Timothy A. Horton (S.B.N. 205414)
THE LAW OFFICE OF TIMOTHY A. HORTON
600 W. Broadway, Suite 700
San Diego, CA 92101
Telephone: (619) 272-7017
timhorton@timhortonlaw.com

Paul D. Cullen, Jr. (pro hac vice)
pxc@cullenlaw.com
Charles R. Stinson (pro hac vice)
crs@cullenlaw.com
THE CULLEN LAW FIRM, PLLC
1101 30th Street NW
Washington, DC 20007
Telephone: (202) 944-8600
Attorneys for Intervenor-Plaintiff
Owner-Operator Independent Drivers Association

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA TRUCKING ASSOCIATION *et al.,*
Plaintiffs,

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION,

Intervenor- Plaintiff,

v.

ATTORNEY GENERAL ROB BONTA, *et al.,*

Defendants.

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

INTERVENOR-PLAINTIFF OOIDA'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW

Judge: Hon. Roger T. Benitez
Date: November 13, 2023
Time: 10:30 a.m.
Courtroom: 5A

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

INTRODUCTION

The Owner-Operator Independent Drivers Association, Inc. ("OOIDA") brings this action against California Assembly Bill 5 ("AB-5") because it makes an entire category of small businesses unlawful—the small businesses of truck drivers who operate as independent contractors. Fifty years ago, independent truck drivers founded OOIDA, and they still make up the majority of OOIDA's approximately 141,200 members across the country.

Independent contractor ("IC") drivers typically own and maintain their trucks and "lease" their trucks and driving services to motor carriers. Motor carriers have authority from the federal government to operate trucks in interstate commerce. Since the 1940s, the federal government has regulated certain aspects of IC driver/motor carrier contracts and relationships, including requiring motor carriers to assume control and be responsible to the public for the safe operation of IC drivers. IC drivers are an essential segment of the trucking industry, meeting specific business needs not met by employee drivers. Moreover, the IC driver model frequently serves as an important professional training ground for drivers to accrue the experience, knowledge, and capital needed to become motor carriers.

In 2019, California enacted AB-5 with the purported goal of addressing misclassification of workers as independent contractors. AB-5 presumes that workers are employees unless the company can demonstrate its workers pass a new "ABC" worker classification test. Only workers who meet the ABC test's rigid elements qualify as independent contractors. But IC truck drivers cannot satisfy part B of the test because they work in carriers' primary business, *i.e.*, providing trucking services.

Defendants' oppositions to Plaintiffs' motions for a preliminary injunction confirm that AB-5's ABC test does not permit IC drivers. Defendants assert that truckers can continue to operate in the trucking industry either as an employee

driver or as a registered motor carrier. Both options require IC drivers to give up their independent contractor businesses.

Therefore, AB-5 imposes significant burdens on IC truck drivers and motor carriers. IC drivers who become employee drivers face a heavy loss. They must discard the capital and experience that they invested to build their small business. To call the loss of their businesses a burden is an understatement. Drivers whose only option is to become an employee driver move down the professional truck driver ladder. Drivers who choose to become a motor carrier must make significant new investments, pay numerous fees and taxes, and take on complex legal, regulatory, and business responsibilities. Not all IC drivers have the funds or experience to take on these responsibilities.

Motor carriers can no longer contract with IC drivers and comply with AB-5, which changes the fundamental economics of their businesses. Now, motor carriers must recruit and hire employee drivers, hire professionals to manage compliance with employment laws, assume greater financial responsibilities for their employees' taxes and other benefits, purchase trucks and other equipment, and assume the costs of registering, paying taxes and fees, fuel, tolls, and maintenance for those vehicles. These burdens far exceed the limited putative local benefits of AB-5 to the state of California and, therefore, are unreasonable burdens upon interstate commerce in violation of the dormant Commerce Clause.

This burden-to-benefit comparison is even more one-sided for motor carriers and IC drivers who are based outside of California and perform less than half of their work in the state. California would enjoy little or no local benefit from enforcing AB-5 against out-of-state truckers. Many motor carriers based outside of California have declined to move freight to, through, or from California because the cost of assuming these burdens is greater than the value of the California business they used to haul.

Facing the Plaintiffs' evidence of these unreasonable burdens, Defendants argue that AB-5's Business to Business ("B2B") exemption—which exempts workers from the ABC test and instead classifies them according to the more flexible *Borello* test—would allow drivers to operate as independent contractors for motor carriers. The B2B exemption, however, conflicts with the federal regulations that govern motor carrier/IC driver relationships for interstate operations. The result is that AB-5 permits California **intrastate** motor carriers and IC drivers to use the B2B exemption but precludes **interstate** motor carriers and IC drivers from likewise utilizing that exemption. This discrimination is a *per se* violation of the dormant Commerce Clause.

Furthermore, this disparate treatment in applying the B2B exemption violates interstate operators' constitutional right to equal protection under the law. No rational basis supports giving California intrastate IC drivers an exemption from the ABC test but denying interstate operators the same exemption from a statute intended to apply to California workers. This irrational, disparate treatment of intrastate and interstate truckers violates the state and federal Constitutions' Equal Protection clauses.

AB-5 creates another unjustified disparate impact by exempting IC drivers serving the construction industry from the ABC test but not similarly exempting IC drivers serving other industries. The distinction's rationale stems from naked economic protectionism for a particular sector and constitutes another Equal Protection violation.

Moreover, because AB-5 eliminates all IC drivers from the trucking industry, it goes beyond addressing worker misclassification—its claimed justification—and instead *misclassifies* as employees IC drivers who were previously properly classified as independent contractors. Thus, AB-5 irrationally undermines and contradicts its stated purpose, which, combined with its blanket elimination of IC

drivers, confirms the animus of the law's sponsors and supporters against the IC driver model.

OOIDA seeks declaratory relief that AB-5 violates both the dormant Commerce Clause and Equal Protection Clause of the Constitution, injunctive relief against the state's enforcement of AB-5's ABC test against motor carriers and drivers operating in interstate commerce, or at minimum, an injunction against its enforcement against motor carriers who contract with IC drivers based outside of California and who perform less than half their work in California, and appropriate attorneys' fees and costs.

STATEMENT OF THE CASE

I. AB-5 cuts at the heart of OOIDA's core membership and substantiates OOIDA's standing to bring this challenge.

Intervenor OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional truck drivers. Founded in 1973, OOIDA has more than 150,000 members located in all 50 states and Canada, who collectively own and operate more than 240,000 individual heavy-duty trucks. OOIDA is a leading advocate of single truck motor carriers, which represent nearly half of the total active motor carriers in the United States, and independent owner-operators, which are a critical component of today's interstate motor carrier industry. Declaration of Todd Spencer in Support of OOIDA's Trial Brief ("Spencer Dec."), attached hereto as Exhibit 1, ¶¶ 5-7, 10-11. OOIDA's membership consists of both independent owner-operator truck drivers and small business motor carriers. *Id.* ¶ 9.

OOIDA's independent owner-operator truck driver members who spend at least some time operating in California face the threat of AB-5 enforcement unless they change their business model or stop hauling freight in California. This includes OOIDA members as exemplified by its declarants Mr. Marc McElroy (ECF 171-5),

Mr. Stacy R. Williams (ECF 171-6), and Mr. Albert Hemerson (ECF 171-4); *see also* Spencer Dec. (Ex. 1) ¶ 42.

OOIDA small business motor carrier members based outside of California are also concerned about the costs and burdens of the application of California's employment laws to their drivers, if they want to continue to serve customers whose freight must be transported in California, as explained by the declarant of Danny R. Schnautz, owner of Clark Freight Lines, Inc. (ECF 171-3), and Mr. Spencer (Ex. 1).

These experiences of OOIDA members demonstrate OOIDA's standing to challenge AB-5. Plaintiffs have Article III standing if they can show that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). For associational or representational standing,

> an organization has standing to sue on behalf of its members where: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Am. Diabetes Ass'n v. U.S. Dep't of the Army, 938 F.3d 1147, 1155 (9th Cir. 2019).

OOIDA satisfies the associational standing and imminent injury requirements by the statements in the declarations in support of its motion for preliminary injunction and this brief that show that its members face the choice of either implementing significant, costly compliance measures or—for motor carriers—risking criminal and civil prosecution. *See, e.g.,* Spencer Dec. (Ex. 1) ¶¶ 45, 57, 58, 64; *see also* Hemerson Dec. (ECF 171-4) ¶¶ 12-16; McElroy Dec. (ECF 171-5) ¶¶ 11-16; Williams Dec. (171-6) ¶¶ 12-16; Schnautz Dec. (ECF 171-3) ¶¶ 9-13; Cal. Unemp. Ins. Code § 2117; Cal. Labor Code §§ 226.6, 226.8, 1199.5.

OOIDA "need only establish a risk or threat of injury to satisfy the actual injury requirement." *City & Cty. of San Francisco*, 944 F.3d at 787 (quoting *Harris*

v. Board of Supervisors, 366 F.3d 754, 762 (9th Cir. 2004)). OOIDA has demonstrated in the testamentary evidence that many of its motor carrier members contract with IC drivers who can no longer be classified as independent contractors under the ABC test, *see* Spencer Dec. (Ex. 1) ¶¶ 40, 43-44, that its members, Mr. Hemerson, Mr. McElroy, Mr. Williams, and Mr. Schnautz, have already or will soon suffer significant economic injury if AB-5 takes effect, *ee* Hemerson Dec. ¶ 15; McElroy Dec. ¶ 15; Williams Dec. ¶ 15; Schnautz Dec. ¶¶ 9, 12, and that each of them would have individual standing to protect their own interests from unconstitutional California regulations. Finally, OOIDA's goal to protect the business model that gave rise to its creation and continued existence is clearly germane to the association's purpose. Spencer Dec. (Ex. 1) ¶ 5.

II. The independent contractor driver business model has long been relied upon by the trucking industry and supported by federal law.

Independent contractor drivers have been a consistent and essential component of interstate commerce and the motor carrier industry for decades, filling a role and meeting business needs not met by employee drivers. *See* Spencer Dec. (Ex. 1) ¶ 16. During times of peak trucking demand, motor carriers can more efficiently meet the needs of their customers by entering lease contracts with independent contractors rather than hiring more employees and buying new equipment. Spencer Dec. (Ex. 1) ¶ 61. The independent contractor driver business is also an important interim training ground for drivers who wish to gain the substantial experience necessary to become a motor carrier. Spencer Dec. (Ex. 1) ¶¶ 17-38.

Federal regulation of the motor carrier industry has recognized for decades, and continues to recognize, the importance of IC truck drivers. *See* Spencer Dec. (Ex. 1) ¶ 16. The Interstate Commerce Commission ("I.C.C.") promulgated rules in 1950 requiring carriers to be responsible for the operation of the IC drivers they contract with and to obtain public liability insurance to cover those operations. *See*

Lease and Interchange of Vehicles by Motor Carriers, Ex Parte MC-43, 51 M.C.C. 461, 533 & 540 (June 26, 1950) (ECF 181-2). A few years later, Congress specifically gave the I.C.C. broad authority to regulate the motor carrier use of equipment not owned by it—*i.e.*, leasing of independent contractors' equipment and driving services. *See* Motor Carriers-Trip Leasing, Pub. L. No. 84-957; H.R. Rep. No. 84-2425, reprinted in 1956 U.S.C.C.A.N. 4304, 4309.

In 1979, the I.C.C. amended the IC driver rules in response to "a number of problems and abuses suffered by independent truckers." *Global Van Lines, Inc. v. I.C.C.*, 627 F.2d 546, 548 (D.C. Cir. 1980); *see also* Spencer Dec. (Ex. 1) ¶ 16. The regulations were motivated by "the Commission's deep concern for the problems faced by the owner-operator in making a decent living in his chosen profession." Lease & Interchange of Vehicles, 42 Fed. Reg. 59,984, Ex Parte MC-43 (Sub-No. 7)) (Nov. 23, 1977).

These rules, which are known as the "Truth-in-Leasing Rules," were intended to strengthen and provide stability to the independent owner-operator model by guaranteeing "full disclosure of the benefits and obligations of leasing arrangements between owner-operators and regulated carriers." Lease & Interchange of Vehicles, 129 M.C.C. 700, 702 (June 13, 1978). According to the I.C.C., the new amendments were also intended to "promote the stability and economic welfare of the independent trucker segment of the motor carrier industry." Lease & Interchange of Vehicles, 131 M.C.C. 141 (Jan. 9, 1979) (affirmed in *Global Van Lines, Inc.*, 627 F.2d at 549-50).

The Truth-in-Leasing rules contain the same relevant provisions first established in the 1950's: "The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. § 376.12(c)(1). These provisions directly conflict with AB-

5's business-to-business exception, as described below. The Truth-in-Leasing Rules did not, and were not intended to, eliminate the independent contractor driver model or the ability for owner-operators to work as independent contractors for motor carriers. 49 C.F.R. § 376.12(c)(4)

IC drivers' importance was reaffirmed by Congress when it enacted the FAAAA. *See* H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 (noting law was response to California legislation discriminating against motor carriers that used "a large proportion of owner-operators instead of company employees").

When Congress abolished the Interstate Commerce Commission in 1995, it granted independent contractor truck drivers a private right of action to enforce the Truth-in-Leasing rules in federal court. *See* 49 U.S.C. § 14704; *see also Rivas v. Rail Delivery Serv., Inc.*, 423 F.3d 1079, 1082 (9th Cir. 2005).

III. AB-5 established a rigid new worker classification test that prevents hiring independent contractor truck drivers.

California's new, rigid worker classification test was established by AB-5 and subsequently amended by AB-2257, codifying the test set forth in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018). *See* Cal. Lab. Code § 2775.[1] Section 2275(b)(1) provides that:

> [A] person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> > (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
> >
> > (B) The person performs work that is outside the usual course of the hiring entity's business.

[1] The later amendments to AB-5 did not substantively change the ABC test previously located at Cal. Lab. Code § 2750.3.

> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

This ABC test determines who is an employee for the purposes of California's Labor Code, the Unemployment Insurance Code, and wage orders of the Industrial Welfare Commission. *See* Cal. Lab. Code § 2775(b)(1). Prong B of the ABC test makes it impossible for independent contractor driver to work in California because the work they provide to motor carriers, providing truck transportation, is within "the usual course of the hiring entity's business." Cal. Lab. Code § 2775(b)(1)(B); *see also* Spencer Dec. (Ex. 1) ¶¶ 33-34. Therefore, AB-5 essentially eliminates IC drivers from working in the state. *Id.* ¶ 48.

Defendants confirm OOIDA's analysis that the ABC test abolishes small businesses operating as IC truck drivers for motor carriers in California. State Defendants' Opposition to Intervenor-Plaintiff OOIDA's Motion for Preliminary Injunction (ECF 175) at 9-10; International Brotherhood of Teamsters' Opposition to Intervenor-Plaintiff OOIDA's Motion for Preliminary Injunction (ECF 173) at 18-19; *see also, e.g.*, Order Granting Preliminary Injunction (ECF 89) at 13-15 (collecting cases and noting that ABC test likely prevents carriers from using independent drivers); *id.* at 14 n.9 (noting that during the Court's hearing on Plaintiffs' preliminary injunction request, Defendants could not provide an example of how a motor carrier could contract with an owner-operator as an independent contractor rather than employee).

Prior to AB-5 and but for the ABC test, OOIDA's independent owner-operator members could work as independent contractors to deliver freight from, to, or through California regardless of where they or the motor carriers they work for were based in the United States. The statutory language of AB-5 is neither limited in its application to those businesses that are based in California or those who conduct a majority of their work in the state. On its face, AB-5 applies to any

business or individual that conducts any work or provides any service in California. Spencer Dec. (Ex. 1) ¶¶ 42-47.

Defendant/Intervenor International Brotherhood of Teamsters ("IBT") and the State says that truck drivers can continue to work as independent contractors for motor carriers under AB-5's business-to-business exemption. ECF 175 at 9-10; ECF 173 at 17-19. This exemption requires a worker to satisfy eleven elements. Cal. Lab. Code § 2776(a)(1)-(11). One of those factors requires that the "business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity." Cal. Lab. Code § 2776(a)(7). Another factor requires that "[t]he business service provider advertises and holds itself out to the public as available to provide the same or similar services." Cal. Lab. Code § 2776(a)(8); Spencer Dec. (Ex. 1) ¶ 41.

These factors conflict with specific requirements of the federal Truth-in-Leasing regulations, 49 C.F.R. § 376.12(c), Spencer Dec. (Ex. 1) ¶ 50, which require a motor carrier to exercise exclusive possession and control of the independent contractor's leased vehicle (and by implication, the independent contractor as well). The federal Truth in Leasing rules are authorized by 49 U.S.C. § 14102, which defines the scope of its application as "motor carrier[s] providing transportation subject to jurisdiction under subchapter I of chapter 135 that uses motor vehicles not owned by it to transport property under an arrangement with another party." 49 U.S.C. § 14102. Subchapter I of chapter 135 describes the scope of the Secretary's jurisdiction as "transportation by motor carrier and the procurement of transportation, to the extent that passengers, property, or both are transported by motor carrier" between one state and another (or between states and reservations or other countries). 49 U.S.C. § 13501. Therefore, if the business-to-business exemption permits IC drivers to be a part of the trucking industry, then this exception is only available to California **intrastate** truckers who are not

required to follow the Truth-in-Leasing rules and not to operations in **interstate** commerce. Spencer Dec. (Ex. 1) ¶ 50.

IV. AB-5's elimination of IC drivers accords with the focused animus of the legislators and sponsors of AB5.

Defendants state that the purpose of AB-5 is to address problems with worker misclassification. The legislative record and accompanying public statements of several of AB-5's supporters, however, betray their animus and intent to eliminate IC drivers from the trucking industry. Former Assemblywoman Lorena Gonzalez held a particular animus against independent truckers, regardless of whether they are properly classified as independent contractors. Indeed, AB-5's "architect" intended the law to completely abolish the owner-operator model, including the brokers who contract with these truckers. In a floor session in advance of the passage of AB-5, California Assemblywoman Lorena Gonzalez said, "And let me talk for one minute about trucking . . . . We are [] getting rid of an outdated broker model that allows companies to basically make money and set rates for people that they called independent contractors." *See, e.g.*, video record of Assembly Floor Session, at 1:07:20-1:08:30 (Sept. 11, 2019), available at https://www.assembly.ca.gov/media/assembly-floor-session-20190911 (distinguishing between "legitimate small business"—referring to truck owners operating under their own authority, which renders them motor carriers—and an "illegal business model"—referring to those who own or lease trucks and contract with motor carriers, *i.e.*, IC drivers).

There are myriad other examples of animus toward the IC driver model. In her own Fact Sheet regarding AB-5, Ms. Gonzalez referred to trucking industry worker misclassification and described the independent contractor model as "exploitative" and dubbed it an "illegal business model." AB-5 Fact Sheet from Assemblywoman Lorena Gonzalez, Californians for the Arts (Sept. 8, 2019), https://www.californiansforthearts.org/ab5-about-blog/2020/2/7/ab-5-fact-sheet-

from-assemblywoman-lorena-gonzalez. In a committee hearing report on AB-5 from April 3, 2019, a sponsor of the bill, the California Labor Federation, described AB-5 in part: "It distinguishes carefully between a trucking company that has no employee drivers (misclassification) and a trucking company that contracts with a mechanic (legitimate contractor)." *See also* Assembly. Comm. on Lab. & Empl. AB5, 2019-20 Reg. Sess., at 6 (Cal. April 3, 2019).

Ms. Gonzalez repeatedly said that the goal was to classify more workers as employees so that they could more easily unionize and be eligible for minimum wage and benefits. Before running for office, Ms. Gonzalez was the leader of San Diego's organized labor council. In a tweet posted May 30, 2019, Ms. Gonzalez wrote: "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." (https://twitter.com/LorenaSGonzalez/status/1134087876390428672). Obviously, independent contractors cannot be unionized.

On February 8, 2020, John Myers of the Los Angeles Tomes wrote, "Few disputes over AB-5 were more intense than those Gonzalez had with the trucking industry . . . ." John Myers, "Lorena Gonzalez likes a good fight. She got it with hotly debated AB-5," Los Angeles Times (February 8, 2020), available at https://www.latimes.com/california/story/2020-02-08/lorena-gonzalezcalifornia-assembly-AB-5-profile. Furthermore, Defendants' arguments demonstrate the law's true purpose: Both the State and IBT Defendants take great pains to describe ways for a former IC driver to work in compliance with AB-5. *See, e.g.*, ECF 175 at 9-10, ECF 173 at 17-18. Drivers must choose to become motor carriers or work as employee drivers. Drivers cannot work as independent contractors and must give up their small businesses.

The legislature, through AB-5, eliminated the independent contractor driver—it did not establish a test to root out misclassification, a goal the law

purports to serve. Declarant Dr. Michael Belzer seeks to redefine owner-operators as motor carriers with their own DOT operating authority and re-label drivers traditionally known as owner-operators as "owner-drivers" and "dependent contractors." ECF 173-1 at ¶¶ 26-36, 39. These are not labels used in the trucking industry, and they attempt to mask the loss of legitimate small businesses.

The ABC test departs from the multi-factor test previously established by *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). The *Borello* test took into consideration at least eight different factors, not one of which was dispositive of a worker's status as an employee or independent contractor. Nevertheless, under the *Borello* test, the State found in the worker's favor in 97% of cases. *See* Intervenor-Defendant's Mem. in Supp. of Mot. to Dismiss (ECF No. 63-1) at 6 (citing Analysis of SB 1402, California Senate Committee on May 7, 2018).

V. AB-5 imposes significant burdens on both independent contractor drivers and motor carriers.

For interstate IC drivers and the motor carriers who use them, the choices under AB-5 are either to stop taking the business from customers that brings them onto California's roads or to assume the burden of the alternative forms of business permitted under AB-5. For a driver who loses their IC business that they have invested time and money in for years, the word "burden" is woefully inadequate. For an independent contractor to then become an employee driver is a loss of autonomy, income, and many tax benefits. *See* Spencer Dec. (Ex. 1) ¶¶ 53-57; Declaration of Barry Fowler, EA, attached hereto as Exhibit 2, ¶¶ 6-12.

Although IC drivers might also choose to become a motor carrier, only the more experienced IC drivers have the knowledge and capital needed to take this step. Becoming a motor carrier requires taking on much more burdensome financial and tax obligations than required of independent contractors. *See* Spencer Dec. (Ex. 1) ¶¶ 37-38, 58 (enumerating the burdens on independent contractor truck drivers

who choose to obtain their own DOT authority to comply with AB-5); *see also* Fowler Dec. (Ex. 2) ¶¶ 13-17 (enumerating tax consequences to contractor truck drivers become motor carriers).

And finally, for motor carriers who must transition from a business model using IC drivers to one using employee drivers, their new financial responsibilities are numerous and burdensome. *See* Spencer Dec. (Ex. 1) ¶¶ 59-64 (listing burdens on motor carriers forced to reclassify their IC drivers as employees); *see also* Fowler Dec. (Ex. 2) ¶¶ 13-17 (listing tax consequences to motor carriers who must engage employee drivers instead of independent contractor drivers).

Because of these burdens, motor carriers and drivers, particularly those based outside of California, have decided to stop hauling freight on California roads rather than take on these substantial burdens. *See generally* Schnautz Dec. (ECF 171-6).

A. Independent contractor drivers who choose to become employee drivers sacrifice much for a smaller income.

For those IC drivers who choose or are forced to become employee drivers, the burdens they face are many. They will lose their independence. They will no longer be free to set their own schedules. They will no longer have the discretion to take time off when they deem in necessary. They will be unable to choose the freight they haul or select their own routes. They will have no say about the equipment that best serves their needs or where and how that equipment is maintained. In short, they will lose their status as business owners, lose their discretion as to how to do their work, and be subject to the whims of their employers' dispatchers. Spencer Dec. (Ex. 1) ¶¶ 55, 57.

They will have to sell their equipment in a market that will be flooded with used trucks and trailers and will likely suffer significant losses. The impact on truck owners who bought trucks at a premium in 2021 and 2022 when freight rates were high will be even more severe. Truck owners whose equipment is unencumbered will suffer tax consequences as a result of the income from the sale of their trucks

and trailers. IC drivers with significant experience will lose the equity in their trucks that they have paid for over the years and the investment they have put into preventative maintenance. They will also be selling just as California is pushing to transition over to all-electric trucks. Owner-operators who have bought their trucks on credit will be required to continue paying for trucks that they cannot drive. *Id.*

IC drivers who become employees will also lose income. Fowler Dec. (Ex. 2) ¶ 7. In addition, employee drivers may be subject to unexpected chargebacks by motor carrier employers that would reduce their already lower income. *Id.* ¶ 6. Their employee status will deprive them of deductions from their adjusted gross income that they enjoyed as IC drivers, in particular employee business expenses like tools for repairing their trucks, safety equipment, their subscriptions to radio, cell phone, and internet services, driver's showers, laundry, postage, and other necessities while traveling over-the-road, none of which are permissible deductions for employees pursuant to the 2017 Tax Cut and Jobs Act (Pub. L. 115-97). These are typically between $4,000 and $8,000 per year, and the loss of these deductions could increase their tax liability by $880 to $1760 per year. *Id.* ¶¶ 7-9.

IC drivers are also entitled to deduct their actual expenses on the road or a $69 per diem from their adjusted gross income. Employee drivers, on the other hand, are neither reimbursed for their expenses nor paid a per diem and they are not allowed to deduct them from their income. Some drivers spend as many as 280 nights a year away from home. As employees, those drivers would lose a deduction of $19,300, which could increase their taxes by as much as $4250 at a 22% marginal tax rate. An employee driver's salary does not consider that the driver is not receiving the per diem amount. *See* Fowler Dec. (Ex. 2) ¶ 10.

Independent contractor truck drivers who must sell their equipment when they become employee drivers will be subject to increased taxes as well. Independent contractor truck drivers who have paid off and fully depreciated their equipment who then must sell that equipment will increase their taxes based on the

added income from the sale. It is important to note that any additional income during their transition to becoming employees could push drivers into a higher tax bracket depending on the sales price of the equipment. Fowler Dec. (Ex. 2) ¶ 10.

B. Independent contractor drivers face higher costs and burdens in obtaining their own federal authority to operate as a motor carrier.

Not all IC drivers are prepared to become motor carriers. Spencer Dec. (Ex. 1) at ¶ 37. Those who do so face significant burdens and large capital investments.

New motor carriers are required to take on the challenge of operating a motor carrier business within an abundant and ever-increasing list of federal and state laws and regulations. Regulatory compliance is by far the most serious challenge that OOIDA members report when operating under their own authority. *See* Spencer Dec. (Ex. 1) at ¶ 58(a). A new carrier must obtain a motor carrier number and DOT authority at a cost of $300. *See id.* ¶ 58(b). Presuming it is a California-based motor carrier, they must register each vehicle for a California International Fuel Tax Agreement (IFTA) license at $10.00 per vehicle plus a cost per vehicle for decals. *Id.* ¶ 58(c). They must register each vehicle under the California Air Resources Board's new Heavy-Duty Inspection and Maintenance Program and pay a fee of $30.00 per vehicle. *Id.* ¶ 58(d). They must register each vehicle under the California International Registration Plan (IRP) at a cost of approximately $2900 per heavy duty truck. *Id.* ¶ 58(e). They must obtain plates for any trailers. Trailer plate registration fees in California range from $7.50 for an annual plate to $52.50 for a permanent plate. *Id.* ¶ 58(f). They must pay annually the appropriate Unified Carrier Registration fee based on the number of vehicles owned. The current registration fee ranges from $37.00 for a carrier with a single truck to $35,836.00 for a carrier with a fleet of 1001 trucks or more. *Id.* ¶ 58(g). They must obtain motor carrier permits based on the size of the fleet at a cost ranging from $250 for a single truck entity to $5,144 for a fleet of 2,001 vehicles or more. *Id.* ¶ 58(h)

They will also lose certain advantages of working for a larger fleet of IC drivers. Big motor carriers often negotiate discounts on fuel and other products and services and pass those on to their drivers, *e.g.*, "fuel discount cards." Owner-operators who decide to obtain their own new DOT authority will lose the discounts they enjoyed as IC drivers because they will not have the same bargaining power as and purchase fewer gallons of fuel than large carriers. *Id.* ¶ 58(i).

New motor carriers may also face difficulty finding customers. Shippers and brokers look on the FMCSA website to determine how long a motor carrier has had its operating authority and often will not engage a motor carrier that lacks an established history and has held its authority for a certain period. These new motor carriers cannot maintain their operations without developing relationships with shippers and brokers. *Id.* ¶ 58(j).

Insurance costs for motor carriers are significant. Interstate motor carriers are required to have a minimum of $750,000 in liability coverage at an average cost of in California of $11,104.50 annually per vehicle. Because most shippers and brokers will not do business with a motor carrier that does not also have cargo insurance, they must obtain cargo insurance at an average cost in California of $2,396.16 annually per vehicle. *Id.* ¶ 58(l). Insurance costs for a young driver who obtains his own authority may exceed these by many multiples. *Id.* ¶ 58(m).

They must also obtain insurance for non-trucking related liability for driving the truck when the truck is used for non-carrier-related purposes; coverage for the truck and trailer for occurrences like vandalism, collision, natural disasters, and theft, which may be as much $6,137.16 per vehicle per year. They must have coverage for physical damage to non-owned trailers; uninsured/underinsured motorists (UM/UIM) coverage; and coverage for miscellaneous occurrences such as a failure of a refrigeration system, lost or stolen cargo, and cargo damage caused by a collision. *Id.* ¶ 58(n).

C. Motor carriers who must change their business model to eliminate IC drivers and hire employee drivers face substantial burdens.

Motor carriers similarly face a choice between two disruptive options: (1) cease operating in California and ignore one of the world's largest markets; or (2) change from using IC drivers to hiring employee drivers for their customers' loads that require driving in California. Should a carrier wish to continue serving the California market, it must incur the substantial costs associated with using employee drivers. *See* Spencer Dec. (Ex. 1) ¶¶ 59-64.

In addition to the costs listed in the preceding section for new carriers, those carriers switching to an employment model will face new obstacles. They will be required to purchase trucks and trailers for their employee drivers[2] and pay for the maintenance of that equipment. *See* Spencer Dec. (Ex. 1) ¶ 64(a)-(b) (outlining costs of this equipment for model years 2010 and later). The motor carrier will incur the labor costs of their new employees. Spencer Dec (Ex. 1) ¶ 64(m)-(n). They will likely face unemployment claims, the costs of which can be significant. *See* Fowler Dec. (Ex. 2) ¶ 15. They will likely have to hire a human resources professional with sufficient experience to manage payroll, tax withholding, OSHA, EEOC, and other requirements of employers, both state and federal. *See, e.g.*, Fowler Dec. (Ex. 2) ¶ 14; Spencer Dec (Ex. 1) ¶ 64(m)-(n).

[2] Defendants have proposed the "two check system", *i.e.*, both compensating an employee for driving by the hour or by the mile and have a contract with the driver for the use of their vehicle, as a ready-made solution to motor carrier's problems. The two-check system is not without risk to a motor carrier that utilizes it. Unless under the employer's "accountable plan"—an IRS requirement—the employee specifically itemizes and substantiates all vehicle and other expenses to be paid by separate check—compliance with which is not easy to ensure—upon audit, all employer deductions for payments to employees for the use of their vehicles and equipment will be reclassified as income payments. The employer will then be assessed payroll taxes on 100% of the reimbursements going back for years, along with interest and penalties. *See* Fowler Dec. (Ex. 2) ¶¶ 16-17.

Mr. Schnautz states in his declaration that his motor carrier, Clark Freight Lines, Inc., has decided to forgo revenue of approximately $40,000 to $50,000 per week from loads going to California rather than risk being required to apply California's employment laws to its drivers. *See* Schnautz Dec. ¶¶ 9-12. Mr. Spencer states that Clark Freight Line's decision is typical of those of motor carriers he has spoken to in OOIDA's membership. Mr. Spencer states that the effect of these motor carriers' decisions, resulting in fewer motor carriers hauling freight to California, will negatively impact the supply chain to and from California. *See* Spencer Dec. (Ex. 1) ¶ 63.

VI. Summary of prior proceedings

California Trucking Association and the other original Plaintiffs filed this suit in October 2018. ECF 1. The Court granted the International Brotherhood of Teamsters' ("IBT") motion for intervention in January 2019. Plaintiffs later moved for preliminary injunction, which the Court granted on FAAAA preemption grounds in January 2020. The Court dismissed Plaintiffs' Commerce Clause claim premised on its finding of FAAAA preemption. Defendants appealed the injunction, and this Court stayed further district court proceedings during the pendency of the appeal. The Ninth Circuit eventually reversed in April 2021, and after petitions for rehearing and certiorari were denied by the Ninth Circuit and Supreme Court, respectively, this Court spread the Ninth Circuit's mandate and took back control of this case in August 2022. On August 30, 2022, the Court entered an order accepting the parties' proposed schedule for renewed preliminary injunction motions and staying all other pending trial deadlines. ECF 144. On September 22, 2022, this Court granted OOIDA's motion to intervene in this matter. ECF 147.

The parties thereafter briefed the motions for preliminary injunction against enforcement of AB-5 in the trucking industry based on both FAAAA preemption and the dormant Commerce Clause. OOIDA and Plaintiffs, in May 2023, amended

their complaints and injunction motions to add claims for violations of the Equal Protection clause based on the Ninth Circuit's recent decision in *Olson v. California*, 62 F.4th 1206 (9th Cir. 2023). Before the parties concluded briefing the injunction motions, this Court consolidated the preliminary injunction hearing, set for August 28, 2023, with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). The parties agreed to a stipulated schedule and procedures for the consolidated hearing, including continuing the hearing to November 13, 2023.

The parties' joint motion included requests of the Court, that "[i]n lieu of in-person testimony at the hearing/trial, permission for all parties to rely on the already-filed declarations that have accompanied their briefing on the pending preliminary injunction motions and any additional declarations that may accompany their pre-trial briefing for this Court's consideration," and that the trial on the merits "be based on the Memoranda of Contentions of Fact and Law, any requests for judicial notice and supporting declarations, the already-filed preliminary injunction briefing, the already-filed declarations and evidence submitted in support of the preliminary injunction briefing, and the argument of counsel to be made at the hearing and trial." ECF 182 ¶¶ 3-4. The Court granted the parties' request, continuing the hearing and adopting the agreed briefing schedule and procedures. ECF 183.

ARGUMENT

I. Plaintiffs are entitled to a permanent injunction against enforcement of AB-5's ABC test in the interstate trucking industry.

"The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 (1987). Here, OOIDA has established all four elements of the permanent injunction standard. As set forth below,

1. OOIDA has demonstrated that its claims are meritorious;

2. Enforcement of AB-5's ABC test against IC drivers and motor carriers will cause substantial, irreparable harm to OOIDA's members in that it will cause IC drivers and motor carriers to change drastically or give up altogether their businesses in California;
3. The balance of equities and public interest favor enjoining unconstitutional laws, particularly where, as here, the state is shown to enjoy no more than nominal benefits from its enforcement; and
4. Likewise, "it is always in the public interest to enjoin unconstitutional laws."

See Miller v. Bonta, __ F. Supp. 3d __, No. 22CV1446-BEN (JLB), 2022 WL 17811114, at *8 (S.D. Cal. Dec. 19, 2022). This Court should therefore enjoin California's enforcement of AB-5's ABC test against IC drivers and motor carriers operating in interstate commerce, or in the alternative, against motor carriers whose drivers are based outside of California.

II. AB5 unconstitutionally discriminates against interstate commerce.

Defendants assert that independent truckers can potentially fall within AB5's business-to-business ("B2B") exemption, which removes workers from the scope of the ABC test if they can satisfy 12 elements. *See* Labor Code § 2776(a)(1)-(12). If that is true, the B2B exemption discriminates against **interstate** commerce, a *per se* Commerce Clause violation, because only **intrastate** truckers could ever satisfy its elements due to the federal rules applicable to interstate operations.

A. Legal standard

"Modern [Supreme Court] precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-91 (2018). "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Id.* at 2091

(quoting *Granholm v. Heald*, 544 U.S. 460, 476 (2005)). State laws that give local entities "privileges" or benefits not afforded to interstate entities discriminate against interstate commerce in violation of the Commerce Clause. *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460, 475-76 (2005) (alcohol regulations that favored in-state producers violated Commerce Clause).

Defendants opened the door to this claim when they argued in response to OOIDA's Motion for Preliminary Injunction that independent contractor truckers may invoke the business-to-business exemption to comply with AB-5. *See* State Prelim. Inj. Opp. (ECF 175) at 9-10; IBT Prelim. Inj. Opp. (ECF 173) at 18-19; *see also* Declaration of Eric Tate (ECF 173-13) at 5. Defendants' argument brought into stark relief the discriminatory nature of AB-5, since only intrastate truckers and carriers can take advantage of the business-to-business exemption. Interstate independent contractor truckers and carriers are governed by federal law that does not permit the use of this AB-5 exemption. *See infra* Part I.B. Similarly, this defense gives rise to an additional related claim of an equal protection violation grounded in the disparate treatment of intrastate IC truckers and carriers versus like operations engaged in interstate commerce.

Rule 15(b)(2) provides:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

See also Idaho Plumbers & Pipefitters Health & Welfare Fund v. Mechanical Contractors, Inc., 875 F.2d 212, 214-15 (9th Cir. 1989) ("We treat issues tried by the express or implied consent of the parties as raised in the pleadings, even if the parties made no formal amendment.").

Here, given that Defendants themselves brought to the fore the legal conundrum presented by the application of AB-5's business-to-business exemption

to IC drivers, they have expressly consented to the Court's consideration of OOIDA's discrimination claim. At a minimum, their consent is implied by their defense. And under the express language of the Rule, OOIDA may still move to amend its complaint, but its failure to do so "does not affect the result of the trial of [the discrimination] issue."

"An amendment of pleadings to conform to proof at trial is proper under Rule 15(b) unless it results in prejudice to one of the parties." *Jeong v. Minnesota Mut. Life Ins. Co.*, 46 F. App'x 448, 450 (9th Cir. 2002) (citing *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513 (9th Cir. 1986)). Rule 15 reflects the liberal policy of favoring amendments of pleadings at any time. *Id.* (citing *Galindo*, 793 F.2nd at 1512. Finally, the party opposing amendment bears the burden of showing prejudice. *Jeong*, 46 F. App'x at 450 (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Defendants cannot claim prejudice since their own defense gave rise to the claim, and in any event, they were on notice of the discrimination claim no later than the date OOIDA filed its Reply to Defendants' Oppositions to OOIDA's Motion for Preliminary Injunction on July 21, 2023. Moreover, per the parties' agreed schedule, Defendants have an opportunity to respond in their opposition brief and at oral argument.

B. AB-5's discrimination against interstate commerce is a *per se* dormant Commerce Clause violation.

California law classifies workers that fall within AB-5's business-to-business ("B2B") exemption found in Labor Code § 2776(a) according to the *Borello* test rather than the ABC test applicable to other workers. Defendants, in their opposition to Plaintiffs' motions for preliminary injunction, have asserted that IC drivers can utilize this exemption to continue operating as ICs. For instance, the State Defendants claim that "carriers can continue working with owner-operators, much as they do now, . . . by working with them as independent contractors pursuant to the business-to-business exemption." State Prelim. Inj. Opp. (ECF 175)

at 9-10. The Teamsters agree: "truck drivers *can* qualify for AB-5's business-to-business exemption." *See* IBT Prelim. Inj. Opp. (ECF 173) at 18-19.

If the Court accepts Defendants' proposition, then AB-5 discriminates against interstate commerce and is *per se* unconstitutional because two of the exemption's requirements conflict with the federal rules applicable to **interstate** IC drivers. The relevant exemption requirements are:

- Labor Code § 2776(a)(1) limits the exemption to situations where the worker "is free from the control and direction" of the hiring business "in connection with the performance of the work."
- Labor Code § 2776(a)(8) limits the exemption to situations where the worker "advertises and holds itself out to the public as available to provide the same or similar services."

But the federal Truth-in-Leasing rules require carriers to "have exclusive possession, control, and use of the equipment for the duration of the lease." 49 C.F.R. § 376.12(c)(1). And they apply to "motor carrier[s] providing transportation subject to jurisdiction under subchapter I of chapter 135 that uses motor vehicles not owned by it to transport property under an arrangement with another party." 49 U.S.C. § 14102. "Subchapter I of chapter 135" governs "transportation by motor carrier . . . (1) between a place in—(A) a State and a place in another State"—*i.e.*, motor carriers' movement in interstate and international commerce. 49 U.S.C. § 13501.

Taken together, these rules mean that to lawfully utilize IC drivers and their equipment in interstate commerce, motor carriers must exercise exclusive control over the trucks they lease. But AB-5's business-to-business exemption can only apply to operators who are free from the control of their carriers and who can offer their services to other hiring entities. The indisputable conclusion is that the only carrier-driver relationship that can fall within the business-to-business exemption is one that is not subject to the Truth-in-Leasing rules—*i.e.*, **intrastate** truckers.

AB-5, therefore, discriminates against truck drivers working as independent contractors for motor carriers operating in interstate commerce because they cannot take advantage of the B2B exemption. Only truckers working for intrastate carriers can utilize the B2B exemption to be classified under *Borello*. This disparate treatment favoring **intrastate** operations and disfavoring **interstate** operations is a *per se* violation of the dormant Commerce Clause.

III. AB5 imposes an unconstitutional burden on interstate commerce.

Independent of AB-5's discriminatory effects, the law also imposes an unreasonable burden on interstate commerce in violation of the dormant Commerce Clause. Indeed, AB-5 as applied to trucking inflicts far beyond a mere burden: It wholly eliminates the small businesses driving as independent contractors. Defendants concede that these drivers must find another business model to continue working in California: "[C]arriers can continue working with owner-operators, much as they do now, by treating them 'as employees.'" State Prelim. Inj. Opp. (ECF 175) at 9-10; *see also* IBT Prelim. Inj. Opp. (ECF 173) at 13-18 (arguing that AB-5 does not burden independent truckers because they can work as employes and that "owner-operators *could* obtain and operate under independent motor carrier authority"). AB-5, therefore, gives motor carriers a choice: give up on the California market or incur substantial costs associated with hiring employee drivers.

Drivers face a similar decision: give up all business they currently perform in California to continue operating as an IC driver elsewhere, give up their IC business and independence to become an employee, or, if they have the experience and capital, obtain federal authority to operate as a motor carrier in interstate commerce. These burdens fall even harder on carriers and operators based out-of-state whose businesses are not dedicated to the California market. Their limited income on loads to and from California does not allow them to take advantage of the economies of scale that make complying with AB-5 feasible for California-based operators.

Moreover, the State derives minimal, if any, benefit from misclassifying thousands of properly independent drivers. Even less significant is the benefit California receives from applying California labor laws to carriers and drivers who are based outside of the State. Whether applied to out-of-state truckers or to interstate trucking generally, AB-5's substantial burdens clearly exceed the law's minimal local benefits.

A. Legal standard

The Commerce Clause restricts states' authority to burden interstate commerce, prohibiting state laws that "regulate[] even-handedly to effectuate a legitimate local public interest" if their burdens on interstate commerce clearly exceed the law's putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

B. AB-5 imposes unconstitutional burdens on all carriers and IC drivers operating in interstate commerce.

1. AB-5 imposes significant burdens on interstate trucking carriers and IC drivers.

AB-5 classifies workers as employees if they work in the same line of business as the companies they contract with. Labor Code § 2775(b)(1)(B) ("Prong B"). Because truck drivers work in the same line of business as motor carriers—*i.e.*, hauling freight—AB-5 classifies all truck drivers as employees. Thus, carriers can no longer use IC drivers in California, ending a critical business model.[3]

AB-5 gives carriers operating in California three options:

(1) cease operating in California and ignore one of the world's largest markets;

(2) change their business model to hire employee drivers for all their California operations; or

[3] Order Granting Preliminary Injunction (ECF 89) at 13-15 (recognizing cases and noting that AB5 prevents use of independent drivers) & 14 n.9 (noting that during hearing defendants could not explain how carriers could use independent contractors)

(3) use independent owner-operators for their non-California loads and employee drivers for their California loads.

Plaintiffs have set forth evidence that each choice carries a heavy burden. *See* Spencer Dec. (Ex. 1) ¶¶ 59-64 (substantial costs associated with switching from IC drivers to employees); Schnautz Dec. (ECF 171-3) ¶¶ 9-12 (leaving California means forgoing $40,000-$50,000 per week in revenue); Spencer Dec. (Ex. 1) ¶¶ 63, 65 (stating that many out-of-state carriers will cease California activities rather than taking on burden of AB-5 compliance and that these changes will negatively impact supply chain); Fowler Dec. (Ex. 2) ¶ 18 (noting unfavorable tax consequences).

Independent drivers face a similar choice:

(1) stop driving in California;

(2) give up their independent status; or

(3) for California residents, move out of the state altogether

See, e.g., Hemerson Dec. (ECF 171-4) ¶¶ 12-16; McElroy Dec. (ECF 171-5) ¶¶ 11-16; Williams Dec. (ECF 171-6) ¶¶ 11-16 (Williams relocated to Arizona based on alternatives presented by carrier). Each option results in drivers giving up the small businesses they built.

Defendants' response to Plaintiffs' showing of AB-5's unconstitutional burden on interstate commerce features two primary points:

(1) As a matter of law, eliminating a particular business model does not constitute an undue burden on interstate commerce for *Pike* purposes; and

(2) Truckers can become employee drivers or obtain their own motor carrier operating authority.

See State Prelim. Inj. Opp. (ECF 175) at 9-10; IBT Prelim. Inj. Opp. (ECF 173) at 13-14. But analyzing these arguments and their interrelatedness demonstrates AB-5's uniquely harmful impact.

That is, AB-5's elimination of IC drivers wreaks havoc on an entire subset of the trucking industry in California—it does not effect a mere ministerial change for

thousands of workers. By forcing independent operators to either give up their hard-earned businesses and preferred lifestyles to become employees or incur substantial costs, responsibilities, and liabilities to become motor carriers, AB-5 rids the industry of a critical stepping-stone. The independent contractor driver role frequently serves as a means for former employee drivers to gain experience and know-how in the field, preparing those who would be full motor carriers for that position. Without that step, employee drivers will be forced to skip straight to operating under their own authority without the experience of running their own businesses. *See, e.g.*, Original Spencer Dec. (ECF 122-3) ¶¶ 28, 30-31; *see also* Spencer Dec. (Ex. 1) ¶¶ 36-38.

Moreover, thousands of IC drivers choose that role because it affords them more flexibility than would an employee relationship yet less responsibility (financial and otherwise) than operating under their own authority. Williams Dec. (ECF 171-6) ¶¶ 8-10; Spencer Dec. (ECF 171-2) ¶¶ 23-27.

Defendants imply that because some drivers are misclassified[4] or that some would prefer to be employees, forcing all IC drivers to become employees does not impose a burden on those workers or the carriers that hire them. *See* IBT Prelim. Inj. Opp. 6-7. But, first, there is no evidence that *Borello* was not properly classifying employee drivers, rendering AB-5's ABC test unnecessary to address misclassification in trucking. Second, whether some drivers would like to be employees (and who could be employees under *Borello*) does not negate the fact

[4] Defendants' witnesses imply that all IC drivers are misclassified. *See, e.g.*, Second Viscelli Dec. Ex. B. (ECF 173-3) at 11-12, 15-17 (opining that "most of the drivers that plaintiffs claim will be affected by AB-5 operate just like employees" and that carriers "can easily get [independent contractor drivers] to behave like employee drivers"); Belzer Dec. (ECF 173-1) ¶¶ 29, 33, 35-36, 46 (referring to IC drivers as "dependent contractors" who function the same as employees and that only truckers with their own authority can be considered independent). This is incorrect. One need only look to the fact that a group of independent truckers has joined this suit for the right to remain independent. Furthermore, for years the State has used the *Borello* test to successfully combat truck driver misclassification.

that many properly-classified IC drivers, including OOIDA members, would prefer to be independent but cannot under AB-5.

2. AB-5 provides only illusory local benefits.

As applied in the trucking industry, enforcing AB-5 provides little more than illusory benefits to California. First, the law works against its stated goal of remedying worker misclassification because it misclassifies IC drivers who were properly classified before AB-5. That is, the intended "benefit" of the law is to remedy worker misclassification and exploitation, but it merely creates more misclassification of workers who were considered independent contractors. Furthermore, the existing classification test, *Borello*, properly classified truck drivers (and Defendants have made no contrary showing). Simply put, California enjoys no benefit from a law that misclassifies a whole subset of an industry where the displaced standard already properly classified that industry's workers.

In response, Defendants point out that there is substantial misclassification in the trucking industry. *See, e.g.*, State Prelim. Inj. Opp. (ECF 175) at 12; IBT Prelim. Inj. Opp. (ECF 173) at 22-23.[5] Even accepting this premise, AB-5 fails. The law fights misclassification with (more) misclassification. Furthermore, the State has never shown that applying *Borello* resulted in any significant level of misclassification in trucking, let alone misclassification that would warrant eliminating IC drivers from the industry. On the contrary, the State (and workers) were successful in the vast majority of classification actions pursued under *Borello*. *See, e.g.*, Intervenor-Defendant's Mem. in Supp. of Mot. to Dismiss (ECF No. 63-1) at 6 (citing Analysis of SB 1402, California Senate Committee on May 7, 2018).

AB-5's burdens on interstate commerce far exceed its putative local benefits.

[5] IBT also claims that AB-5 "allow[s] true independent contractors to continue as such." ECF 173 at 23. Presumably, this means that "true independent contractors" can make use of the B2B exemption. As described herein, the exemption, to the extent it applies to truckers, violates the Commerce Clause and Equal Protection Clause. Otherwise, the parties agree that IC drivers must either become employees or motor carriers to continue operating in California under AB-5.

C. The *Pike* balancing test leans even further against AB-5's ABC test as applied to out-of-state truckers.

1. AB-5 imposes the same burdens on out-of-state truckers as those inflicted on California truckers—but to worse effect.

AB-5's burden-benefit comparison paints an even starker picture when considered in the context of truckers who are based out-of-state who do not work a majority of their time in California. Many owner-operators and motor carriers based out-of-state would rather forego their California work than change their business model. The burdens (including the significant costs described above) associated with switching to employee drivers for out-of-state carriers would match the burdens on in-state truckers, but the amount of business they do in California would not justify bearing these costs. Indeed, Plaintiffs' Declarants describe how they have given up California freight because of these burdens. *See* Spencer Dec. (Ex. 1) ¶¶ 54-59.

On the other hand, Defendants have described the increase in employment of truckers and in new motor carriers in California over the last few years. *See* IBT Prelim. Inj. Opp. (ECF 173) at 18; Declaration of Steve Viscelli (ECF 173-3) at 31-32. Thus, testimony from both Plaintiffs and Defendants confirms how these economies of scale result in AB-5 giving California based trucking businesses a competitive edge to take the business that used to be hauled by out-of-state trucking businesses. Plaintiffs' and Defendants' evidence here illustrates that California based motor carriers may be economically enriched by AB-5 at the expense of the motor carriers from outside of the state who have given up the business they used to haul to and from California. The dormant Commerce Clause, as demonstrated by *Pike*, stands as the Constitution's protection against just this type of "evenhanded" regulation that disproportionately impacts interstate commerce. *See Pike*, 397 U.S. at 142; *see also Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 395-96 (2023) (Roberts, C.J., concurring in part) (noting that the dormant Commerce Clause

prohibits nondiscriminatory state laws whose burdens on interstate commerce "clearly outweigh" the law's benefits).

2. California enjoys no benefits from enforcing AB-5 against out-of-state truckers.

California's interest in applying its labor rules wanes with increased distance from the state's borders. *See Ward v. United Airlines, Inc.*, 9 Cal.5th 732 (2020); *Oman v. Delta Air Lines, Inc.*, 9 Cal.5th 762 (2020). In these two cases, the Supreme Court of California examined labor rules to determine whether they covered airline workers who were not based in and did not do a majority of their work in California. In both cases, the court held that the California rules, which did not expressly limit their geographic reach, covered only workers whose principal place of work is California—that is, workers who performed a majority of their work in California or, for workers who did not perform a majority of their work in any one state, workers based in California. *See Ward*, 9 Cal.5th at 755-56; *Oman*, 9 Cal.5th at 773.

Oman and *Ward* demonstrate that California has **no** interest in applying its labor laws to those operators based outside its borders and doing less than half their work in-state. Instead, California only has an interest in applying its labor laws to workers "based" in California (those who work for California companies or perform most of their work in California). And Defendants have offered no evidence that the state has any interest in applying its labor laws to these workers.

The Teamsters criticize Plaintiffs for not adequately demonstrating that AB-5 applies to truckers who are based out-of-state and criticize Plaintiffs for not embarking on a rule-by-rule analysis of the underlying labor laws to determine whether they apply to out-of-state truckers. IBT Prelim. Inj. Opp. (ECF 173) at 19-21. But deciding the *Pike* question does not require such an examination. Instead, OOIDA cites to *Oman* and *Ward* demonstrate that California has a minimal, if any, interest in enforcing its labor laws to workers based out-of-state.

In sum, *Pike* explains that the Commerce Clause prohibits state laws that impose burdens on interstate commerce that clearly exceed the law's putative benefits to the state. Plaintiffs have shown that AB-5 imposes destructive burdens on both IC drivers and the carriers who hire them, whether those companies hail from California or another state. These burdens far outweigh the law's few, if any, putative local benefits, and, as applied to workers based outside the state, it offers no apparent benefits. In short, AB-5 imposes an unconstitutional burden on interstate commerce.

IV. AB-5 Violates OOIDA Members' Right to Equal Protection Under the California and U.S. Constitutions.[6]

The California and United States constitutions guarantee equal protection under the law, but two components of AB-5 treat certain trucking segments differently without any rational basis supporting these distinctions. First, AB-5's B2B exemption gives intrastate operations the benefit of classification under *Borello*, which allows for IC drivers, while denying that treatment for interstate trucking. Exempting local workers from AB-5 undermines and contradicts the law's claimed purpose of attacking misclassification in the state. Second, the construction exemption similarly applies *Borello* to only those truckers who work in the construction industry, a law motivated by naked political favoritism. Both exemptions violate OOIDA's members' constitutional right to equal protection.

Moreover, the legislature's demonstrable animus toward the IC driver business model and its economic protection of the construction industry motivated AB-5, further demonstrating the law's equal protection shortcomings.

A. Legal standard

"[T]he Equal Protection Clause prohibits states from denying to any person within its jurisdiction the equal protection of the laws." *Olson v. California*, 62

[6] 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).

F.4th 1206, 1218 (9th Cir. 2023) (quoting *Am. Society of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 964 (9th Cir. 2021)). Where a law makes economic or occupational classifications, courts apply "rational basis" review and uphold laws "so long as there is any reasonably conceivable state of facts that could provide a rational basis for them." *Olson*, 62 F.4th at 1219. Accordingly, equal protection claimants must therefore show that the challenged law treats them differently from other similarly situated persons and that there exists no rational basis for that distinction.

But a claimed rational basis that is contradicted by reality cannot sustain a legal distinction. *See, e.g.*, *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) (affirming district court's rejection of "claimed legislative justification because the record established that the statute was not rationally related to furthering such interests"). "Needless to say, while a government need not provide a perfectly logically solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality." *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008). And a government's "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Olson*, 62 F.4th at 1220 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

B. AB-5 denies most independent contractor drivers equal protection of the law.

1. The B2B exemption treats intrastate and interstate drivers differently, and that distinction lacks any rational basis.

a. To the extent any truckers can satisfy the B2B exemption, only intrastate operators, and not their interstate counterparts, can possibly meet the requirements.

As articulated above, the federal Truth-in-Leasing rules prevent interstate operators from satisfying the elements required to invoke the business-to-business exception. *See supra* Part II.B. Defendants argue that independent drivers can utilize the business-to-business exception to avoid AB-5's restrictive ABC

classification test. *See* Labor Code § 2776(a). But if that is so, the business-to-business exception could only be invoked by **intrastate** truck drivers, because the elements of the ABC test directly contradict the federal law applicable only to **interstate** truckers and motor carries.

b. This distinction contradicts and undermines AB5's claimed purposes.

Truck drivers and motor carriers that can invoke the business-to-business exception are limited to intrastate California drivers and motor carriers. Interstate truck drivers and motor carriers cannot invoke the business-to-business exception because it is in direct conflict with the federal Truth in Leasing statutes and regulations that apply to interstate drivers and carriers. This too is contrary to AB-5's stated purpose of remedying worker misclassification in California.

There is no rational basis for AB-5 to favor in-state workers with an exemption to the ABC test, but then for the law to deny that same exemption to truckers operating in interstate commerce.

2. AB5's construction exemption violates Equal Protection.

The exception from AB-5 granted to trucking companies involved in the construction industry, *see* Cal. Labor Code § 2781(h), results in disparate treatment of other motor carriers and truckers that serve other industries, despite there being no relevant distinction between the two. In defending the construction industry exemption, the Teamsters submitted the Declaration of Chris Hannan, whose only qualification for offering an opinion is a position as Executive Secretary for the Los Angeles/Orange Counties Building and Construction Trade Council. *See* ECF 173-8 ¶ 2. But "familiar[ity] with the construction industry and with construction contractors' use of subcontractors to provide hauling and trucking services for construction projects" is inadequate to establish expertise sufficient to offer an expert opinion on the construction exception. *Id.* ¶ 3. Even if Hannan's credentials were adequate to admit his testimony as expert, which they are not, Hannan

acknowledges that "contractors [] rely on subcontractors to provide hauling and trucking because the contractor needs [] additional vehicles and personnel for a particular job." *Id.* ¶ 4. That those additional vehicles and personnel—if they work exclusively in the construction industry—can be classified as independent contractors, whereas if they serve other industries as well, they must be employees, is nonsensical.

The Teamsters further defend the construction industry exception by claiming that legislation *always* includes "line-drawing" and that such line-drawing need not be perfect. *See* ECF-173 at 34. The Teamsters also speculate that "the Legislature may have been concerned that the business-to-business exemption would be unavailable for truckers who operate in the construction industry, although noting that "the business-to-business and construction trucking exemptions serve similar functions and share many substantive requirements." *Id.* at 36, implying that IC drivers can invoke the business-to-business exception. But this argument rests on a false premise because few, if any, IC drivers can meet the requirements of the business-to-business exception, and no IC drivers can do so if they operate in interstate commerce. *See supra* Part II.B.

The State Defendants justify the construction industry exception because they contend that the construction industry's use of trucking services is different than other sectors, particularly because it involves more oversight and control. But the legislature's demonstrated animus against the independent contractor trucker driver model defeats any rational basis for the distinction between the construction industry truck drivers versus truck drivers serving any other industry. *Olson*, 62 F.4th at 1220 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973)) (a legislative "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

Finally, the construction industry exception serves only to protect the local construction industry from the vagaries of A B5's elimination of IC drivers. *See*

Merrifield v. Lockyer, 547 F.3d 978, 991 n. 15 (9th Cir. 2008) ("[M]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review.").

The Defendants have no rational basis to justify the disparate treatment of all independent contractors and those working for the construction industry.

3. AB-5's architect demonstrated animus against the independent contractor driver model.

In *Olson*, the Ninth Circuit held that a legal distinction motivated by a lawmaker's "disfavor" of a business model—indeed, the same lawmaker who articulated her distaste for IC drivers—which also undermines the purposes of the challenged law, to fight misclassification and provide workers with the protections afforded to employees, constitutes an irrational basis for the challenges law and establishes an equal protection violation. The architect of AB-5 was certainly motivated by animus toward the independent contractor trucker model; indeed, if the law stands, Former Assemblywoman Gonzalez succeeded in eliminating the small businesses of independent contractor truck drivers from operating in California. In so doing, the law misclassifies workers who were properly classified as independent contractors under the previous test, demonstrating that AB-5, with respect to trucking, was motivated by something other than a desire to properly classify workers as it claimed—a desire to convert workers into employees.

In *Olson*, the Ninth Circuit noted that Ms. Gonzalez's disparagement and "singling out" of Uber and Lyft drivers in the lead-in to the passage of AB-5 meant that the law was unable to meet "the relatively easy standard of rational basis review." 62 F.4th at 1220 (citing *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008)). Ms. Gonzelez expressed the same distaste for independent contractor truck drivers as for Uber and Lyft drivers and others working in the "gig economy."

There is no doubt that AB-5 was the creation of labor unions, who have long wanted to organize truck drivers at the state ports but could not because federal law

prohibits independent contractors from joining unions. "Pushing AB-5 through the legislature is perhaps one of the most significant labor wins in decades," reported Alexia Fernandez of Vox when AB-5 passed. *See* Alexia Fernandez, Gig workers' win in California is a victory for workers everywhere, Vox (September 11, 2019), available at https://www.vox.com/2019/9/11/20851034/california-ab-5-workers-labor-unions.

On the floor of the Legislature in advance of the passage of AB-5, Ms. Gonzalez said, "[L]et me talk for one minute about trucking . . . . We are [] getting rid of an outdated broker model that allows companies to basically make money and set rates for people that they called independent contractors." *See* video record of 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. Ms. Gonzalez also issued a Fact Sheet about AB-5, wherein she described the independent contractor trucker model as "exploitative," dubbing it an "illegal business model." AB-5 Fact Sheet from Assemblywoman Lorena Gonzalez, Californians for the Arts (Sept. 8, 2019), https://www.californiansforthearts.org/ab5-about-blog/2020/2/7/ab-5-fact-sheet-from-assemblywoman-lorena-gonzalez. Ms. Gonzalez wrote further, "Companies have used the practice of misclassification to cut costs at the expense of workers and in turn, created an insurmountable challenge for working families trying to make ends meet. This exploitative business practice has proliferated in industries such as trucking, delivery, janitorial and construction for decades." *Id*.

Ms. Gonzalez repeatedly stated that her goal was to classify more workers as employees so that they could more easily unionize. In a tweet posted May 30, 2019, Ms. Gonzalez wrote: "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."

https://twitter.com/LorenaSGonzalez/status/1134087876390428672. Independent contractors cannot be unionized. Hence, Ms. Gonzelez' animus.

John Myers of the Los Angeles Times wrote, "Few disputes over AB 5 were more intense than those Gonzalez had with the trucking industry . . . ." John Myers, "Lorena Gonzalez likes a good fight. She got it with hotly debated AB-5," Los Angeles Times (February 8, 2020), available at https://www.latimes.com/california/story/2020-02-08/lorena-gonzalez-california-assembly-AB-5-profile.

Defendants argue that "if the challenged law serves legitimate state interests, that conclusion, on its own, prevents parties from succeeding on their Equal Protection claim" based on animus. *See* State Defendants' Opposition to OOIDA's Motion for Preliminary Injunction (ECF 175 at 22) (internal quotation marks omitted) (citing *Boardman v. Inslee*, 978 F.3d 1092, 1119 (9th Cir. 2020)). But *Olson* stands for the opposite: a lawmaker's (indeed, the same lawmaker's) animus against a group targeted by the law along with an effect of the law that contradicts or undermines the law's stated purpose is sufficient to establish a violation of equal protection. Here AB-5's complete elimination of IC driver businesses, including those who were properly classified, is best explained by the animus described above targeting IC drivers' businesses for elimination from the trucking industry.

OOIDA has established an equal protection violation in AB-5's disparate treatment of truckers serving the construction industry versus truckers that serve all other industries, and in its disparate treatment of intrastate vs. interstate IC drivers.

V. The FAAAA preempts AB5 as applied to interstate trucking.

OOIDA joins with the FAAAA preemption arguments advanced by the CTA Plaintiffs.

VI. Conclusion and prayers for relief

Defendants state that the purpose of AB-5 is to address the misclassification of workers in California. Instead of routing out truck driver misclassification, the

law's ABC test automatically classifies all independent contractor truck drivers as employees and eliminates their small businesses from the trucking industry. This means the ABC test misclassifies as employees all of the IC drivers who were properly classified as independent contractors. That would include OOIDA members who chose and prefer to operate under the independent contractor driver small business model. Then inexplicably, AB-5 grants California truck drivers the use of a "business-to-business" exemption from the ABC test, an exemption that is not available to truck drivers operating in interstate commerce under federal law.

These consequences of the ABC test to the trucking industry are a major disruption to interstate commerce. Thousands of properly classified IC driver businesses are terminated. The universe of drivers and motor carriers willing to haul freight in California and expose themselves to liability under AB-5 is greatly narrowed. And those carriers and drivers who change their fundamental business models to comply with AB-5 face significant burdens to do so.

OOIDA continues to seek the preliminary relief sought in its pending motion for preliminary injunction. ECF 171. Furthermore, because the business-to-business exemption is available only to intrastate California motor carriers and drivers, and not to motor carriers operating in interstate commerce, OOIDA asks the Court to declare that the ABC test violates the dormant Commerce Clause of the U.S. Constitution and enjoin its enforcement against motor carriers and truck drivers operating in interstate commerce.

Because the burdens that AB-5 imposes on interstate commerce far outweigh the putative local benefits of AB-5 to California, particularly to motor carriers and drivers based outside of California who perform less than 50% of the work in California, OOIDA ask the Court to declare that the ABC test violates the dormant Commerce Clause of the U.S. Constitution and to enjoin California's enforcement of the ABC test against motor carriers and drivers operating in interstate commerce,

or in the alternative, at least against the motor carriers and driver based outside of California performing less than 50% of their work in California.

Because there is no rational basis for AB-5's business-to-business exemption that applies only to California motor carriers and drivers operating in intrastate commerce and not to motor carriers and drivers operating in interstate commerce; because there is no rational basis for AB-5 to give an exemption to the ABC test to independent contractor operating for the construction industry and not give that exemption to all motor carriers; and because AB-5 sponsors' animus toward independent contractor driver businesses and AB-5's self-conflicting provisions that address misclassification with more misclassification are irrational bases for a law, OOIDA asks the Court to declare that the ABC test violates the equal protection clause of the U.S. and California constitutions and enjoin its enforcement as to all motor carriers and drivers so that all such classes of independent contractor drivers can be classified as independent contractors and, therefore, are treated equally under the law.

Finally, OOIDA prays for all appropriate attorneys' fees and costs.

Dated: September 29, 2023

Respectfully submitted,

The Law Office of Timothy A. Horton
By: /s/ Timothy A. Horton
Timothy A. Horton

Local counsel for Intervenor-Plaintiff Owner-Operator Independent Drivers Association

Paul D. Cullen, Jr. (*pro hac vice*)
Charles R. Stinson (*pro hac vice*)

Attorneys for Intervenor-Plaintiffs Owner-Operator Independent Drivers Association

INDEX OF EXHIBITS

(S.D. Cal. Civ. LR 5.1(e))

INTERVENOR-PLAINTIFF OOIDA TRIAL BRIEF