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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA TRUCKING ASSOCIATION, ET AL., Plaintiff, **v.** **ATTORNEY GENERAL XAVIER BECERRA, ET AL.,** Defendants.	3:18-cv-02458-BEN-BLM **STATE DEFENDANTS' MEMORANDUM OF CONTENTIONS OF FACT AND LAW** Dept: Courtroom 5A Judge: The Honorable Roger T. Benitez Trial Date: November 13, 2023

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INTRODUCTION

Plaintiffs and OOIDA cannot meet their burden in their challenge to the application and enforcement of Assembly Bill 5 (AB 5) to the motor carrier industry. With certain exceptions, AB 5 requires the "ABC test" to be used to determine whether a worker is legally classified as an employee entitled to a number of important benefits and protections—including, but not limited to, workers' compensation, unemployment insurance coverage, a minimum wage, and sick leave. While this Court previously entered a preliminary injunction against AB 5 pursuant to the Federal Aviation Administration Authorization Act (F4A), the Ninth Circuit reversed in a published decision. The Supreme Court denied certiorari, allowing this Court's injunction to be lifted and AB 5 to take full effect.

Since that time—over one year ago—the disruptions and burdens predicted by Plaintiffs have not materialized. Drivers are still driving. Ports are functioning. And packages and freight are being delivered across the State. In fact, the industry in California is expanding. The only material difference is that drivers previously misclassified as independent contractors are now starting to receive the benefits and protections to which they have long been entitled under California law.

In many ways, it is unsurprising that Plaintiffs' far-reaching allegations of harm have not arisen in practice. AB 5 allows motor carriers to continue working with drivers, much as they did before AB 5, by classifying them as employees, or by lawfully classifying them as independent contractors pursuant to the statute's "business-to-business" exemption. While classification as employees may require carriers to expend funds on workers' compensation, and other benefits required under the Labor and Unemployment Insurance Codes, nothing in California law requires carriers to radically restructure their working relationships in the ways that plaintiffs have imagined. Carriers, for example, can continue requiring drivers to furnish their own vehicles. Carriers and drivers can also agree to flexible work schedules, short-term hiring arrangements, and compensation schemes designed to

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incentivize efficiency and productivity on the part of drivers, regardless of the classification.

Plaintiffs provide no basis for the Court to permanently enjoin AB 5's application to the motor carrier industry. The Ninth Circuit's rejection of plaintiffs' F4A claim forecloses relief on that basis. A mere increase in the costs of doing business, standing alone, does not give rise to F4A preemption. Plaintiffs only attempt to distinguish the Ninth Circuit's ruling is their sweeping assertion that carriers have proven unable to recruit drivers willing to work if classified as employees. For the reasons explained below, and detailed in the declarations submitted with this brief and Defendants' preliminary injunction briefing, that is demonstrably false—and indeed, defies common sense. No such disruptions are, in fact, taking place. Rather than discouraging small business trucking, AB 5 may in fact be fostering an increase in small business formation, as well as an increase in truck drivers in the State.

Plaintiffs' remaining claims also fail. Plaintiffs have not demonstrated that AB 5's application to the motor carrier industry is discriminatory or unduly burdensome in ways that would violate the dormant Commerce Clause. Nor does AB 5 violate the highly deferential rational basis standard for purposes of the Equal Protection Clause. In light of evidence of widespread misclassification in the motor carrier industry, and the burdens that misclassification imposed not only on workers but also on law-abiding companies and California, it was plainly rational for the Legislature to refuse to exempt drivers from the ABC test. The Legislature sought to ensure such drivers would—just like workers across hundreds of other industries—receive the many benefits and protections to which employees are legally entitled. Judgment should be entered in favor of the State.

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BACKGROUND

I. THE *DYNAMEX* DECISION AND ASSEMBLY BILL 5

The distinction between workers classified as employees and those classified as independent contractors is significant because under California law employers have obligations to employees that they do not owe to independent contractors. *See Dynamex Oper. W. v. Super. Ct.*, 4 Cal. 5th 903, 912 (Cal. 2018) (*Dynamex*). If a worker is properly classified as an employee, the hiring entity must contribute to the state unemployment insurance system and must ensure that the worker receives a number of important benefits and protections, including workers' compensation and sick leave.[1] *Id.* at 913. By misclassifying its workers, an employer not only denies such benefits to workers; it also gains an "unfair competitive advantage" over businesses "that properly classify similar workers as employees." *Id.* And because employers generally withhold taxes only for workers classified as employees, misclassification "depriv[es] federal and state governments of billions of dollars in tax revenue." *Id.*

Before 2018, California regulatory agencies and courts applying California law used the multi-factor test enunciated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (Cal. 1989) (*Borello*), to determine whether a worker is properly an employee. Drivers working for motor carriers, for example, filed numerous complaints under this standard challenging their classification as independent contractors. In a great many of those cases, courts or administrative agencies agreed that the drivers should have been classified as employees under the *Borello* multi-factor test. *See, e.g., Garcia v. Seacon Logix, Inc.*, 238 Cal. App. 4th 1476, 1488 (Cal. Ct. App. 2015) (describing "unassailable" evidence that motor carrier drivers were "employees, not independent contractors" under the *Borello*

[1] Unlike other employees, most truck drivers in California are exempt from overtime, as their hours are regulated by the Federal Motor Carrier regulations (49 C.F.R. §395.1 et seq.) and/or California's Motor Carrier Safety regulations (13 C.C.R. §1200 et seq.).

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test); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101-05 (9th Cir. 2014) (similar); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988-997 (9th Cir. 2014) (similar).

In April 2018, the California Supreme Court held that courts applying the "suffer or permit" standard under the Industrial Welfare Commission Wage Orders must apply the ABC test to determine whether a worker is classified as an employee. *Dynamex*, 4 Cal. 5th at 916. Under the ABC test, a worker is presumed to be an employee, rather than an independent contractor, unless the hiring entity establishes: (a) that the worker is "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;" (b) that the worker "performs work that is outside the usual course of the hiring entity's business;" and (c) that the worker is "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *Id.* at 916-17.

The Legislature subsequently enacted AB 5, which codified the ABC test and expanded its scope beyond the wage order context. The Legislature found that "[t]he misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality." AB 5 § 1(c).[2] In enacting AB 5, the Legislature intended "to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law," including a minimum wage, workers' compensation, unemployment insurance, paid sick leave, and paid family leave. *Id.* § 1(e). By adopting the ABC test, AB 5 "restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law." *Id.*

[2] AB 5 was amended, but those amendments do not impact the legal analysis here. *See Vendor Surveillance Corp. v. Henning*, 62 Cal.App.5th 59, 73 n.5 (Cal. Ct. App. 2021). For ease of reference, this brief refers to AB 5, as amended.

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AB 5 extends the scope of the ABC test to contexts beyond those at issue in *Dynamex*, to include (among other things) workers' compensation, unemployment insurance, and disability insurance. Cal. Lab. Code § 2775(b)(1); *id.* § 3351(i). It also creates limited statutory exemptions to the ABC test for certain occupations and industries, where the Legislature determined the ABC test was not a good fit. In particular, the Legislature exempted occupations in which workers have historically—and lawfully—been classified as independent contractors. Request for Judicial Notice (RJN), Ex. 7, pp. 5-8. Occupations falling within these exemptions are instead governed by the pre-existing multifactor classification test established in *Borello*. *See, e.g.,* Cal. Lab. Code §§ 2776, 2778. One exemption covers "bona fide business-to-business contracting relationship[s]," as defined. *Id.* § 2776(a).

Another exemption covers certain construction services, *id.* § 2781, and—if additional requirements are met—construction trucking services. *Id.* § 2781(h). The construction trucking services exemption is only in effect until December 31, 2024, before the ABC test is then applied to those services. Even before that date, however, the exemption applies only if strict conditions are satisfied. *See infra* at 33-34.

Neither the ABC test nor the *Borello* test in and of itself provides any specific labor protections. The classification tests provide a methodology for determining employment status and are not a source of any independent substantive legal requirements.

II. MISCLASSIFICATION IN THE MOTOR INDUSTRY

As the record before the California Legislature reflected, misclassification is particularly acute in certain industries, including trucking, to the great detriment of drivers, as well as law-abiding businesses and the California public. RJN, Ex. 8, p. 2; *see also* ECF 173-3 at 19-20, ECF 173-12, ¶¶ 13-14, 17, ECF 17-11, ¶¶ 11-12, ECF 173-7, ¶¶ 8-9. Employers who misclassify in the trucking industry offload as

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much as 30 percent of payroll, equipment, and benefits costs on their drivers. ECF 173-1, ¶ 59 ("The main consequence of trucking companies' widespread misclassification of owner-drivers as contractors rather than employees for payroll purposes is to shift business and liability risk from the trucking company to the misclassified driver."). Misclassified drivers face multiple adverse effects. *See*, *e.g.*, ECF 173-1, ¶¶ 59-65, ECF 173-3 at 21, ECF 173-4, ¶ 10, ECF 173-5, ¶¶ 6, 8; ECF 173-6, ¶¶ 8-9; ECF 173-9, ¶¶ 11-16, 18; ECF 173-10, ¶¶ 5-13.

In addition, a "myth" has been propagated regarding the independence of "owner-operators." ECF 173-1, ¶ 58. Many drivers "(whether they are classified by trucking companies as employees or contractors for payroll purposes) do not have true independence." *Id.*, ¶ 57; *see also* ECF 173-4, ¶ 9; ECF 173-5, ¶¶ 4, 5; ECF 173-9, ¶¶ 6, 7; ECF 173-6, ¶ 7. They cannot "independently go to a dock, or port, or railyard, and pick up freight for a customer and deliver it;" they do not "own or have independent access" to the insurance, trailers, and other equipment necessary to do so; they do not communicate with customers; and they "do not price, market, and sell their services in the freight market." ECF 173-3 at 15. Rather, the trucking firms themselves fully control the terms and conditions of drivers and create "an arrangement entirely determined by and executed by the motor carrier." *Id.* at 16. Companies "shift operational costs entirely to workers." *Id.* at 20. Drivers "do not negotiate the rates they will get paid for loads and don't know the volume of work they will be given to do." *Id.* at 21; *see also* ECF 173-4, ¶ 9; ECF 173-5, ¶ 4; ECF 173-9, ¶ 11; ECF 173-6, ¶ 5; ECF 173-1, ¶ 29.

Moreover, previously misclassified truck drivers who are now classified as employees have generally seen no change to their type of work or how that work is performed. *See* ECF 173-4, ¶ 6; ECF 173-5, ¶ 10. Plaintiffs have provided no evidence to the contrary. Many such drivers, for example, continue to own their own trucks. ECF 173-4, ¶ 7; ECF 173-5, ¶ 3; ECF 173-6, ¶ 11; ECF 173-12, ¶ 5; *see also* ECF 173-1, ¶¶ 71, 77. The biggest change has been the statutory benefits

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and protections that drivers now receive. *See* ECF 173-4, ¶¶ 6, 8; ECF 173-10, ¶¶ 14, 15; ECF 173-5, ¶ 9; ECF 173-6, ¶ 10. The Legislature's inclusion of the motor-carrier industry in the generally applicable ABC test is grounded in the prevalence of misclassification in the industry. *See*, *e.g.*, RJN Ex. 8, p. 3.

III. PROCEDURAL HISTORY

A. Initial Injunction and the Ninth Circuit's Reversal

Plaintiffs filed the complaint on October 25, 2018 (ECF 1), and it has been amended several times.[3] On January 16, 2020, this Court granted Plaintiffs' motion for a preliminary injunction. ECF 89. Defendants appealed.

On April 28, 2021, the Ninth Circuit reversed this Court's grant of preliminary injunctive relief. *Cal. Trucking v. Bonta* (*CTA*), 996 F.3d 664 (9th Cir. 2021). The Court held that "AB-5 is a generally applicable law because it applies to employers generally; it does not single out motor carriers but instead affects them solely in their capacity as employers." *Id.* at 658. Such generally applicable background labor regulations do not trigger F4A preemption. These laws pose preemption concerns only if they have a "significant impact on prices, routes [or] services," *CTA*, 996 F.3d at 660, or "meaningfully interfere" with prices, routes, or services, *id.* at 657. For example, state laws are preempted under the F4A if they "bind[] the carrier to a particular price, route or service or otherwise freeze[] them into place or determine[] them to a significant degree." *Id.* at 658. While such regulations may pose preemption concerns if they are "significantly related to rates, routes, or services," Plaintiffs failed to show that AB 5 is so related. *Id.* at 664; *see id.* at 659 & n.11.

Plaintiffs' earlier motion was premised on the allegation that AB 5 would disrupt motor carrier prices, routes, and services by purportedly requiring that carriers provide their services using only employee drivers, which they alleged will

[3] This Court later granted International Brotherhood of Teamsters' and OOIDA's motions to intervene. ECF 21, 147.

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result in increased costs. Plaintiffs submitted multiple declarations contending disruptive effects. But the Ninth Circuit concluded that such evidence was insufficient to justify a preliminary injunction on F4A grounds. AB 5 "does not bind, compel, or otherwise freeze into place a particular price, route, or service of a motor carrier at the level of its customers." *Id.* at 664. And as the Court explained, it was not enough for Plaintiffs to allege "increased costs" of doing business because "numerous areas of state regulation" can lead to increased business costs. *Id.* at 659, 660 ("We have routinely rejected similar arguments that the F4A preempts California labor laws that impose such indirect effects.").

The Supreme Court denied Plaintiffs' petition for a writ of certiorari. *Cal. Trucking Ass'n v. Bonta*, 142 S. Ct. 2903 (2022). This Court spread the Ninth Circuit's mandate in August of 2022. For over a year, AB 5 has been in effect in the motor carrier industry.

B. The Pending Complaints and Preliminary Injunction Motions

Plaintiffs and OOIDA have each amended their complaints. Plaintiffs' third amended complaint (TAC) alleges four claims for relief. First, it alleges that AB 5 is preempted by the F4A. CTA TAC, ¶¶ 68-80. Second, Plaintiffs allege that AB 5 violates the Commerce Clause. CTA TAC ¶¶ 81-86. Third, Plaintiffs allege that AB 5 violates the Supremacy Clause of the U.S. Constitution, because it requires the contravention of regulations set forth by the Federal Motor Carrier Safety Administration (FMCSA) setting forth meal and rest period rules, but Plaintiffs have since confirmed that they are not pursuing relief based on this claim.[4] CTA TAC ¶¶ 87-94; Haddad Decl., ¶ 4, Ex. 1. Fourth, Plaintiffs added an equal protection claim, based on both the U.S. and California Constitutions, alleging that

[4] This Court previously dismissed this claim because the FMCSA does not create a private cause of action; the Supremacy Clause also does not create a cause of action for preemption claims. *See* ECF 110 at 11; *see also id.* at 11 n.3. On August 30, 2022, this Court granted Plaintiffs' motion for reconsideration (ECF 144) but Plaintiffs had specifically noted in their brief in support of their motion that they "do not seek reconsideration of the Court's dismissal of their claim for relief pursuant to the [FMCSA]'s December 2018 Order." ECF 115-1 at 5 n.1.

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AB 5 has no rational basis for distinguishing (1) between motor carriers and other types of businesses not subject to the ABC test, or (2) between interstate motor carriers and intrastate construction trucking services. This claim further alleges that AB-5's application of the ABC test to trucking services, while exempting certain construction trucking services from the ABC test, is based on animus. CTA TAC ¶¶ 95-114. Plaintiffs seek, in their claim for relief, a declaration that AB 5, with respect to the trucking industry, is "expressly and impliedly preempted by federal law;" that it violates the Commerce Clause; and that, with respect to the trucking industry, the law "violates the Equal Protection Clause." CTA TAC at 33-34. Plaintiffs also seek a preliminary and permanent injunction prohibiting Defendants "from enforcing the ABC test set forth in AB-5," and instead apply the *Borello* test to motor-carriers. CTA TAC at 34.

OOIDA's first amended complaint (FAC) also alleges that AB 5 violates the Commerce Clause (OOIDA FAC ¶¶ 114-121), that the law is preempted by the F4A (OOIDA FAC ¶¶ 122-125), and that it violates the Equal Protection clauses of the U.S. and California Constitutions. OOIDA FAC ¶¶ 126-140. OOIDA seeks a declaration that AB 5, "as it pertains to the interstate motor carrier industry and interstate independent owner-operators," violates the Commerce Clause; that, "as it pertains to the motor carrier industry," it is preempted by the F4A; and that, "as it pertains to the motor carrier industry," it violates the U.S. and California Constitutions' Equal Protection clauses. OOIDA FAC at 20-21.

Although the Ninth Circuit issued its mandate on July 1, 2022, Plaintiffs and OOIDA did not file their motions for a preliminary injunction until over six months later, on January 11, 2023. ECF 155, 156. The Court issued a minute order consolidating hearing on the preliminary injunctions with the trial on the merits in this matter. ECF 176. Pursuant to the Court's grant of the parties' stipulation, ECF 183, State Defendants file this brief and accompanying papers as to the merits of this matter.

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CONTENTIONS OF FACT AND LAW

I. PLAINTIFFS' AND OOIDA'S F4A EXPRESS PREEMPTION CLAIMS FAIL

A. The Ninth Circuit's Decision in this Case Forecloses the Renewed F4A Preemption Arguments.

Plaintiffs and OOIDA have raised no new material arguments in support of the F4A preemption claim that were not already considered and rejected by the Ninth Circuit. *See* CTA TAC, ¶¶ 72 (alleging that application of Prong B of the ABC test "directly impacts the services, routes and prices that CTA's members and other similarly situated motor carriers offer their customers for the transportation of property), 74-75 (alleging that motor carriers will have to cease using independent contractors to provide trucking services, will have to cease providing certain services or limit use of specialized trucks, and must charge higher prices); *see also* OOIDA FAC, ¶¶ 123-125. Nor have Plaintiffs and OOIDA submitted materially distinct evidence since the Ninth Circuit ruling: Plaintiffs previously asserted that drivers would prefer to work as "independent owner-operator[s]" rather than employees, and that it was "not realistic" that carriers could "acquire a sufficient number of trucks and drivers to meet maximum demand." ECF 54-3, ¶ 22.

Reviewing these assertions and Plaintiffs' other allegations of "increased costs" of doing business, the Ninth Circuit concluded, "the F4A does not preempt AB 5." *CTA*, 996 F.3d at 659. In reaching this conclusion, it first determined that "AB-5 is a generally applicable law because it applies to employers generally; it does not single out motor carriers but instead affects them solely in their capacity as employers." *CTA*, 996 F.3d at 658. This is notwithstanding the exemptions for some categories of businesses. *Id.* at 658-659, 659 n. 9 ("CTA claims that AB-5 is not generally applicable because it includes a number of exemptions. We disagree. Labor laws typically include exemptions."). The Court of Appeals then concluded that "AB-5 is not significantly related to rates, routes, or services. Therefore . . . the F4A does not preempt AB-5 as applied to motor carriers." *Id.* at 659.

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In making this determination, the Court had before it Plaintiffs' arguments that AB 5 significantly affects the prices, routes, and services provided by motor carriers because, in Plaintiffs' view, it precludes the use of independent contractors as drivers. *Id.* at 659-660. Plaintiffs argued that AB 5 thus required trucking companies to "reconfigure and consolidate routes," and raise prices, potentially forcing some motor carriers out of business or to leave California. *Id.* The Ninth Circuit also had before it Plaintiffs' earlier supporting declarations asserting that drivers preferred to work as "independent owner-operator[s]" rather than employees. *See*, *e.g.*, *CTA*, No. 22-5106, ECF 40 at SER 132, ¶ 9. But the Court of Appeals rejected Plaintiffs' arguments, observing that it has "routinely rejected similar arguments that the F4A preempts California labor laws that impose such indirect effects." *CTA*, 996 F.3d at 660. "[D]ire predictions about increased costs" of doing business are on their own insufficient to demonstrate the necessary "'clear and manifest' Congressional intent to preempt" generally applicable state labor laws. *Id.* at 660 (internal quotation marks omitted). The Court also pointed out that, under California law, carriers could avoid the asserted harms by working with drivers "as employees." *Id.* at 659 n. 11.

Plaintiffs cannot point to any material differences that would support a different result today. Therefore, the Ninth Circuit's conclusions are binding under the law of the case doctrine, which precludes a court from reconsidering an issue decided previously by a higher court in the same case. *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). "[A] published decision of [the Court of Appeals] constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'" *Gonzalez v. Arizona*, 677 F.3d 389 n.4 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013). Especially relevant here, "[a] fully considered appellate ruling on an issue of law made on a preliminary injunction appeal . . . become[s] the law of the case for further proceedings in the trial court on remand." *Ranchers*

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Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 499 F.3d 1108, 1114 (9th Cir. 2007) (citation omitted).

In their preliminary injunction briefing, Plaintiffs attempted to distinguish the issue before the Ninth Circuit, asserting that the Court "was tasked with addressing whether an all-or-nothing rule is preempted, but it did not consider what would happen if motor carriers were unable to convert owner-operators to employee drivers." ECF 180 at 14. Not so. The Court's opinion was very clear: it rejected CTA's assertions that AB-5 would force motor carriers "out of business" or "to leave California" as a basis for F4A preemption. *CTA*, 996 F.3d at 660.

B. Plaintiffs' and OOIDA's F4A Preemption Claim Fails as a Matter of Law.

Even if the Ninth Circuit has not foreclosed the F4A claims raised here, Plaintiffs' and OOIDA's challenges fail as a matter of law. The F4A prohibits a state or its political subdivisions 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). The Supreme Court has held that "§ 14501(c)(1) does not preempt state laws affecting carrier prices, routes, and services 'in only a tenuous, remote, or peripheral . . . manner.'" *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013) (citing *Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. 364, 371 (2008)). Where, as here, a law is generally applicable, that factor "'will likely influence whether the effect on prices, routes, and services is tenuous or significant.'" *CTA*, 996 F.3d at 656 (quoting *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 966 (9th Cir. 2018)). In particular, "laws of general applicability that affect a motor carrier's relationship with its workforce, and compel a certain wage or preclude discrimination in hiring or firing decisions, are not significantly related to rates, routes, or services." *CTA*, 996 F.3d at 657 (citing *Su*, 903 F.3d at 966). Here, the ABC test, and AB 5 by extension, does not refer to motor carrier prices, routes,

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or services. It is instead a state regulation of labor conditions, generally applicable to all employers in the state. *See CTA*, 996 F.3d at 658. That it may cause a motor carrier to take the law into account when making business decisions or increase the motor carrier's operating costs does not change its general applicability. *Id.* (citing *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646-647 (9th Cir. 2014)).

Nor have Plaintiffs and OOIDA shown, nor can they show, that AB 5 has been or will be highly burdensome on prices, routes, and services. In their operative complaints, and in Plaintiffs' preliminary injunction briefing, they contended that AB 5 would cause them to charge higher prices or lose their businesses, therefore impeding Congress' goal of ensuring competitive market forces. CTA TAC, ¶¶ 74-76. Relatedly, they also contended that AB 5 will drive owner-operators completely from the trucking business or upend the motor carrier industry, ECF 180 at 13, or that there is no way for owner-operators to continue working in the trucking business or to utilize the business-to-business exemption, ECF 180 at 11-12. These arguments, even if true, do not meet the standard for F4A preemption; what's more, they are unsupported by the evidence.

1. There Is No Evidence That AB 5 Has Upended the Motor Carrier Industry.

Since AB 5's passage, the trucking industry in California has continued to operate successfully, and indeed, has grown. From 2021 to 2023, the number of truck drivers in California increased from 813,647 to 876,195. RJN, Ex. 1. There has been no "significant disruption to the trucking industry, emerging shortage of trucking services or capacity, or increasing freight rates in California." ECF 173-3 at 25; *see also* 173-1, ¶¶ 20, 78-80. To the contrary, in the time since this Court's preliminary injunction was lifted, thereby allowing AB 5 to take effect, "California saw rate *declines*." ECF 173-3 at 26, emphasis added; *see also id.* at 26-31. Nor have smaller trucking businesses been forced out of business. Since AB 5 has gone into effect, small business trucking is growing *faster* than before. *See id.* at 31-32.

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And, previously misclassified truck drivers who are now classified as employees attested in sworn declarations that they saw no change to their type of work or how that work is performed. *See* ECF 173-4, ¶ 6; ECF 173-5, ¶ 10. Many, for example, continue to own their own trucks while working as employee-classified drivers. ECF 173-4, ¶ 7; ECF 173-5, ¶ 3; ECF 173-6, ¶ 11; ECF 173-12, ¶ 5; *see also* ECF 173-1, ¶¶ 71, 77.

On the other hand, Plaintiffs and OOIDA have provided *no* evidence that AB 5 "represent[s] a sea change in how the trucking industry works in California," as Plaintiffs contend. ECF 180 at 13. There is no evidence suggesting that the trucking industry has been upended, that long-haul routes have been abandoned, or that drivers and trucking services are fleeing the state, as Plaintiffs and OOIDA suggest. *See*, *e.g.*, ECF 155-2, ¶¶ 28-30, 35; ECF 156-6, ¶¶ 6, 8, 11. Nor have Plaintiffs been able to present any evidence that AB 5 has resulted in the loss of 1 out of 10 owner-operators, as they speculate may occur. ECF 180 at 14-15. To the contrary, the evidence presented by Defendants shows the exact opposite. The only evidence that Plaintiffs have presented indicative of anything close to a negative trend are general statements from a corporate officer claiming that that a majority of his company's 85 "independent contractor" drivers were unwilling to work as employees, ECF 172-5, ¶¶ 8, 12, and from CTA's own Chief Executive Officer stating that he is "not aware of any motor carrier that has successfully converted all or even most of its" independent contractor positions to employee roles. ECF 172-6, ¶¶ 6-7. These statements lack foundation and provide no specifics that would allow this Court to gauge if they are accurate or representative. Moreover, three company representatives declare precisely the opposite. ECF 173-7, ¶¶ 5-7; ECF 173-12, ¶¶ 4-7; ECF 173-11, ¶¶ 7-10. Their declarations are supported by Defendants' experts. *See*, *e.g.*, ECF 173-1, ¶¶ 69-77.

Plaintiffs also submit declarations from three individual drivers stating that they prefer not to work as employees. ECF 172-3, ¶ 14; ECF 172-4, ¶ 16. But

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there is no basis for concluding that these preferences are representative of drivers throughout the state. Nor are they. *Cf.* ECF 173-5, ¶¶ 4, 6, 9, 10; ECF 173-9, ¶¶ 16, 20; ECF 173-10, ¶¶ 8, 13-15; ECF 173-6, ¶¶ 4, 10, 13; ECF 173-4, ¶¶ 8-11. Indeed, case law reflects a multitude of lawsuits by drivers seeking to be classified as employees, rather than misclassified as independent contractors. *See, e.g.*, *People v. Superior Ct.*, 57 Cal. App. 5th 619, 625 (Cal. Ct. App. 2020), *cert. denied*, 142 S. Ct. 76 (2021) (*Cal Cartage*); *Parada v. East Coast Transp. Inc.*, 62 Cal. App. 5th 692, 695 (Cal. Ct. App. 2021). The Legislature had evidence before it that from 2010 to 2018, approximately 1,150 truck drivers filed complaints with state agencies alleging that they were misclassified as independent contractors. RJN, Ex. 2, pp. 1-2. These statistics and the existence of these lawsuits stand in stark contrast to the three driver declarations Plaintiffs have previously proffered stating that they prefer not to be classified as employees.

Defendants' evidence also underscores how overbroad the relief is that Plaintiffs and OOIDA seek. Plaintiffs and OOIDA each seek a declaration and injunction prohibiting AB 5 from applying to the *entire* trucking industry. *See* CTA TAC at 33-34; OOIDA SAC at 21. Their requested relief would extend to every corner of the diverse motor carrier industry—an industry that includes, among other things, drayage drivers at ports, FedEx-style delivery drivers, and long-haul truckers driving routes within California and those driving between States. Further, Plaintiffs have not, and cannot, provide any basis for concluding that AB 5 impacts every type of motor carrier operation in the burdensome ways necessary to justify the far-reaching remedy they seek. The relief Plaintiffs and OOIDA seek would reach *every single* provision of the California Labor and Unemployment Insurance Codes. Yet Plaintiffs and OOIDA have not mentioned many of these provisions in their prior briefing, let alone explain how they would cause the types of harm that would trigger F4A preemption.

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2. Trucking Services and Drivers Can Comply With AB 5.

a. Plaintiffs and OOIDA Misstate State Law.

Application of the ABC test pursuant to AB 5 does not burden Plaintiffs in the ways that they assert—and certainly does not burden them in ways that would trigger F4A preemption. Carriers can continue hiring drivers while classifying them "as employees," thereby providing them with the benefits and protections to which employees are legally entitled. *CTA*, 996 F.3d at 659 n.11; *see also* ECF 173-1, ¶¶ 51-56, 71. Indeed, Defendants' declarations show that carriers are already doing exactly that. ECF 173-12, ¶ 4; ECF 173-7, ¶¶ 5-7.

In alleging otherwise, Plaintiffs and OOIDA rely on inaccurate assertions concerning California law. For example, their declarants have suggested that, if classified as employees, drivers will no longer be able to work on a job-by-job basis for multiple carriers. ECF 172-2 at 5-6 ¶ 16; ECF 172-6 at 5-6 ¶ 12. Not so. California labor law does not prevent employees from working for multiple employers, or from working short, temporary jobs. AB 5 § 1(g) ("Nothing in this act is intended to diminish the flexibility of employees to work part-time or intermittent schedules or to work for multiple employers."); *see, e.g.*, *Smith v. Superior Ct.*, 39 Cal. 4th 77, 81 (2006) (describing temporary employment arrangement for "one day's work"); *Drillon v. Indus. Acc. Comm'n*, 17 Cal. 2d 346, 348 (1941) (treating a horse-racing jockey as an employee when engaged for "a single race"). Nor does California law prohibit employees from working flexible schedules: California law does not require employers to force their employees to work a "9-5," "Monday-Friday" schedule (or any other particular schedule). *See*, *e.g.*, RJN, Ex. 3.

Similarly, contrary to Plaintiffs' assertions that drivers will not be able to use their own trucks,[5] state law allows employers to require that employee-drivers use

[5] In fact, Plaintiffs in the Ninth Circuit proceeding conceded that its members could hire drivers who own their own trucks as employees. *CTA*, 996 F.3d at 659, n.11.

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their own trucks as a condition of employment. *CTA*, 996 F.3d at 659 n.11; *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 24-25 (Cal. Ct. App. 2007); *see also* ECF 173-1, ¶¶ 45, 47-56 (describing ways in which drivers may own their own trucks). Indeed, many drivers properly classified as employees *do* continue to own their own trucks. *See*, *e.g.*, ECF 173-4, ¶ 7; ECF 173-5, ¶ 3; ECF 173-6, ¶ 11; ECF 173-12, ¶ 5.

Moreover, Plaintiffs suggest that drivers will not be properly incentivized to be productive or efficient if treated as employees (*see, e.g.*, ECF 172-6, ¶ 24), but record evidence shows the opposite—that employees report operating successfully and without issue. *E.g.*, ECF 173-12 (Ta Decl.), ¶¶ 10-12. State law does not prohibit employers from devising compensation or disciplinary systems to encourage employee productivity and efficiency. *See*, *e.g.*, Cal. Labor Code § 226 (allowing piece-rate compensation); RJN, Ex. 4 (employers may tie compensation to performance); Cal. Lab. Code § 2922 (employees with no specified term may be terminated at will).

Finally, Plaintiffs' and OOIDA's declarants have asserted that reclassifying drivers as employees would deprive them of "freedom" or "independence." ECF 171-5, ¶ 13; ECF 171-4, ¶ 16; ECF 171-6, ¶ 16; ECF 172-4, ¶ 16. But state law does not require employers to force their employees to drive particular routes or accept particular loads, as declarants suggest (ECF 172-2, ¶ 16), nor to require closer supervision by employers (ECF 172-3, ¶ 5), nor to require any dress code. ECF 172-2, ¶ 16. In any case, Plaintiffs' assertions about driver "independence" are largely a "myth." ECF 173-1, ¶ 58; *see, e.g.*, RJN, Ex. 7, pp. 9-10 (discussing hallmarks of true independent contractor status); ECF 173-1, ¶ 57 (describing lack of independence that many truck drivers have); *see also*, *e.g.*, ECF 173-4, ¶¶ 9-10; ECF 173-5, ¶¶ 4, 5, 8; ECF 173-6, ¶¶ 5, 7; ECF 173-9, ¶¶ 6, 7, 11, 13; ECF 173-5, ¶¶ 4, 5, 8; ECF 173-10, ¶ 11.

Plaintiffs and OOIDA have failed to demonstrate that the reclassification of

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drivers as employees is highly burdensome, or comes anywhere close to the burdens necessary to trigger F4A preemption.

b. Plaintiffs and OOIDA Are Not Prohibited From Using Independent Contractors Under AB 5.

Plaintiffs' and OOIDA's preemption claims also fail because they have not demonstrated that AB 5 prohibits motor carriers from working with drivers properly classified as independent contractors. Those seeking to work as independent contractors may utilize the business-to-business exemption. California Labor Code section 2776, subdivision (a) provides that the ABC test "do[es] not apply to a bona fide business-to-business contracting relationship," if an individual acting as a sole proprietor or a similar business entity "contracts to provide services to another such business." *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 478 (9th Cir. 2023). If these conditions are met, the applicable test is the *Borello* standard. *Id.* And as the California Court of Appeal has recognized, the motor carrier industry already utilizes "legally organized business entities and appear to be among the kinds of businesses contemplated by the business-to-business exemption." *Cal Cartage*, 57 Cal. App. 5th at 632-34.

Plaintiffs assert that drivers in the motor carrier industry will never be able to satisfy the B2B exemption. ECF 180 at 11. That is incorrect. While the exemption is certainly rigorous—and justifiably so, to serve AB 5's interest in preventing misclassification—the statute erects no categorical barrier for motor carrier drivers. *See*, *e.g.*, ECF 173-1, ¶ 73, n. 27 (citing Mongelluzzo, Bill (2022, July 1), *California Truckers Expect 'Business as Usual' Amid AB 5 Implementation*, Journal of Commerce).

In order to take advantage of the exemption, the driver must be "acting as a sole proprietor" or operating as a "business entity." Plaintiffs have never suggested it is impossible to satisfy that threshold requirement. Nor could they. For example, major California motor carriers seeking to hire independently contracted drivers

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under the B2B exemption are contracting with drivers who have formed their own corporations. ECF 173-1, ¶¶ 72-73. And drivers need not even go that far, as the plain language of the statute allows a driver to be a "sole proprietor," which is a relatively informal type of business that does not involve incorporation. *See*, *e.g.*, RJN Ex. 7, pp. 2-3.

The chart below addresses the exemption's additional criteria and how drivers can satisfy them if they wish to work as independent contractors:

B2B Requirement	**How Requirement Can Be Satisfied**
Free from control and direction. Cal. Lab. Code § 2776(a)(1).	If carriers are able to satisfy the control-related element of *Borello*, as Plaintiffs have asserted, they necessarily satisfy the identical element under the B2B exemption. *See Borello*, 48 Cal. 3d at 353-354.
Services are provided directly to the contracting business. Cal. Lab. Code § 2776(a)(2).	"Motor carriers . . . could contract with owner-operators (or other business entities meeting the requirements of the business-to-business exemption), direct their actions, and pay them." *Cal Cartage,* 57 Cal. App. 5th at 634.[6] In any event, the statute makes clear that "[t]his requirement does not apply if the business service provider's employees are solely performing services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses." Cal. Lab. Code § 2776(a)(2).
Contract is in writing. Cal. Lab. Code § 2776(a)(3).	By its plain language, this simply requires specifying in writing the applicable rate of pay, services to be performed, and pay date.
Business license or business tax registration. Cal. Lab. Code § 2776(a)(4).	Drivers need not have "a federal motor carrier operating license" to satisfy the exemption. "[T]he phrase refers to the licenses issued by local governments . . . for health and safety regulation and tax purposes." *Cal Cartage*, 57 Cal. App. 5th at 633.
Service provider maintains a business location separate from contracting business' location. Cal. Lab. Code	Under the plain statutory text, a driver can comply even by operating the driving business outside of the driver's own "residence."

[6] The State reserves the possibility of arguing, in a future case, that this portion of *Cal Cartage* was incorrectly decided.

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§ 2776(a)(5).	
Customarily engaged in an independently established business of the same nature Cal. Lab. Code § 2776(a)(6).	This criterion simply requires (as relevant here) that a driver be "customarily engaged" as an independently established business in the business of driving.
Can contract with other businesses without restrictions from the hiring entity. Cal. Lab. Code § 2776(a)(7).	A driver has the ability to work with multiple motor carriers in carrying out their independent driving business. Plaintiffs themselves acknowledged that "owner-operators" work with multiple carriers. *See, e.g.*, ECF 172-1 at 4-5.
Advertises and holds itself out to the public. Cal. Lab. Code § 2776(a)(8).	This criterion simply requires that drivers "present (something or oneself) to the public in a way that is intended to attract customers." *Merriam-Webster Online*, "Advertise," available at https://www.merriam-webster.com/dictionary/advertise.
Provides its own tools, vehicles, and equipment to perform the services. Cal. Lab. Code § 2776(a)(9).	Drivers use their own trucks, and other equipment as needed. As Plaintiffs themselves acknowledge, some drivers in the industry own their own vehicles. *See*, *e.g.*, ECF 171-2, ¶ 21; *see also* ECF 173-1, ¶ 26.
Negotiates its own rates. Cal. Lab. Code § 2776(a)(10).	This requirement – the ability to negotiate rates with motor carriers - is a hallmark of true independent contractor status. *See* RJN, Ex. 7, p. 9.
Can set its own hours and location of work. Cal. Lab. Code § 2776(a)(11).	Plaintiffs acknowledge many drivers already prefer to set their own hours and choose routes. *See, e.g.*, ECF 172-2, ¶ 16, ECF 172-3, ¶ 15.
Not performing work which requires a license from the Contractors' State License Board. Cal. Lab. Code § 2776(a)(12).	No license from the Contractors' State License Board is required to operate a driving business in California. *See* Cal. Bus. & Professions Code, §§ 7055-7509.1 (listing classifications).

OOIDA has asserted that federal Truth-in-Leasing Regulations prevent drivers from satisfying certain criteria under the B2B exemption. OOIDA FAC, ¶¶ 104-105. OOIDA, however, fails to explain how the requirements conflict or even how the regulations come into play. As an initial matter, under 49 C.F.R. § 376.12(c)(1), a carrier must have exclusive control of a vehicle during the course of a specific type of leasing arrangement; the regulations do not apply to *all* types of relationships between drivers and motor carriers. The B2B exemption,

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moreover, does not require carriers to relinquish such control over the vehicle. Nor do the federal regulations bar independent driving businesses from advertising their availability to perform work for multiple carriers. And the regulations expressly make clear that they are not intended to dictate the "control" analysis relevant to worker classification standards under state law. *See* 49 C.F.R. § 376.12(c)(4). For these reasons, and those explained above, the B2B exemption does not categorically prohibit motor carriers from working with truly independent drivers.

3. Plaintiffs Cannot Demonstrate How AB 5 Is "Impliedly Preempted" by the F4A.

Plaintiffs also assert that AB 5 is "impliedly preempted" by the F4A, CTA TAC ¶ 76, because it "effectively bars" motor-carriers from using individual owner-operators to provide trucking services, which is an "obstacle" to Congress' goal of ensuring "maximum reliance on competitive market forces." *Id.* Their argument is legally and factually flawed.

As a threshold matter, Plaintiffs cannot properly invoke implied preemption principles in the F4A context. While the Supreme Court has sometimes applied implied preemption principles in cases involving federal statutes with express preemption clauses, it has done so only where state law conflicts with or poses an obstacle to some component of the relevant federal statutory regime, *apart from* the statute's express preemption clause. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000). Here, however, Plaintiffs cannot point to any aspect of the F4A beyond the "express preemption clause," because there is nothing more to the statute than the preemption clause. 49 U.S.C. § 14501(c)(1); ECF 172-1 at 27-28; s*ee Rowe*, 552 U.S. at 368 (describing the F4A as a statute designed "to preempt state trucking regulation"); Pub. L. 103-305, 108 Stat. 1605-1606.

In any event, Plaintiffs' contentions that AB 5 is so burdensome as to justify preemption, are without merit, for the myriad reasons explained above. *Supra* at 12-19. As the Ninth Circuit recognized, and as discussed above, carriers can

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continue to work with owner-operators, much as they do now, by treating them as employees, *CTA*, 996 F.3d at 659 n.11, or as independent contractors pursuant to the business-to-business exemption. *Bowerman*, 60 F.4th at 478. While those options may require carriers to spend more money on worker benefits and protections, the F4A does not preempt a statute merely because it will increase business costs. *See, e.g.*, *CTA*, 996 F.3d at 660.

Plaintiffs' remaining argument—that AB 5 creates an impermissible patchwork of state regulations, ECF 172-1 at 27-29—ignores the fact that there has long been—and will invariably be—a plethora of differing state worker classification standards across the 50 States in our federal economy, as there is no uniform employee classification test for any industry, including the motor carrier industry. Numerous States, for example, have adopted the ABC test for at least some purposes (like workers' compensation or unemployment insurance). *See* RJN, Ex. 6, pp. 9-10. And even in States that apply a *Borello*-like multi-factor standard for all purposes, there is inevitably variation in which specific factors each state applies and how courts in each state interpret and balance those factors. *See generally* Anna Deknatel and Lauren Hoff-Downing, ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes, 18 U. Pa. J.L. Soc. Change 54, 65-71 (2015) (cited by *Dynamex*, 4 Cal. 5th at 957). Thus, regardless of AB 5, motor carriers operating across state lines will necessarily have to take into account and apply a wide variety of state-specific worker classification standards. Given this reality, Plaintiffs cannot plausibly show that AB 5 poses an obstacle to the F4A objectives. Finally, as State Defendants point out in their PI opposition briefing, nothing in the text or legislative history of the F4A supports Plaintiffs' suggestion that Congress somehow intended the F4A to protect the business opportunities of "independent truckers." ECF 172-1 at 28. The Ninth Circuit already rejected this argument, finding nothing in the legislative history reflecting a Congressional intent to preempt the traditional authority of

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states to protect employees, or "the necessary precursor to that power, i.e., identifying who is protected." *CTA*, 996 F.3d at 664 (citation omitted); *see People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal. 4th 772, 786 (Cal. 2014). Instead, the Ninth Circuit has described the F4A's "principal purpose" as "prevent[ing] States from undermining federal deregulation of interstate trucking"—with Congress particularly concerned about States enacting 'barriers to entry, tariffs, price regulations, and laws governing the types of commodities that a carrier could transport." *Su*, 903 F.3d at 960-61. AB 5 does not regulate transportation matters and thus does not conflict with or act as an obstacle to the F4A's objectives.

II. AB 5 DOES NOT DISCRIMINATE AGAINST NOR UNDULY BURDEN INTERSTATE COMMERCE

Plaintiffs and OOIDA claim that AB 5 burdens interstate commerce, in violation of the dormant Commerce Clause, because it allegedly requires motor carriers to abandon their preferred business practices, ECF 172-1 at 21-27, and to treat all drivers as employees, effectively barring reliance on "owner-operators." ECF 171-1 at 9, 16. In addition, Plaintiffs assert that AB 5's exemptions impermissibly benefit intrastate businesses. ECF 172-1 at 9-10, 26.

The Commerce Clause empowers Congress to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3; *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008). As the Supreme Court recently recognized, courts must exhibit "extreme caution" before invalidating laws under the dormant Commerce Clause doctrine. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 390 (2023). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Davis*, 553 U.S. at 337-38 (citation omitted).

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A. Plaintiffs and OOIDA Do Not Claim that AB 5 Discriminates Against Out-of-State or Interstate Motor Carrier Companies or Drivers.

Discrimination under the dormant Commerce Clause means treating similarly situated in-state and out-of-state economic interests differently in a way that favors the in-state interests. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013). Plaintiffs and OOIDA do not claim that AB 5 discriminates against out-of-state motor carriers or drivers, nor could they. AB 5 is a state law of general applicability governing worker classification—it neither targets interstate commerce nor the transportation of goods and services. *See CTA*, 996 F.3d at 664 (AB 5 "is a generally applicable labor law"); *Cal Cartage*, 57 Cal. App. 5th at 631 & fn.12 (same); *see also supra* at 10-12. AB 5 does not facially discriminate against interstate commerce, but instead applies equally to in-state, multi-state, and out-of-state employers and drivers that operate in the State. *See* Cal. Lab. Code § 2775(b)(1).

Plaintiffs cited to *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), in support of their argument that AB 5 requires California companies to focus on California work rather than interstate commerce. ECF 180 at 17-18. Even if this were true, it would not support a Commerce Clause violation. Plaintiffs, unlike in *Scheiner*, cannot prove discriminatory treatment because AB 5 does not distinguish between in-state and out-of-state carriers and drivers. In particular, in *Scheiner*, Pennsylvania imposed vehicle taxes that discriminated against out-of state vehicles by exempting in-state registered vehicles from the tax and by levying a heavier charge per mile of highway usage by out-of-state vehicles. *Scheiner*, 483 U.S. at 275-275. The Supreme Court recognized that the state was not treating out-of-state and in-state vehicles "with an even hand." *Id.* at 282. AB 5 is readily distinguishable. It is neutral; it treats all drivers and motor-carriers the same.

In such situations, it is exceptionally difficult—virtually impossible—to show a Commerce Clause violation. *See Nat'l Pork*, 598 U.S. at 370; *Nat'l Ass'n of*

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Optometrists & Opticians LensCrafters, Inc. v. Brown, 567 F.3d 521, 525 (9th Cir. 2009) (finding no discriminatory effect where state law treats in-state and out-of-state entities the same); *see also Sullivan v. Oracle Corporation*, 662 F.3d 1265, 1271 (9th Cir. 2011) (Labor Code applies equally to work performed in California, whether that work is performed by California or out-of-state residents; "[t]here is no plausible Dormant Commerce Clause argument when California has chosen to treat out-of-state residents equally with its own"); *Yoder v. Western Express, Inc.*, 181 F. Supp. 3d 704, 720 (C.D. Cal. 2015) ("California's wage and hour laws regulate 'even-handedly' as they apply to almost all employers within the state, not just those engaged in interstate commerce.").

All nine justices recently agreed that the principal function of the balancing standard under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), is not to strike down nondiscriminatory laws, but instead to "'smoke out' a hidden protectionism." *Nat'l Pork*, 598 U.S. at 379; *id.* at 394 (Robert, C.J., Alito, J., Kavanaugh, J., & Jackson, J.). While the Court "left the 'courtroom door open'" to other types of claims, plaintiffs face a difficult burden in those circumstances. *Nat'l Pork*, 598 U.S. at 379. As OOIDA conceded, the framework applied by the Ninth Circuit in *National Pork*, and confirmed by the Supreme Court, "applies today." ECF 181 at 12.

This standard under *Pike* is exacting: "[a]bsent discrimination," a "law will be upheld unless the burden imposed on [interstate] commerce is *clearly excessive* in relation to the putative local benefits." *Davis*, 553 U.S. at 339 (emphasis added). In a "small number" of Supreme Court cases, the Supreme Court has invalidated state laws "where such laws undermined a compelling need for national uniformity in regulations." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997). That is far from the case here: the F4A does not impose or sanction a uniform national rule of determining employee status. Indeed, even if Plaintiffs and OOIDA succeed here in invalidating AB 5 as applied to motor carriers, their industry will

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still face a patchwork of regulatory standards on this very issue. *Supra* at 22. There simply is not a national, uniform way of classifying drivers in the trucking industry. And the Commerce Clause cannot be read to dictate any policy to the contrary. *See, e.g.*, Jack Goldsmith & Eugene Volokh, State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation, Tex. L. Rev. at 26 (forthcoming) ("[W]elcome to the American federal system, where companies that do business with people who are in multiple states must comply with the laws of those multiple states.").

B. AB 5 Puts No Excessive Burden on Interstate Commerce.

As to the alleged burden, Plaintiffs and OOIDA argue that the ABC test effectively forces them to stop using individual owner-operators for their trucking services. But that assertion is legally erroneous and factually unsupported for the many reasons discussed above. *Supra* at 18-21. AB 5 says nothing about precluding the use of "independent owner-operators," or, for that matter, independent contractors generally. As detailed above, carriers can continue working with owner-operators, much as they do now, by treating them "as employees," *CTA*, 996 F.3d at 659 n. 11, or by working with them as independent contractors pursuant to the business-to-business exemption, *see Cal Cartage*, 57 Cal. App. 5th at 632. For these reasons, multiple courts have rejected the contention that AB 5 prohibits a hiring entity from utilizing independent contractors, or that it mandates the use of employees. *Cal Cartage*, 57 Cal. App. 5th at 631 ("The ABC test does not mandate the use of employees for any business or hiring entity."); *Parada v. East Coast Transp., Inc.*, 62 Cal. App. 5th 692, 702 n.4 (Cal. Ct. App. 2021); *Western State Trucking Ass'n v. Schoorl*, 377 F. Supp. 3d 1056, 1072 (E.D. Cal. 2019) (rejecting challenges to ABC test under *Dynamex*, noting that it does not "preclude[] a motor carrier from hiring an independent contractor for individual jobs or assignments").

Plaintiffs and OOIDA also point to the costs of reclassifying their drivers as

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employees, but the Commerce Clause does not protect a party's preferred business model or preferred "methods of operation" in a given marketplace. *Nat'l Pork*, 598 U.S. at 384 (controlling plurality opn.);[7] *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978). Plaintiffs and OOIDA, here, must prove "substantial harm to interstate commerce; facts that render that outcome a 'speculative' possibility are not enough." *Nat'l Pork*, 598 U.S. at 385. In any case, Plaintiffs seriously overstate the burdens of compliance. Given that AB 5 has now been in effect for nearly a year for motor carriers without any meaningful evidence of serious or widespread disruptions to the State's trucking industry, it is a mere speculative possibility to think that AB 5 will result in any substantial burdens on the motor carrier industry. *Cf.* ECF 173-3, pp. 12-25; ECF 173-12, ¶¶ 10-15; ECF 173-7, ¶¶ 8-9; ECF 173-11, ¶¶ 11-12.

At most, AB 5 imposes an incidental burden on the flow of commerce by increasing certain business costs: "[L]aws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce." *Nat'l Pork Producers Council*, 6 F.4th 1021, 1032 (9th Cir. 2021), *aff'd*, 598 U.S. 356; *Yoder v. Western Express, Inc.*, 181 F. Supp. 3d 704, 721 (C.D. Cal. 2015). The dormant Commerce Clause does not protect "*particular firms*" within a marketplace. *Nat'l Pork*, 598 U.S. at 384 (controlling plurality opn.). "Nor does a non-discriminatory regulation that 'precludes a preferred, more profitable method of operating in a retail market' place a significant burden on interstate commerce." *Nat'l Pork Producers Council*, 6 F.4th at 1032 [internal citations omitted].

C. AB 5's Benefits Far Outweigh Any Burden AB 5 May Impose

Plaintiffs and OOIDA cannot establish that any burdens imposed by AB 5 are

[7] "Part IV–C of Justice GORSUCH's opinion is controlling precedent for purposes of the Court's judgment as to the plaintiffs' *Pike* claim." *Nat'l Pork*, 598 U.S. at 403 (Kavanaugh, J. concurring in part and dissenting in part); *see generally Marks v. United States*, 430 U.S. 188, 193 (1977). In any event, Part IV-C is materially indistinguishable from Judge Ikuta's analysis in *Nat'l Pork Producers Council*, 6 F.4th at 1032—an opinion affirmed by the Supreme Court.

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"clearly excessive" in relation to its benefits, such that it would violate the dormant Commerce Clause, as they contend. ECF 172-1, citing *Pike*, 397 U.S. at 142. AB 5 serves the important interest of ensuring that employees receive benefits guaranteed by law, including minimum wage, unemployment insurance, workers' compensation, and sick leave, among others. The California Supreme Court and Legislature found the multifactor tests for employee classification such as the *Borello* test afford hiring entities "greater opportunity to evade its fundamental responsibilities under a wage and hour law" than the simpler ABC test. *Dynamex*, 4 Cal. 5th at 954. In enacting AB 5, the Legislature intended "to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law." Stats. 2019, ch. 296, § 1(e) (Cal. 2019). As research has shown and the Legislature acknowledged, misclassification is prevalent in the trucking industry. *See supra* at 5-7; *infra* at 31. Plaintiffs and OOIDA cannot prove that AB 5 fails to effectuate a legitimate public interest or that it imposes a "clearly excessive" burden in relation to AB 5's benefits.

Indeed, the Ninth Circuit has rejected *Pike* challenges to California labor laws. In *Ward v. United Airlines, Inc.*, 986 F.3d 1234 (9th Cir. 2021), the Ninth Circuit rejected defendant's challenge to the application of California Labor Code section 226, requiring accurate, itemized wage statements, to interstate transportation workers based in California who do not perform a majority of their work in California *Id.* at 1239-41. Since United had not shown that applying California law to these workers regulates in an area that requires national uniformity, or that the cost of compliance otherwise impairs the free flow of goods or services across state borders, it had not shown a significant burden on interstate commerce. *Id.* at 1242; *see also Bernstein v. Virgin America, Inc.*, 3 F.4th 1127, 1133 (9th Cir. 2021) (rejecting similar employer defense in case brought by California-based flight attendants against employer, claiming violations of various provisions of the

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California Labor Code, including minimum wage and overtime.)

In their preliminary injunction briefing, Plaintiffs assert that *Bernstein* and *Ward* are inapposite because they were limited to individuals who primarily worked in California. ECF 180 at 17. But those holdings and the reasoning behind them are not predicated on workers' principal place of work. They are premised on the well-established principle that only certain types of burdens—burdens on the flow of interstate commerce—can trigger a *Pike* inquiry.

The principal cases Plaintiffs invoke illustrate the rare type of circumstances where such a burden exists. ECF 172-1 at 23, citing *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *S. Pac. Co. v. State of Ariz. Ex rel. Sullivan*, 325 U.S. 761 (1945) (*Southern Pacific*).) These cases involved highly anomalous restrictions that directly burdened the flow of commerce across state borders. *E.g.*, *Bibb*, 359 U.S. at 530 (mud flap restrictions that required trucks and trains to stop for hours at state border for no legitimate reason); *Southern Pacific*, 325 U.S. at 775-76 (state law on interstate train length undermined uniformity as trains had to be broken up and reconstituted to comply with regulation, which had dubious relation to safety); *Nat'l Pork*, 598 U.S. at 379 n. 2 (suggesting that *Bibb* and *Southern Pacific* may really have been discrimination cases). AB 5 creates no analogous burdens. At most, it incidentally burdens carriers' preferred method of doing business by requiring them to provide greater benefits and protections to their drivers. As discussed above, however, that type of burden does not trigger a *Pike* balancing of costs and benefits under the Commerce Clause. *See, e.g.*, *Nat'l Pork Producers Council*, 6 F.4th at 1033 (citing *Exxon*, 437 U.S. at 127-28).

For these reasons, the allegations that AB 5 violates the dormant Commerce Clause fail.

III. AB 5 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

AB 5's inclusion of motor carriers under the ABC test, while exempting certain businesses and occupations, easily passes the highly deferential rational

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basis standard.[8] "[I]t is well settled that equal protection challenges to economic legislation . . . are evaluated under rational basis review." *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1085 (9th Cir. 2015). Rational basis review presumes the validity of state law and imposes upon the party attacking the legislative classification the burden to negate "*every conceivable* basis" that might support it. *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012) (emphasis added, citing *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *ASJA*, 15 F.4th at 965. This is especially true in the context of economic legislation, where the Equal Protection Clause allows "wide latitude." *City of Cleburne*, 473 U.S. at 440. "We have made clear . . . that, where ordinary commercial transactions are at issue, rational basis review requires deference to reasonable underlying legislative judgments." *Armour*, 566 U.S. at 680 (citations omitted). AB 5 readily passes this standard.

A. The Legislature Had a Rational Basis for Including the Motor Carrier Industry in AB 5.

AB 5 has a clear rational basis: the law seeks to remedy the widespread misclassification of workers as independent contractors. AB 5 § 1(c); *see also ASJA*, 15 F.4th at 965 (AB 5 has rational basis). The Legislature noted that "a 2000 study commissioned by the U.S. Department of Labor found that nationally between 10% and 30% of audited employers misclassified workers," and that a 2017 audit program by the California Employment Development Department that conducted 7,937 audits and investigations "identified nearly half a million unreported employees." RJN, Ex. 8, p. 2. The Legislature specifically sought to ensure that misclassified workers were afforded fundamental minimum labor protections under the law. *Id.* § 1(e); *see*, *e.g.*, RJN, Ex. 8, p. 5. AB 5 codifies the

[8] The same legal standard applies under both the U.S. and California constitutions. *Manduley v. Super. Ct.*, 27 Cal. 4th 537, 571-72 (Cal. 2002); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004).

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ABC test adopted in *Dynamex*, and uses this standard to determine the proper classification of workers for purposes of the California Labor Code, California Unemployment Insurance Code, and the Industrial Welfare Commission (IWC) Wage Orders. Cal. Lab. Code § 2775(b)(1). As the Legislature observed, the previous *Borello* test was easily manipulated, and "[o]utside of particularly clear-cut or egregious situations," made determining who is an independent contractor "complicated, expensive, and prone to litigation." RJN, Ex. 18, p. 9. Misclassification of workers has increased exponentially in California because of the "tremendous incentive for employers to misclassify their workers and illegally avoid paying the cost of benefits." *Id.* The Legislature further observed that the California Supreme Court announced the new ABC standard in part because of "the need to protect workers to prevent a race to the bottom." RJN, Ex. 7, p.7. Finding that misclassification caused workers to "lose significant workplace protections," deprive the state of needed revenues, and contributes to the "erosion of the middle class and the rise in income equality," the Legislature passed AB 5 to protect "potentially several million workers." AB 5, §§ 1(b), (c), (e).

With respect to the motor carrier industry specifically, the Legislature considered evidence showing some of the highest misclassification rates were in the trucking industry. *See*, *e.g.*, RJN, Ex. 8, p. 2; *see also* RJN, Ex. 10, 23:14-23. (majority of truck drivers are misclassified). As discussed, Defendants' experts confirm the Legislature's findings with respect to the motor carrier industry and the myriad negative consequences of truck driver misclassification. *Supra* at 5-6.

B. The Legislature's Limited Exemptions to AB 5 Satisfy the Rational Basis Standard.

In passing AB 5, the Legislature made the ABC test "generally applicable," ensuring that it would "appl[y] 'to hundreds of different industries.'" *Cal. Trucking*, 996 F.3d at 657. AB 5 did not apply the ABC test to all professions, however, and provided that the *Borello* standard would govern certain exempt

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occupations and industries. *See*, *e.g.*, AB 5, § 2(b)-(e) (listing exempt occupations and professions). In general, the Legislature's rationale for exempting certain occupations and industries from the ABC test was to avoid creating unnecessary uncertainty for workers long and lawfully classified as independent contractors under the *Borello* standard. *See, e.g.*, RJN, Ex. 7, pp. 5-8. Or as the Ninth Circuit recently explained, in determining AB 5's exemptions, "California weighed several factors: the workers' historical treatment as employees or independent contractors, the centrality of their task to the hirer's business, their market strength and ability to set their own rates, and the relationship between them and their clients." *ASJA*, 15 F.4th at 965 (citing AB 5's legislative history).

As discussed in the legislative history, *Dynamex* gave several examples of vocations that include "unquestionably independent" contractors, such as plumbers, electricians, architects, solo practitioner attorneys, and others. RJN, Ex. 7, p. 6, citing *Dynamex*, 4 Cal. 5th at 949. The Legislature noted that where such workers "*provide only occasional services unrelated to a company's primary line of business*" they "have traditionally been viewed as working in their own independent business." *Id.* (emphasis in original, citing *Dynamex*, 4. Cal. 5th at 949). It was also noted to the Legislature that many of the exemptions are based on the California IWC's wage orders, RJN Ex. 19, p. 11:11-14, 13:8-12, which in turn "largely mirror those that are carved out in the federal Fair Labor Standards Act." RJN Ex. 8, p. 4, citing 29 C.F.R. Part 541, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees." And the Legislature also acknowledged that they had new industries and professions to consider, and to apply *Dynamex* to. *See*, *e.g.*, RJN Ex. 19, p. 15:20-16:14.

Plaintiffs and OOIDA contend that these rationales cannot explain *all* of AB 5's exemptions. *See*, *e.g.*, ECF 180 at 19-20. They discuss the various exemptions in drive-by fashion, *id.* at 19, failing to meet their burden of proving that any of

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them is irrational. Nor do they make any serious attempt to show that workers in the exempted professions are "similarly situated" to motor carrier drivers—discussing workers as widely disparate as fisherman, barbers, and in-home cosmetic sellers—as would be necessary to show irrational treatment for purposes of the Equal Protection Clause. *See*, *e.g.*, *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011). Plaintiffs' assertion that motor-carrier industry has had a long, federally sanctioned history of owner-operators as independent contractors (CTA TAC, ¶ 105) is belied by the numerous successful cases challenging trucker misclassification prior to AB 5. *See*, *e.g.*, RJN, Ex. 2, pp. 1-2; RJN, Ex. 20, pp. 48:24-49:17 (discussing lawsuits against trucking companies).

Plaintiffs also misstate the scope of AB 5's exemptions. In particular, they assert that the statute exempts "persons who provide minor home repairs, home cleaners, errand runners, furniture assemblers, dog walkers, dog groomers, picture hangers, pool cleaners, [and] yard cleaners." ECF 180 at 19. Not so. The provision to which Plaintiffs cite—Labor Code § 2777—establishes that *Borello*, rather than the ABC test, governs the relationship between such workers and a "referral agency" (provided multiple conditions are satisfied). "Referral agencies" are "intermediar[ies]": much like the Yellow Pages, they connect independent service providers to clients through marketing and other means. *See* RJN, Ex. 7, p. 10. Because such service providers have not historically qualified as employees of referral agencies, *see*, *e.g.*, *Avchen v. Kiddoo*, 200 Cal. App. 3d 532, 537 (Cal. Ct. App. 1988), the Legislature saw no need to subject referral arrangements to the ABC test.

Plaintiffs and OOIDA cannot meet their burden to negate every conceivable rational basis that might support AB 5's exemptions.

C. The Legislature's Time-Limited Extension for AB 5 to Apply to the Construction Industry is Rational.

The Legislature also provided a time-limited carve-out for construction

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trucking services; much narrower than other exemptions in AB 5, this carve-out grants a short-term extension for construction trucking services to come into compliance with AB 5's requirements, provided that multiple strict requirements are met. Cal. Lab. Code § 2781. For that carve-out, which expires on December 31, 2024, to apply to construction trucking services, a subcontractor providing those services must maintain a business location separate from the contractor's location (*id.*, § 2781(d)) and have the authority to hire and fire persons to assist in providing services to the contractor (*id.* § 2781(e)). In addition, if the subcontractor providing construction trucking services is not licensed by the Contractors State License Board,[9] it must meet additional requirements in order to take advantage of the time-limited exemption: it must be a separately-established business entity (*id.*, (h)(1)(A)); be registered with the Department of Industrial Relations as a public works contractor (*id.*, (h)(1)(B)); and negotiate with, contract with, and be directly compensated by the licensed subcontractor (*id.*, (h)(1)(D)).[10] If a construction trucking service "utilizes" more than one truck when providing services, it is "deemed the employer for all drivers of those trucks." *Id.*, (h)(2).

Plaintiffs' and OOIDA's assertion that there is no basis for this exemption is incorrect. In enacting this exemption, the Legislature rationally sought to avoid "significant operational impacts within the heavy civil construction industry for a limited period of time." *See* RJN, Ex. 23, p. 2. The construction industry's use of trucking services "is different from how trucking services are used in many other industries." ECF 173-8, ¶ 4; Borjas Declaration, ¶¶ 4-5. A construction project

[9] A subcontractor that only provides trucking services is not subject to licensing requirements by the Board. See Bus. & Prof. Code § 7026.

[10] To be exempted from the ABC test, a subcontractor in the construction industry must meet certain criteria including subdivision (b) which requires a subcontractor to be licensed by the Contractors State License Board (CSLB). Companies performing trucking services for construction sites are not required to have contractor's licenses to take advantage of the time-limited exemption. *See* Lab. Code § 2781(h). When the exemption set forth in subdivision (h) for construction trucking services expires on December 31, 2024, any company without a license as required by Lab. Code § 2781(b) would not qualify for the general construction industry exemption to AB 5.

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generally involves much more oversight and direction of drivers than in the regular trucking industry, and unlike in regular trucking, for example, drivers in construction trucking services often must take direction from onsite contractors not only in the delivery of the material, but in putting it to immediate use in the project, ECF 173-8, ¶ 5, such as pouring concrete, or transporting and setting up equipment.

Construction bids, which account for and incorporate these construction trucking costs, are fixed-price and often entered into years in advance, such that the immediate application of AB 5 could have disrupted operations because contractors may have struggled to incorporate any increased costs of reclassification of drivers into their contracts. ECF 173-8, ¶ 6; Borjas Decl., ¶ 5. The time-limited exemption permitted by AB 5 gives the construction industry the necessary time to come into compliance with the law, by reclassifying drivers as necessary and adjusting for any costs of reclassification when bidding on construction projects going forward, without seriously disrupting the construction industry. *See id.*; RJN, Ex. 23, p. 2; Borjas Dec., ¶ 5. The Legislature reasonably determined that the remainder of the trucking industry did not need such a transition period—and this has been borne out by the fact that a number of motor-carrier services have been able to reclassify their drivers within a few months of deciding to do so. *See* ECF 173-6, ¶¶ 5-7; ECF 173-12, ¶ 4. "Defining classes of people subject to legal requirements inevitably places those with almost equally strong claims on the other side of the line. Whether the line could or should have been drawn differently is a matter for legislative, not judicial, consideration." *Quinn v. LPL Fin. LLC*, 91 Cal. App. 5th 370, 381 (2023), review denied (Aug. 9, 2023) (finding that AB 5's exemption of registered securities-broker-dealers and investment advisers was rational and did not violate Equal Protection Clause.).

Plaintiffs contend that the construction industry also had enough time to come into compliance with the law, ECF 180 at 23, but they ignore the specific concerns reasonably relied on by the Legislature and underscored by the declarations

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submitted by Defendants in this matter. Moreover, as the Ninth Circuit recently confirmed, "[l]egislatures may implement their program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *ASJA*, 15 F.4th at 965 (internal quotations and citations omitted). "[T]he law need not be in every respect logically consistent with its aims to be constitutional." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-488 (1955); *see also ASJA*, 15 F.4th at 965 (citing same). Here, the construction industry carve-out, which is time-limited, *is* consistent with AB 5's purposes: it requires that the construction trucking industry come into compliance with AB 5, albeit on a different timeframe.

Moreover, even if this Court were to find that this carve-out is irrational, such a finding cannot invalidate AB 5 wholesale as Plaintiffs and OOIDA seek. *See* CTA TAC, pp. 33-34; OOIDA FAC, pp. 20-21. As Plaintiffs acknowledge, § 2775(b)(3) limits the scope of relief where "a court of law rules that the [ABC test] cannot be applied to a particular context." In particular, § 2775(b)(3) requires application of *Borello*, rather than the ABC test, to the extent that the ABC cannot be applied. If this Court finds the construction trucking carve-out irrational, it would only be irrational to the extent that it excludes non-construction drivers who would qualify for the exemption *but for* the fact that they work outside the construction context. Thus, the appropriate remedy consistent with § 2775(b)(3) would be an injunction applying *Borello only* to non-construction drivers who can satisfy the stringent criteria set forth under the carve-out. And in any event, any remedy would last only through the end of 2024, when the carve-out expires.

D. The Legislature's Inclusion of the Motor-Carrier Industry in AB 5 is Due To Legitimate Concerns About Misclassification, Not Animus.

The assertion that the Legislature's inclusion of motor carriers in AB 5 is due to animus, CTA TAC, ¶¶ 55, 99; OOIDA FAC, ¶¶ 45, 129, is without merit and unsupported by the legislative history. As an initial matter, if the challenged law

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serves legitimate state interests, "[t]hat 'conclusion, on its own, prevents [Plaintiffs] from succeeding on their Equal Protection claim" on animus grounds. *Boardman v. Inslee*, 978 F.3d 1092, 1119 (9th Cir. 2020). Even if Plaintiffs and OOIDA could demonstrate animus, their equal protection challenge would fail because AB 5 and the statute's exemptions serve the rational, legitimate interests discussed above.

But as discussed in State Defendants' opposition briefs to the preliminary injunction motions, Plaintiffs and OOIDA have not established anything close to animus. The legislative materials to which they have cited (ECF 172-7 at 12, ECF 171-7 at 11-12) show that AB 5 applies the ABC test to motor carriers because, as Assemblywoman Lorena Gonzalez stated, drivers "act a lot like employees." RJN, Ex. 21, p. 6:21-25. Rather than demonstrate animus, this statement underscores the Legislature's purpose in including motor carrier services in the long list of other industries that AB 5 covers: to address worker misclassification.[11] As the legislative history demonstrates, the Legislature was concerned that misclassification is rampant across the economy, and especially in particular growth industries, including—but far from limited to—the motor carrier industry. RJN, Ex. 8, p. 2; RJN, Ex. 10, p. 23:14-25. In any case, legislators are entitled to identify and prioritize "the phase of the problem" of misclassification "which seems the most acute to the legislative mind." *Williamson*, 348 U.S. at 489. And the

[11] The other supposedly offending statements made by Assemblywoman Gonzalez, according to Plaintiffs, are tweets that a) do not in fact demonstrate any animus to motor carriers and 2) are not a part of the legislative history of AB 5. In one tweet, she asserted that she was a Teamster, that she stands in solidarity with workers every single day, and that she was not "bought and paid for"—she is "the union." ECF 172-7 at 10, citing May 19, 2019 tweet, available at https://twitter.com/LorenaSGonzalez/status/1134087876390428672. This statement has nothing to do with motor carriers, and it does not suggest that animus against them is the basis for her vote—or the vote of any other member of the Legislature—in support of AB 5. The other tweet Plaintiffs point to is a straightforward explanation of AB 5's applicability to motor carriers and how the exemption for construction trucking services works. ECF 172-7 at 11, citing November 21, 2019 tweet, available at https://twitter.com/LorenaSGonzalez/status/1197517607022149632.

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legislative record reflected that misclassification in the motor carrier industry is a significant problem. *See*, *e.g.*, RJN Ex. 8, p. 2.

Nor do Plaintiffs present any evidence suggesting that AB 5's exemptions impermissibly "protect politically favored groups." ECF 172 at 12; ECF 168 at 33 ¶ 107; *id.* at 34 ¶ 109. "Accommodating one interest group is not equivalent to intentionally harming another." *Gallinger v. Becerra*, 898 F.3d 1012, 1021 (9th Cir. 2018) (rejecting allegations similar to those here that statute was motivated by animus). The two cases that Plaintiffs most heavily rely on, *Fowler Packing v. Lanier*, 844 F.3d 809, 819 (9th Cir. 2016), and *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), involved very different circumstances. In *Merrifield*—a case that the Ninth Circuit has repeatedly construed narrowly, *see, e.g.*, *S.F. Taxi Coal. v. City & Cnty. of San Francisco*, 979 F.3d 1220, 1224-1225 (9th Cir. 2020); *Allied Concrete & Supply Co v. Baker*, 904 F.3d 1053, 1065-1066 (2018)—the court concluded that the only conceivable explanation for certain statutory exemptions was "economic protectionism for its own sake." *Id.* at 991 & n. 15. "*Merrifield*," in other words, "stands for the unremarkable proposition that no rational basis exists if the law lacks *any* legitimate reason for its adoption." *S.F. Taxi*, 979 F.3d at 1225 (emphasis added).

Similarly, *Fowler* involved narrow carve-outs that, in the Court's view, were included by the Legislature "to procure the support" of a single labor union. 844 F.3d at 815. There is no evidence of naked protectionism of the sort addressed in *Merrifield*, nor are Plaintiffs' assertions of animus equivalent to the findings of political favoritism in *Fowler*.

For the reasons discussed above, Plaintiffs have demonstrated nothing like that here: AB 5 and its exemptions serve the rational, legitimate purpose of protecting workers against misclassification, while exempting industries and occupations in which workers have traditionally and properly been classified as independent contractors. *Supra* at 26-34. And the construction trucking exemption serves the

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rational basis of temporarily exempting certain driver arrangements from the ABC test to allow necessary time for that unique sector to come into compliance. *Supra* at 28-31. Under the highly deferential standard, the Equal Protection Clause is satisfied as long as the "relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordinger v. Hahn,* 505 U.S. 1, 11 (1992). Further, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1086 (9th Cir. 2015); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (stating that "rational [legislative] distinctions may be made with substantially less than mathematical exactitude").

Because AB 5's treatment of the motor carrier industry serves the rational justifications discussed above—and does not reflect animus on the part of legislators—the recent Ninth Circuit decision in *Olson v. State of California*, 62 F.4th 1206 (9th Cir. 2023), is inapplicable.[12] In *Olson*, the court held, at the motion to dismiss stage, that the plaintiffs had plausibly alleged animus, pointing to what the court viewed as "repeated[] disparage[ment]" of gig companies. *Id.* at 1220. The court, however, had no occasion in *Olson* to consider whether the plaintiffs there could meet the much higher bar for preliminary injunctive relief, requiring a showing of likelihood of success on the merits, and whether plaintiffs could actually prevail on their claims. *Id.* at 1218, 1223. While the State strenuously disagrees with the *Olson* decision—as its pending rehearing petition reflects—that decision has no application to the distinct circumstances here. Here, the only phrases Plaintiffs point to are legitimate criticisms of trucking industry practices that lend themselves to misclassification. And as demonstrated above, the

[12] The State has petitioned for en banc review, and the Ninth Circuit called for a response. Order, 21-55757 (filed May 5, 2023). The petition remains pending.

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Legislature had a rational basis for exempting certain occupations and industries and for including the motor carrier industry.

Because Plaintiffs have come nowhere close to "negat[ing] 'every conceivable basis' which might have supported the distinction" made between covered and exempted occupations, *Angelotti Chiropractic*, 791 F.3d at 1086, their Equal Protection Claim fails.

IV. PERMANENT INJUNCTIVE RELIEF IS NOT WARRANTED

The balance of the equities weighs heavily against Plaintiffs' and OOIDA's request for permanent injunctive relief. "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (internal citation omitted). Plaintiffs and OOIDA cannot establish irreparable harm from AB 5. Their assertions of harm are factually unsupported and legally flawed. *Supra* at 14-17. AB 5 has also been in effect with respect to motor-carrier services for over a year, and none of the ills of which Plaintiffs and OOIDA speculated have come to pass. *Supra* at 13-14. By contrast, the public interest will be disserved, *supra* at 3, and both Defendants and workers will suffer irreparable injury, if this Court enjoins AB 5's enforcement. Because AB 5 helps to ensure workers, particularly those in an industry with some of the highest rates of misclassification, receive important benefits and protections, including workers' compensation, and sick leave, drivers will be vulnerable to serious harm if AB 5 is enjoined. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The public interest therefore weighs heavily against enjoining AB 5.

CONCLUSION

For the above reasons, judgment should be entered in favor of State Defendants.

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Dated: September 29, 2023

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CERTIFICATE OF SERVICE

Case Name: **California Trucking Association, et al. v. Xavier Becerra, et al.** No. **3:18-cv-02458-BEN-BLM**

I hereby certify that on September 29, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

STATE DEFENDANTS' MEMORANDUM OF CONTENTIONS OF FACT AND LAW

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 29, 2023, at Los Angeles, California.

Lara Haddad
Declarant

Lara Haddad
Signature

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