I became an owner-operator was to get away from an employee role where someone tells you when to work and how to do your job."); Williams Decl., ECF

[6] *See, e.g.*, Paul Berger, *Truck Protests Bring Port of Oakland Close to a Standstill*, Wall Street Journal (July 19, 2022), https://www.wsj.com/articles/truck-protests-bring-port-of-oakland-close-to-a-standstill-11658266880; Paul Berger, *Protesting Truckers Pledge Extended Blockade of Port of Oakland*, Wall Street Journal (July 20, 2022), https://www.wsj.com/articles/blockaded-port-of-oakland-braces-for-more-trucker-protests-11658334195; Colin Campbell, *"NO TO AB5": Hundreds of California Port Truckers Protest Labor Law*, Supply Chain Dive (July 14, 2022), https://www.supplychaindive.com/news/trucking-protest-AB5-california-ports-los-angeles-long-beach-oakland-supply-chains/627214/.

155-6, ¶ 7.

The refusal by owner-operators to become employee drivers is not surprising. As shown by a survey of more than 2,000 drivers, the "motivating factors behind the decision" to become an owner-operator rather than an employee driver differ. *See* Rebecca M. Brewster, *Owner-Operators/Independent Contractors In The Supply Chain*, American Transportation Research Institute, p. 26 (2021). While the top three motivating factors among employee drivers were "Job Security/Stability", "Income", and "Healthcare/Retirement Savings", the top three motivating factors for owner-operators were "Independence/Ability to Set Hours", "Schedule/Flexibility", and "Choice of Routes/Length of Haul". *Id.* In short, owner-operators have self-selected a job not just for recompense or benefits but to maximize their freedom and flexibility. Because they do not want to be employee drivers, many owner-operators are still seeking a way to remain independent, or like plaintiff Tom Odom are leaving California, or are quitting the profession entirely. Further Odom Decl. ¶¶ 24 (relocated his business to Tennessee and is moving with his wife to Texas); ECF No. 172-4, Estrella Decl. ¶¶ 15, 17; ECF No. 172-3, Medina Decl. ¶ 10; ECF No. 155-6, Williams Decl. ¶ 12 (relocated to Arizona to continue working as an owner-operator); ECF No. 172-5, Stefflre Decl. ¶ 12 (out of 85 owner-operators, only two were willing to become employee drivers).

These experiences are validated by motor carriers, who are unable to fill postings for employee positions with owner-operators. ECF No. 172-5, Stefflre Decl. ¶¶ 8-9; ECF No. 172-6, Sauer Decl. ¶ 7 ("I'm not aware of any motor carrier that has successfully converted all or even many of its owner-operators to employee roles."). That is true even if motor carriers offer pay and benefits equivalent to what an owner-operator might make as an independent contractor. "Even if I could make the same amount of money working as an employee driver, I have no interest in becoming an employee." ECF No. 172-2, Further Odom Decl. ¶ 16; ECF No. 172-4, Estrella Decl. ¶ 16 (same); ECF No. 172-3, Medina Decl. ¶ 14 (same). As discussed

below, the inability to engage owner-operators as independent contractors or to hire them as employees is limiting the services that motor carriers can provide.

E. The Irreparable Harm To Motor Carriers And Owner-Operators Was An Intended Effect Of The Challenged Statutes.

The negative impact on Plaintiffs was not accidental, since the primary legislative sponsors of the challenged statutes irrationally and unconstitutionally targeted motor carriers. This includes Assemblywoman Gonzalez observing during a floor session that the statute was intended to "get[] rid of an outdated broker model that allows [trucking] companies to basically make money and set rates for people that they called independent contractors . . . ."[7]

The claimed purpose of AB-5 was to "ensure [that] workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve." AB-5 § 1(e). Yet, the dozens of exceptions grafted onto AB-5 and then AB-2257 undermine this alleged goal. This includes a specific exemption for "construction trucking services" such that drivers engaged in a largely intrastate activity may be able to continue to work as independent contractors, while other owner-operators not performing construction trucking services must work exclusively as employees.

III. LEGAL STANDARD

To obtain a preliminary injunction, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the

[7] Remarks of Assembly Member Lorena Gonzalez, Assembly Floor Session, at 1:08:20-1:08:30 (Sept. 11, 2019), available at https://www.assembly.ca.gov/media/assembly-floor-session-20190911/video.

plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987).

IV. PLAINTIFFS SUCCEED ON THE MERITS

A permanent injunction is justified because Plaintiffs can show that § 2775 is preempted by: (1) FAAAA express preemption; (2) the Dormant Commerce Clause; (3) implied preemption; and (4) the Equal Protection Clauses.

A. The FAAAA's Express Preemption Clause Preempts Section 2775 As Applied to Motor Carriers and Independent Owner-Operators.

Congress passed the MCA in 1980, in part, to reduce and eliminate the significant and inconsistent regulatory burdens that states had imposed on the motor-carrier industry. In 1994, Congress bolstered the MCA by passing the FAAAA. Recognizing that "[t]he sheer diversity" of state regulatory schemes" posed "a huge problem for national and regional carriers attempting to conduct a standard way of doing business," Congress intended the FAAAA to eliminate the patchwork of state regulations that had bogged down the motor carrier industry. *See* H.R. Rep. 103-677, at p. 87, 1994 U.S.C.C.A.N. 1715, 1759.

Congress declared that state regulation of the trucking industry "imposed an unreasonable burden on interstate commerce" and "impeded the free flow of trade, traffic, and transportation of interstate commerce." FAAAA, Pub. L. No. 103-305, § 601(a)(1)(A)-(B), 108 Stat. 1569, 1605. To achieve its goal of replacing the patchwork of state and local regulations with *one* federal standard for motor carriers, Congress included an express preemption clause in the FAAAA. That clause prohibits states from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

Congress intended the FAAAA's preemption clause to be broad. By decreeing that "a State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier," Congress "express[ed] a broad pre-emptive purpose" because

the phrase "related to" is "deliberately expansive" and "conspicuous for its breadth." *Morales*, 504 U.S. at 383–384 (interpreting identical preemption language in the ADA)). Thus, the FAAAA preempts any state law that affects motor carrier rates in anything other than a "tenuous, remote, or peripheral [] manner." *Id*. at 390. A law or regulation is "related to" prices, routes, or services if it has *any effect* on them—regardless of whether the "effect is direct or indirect." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644-645 (9th Cir. 2014) (emphasis added); *see also Rowe*, 552 U.S. 364 (2008).

The FAAAA preempts state laws having a significant impact on motor carriers' "prices, routes, *or* services." 49 U.S.C. § 14501(c)(1). Because the express preemption clause is worded in the disjunctive, Plaintiffs need show only a likelihood that § 2775 will have a more than tenuous impact on motor carriers' "services" *or* "routes" *or* "prices."

1. The Ninth Circuit's Clarified Standard.

This Court previously found, and dissenting Judge Bennett agreed, "that the FAAAA likely preempts 'an all or nothing' state law like AB-5 that categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees." 433 F. Supp. 3d at 1165; 996 F.3d at 671 ("AB-5 is preempted as applied to CTA's members") (Bennett, J., dissenting).

The other members of the Ninth Circuit panel reached a contrary conclusion. Distinguishing prior Ninth Circuit cases, the majority focused on "where in the chain of a motor carrier's business AB-5 is acting to compel a certain result, and the result it is compelling." 996 F.3d at 659. It reasoned that AB-5 "affects the way motor carriers must classify their workers, and therefore compels a particular result at the level of a motor carrier's relationship with its workforce." *Id*. Because Plaintiffs had not shown below that the statute similarly "compel[s] a result in a motor carrier's relationship with consumers," the Ninth Circuit concluded that AB-5 was "not significantly related to rates, routes, or services." *Id*.

2. The Ninth Circuit Did Not Address A Situation Where Owner-Operators Will Not Become Employee Drivers.

Even though it reversed the original injunction, the Ninth Circuit's opinion does not insulate § 2775 from challenge. The issue on appeal was whether preventing motor carriers from engaging owner-operators *as independent contractors* was, in and of itself, enough to trigger preemption. Even if the Ninth Circuit found that such a rule was not per se unlawful, it did not address the possibility that motor carriers would be unable to engage owner-operators as either independent contractors or employees.

To the contrary, the Ninth Circuit appears to have presumed that motor carriers could reclassify owner-operators as employee drivers, thus minimizing any potential harm despite the administrative and financial burdens. In its opinion, the majority addressed various "indirect effects" caused by AB-5, including the "increased costs" and "less efficient" routes arising from an employee-only model. 996 F.3d 644, at 659-660.[8] It did not, however, contemplate that owner-operators would refuse to become employee drivers, which is the situation now faced by motor carriers.

3. Section 2775 Affects Motor Carrier Services.

Here, the impact of § 2775 on motor carriers' relationship with their customers is profound and direct. Section 2775 not only impacts *how* a motor carrier classifies its workers, but *whether* a motor carrier has the workers that it needs to provide trucking services. As this Court has already noted, owner-operators have been a linchpin of the interstate trucking industry for decades. 433 F. Supp. 3d at 1158. Through AB-5, California has effectively told all of those owner-operators that they must become employee drivers if they want to work in the state.

[8] The Ninth Circuit's opinion appears consistent with that of the State Defendants and the IBT, who have repeatedly downplayed the challenges of converting owner-operators to employee drivers. For example, the IBT previously argued that motor carriers "could simply hire owner-operators for individual assignments." ECF No. 58, 9:9-11.

The fundamental problem is that owner-operators are unwilling to accept roles as employee drivers. *See*, Section II.D, *supra*. Even if motor carriers were willing to accept the increased costs and inflexibility from hiring a purely employee workforce, they cannot find owner-operators who will accept those positions. While Plaintiffs will supplement this evidence as the case advances, it is already clear:

- Many owner-operators are primarily motivated by the freedom and flexibility possible under an independent contractor model. ECF No. 172-2, Further Odom Decl. ¶ 16; ECF No. 172-4, Estrella Decl. ¶¶ 9-12; ECF No. 172-3, Medina Decl. ¶ 5 ("The whole reason that I left my previous job in construction was to get away from having someone looking over my shoulder."); ECF No. 171-5, McElroy Decl. ¶ 6; ECF No. 171-6, Williams Decl., ¶ 7; ECF No. 171-4, Hemerson Decl. ¶ 8.
- Many owner-operators have no interest in becoming employee drivers. ECF No. 172-2, Further Odom Decl. ¶ 16; ECF No. 172-4, Estrella Decl. ¶ 16; ECF No. 172-3, Medina Decl. ¶¶ 5, 14-15; ECF No. 171-5, McElroy Decl. ¶ 13; ECF No. 171-6, Williams Decl. ¶ 16; ECF No. 171-4, Hemerson Decl. ¶ 16.
- Motor carriers who have offered to convert owner-operators to employee drivers have been largely unsuccessful. ECF No. 172-5, Stefflre Decl. ¶ 12; ECF No. 172-6, Sauer Decl. ¶ 7.
- Owner-operators would rather leave California, or quit trucking entirely, before they become employee drivers. ECF No. 172-2, Further Odom Decl., ¶ 24 (moving to Texas); ECF No. 171-6, Williams Decl. ¶ 12 (moved to Arizona); ECF No. 172-4, Estrella Decl. ¶ 17 (has considered buying moving to another state, but not willing to do that yet "since my family, my friends, and my church are all here"), ¶ 18 ("At the point at which I can no longer work as an owner-operator, I will just leave the trucking field."); ECF No. 172-6, Sauer Decl. ¶ 8.

Because motor carriers can no longer depend on owner-operators and because they cannot replace owner-operators with employee drivers, AB-5 will result in trucking companies offering fewer services, or not meeting available demand, or going out of business entirely. ECF No. 172-6, Sauer Decl. ¶¶ 10, 14, 21, 24; ECF No. 172-5, Stefflre Decl. ¶ 13 ("our inability to continue to use independent contractors has resulted in the loss of approximately $4,000,000 in annual revenue"). All of these outcomes directly impact the services that motor carriers can offer to customers.

In sum, § 2775 does not merely require motor carriers to reclassify owner-operators as employees. Instead, the practical effect is to prevent motor carriers from engaging thousands of owner-operators in any capacity. Motor carriers are not able to engage these drivers as independent contractors under the statute, and they are not able to hire them as employee drivers either because many owner-operators do not want to be employees. AB-5, therefore, constructs an artificial barrier to trucking, worsens an existing labor shortage, and ensures that necessary services are not provided. Section 2775, which is "significantly related to" services, is preempted by the FAAAA even under the Ninth Circuit's clarified standard. 996 F.3d at 659.

B. <u>The Dormant Commerce Clause Preempts Section 2775 As Applied to Motor Carriers and Independent Owner-Operators</u>

The Commerce Clause of Article I, Section 8, clause 3 of the United States Constitution, grants Congress the power to "regulate Commerce . . . among the several States." Although the Commerce Clause is framed as a positive grant of power to Congress, the Supreme Court has "long held that this Clause also prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460, 204 L. Ed. 2d 801 (2019). "This 'negative' aspect of the Commerce Clause" prevents the States from adopting protectionist measures and thus preserves a national market for goods and services. *Id.*, citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). "[T]he proposition that the Commerce Clause by its own force restricts state protectionism is deeply

rooted in our case law," *Tenn. Wine & Spirits*, *supra* at 2460, and the need to "remov[e] state trade barriers was a principal reason for the adoption of the Constitution." *Id.* As the Supreme Court has observed, the Court's "dormant Commerce Clause cases reflect a 'central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979).

Courts have thus consistently held that this affirmative grant of power to Congress includes a negative implication, which restricts the ability of states to regulate interstate commerce. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 520 U.S. 564, 571 (1997). The Dormant Commerce Clause ("DCC") restricts "a State from jeopardizing the welfare of the Nation as a whole by placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Service Comm'n,* 545 U.S. 429, 433 (2005). This negative restriction upon the states also "prohibits economic protectionism—that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996).

The court evaluates a DCC challenge using a two-tiered analysis. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986). Under the DCC, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to "'advanc[e] a legitimate local purpose.'" *Id.* at 579; *see also Tenn. Wine & Spirits*, 139 S. Ct. at 2461; *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). "[I]n all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic

interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 544 at 472. Second, for laws that are not facially discriminatory, the Court applies a balancing test and examines "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers*, 476 U.S. at 579; *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (a law is invalid if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits").

Historically, state laws like § 2775 which try to regulate the interstate transportation of goods or services in commerce have experienced sound defeat before the DCC. For example, even before Congress acted to deregulate the trucking industry and promote independent owner-operators, the Supreme Court in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) held that an Illinois statute requiring use of contoured rear fender mudguards on trucks and trailers operated on highways of Illinois rather than customary straight mudguards, placed an unconstitutional burden on interstate commerce even though the statute was facially non-discriminatory and a local safety measure. Likewise, an Arizona statute limiting the length of trains was similarly found to violate the DCC in *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761 (1945). And in *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 284 (1987), the Court struck down Pennsylvania's unapportioned flat taxes on motor carriers because the tax failed the "internal consistency" test and had the "inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania." The principle is simple: the framers of the Constitution intended that goods flow freely between the States.

"[T]he familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down, if the activity is one of predominantly local interest, state action is sustained." *People v. Zook*, 336 U.S. 725, 728 (1949). Given the FAAAA's explicit goal of

removing burdensome state regulations on motor carriers, trucking is an area "thought" by Congress "to demand a uniform national rule." Indeed, as noted above, Congress recognized that state regulation "a huge problem for national and regional carriers at-tempting to conduct a standard way of doing business" (H.R. Conf. Rep. No. 103-677, at 87 (1994)), and declared that state regulation of the trucking industry "imposed an unreasonable burden on interstate commerce" that "impeded the free flow of trade, traffic, and transportation of interstate commerce." FAAAA, Pub. L. No. 103-305, § 601(a)(1)(A)-(B), 108 Stat. 1569, 1605. Congress then enacted the FAAAA "to ensure that the States would not undo federal deregulation with regulation of their own" and to prevent development of "a patchwork of state service-determining laws, rules, and regulations." *Rowe*, 552 U.S. at 368, 373.

A state law like § 2775 imposes excessive burdens on motor carriers. To comply with § 2775, motor carriers must overhaul their business, terminate contracts, and abandon the efficient, effective, and federally recognized use of independent owner-operators to transport the nation's freight. As a result of § 2775, motor carriers can no longer offer the same range of services as before to customers seeking to transport cargo into or out of California, as detailed in Section IV.A.3, supra. This has resulted in motor carriers either forced to abandon the California market entirely—thus introducing the very chilling effect on interstate commerce that the FAAAA prevented by prohibiting disparate regulation of the industry by different states—or restructure their driver arrangements, or operate exclusively within California foregoing their prior business of interstate shipping. ECF No. 172-6, Sauer Decl. ¶¶ 7, 10-12; ECF No. 172-5, Stefflre Decl. ¶¶ 6-11; ECF No. 171-3, Schautz Decl. ¶¶ 9-12. *See Scheiner*, 483 U.S. at 286-287 (finding a "forbidden impact on interstate commerce" where an anomalous state trucking regulation "exert[ed] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States'").

Section 2775 also, contrary to Congressional intent, promotes balkanization of

the interstate transportation market. As a result of the statute, owner-operators can potentially operate as independent contractors in 49 of the 50 states.[9] Prior to the ABC test, an owner-operator could start on the East Coast, transport a load to a destination in California, and return with another load to the East Coast, all while performing such trucking services as an independent contractor. Now, if the law is followed, that owner-operator must be treated as an employee during the California leg of the journey. Alternatively, a shipper might engage in the wholly inefficient task of transporting loads at the California border away from owner-operators and exclusively use employee drivers for in-state activities. The former scenario is a logistical nightmare that imposes outsized costs on non-California businesses, and the latter scenario a hugely inefficient exercise that impedes the free movement of commerce.[10]

The numerous exemptions to § 2775 also support preemption under the DCC. The exemptions undercut the putative state interest in § 2775, which "presumptively considers *all workers* to be employees" unless the three prongs are met. *Dynamex*, 4 Cal.5th at 955 (emphasis added). By exempting so many categories of California workers, § 2775 does not actually serve this goal.

Because § 2775's exemptions benefit intrastate businesses and professions, the statute's imposition of the ABC test disproportionately burdens interstate businesses. Many exemptions are afforded to individuals licensed by the State of California, such

---

[9] While California is not the only state to have adopted the ABC test for employment status, courts in other jurisdictions have found that test is preempted by the FAAAA. For example, in *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016), the First Circuit held that Massachusetts' ABC test was preempted as to a motor carrier. Thus, the Ninth Circuit's reversal of the preliminary injunction not only created a circuit split, but allowed a situation where California will be an outlier among the 50 states.

[10] Multiple declarants also describe situations where they now have to "deadhead", basically, drive an empty truck out of California before they can start hauling loads as an owner-operator. *See, e.g.*, ECF No. 172-4, Estrella Decl. ¶ 15; ECF No. 172-3, Medina Decl. ¶¶ 9-10 ("Around six months ago, Landstar informed me that I could no longer pick up loads in California"); McElroy Decl., ECF 155-5, ¶¶ 11-12. That is true even though there is considerably more work available in California, a hugely inefficient situation created by AB-5. ECF No. 172-3, Medina Decl. ¶ 11.

as doctors, lawyers, and real estate agents. Labor Code §§ 2776-2784. The Labor Code carves out the construction industry—including "construction trucking services"—thus protecting the inherently domestic activity of licensed construction contractors. Labor Code § 2781. But the Labor Code does not similarly protect motor carriers engaged in *interstate* business. Thus, by exempting *intrastate* businesses and applying the more stringent ABC test to interstate businesses like motor carriers, § 2775 imposes an excessive and disproportionate burden on those businesses.[11]

In addition, § 2775 magnifies the ABC test's burden on interstate commerce far beyond the burden inflicted by *Dynamex* alone. *Dynamex* applied the ABC test as only one of three tests for employment status under California's wage orders only. Significantly, § 2775's version of the test establishes a *single* test, unless exempted, for employment status under the California Labor Code, the wage orders and the California Unemployment Insurance Code. Thus, § 2775's effects on interstate commerce even more greatly outweigh the putative local benefits of the law.

Finally, the discriminatory intent against interstate motor carriers is clear from the comments of the author and sponsor of the Act. Section 2775 affirmatively *targeted* the motor-carrier industry. The author confirmed that § 2775 seeks to eliminate the longstanding relationships between motor carriers and owner-operators that Congress sought to enhance through deregulation. *See, e.g.*, Remarks of Assembly Member Lorena Gonzalez, Assembly Floor Session, at 1:08:20-1:08:30 (Sept. 11, 2019) ("And let me talk for one minute *about trucking* . . . . We are [] getting rid of an outdated broker model that allows companies to basically make

[11] Declarant Louis Estrella, prior to working in the trucking industry, had a real estate license. Unless AB-5 is enjoined, he will likely leave the trucking field and resume working as an independent contractor in real estate. ECF No. 172-4, Estrella Decl. ¶ 18. Mr. Estrella question "why AB-5 has an exemption that allows me to be an independent contractor if I am a real estate agent, but that doesn't give owner-operators the same type of exemption?" *Id.* "I don't know why California thinks that lawyers, doctors, and real estate agents should have the freedom to work independently, but that owner-operators like me can't take care of ourselves." *Id.*

money and set rates for people that they called independent contractors . . . .) [12] Assembly Member Gonzalez even boasted that § 2775 sought to "cure" the perceived evils resulting from federal deregulation, including the trucking industry's "outdated broker model" and use of owner-operators. While the California legislature may view state prohibition of owner-operators as good public policy, it is contrary to Congress's exercise of its Commerce Power, including ensuring a role for independent contractor owner-operators in the trucking industry.

C. The ABC Test Is Preempted By The FAAAA Through Implied Preemption.

In addition to being expressly preempted by FAAAA, and violative of the dormant Commerce Clause, § 2775 is also impliedly preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *Valadez v. CSX Intermodal Terminals, Inc.*, 2017 WL 1416883, at *10 (N.D. Cal. Apr. 10, 2017) (finding California law preempted where it would conflict with regulations that "expressly contemplate" the availability of certain terms of the lessor-lessee relationship in motor carrier-independent contractor relationships).[13]

Congress's "overarching goal" when enacting the FAAAA was "helping ensure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378). This included efforts to "enhance business opportunities for independent truckers." Motor Carrier Act of 1980: Remarks on Signing S. 2245

[12] Available at https://www.assembly.ca.gov/media/assembly-floor-session-20190911/video.

[13] "[N]either an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict preemption principles.'" *Buckman Co. v. Plaintiffs' Legal Com.*, 531 U.S. 341, 352 (2001) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)). Thus, even if the Court does not find that the FAAAA expressly preempts the ABC test, it still may find that the test is preempted because it impedes Congress' objectives.

Into Law, Pub. Papers of Jimmy Carter at 1266 (July 1, 1980).

As with the state law in *Rowe*, which would "require carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer)," § 2775 "produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Rowe*, 552 U.S. at 372. In other words, through § 2775 test, the state controls how services are provided, instead of allowing that choice to flow from "competitive market forces," as Congress directed. And likewise, even though Congress intended to expand opportunities for independent owner-operators in the trucking industry, the California Assembly's passage of § 2775 unquestionably *completely eliminates* owner-operators from operating their own businesses within this State. Section 2775 pushes owner-operators—who have spent significant time, money, and sweat building their own businesses in reliance on the FAAAA and other federal laws which encouraged them to do so—*out* of the California market for trucking services. *See* ECF No. 172-2, Further Odom Decl. ¶¶ 22-24 ("AB-5 and the lifting of the injunction is forcing me to leave California."); ECF No. 172-4, Estrella Decl. ¶ 15 (now has to drive an empty truck out of California to pick up loads); ECF No. 172-3, Medina Decl. ¶ 10 ("[I]f I want to do my job as an owner-operator, I effectively have to leave the state to do it.").

Allowing a "patchwork" of differing state regulations to flourish runs counter to Congress' goals in enacting the FAAAA and presents "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Rep. 103-677, at p. 87, 1994 U.S.C.C.A.N. 1715, 1759. Permitting California's unusually restrictive worker classification test to apply to the trucking industry will require a motor carrier contracting with a truck driver to classify that person as an employee for California's purposes but as an independent contractor for other states' purposes. Section 2775 runs counter to Congress's purpose to avoid "a patchwork of

state service-determining laws, rules, and regulations" that it determined were better left to the competitive marketplace. *Rowe*, 552 U.S. at 373.

Because § 2775 is not just a barrier to, but fully thwarts Congress' objectives in enacting the FAAAA, to eliminate a patchwork of state regulations and enhancing opportunities for independent owner-operators, it is impliedly preempted.

D. AB-5/AB-2257 Violated The Equal Protection Clauses.

AB-5 and AB-2257 also violate the Equal Protection Clauses of the United States and California Constitutions.

"The Equal Protection Clause prohibits states from denying to any person within its jurisdiction the equal protection of the laws." *American Society of Journalists and Authors, Inc. v. Bonta*, 15 F.4th 954, 964 (9th Cir. 2021) (citation, alteration, and internal quotation marks omitted). "If the ordinance does not concern a suspect or semi-suspect class or a fundamental right, we apply rational basis review and simply ask whether the ordinance 'is rationally-related to a legitimate governmental interest.'" *Honolulu Wkly., Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002) (citation and internal quotation marks omitted).

Consequently, the State must have a rational basis for its treatment of motor carriers and owner-operators.

1. AB-5's Sponsor Irrationally Targets Motor Carriers In Violation Of Equal Protection.

The United States and California Constitutions each require California to provide the "equal protection of the laws" to persons within its jurisdiction. U.S. Const. amend. XIV, § 1; Cal. Const. art I, § 7(a). This guarantee is "essentially a direction that all persons similarly situated should be treated alike" (*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)) and "secure[s] every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents" (*Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564

(2000)).

No law may draw classifications that do not "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "A regulatory statute which singles out a particular class, or makes distinctions in the treatment of business entities engaged in the same business activity, must bear a reasonable relationship to the underlying purpose of the statute, and that purpose must be legitimate." *Santos v. City of Houston, Tex.*, 852 F. Supp. 601, 608 (S.D. Tex. 1994). By requiring that classifications "bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996); *see also Hays v. Wood*, 25 Cal. 3d 772, 786–87 (1979) (under rational basis review, a court must "conduct a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals" (internal quotation marks omitted)).

AB-5 and AB-2257 are unconstitutional because the classifications (1) target motor carriers and are motivated by animus, (2) are clearly designed to benefit favored constituents, and (3) lack the necessary "fit" between the legislative goals and the classifications used.

2. The Statute Is Motivated By Animus.

As described in the Third Amended Complaint (¶¶ 52-58), the sponsor of AB-5 openly communicated her desire to target trucking. This is not surprising, since former representative Gonzalez was, before entering the Legislature, an employee and union organizer for the IBT. She did not abandon her allegiance to the IBT when she joined the Legislature, proudly announcing on May 30, 2019 that "I am a Teamster" and "I am the union."

As originally crafted by the California Supreme Court, *Dynamex* established a standard that would have—for purposes of the Wage Orders—equally applied to all persons who sought to work in California as independent contractors. Through AB-5

and then AB-2257, the California Legislature did not replicate the impact of *Dynamex*, nor did they seek to overturn that decision in its entirety. Instead, they principally targeted two disfavored groups—motor carriers and app-based driving or delivery companies.

The fact that AB-5 was intended to target motor carriers is clear from floor debate on the bill. Assemblywoman Gonzalez specifically stated on the Assembly Floor on September 11, 2019 that one of the purposes of AB-5 was to "get[] rid of an outdated broker model that allows companies to basically make money and set rates for people that they called independent contractors."

This fact is also clear from the dozens of exemptions and exceptions inserted into AB-5 and AB-2257. These exclusions establish that the traditional *Borello* test continues to apply to numerous industries and professions. This includes not only white-collar roles such as doctors and lawyers, but freelance writers, graphic designers, manicurists, hair dressers, real estate agents, recording artists, musicians, interpreters, publicists, proofers, competition judges, and many more.

Further showing animus toward interstate motor carriers, the California legislature also created an exception for the construction industry, and particularly construction trucking services. Whereas interstate truckers had to continue to satisfy the ABC test, the Legislature provided an exemption for intrastate truckers providing "construction trucking services" applying instead the *Borello* test. The proliferation of exceptions and exemptions under AB-5 for workers in businesses other than interstate trucking, ***including an exception for an industry that involves intrastate trucking***, underscores the animus towards non-construction-related motor carriers.

Assemblywoman Gonzalez's commitment to the IBT continued while she sponsored AB-5 and then AB-2257. For example, she tweeted on November 21, 2019 that AB-5 (and its exceptions) would permit a trucker to "work as an independent contractor for a construction firm" but that an owner-operator must

"work as an employee for a trucking company,"[14] specifically acknowledging the disparate treatment of these similarly-situated drivers.

As in *Olson*, "these allegations plausibly state a claim that the 'singling out' of Plaintiffs effectuated by A.B. 5, as amended, 'fails to meet the relatively easy standard of rational basis review.'" *Olson*, 62 F.4th at 1220 (quoting *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008)). This animus alone is enough to enjoin AB-5's enforcement, because "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (invalidating law aimed at targeting disfavored group); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 945–46 (9th Cir. 2004), overruled on other grounds by *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005) ("[A] plaintiff may pursue an equal protection claim by raising a triable issue of fact as to whether the defendants' asserted rational basis was merely a pretext for differential treatment." (punctuation omitted)). Equal protection is "designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation." *McPherson v. Blacker*, 146 U.S. 1, 39 (1892).

3. The Exemptions Do Nothing But Protect Politically Favored Groups.

"Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). The Ninth Circuit, for example, reversed a decision granting a motion to dismiss in an equal protection challenge to a California minimum wage statute that was ostensibly designed to codify judicial decisions, but added carve-outs to "procure [a labor union's] support in passing [the]

[14] Message Posted November 21, 2019. Available at: https://twitter.com/LorenaSGonzalez/status/1197517607022149632.

legislation." *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 812–13, 816 (9th Cir. 2016). This was impermissible: "[L]egislatures may not draw lines for the purpose of arbitrarily excluding individuals," even to "protect" those favored groups' "expectations." *Id.* at 815.

Like the measure in *Fowler*, AB-5's arbitrary exemptions were crucial to procuring the interest group support necessary to ensure its passage.[15] The statute provides no explanation for its hundreds of lines of exemptions. *See Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 463 (1937). And there is, in fact, "no other reason why the California legislature would choose to carve out these [occupations] other than to respond to the demands of [certain] political constituent[s]." *Fowler*, 844 F.3d at 815. As one legislator reported, "if you had the financial wherewithal as an industry to hire fancy lobbyists, you got a carve out."[16]

"[T]here is no more effective practical [guarantee] against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally," because "nothing opens the door to arbitrary action so effectively as to allow [state] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Hays*, 25 Cal. 3d at 777; *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (same). AB-5's sponsors sought to "pick and choose" the "few" against whom the legislation would apply in order to "escape the political retribution" that would have ensued "if larger numbers were affected." *Hays*, 25 Cal. 3d at 777. They flouted the

[15] Assemblywoman Gonzalez admitted that she "had no other choice" to add one particular exemption "as a condition of AB 5's passage." Katy Grimes, How Assemblywoman Lorena Gonzalez was Forced to Author AB 170 and Voted NO on Her Own Bill, Cal. Globe (Sept. 16, 2019), https://californiaglobe.com/section-2/how-assemblywoman-lorena-gonzalez-was-forced-to-author-ab-170-and-voted-no-on-her-own-bill/. This was just one of AB-5's dozens of exemptions.

[16] CBS 47 KSEE24, CA Senator Andreas Borgeas Calls AB5 Most 'Half-hazard' Piece of Legislation He's Seen, YouTube (Sept. 19, 2009), https://www.youtube.com/watch?v=mwtSZRR-f0U.

"require[ment]" that laws "impose[d] upon a minority" must be "imposed generally." *Id.*; *see also Ex parte Scaranino*, 7 Cal. 2d 309, 312 (1936) ("A general law must include within its sanction all who come within its purpose and scope."). And they sought to protect certain intrastate industries, including construction and real estate with specific exemptions, while disregarding interstate trucking. But "economic protection of a particular industry" is not "a legitimate governmental purpose." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013); *see Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (law unconstitutional where its "aim [was] designed only to favor domestic industry within the State"). That is particularly true when this protectionism favors local interests and California-based citizens, while disadvantaging citizens of other states, including motor carriers and owner-operators who are not based in California. *See, e.g., County of Alameda v. City and County of San Francisco*, 19 Cal. App. 3d 750, at 756 (1971) ("[E]ven though a city has justification for allocating certain costs to nonresidents, the city may not accomplish this end by imposing a tax solely upon nonresidents engaged in a particular activity, while totally exempting residents engaged in the same activity").

4. AB-5 Does Not Advance Its Purported Purpose.

AB-5 and then AB-2257 purport to codify *Dynamex*, but *Dynamex* did not apply the ABC test only to a certain disfavored group. In fact, the litany of exemptions to these statutes actually remove the exempted entities from the ABC test that *Dynamex* otherwise mandated, which accomplishes the opposite of the statute's supposed purposes for the exempted entities, and leaves only singled-out entities to bear the weight of the law, including principally trucking and certain gig-economy companies. The statutes do not advance "a legitimate government interest." *Fowler*, 844 F.3d at 818.

For example, in *Merrifield v. Lockyer*, a California pest-controller licensing scheme purported to protect pest controllers and the public from harms associated with mishandling toxic pesticides, but exempted from the licensing requirement a

group of controllers more likely to recommend and handle such pesticides than a similarly situated economic group singled out by the law. 547 F.3d 978, 990–91 (9th Cir. 2008). The Ninth Circuit concluded that the government "undercut its own rational basis for the licensing scheme" by including the targeted group but excluding the other. *Id*. at 992. The court observed that the legislature's "singling out of a particular economic group, with no rational or logical reason for doing so, [i]s strong evidence of an economic animus with no relation to public health, morals or safety." *Id*. at 989. Like the regulation in *Merrifield*, the exemptions introduced through AB-5 and AB-2257 undermine the law's stated purpose and demonstrate its drafters' animus towards a disfavored group like motor carriers. If the ABC test really were necessary to protect workers, it would be irrational to leave so many other workers out in the cold.

Further, if there was a rational basis for treating *trucking* differently than so many other industries, then there is no reason why "construction trucking services" would also get an exemption. Truckers transporting construction materials are not different in any other material way from interstate owner-operators. In both cases, there are independent contractor drivers who have many years of experience in the industry, who have invested considerable money in purchasing their own vehicles, who are moving heavy goods on interstate highways, and who are subject to licensing and other safety regulations. If anything, interstate owner-operators are subject to greater federal regulations and safety requirements, since they must abide by the DOT's HOS regulations, whereas intrastate construction truckers may be only subject to California's rules.

Put simply, "there is a disconnect between" the law's reach and its stated purpose. *St. Joseph Abbey*, 712 F.3d at 225; *see Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty., W. Va.*, 488 U.S. 336, 346 (1989) (assessment system resulting in "relative undervaluation of comparable property . . . denies petitioners the equal protection of the law"); *Santos*, 852 F. Supp. at 608 (invalidating ordinance

under which "jitneys have been excluded from operating on city streets, while numerous other forms of similarly situated business entities providing ground transportation have been operating without restriction").

Here, AB-5 and now AB-2257 are "so discontinuous with the reasons offered for" the statutes that it is "inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632.

V. THE REMAINING INJUNCTION CRITERIA ARE MET

As discussed above, Plaintiffs will succeed at trial on the merits of one or more of their claims. The remaining permanent injunction factors follow readily. Indeed, this Court previously found that enforcement of § 2775 would cause irreparable harm to Plaintiffs, 433 F. Supp. 3d at 1169-70, that "on balance, the hardships faced by Plaintiffs significantly outweigh those faced by Defendants," and that "the public interest tips sharply in Plaintiffs' favor." *Id*. at 1171. Nothing in the Ninth Circuit's opinion disturbs these findings, which are well supported.

A. Plaintiffs Will Suffer Irreparable Harm If The Court Denies Relief.

As this Court previously found, "Plaintiffs have shown that irreparable harm is likely" given "the risk of governmental enforcement actions, as well as criminal and civil penalties." 433 F. Supp. 3d at 1169-70. Plaintiffs, as this Court noted, 433 *id.*, face a "Hobson's choice" warranting injunctive relief under both Supreme Court and Ninth Circuit precedent because motor carriers can either "continually violate the law and expose themselves to a potentially huge liability; or violate the law once and suffer the injury of obeying the law during the pendency of the proceedings and any further review." *Morales*, 504 U.S. at 381; *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057-58 (9th Cir. 2009).

In addition, "[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). These constitutional violations include through the FAAAA, since § 2775 "would cause

irreparable injury by depriving [motor carriers] of a federally created right to have only one regulator in matters pertaining to rates, routes and services." *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990), *aff'd in part, rev'd in part sub nom., Morales*, 504 U.S. 374 (1992).

The harms, however, extend beyond the "Hobson's choice" between transforming their business and criminal and civil penalties, and the constitutional violations. Entire lifeworks are at stake. Plaintiff and owner-operator Thomas Odom, like others, is forced to choose between staying in California and finding a different type of work, or relocating his entire life so that he can continue working—as he has for decades—as an owner-operator. ECF No. 172-2, Further Odom Decl. ¶ 25. Other owner-operators, like Paul Medina, cannot relocate because he needs to care for his elderly parents, yet must now spend much of his time far away from them. ECF No. 172-3, Medina Decl. ¶¶ 12-13.

B. <u>The Balance Of The Equities Tips Sharply In Plaintiffs' Favor.</u>

The next factor considers "the balance of hardships between the parties." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011).

In contrast to Plaintiffs' many injuries, the State will suffer no harm from a permanent injunction. As this Court previously found, 433 F. Supp. 3d 1170-71, while the State may cite the supposed harms from the misclassification of workers as independent contractors, California can *already* enforce its existing laws and penalize law-breakers through the long-standing test set forth in *Borello*, 48 Cal.3d 341 (1989). Section 2775(3) reaffirms that the *Borello* test remains appropriate for determining whether many workers are properly classified, including for professions that fall within one of the Acts numerous carve-outs. Thus, a permanent injunction would simply put motor carriers and owner-operators *on the same footing* as the many professions and industries which secured express exemptions in § 2775. Further, the relief sought by this motion, and therefore any risk of harm to the State's interests, is limited. If granted, the injunction will bar enforcement of § 2775 only as

to a narrow sector of the State's economy, motor carriers and owner-operators only.

C. Granting Injunctive Relief Is In The Public Interest.

For similar reasons, granting injunctive relief remains in the public interest. When challenging government action that affects the exercise of constitutional rights, "[t]he public interest . . . tip[s] *sharply* in favor of enjoining the" law. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (emphasis added). Here, Plaintiffs seek to vindicate their rights under the Constitution. As the Ninth Circuit has clarified, "*all citizens* have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (emphasis added). Indeed, "Congress has declared that it is in the public interest" to avoid having businesses "subjected to the demands and criteria of numerous legislatures rather than being required to comply only with federal laws and regulations." *Mattox*, 897 F.2d at 784.

And, as this Court noted earlier in the case, while California may have an interest in "protecting misclassified workers," that interest "must be balanced against the public interest represented in Congress's decision to deregulate the motor carrier industry, and the Constitution's declaration that federal law is to be supreme." 433 F. Supp. 3d at 1171, quoting *American Trucking*, 559 F.3d at 1059-60. As before, the public interest "tips sharply in Plaintiffs' favor." *Id.*; *Klein*, 584 F.3d at 1208.

VI. ABANDONED ISSUES

At trial, Plaintiffs do not intend to seek any relief based upon their Third Claim for Relief in the Third Amended Complaint, ECF No. 168, ¶¶ 87-94. Specifically, Plaintiffs do not seek any relief based on the previous Order from the Federal Motor Carrier Safety Administration preempting California's meal and rest period requirements.

VII. WITNESSES AND EXHIBITS

At the trial on the merits, Plaintiffs intend to rely only on the declarations previously submitted in this matter, and as referenced above.

Respectfully submitted,

DATED: September 29, 2023

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Alexander M. Chemers
Alexander M. Chemers

Attorneys for Plaintiffs
RAVINDER SINGH, THOMAS ODOM and CALIFORNIA TRUCKING ASSOCIATION