ROB BONTA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney Genera
STEPHANIE ALBRECHT
Deputy Attorney General
LARA HADDAD
Deputy Attorney General
State Bar No. 319630
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Telephone: (213) 269-6250
Fax: (916) 731-2124
E-mail: Lara.Haddad@doj.ca.gov
Attorneys for Defendants Attorney General Rob Bonta, Director Katrina S. Hagen, Secretary Stewart Knox, Labor Commissioner Lilia García-Brower, and Director Nancy Farias, in their official capacities

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA TRUCKING ASSOCIATION, ET AL., Plaintiffs, **v.** **ATTORNEY GENERAL XAVIER BECERRA, ET AL.,** Defendants.	3:18-cv-02458-BEN-BLM **STATE DEFENDANTS' OPPOSITION TO CTA'S AND OOIDA'S MEMORANDA OF CONTENTIONS OF FACT AND LAW** Judge: The Honorable Roger T. Benitez Trial Date: November 13, 2023

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INTRODUCTION

After remand, this matter is now before the Court for trial, and simply stated, Plaintiffs and OOIDA have failed to make the factual and legal showing necessary to be successful on their challenges to AB 5. Plaintiffs have not distinguished the Ninth Circuit's previous ruling, which is binding, on their renewed F4A claim. Further, they have not presented any substantial, let alone compelling, evidence that the implementation of AB 5 over the past year and half in California has disrupted motor carrier services in any significant way. Nor have they shown that the law has had or will have any actual significant impact on the prices, routes, or services, as necessary for their express and implied preemption claims. Plaintiffs and OOIDA similarly have not proven that AB 5 favors intrastate drivers over interstate drivers or is unduly burdensome in ways that would violate the dormant Commerce Clause. Nor does AB 5 violate the Equal Protection Clause. Plaintiffs and OOIDA have failed to show that there is no conceivable basis for AB 5 and its exemptions. The law readily passes the highly deferential rational basis standard.

Moreover, even if Plaintiffs and OOIDA could succeed on the merits, they have not demonstrated irreparable harm justifying their demand for sweeping injunctive relief requested that would enjoin AB 5's application to every corner of the diverse trucking industry and to every provision providing critical benefits and protections to employees. AB 5 has been in effect in the motor carrier industry for over a year and half, and in that time, none of their predicted harms have come to pass. Their dire predictions are supported only by a handful of individual declarations that at most demonstrate personal preferences. Such evidence is insufficient to counter the reality that there are many ways to comply with AB 5 and there has been no significant disruption of the motor carrier industry. In fact, freight rates are lower than a year ago, and the number of truck drivers in the State (and nationally) has increased. Judgment should be entered for the State.

ARGUMENT

I. THE F4A DOES NOT PREEMPT AB 5

A. Plaintiffs Fail to Distinguish the Ninth Circuit's Decision.

In their memoranda, Plaintiffs and OOIDA raise no new material arguments in support of their F4A preemption claim that the Ninth Circuit has not already rejected. Nor have they submitted any declarations with new evidence, distinct from what they submitted to this Court prior to their appeal. The Ninth Circuit in this case concluded that AB 5's application to motor carriers is not preempted by the F4A, because AB 5 is a generally applicable law that is not "significantly related to rates, routes, or services." *Cal. Trucking Assn. v. Bonta*, 996 F.3d 644, 659 (9th Cir. 2021) (*CTA*). Plaintiffs attempt to distinguish *CTA* by asserting that the Court "took for granted" that motor carriers would be able to continue providing the same services if AB 5 took effect, limiting its analysis of harm to increased costs and indirect effects. ECF 189 at 11. But Plaintiffs' arguments now are materially indistinguishable from the arguments rejected by the Ninth Circuit as a basis for preemption: that drivers would not continue working in the industry if classified as "employees." See ECF 54-3, ¶ 22 (drivers would prefer to work as "independent owner-operator[s]" than employees and carriers would not have enough trucks or drivers to meet maximum demand). As explained below, in the year and a half that AB 5 has been in effect in the industry, this contention has proven untrue. The Ninth Circuit's decision is now the law of the case, and is binding. *Ranchers 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).

B. AB 5 Is Not Preempted by the F4A as a Matter of Law.

Even if this Court holds that Plaintiffs' arguments are distinguishable, their preemption challenge fails as a matter of law. The F4A preempts state law to the extent it relates to the price, route, or service of a motor carrier in its operations involving the transportation of property. 49 U.S.C. § 14501(c)(1). State action is

not preempted if the effect on price, route or services is in a "tenuous, remote, or peripheral [] manner." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013) (internal citation omitted).

Plaintiffs have not demonstrated that AB 5 has the kind of significant impact on motor carriers' services that would justify F4A preemption. The crux of their argument is that "thousands of owner-operators are not willing to work as employees," ECF 189 at 11-12, pointing to anecdotal declarations and "surveys" purporting to demonstrate that drivers want to operate their own businesses. *Id.* at 12, 24-25. But these arguments are not supported by the weight of evidence before this Court. And even if Plaintiffs' scant evidence establishes that some drivers may choose not to work if classified as employees, it still does not meet the standard for F4A preemption.

1. The Motor Carrier Industry Has Expanded in California and Nationally Since AB 5's Passage.

Plaintiffs have not proven that AB 5 has resulted in "trucking companies offering fewer services, or not meeting available demand, or going out of business entirely." ECF 189 at 25. Plaintiffs' only evidence of such dire consequences are several declarations attesting to individual driver's preferences to not be classified as an employee and one declaration from a motor carrier discussing the difficulty of hiring employee drivers; a survey of 2,000 drivers discussing why certain drivers prefer to be classified as independent contractors or as employees; and statements about the limited port protests, which occurred over a year ago.

The reality is that the trucking industry in California has continued to operate and has grown, *adding* over 60,000 truck drivers from 2021 to 2023. ECF 190-1 at 8. Similarly, the industry nationally has expanded. *See*, *e.g.*, ECF 173-3 at 39. Motor carriers have continued to operate. *E.g.*, ECF 173-12, ¶¶ 10 ("Our success in the industry after reclassifying our drivers as employees shows that such a transition is possible"), 11-13; ECF 173-11, ¶¶ 5-10. Nor have freight rates

increased: California has seen "rate declines since AB 5 went into effect." ECF 173-3 at 26; *see also id.* at 26-31 (discussing how lower load-to-truck ratios since AB 5 took effect demonstrate there is no driver shortage). Small business trucking, contrary to speculation by Plaintiffs and OOIDA, is growing faster now than it did before AB 5 went into effect. ECF 173-3 at 31-32.

Plaintiffs' declarations are clearly not representative of drivers or carriers throughout the state. *See*, *e.g.*, 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; ECF 173-12, ¶¶ 10-13; ECF 173-11 ¶¶ 5-10; ECF 173-7, ¶¶ 5-7. The port protests were limited in scope and have not been repeated since AB 5 went into effect. *See* ECF 174 at 20 n.8. The survey of 2,000 drivers to which Plaintiffs cite does not ask the drivers classified as independent contractors if they are *willing* to work as employees. *See* Rebecca M. Brewster, Owner-Operators/Independent Contractors In The Supply Chain, American Transportation Research Institute, pp. 17, 25 (2021).[1] Moreover, the motivating factors listed for independent contractors—the "independence/ability to set hours, schedule/flexibility, and choice of routes/length of haul" (ECF 189 at 19, internal quotations omitted)—often are hallmarks of employee drivers as well. *Infra* at 13-14. The majority of employee drivers surveyed indicated that they were satisfied with each of these factors in their work. Brewster, Owner-Operators/Independent Contractors In The Supply Chain, pp. 17-26, *id.*, p. 26 (majority of employee drivers reported high level of satisfaction). Further, as Defendants' experts have demonstrated and Plaintiffs do not dispute, drivers classified as independent contractors often net less total compensation than drivers classified as employees.[2] *See*, *e.g.*, Viscelli Rebuttal Decl. at ¶¶ 6, 8-11;

[1] Available at available at: https://truckingresearch.org/wp-content/uploads/2021/12/ATRI-OO-IC-in-the-Supply-Chain-12-1-21.pdf.

[2] In addition, evidence before the Legislature and case law reflects a multitude of complaints and lawsuits by drivers alleging they were misclassified as independent contractors prior to AB 5's passage, evincing an obvious desire to be classified as employees. *See* ECF 190 at 24.

ECF 173-1, ¶¶ 60-66. In addition, drivers classified as employees have the value of being covered by unemployment insurance, workers' compensation, and other benefits. *Id*. at ¶¶ 6, 8, 10; Fuentes Suppl. Decl. at ¶¶ 4, 6. Plaintiffs' evidence fails to demonstrate that AB 5 has had or will have a significant impact on services, especially considering that the industry is expanding overall.

2. AB 5 is a Generally Applicable Law With Multiple Ways to Comply.

As the Ninth Circuit recognized, motor carriers may choose to work with their drivers "as employees." *CTA*, 996 F.3d at 659 n.11. It may cost Plaintiffs more in certain respects. ECF 172-15 at ¶ 15. But such "increased costs" of doing business are incidental burdens insufficient to support F4A preemption—no more so than the costs of complying with a wide range of regulations and laws (from business licensing laws to environmental standards to health-and-safety restrictions), none of which triggers preemption. *CTA*, 996 F3.d at 659, 660. As described in State Defendants' Memorandum, the law does not require employers to eliminate flexible or intermittent schedules, or to prevent drivers from working for others. ECF 190 at 25. Nor does it prevent employee truck drivers from using their own trucks. *Id.* at 25-26; *see also* ECF 173-1 at ¶¶ 18, 51-56 (describing how motor carriers compensate drivers separately for the lease of the truck and for the wages of the truck driver). And as discussed *supra* at 3-4, Plaintiffs and OOIDA have failed to demonstrate that there is a shortage of drivers willing to work as employees.

In addition, Plaintiffs have not shown that AB 5 requires the use of employee drivers. ECF 189 at 8. Numerous courts have held otherwise. *See People v. Superior Ct.*, 57 Cal. App. 5th 619, 631 (Cal. Ct. App. 2020) (*Cal Cartage*); *see also* ECF 190 at 35 (citing cases). As Dr. Belzer described at length in his unrebutted declaration, motor carriers can contract with "true owner-operators who operate their truck(s) under their own authority." ECF 173-1 at ¶ 19. In fact, Plaintiffs' declaration attests that motor carriers are utilizing this route since

passage of AB 5. ECF 172-5 (stating that "about 65% of these former contractors obtain their own authority and seek to continue to work with us as brokered carriers"). Or, motor carriers can contract with "other motor carriers that have employee drivers," ECF 173-1 at ¶ 19, a practice that "has a long history in trucking." *Id.* at ¶ 75. Yet Plaintiffs and OOIDA do not discuss these options in their briefing.

In addition, despite numerous industry representatives observing that the business-to-business (B2B) exemption set forth in § 2776(a) is a "viable option," Plaintiffs did not address it. *See*, *e.g.*, Kingston, *If AB5 Comes to California Trucking, There May Be a Way Out: The B2B Exception*, FreightWaves (March 2, 2021) (quoting guidance provided by a law firm serving clients in the motor carrier industry);[3] ECF 173-1, ¶ 73 n.27 (citing Mongelluzzo, *California Truckers Expect 'Business as Usual' Amid AB 5 Implementation*, Journal of Commerce (July 1, 2022)). The B2B exemption provides a set of requirements that, if met, allow application of the *Borello* standard. *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 478 (9th Cir. 2023). OOIDA asserts, without legal foundation, that this exemption discriminates against interstate motor carriers because its requirements conflict with the federal Truth-in-Leasing (TIL) rules, which regulate truck leases.[4] ECF 193 at 28, 31. OOIDA's argument is unsupported by the plain language of the federal regulation and a common-sense application of the B2B exemption.[5]

[3] Available at https://www.freightwaves.com/news/if-ab5-comes-to-california-trucking-there-may-be-a-way-out-the-b2b-exception.

[4] The federal Truth-in-Leasing rules apply to transportation by motor carrier *and* the "procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier," between states, among other places, and if done so on a public highway. 49 U.S.C. § 13501. The TIL provisions at issue therefore not apply to owner-operators that are operating under their own operating authority.

[5] OOIDA's blanket assertion that the B2B exemption favors intrastate truckers and discriminates against interstate truckers is unfounded, as in-state truckers who haul goods in interstate commerce are equally subject to the federal leasing regulations. "The scope of an interstate commerce run under the [Motor Carrier Act] is generous. It includes a purely intrastate run so long as it is a part of a continuous interstate journey." *Id.*, internal citations omitted (purely intrastate

As a preliminary matter, and as OOIDA acknowledges (ECF 193 at 15), TIL regulations state plainly that they are not intended to affect a determination of employee or independent contractor status. 49 C.F.R § 376.12(c)(4). And courts interpret statutes to give effect to both provisions. *See*, *e.g.*, *Southwest Research Inst. v. Unemployment Ins. Appeals Bd*, 81 Cal. App. 4th 705, 709 (Cal. Ct. App. 2000) (where the method of performing a task is dictated by government regulations, it will not go to establishing the manner and means of control necessary for an employment relationship).

But OOIDA does not demonstrate how the B2B exemption conflicts with the TIL regulations. It merely observes that those regulations "require carriers to have exclusive possession, control, and use of the equipment for the duration of the lease." It has not shown how these provisions conflict with the provision of the B2B exemption that requires the provider to be "free from the control and direction of the contracting business entity in connection with the performance of the work." ECF 193 at 31 (citing § 2776(a)(1)). The same control element applies under the *Borello* standard, which OOIDA seeks to have applied to the motor carrier industry. *See S.G. Borello & Sons, Inc. v. Dep't. of Industrial Rel.*, 48 Cal.3d 341, 350 (1989) (stating that the "principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result"). The *Borello* test in turn would apply equally to intrastate and interstate drivers; OOIDA's argument that the same factor under the B2B exemption conflicts with TIL regulation is baseless.

OOIDA similarly has not shown how section 2776(a)(7), which requires that the business service provider "advertises and holds itself out to the public as available to provide the same or similar services" conflicts with the TIL provisions that motor carriers exercise exclusive control over the trucks they lease. ECF 193

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transportation of goods over short distances were part of interstate commerce when those goods were then "destined for out-of-state delivery").

at 31. The federal regulations do not bar independent driving businesses from advertising their availability to perform work for multiple carriers. A driver who owns and leases his or her truck to a carrier can still work for other carriers using the carriers' equipment. Nothing in the federal regulations prevents such arrangements. And Plaintiffs acknowledge that owner-operators prior to AB 5 were working with multiple carriers, presumably without violating the TIL provisions. See ECF 172-1 at 4-5.

In short, AB 5 permits drivers to remain independent contractors and motor carriers who wish to work solely with independent contractors to do so. There is no evidence that AB 5 has affected or will affect services in any way more than a tenuous, remote, or peripheral manner, if at all. *See Pelkey*, 569 U.S. at 361. Plaintiffs' and OOIDA's F4A claim therefore fails.

3. AB 5 is Also Not "Impliedly Preempted" by the F4A.

Plaintiffs again argue that AB 5 is "impliedly" preempted, relying on *Buckman Co. v. Plaintiffs' Legal Com.*, 531 U.S. 341, 352 (2001) and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) to assert that it impedes Congress' objectives. ECF 189 at 31-33. These cases are inapposite. *Buckman* concerned an obstacle to aspects of a federal statutory regime separate from the statute's preemption clause. *Buckman*, 531 U.S. at 348, 348 n.2. *Crosby* involved expansive foreign affairs preemption principles that have no application here. *Crosby*, 530 U.S. at 374-78.

Nothing in the F4A supports Plaintiffs' underlying premise that Congress intended the Act to promote independent contracting in trucking over employment. *See CTA*, 996 F.3d at 664 (F4A's legislative history does not reflect a Congressional intent to preempt states' traditional authority to protect employees). Plaintiffs also cite to *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008), in support of their implied preemption argument. ECF 189 at 31-32. But *Rowe* concerned *express* F4A preemption, where the challenged law forbade use of

a delivery service by tobacco retailers unless it followed set requirements. *Rowe*, 552 U.S. at 367, 371. AB 5 does not dictate how motor carriers transport their goods; it is an employee classification test.

Plaintiffs likewise cannot show that AB 5 is so burdensome as to justify implied preemption. *See supra* at 3-6; *see also* ECF 190 at 30-31. Nor does AB 5 create an impermissible patchwork or "Balkanization" of state regulations, as they assert. ECF 189 at 29-30, 32-33; *id.* at 29-30. As State Defendants have previously pointed out and Plaintiffs' own evidence supports, there has long been a plethora of differing state worker classification standards across the 50 States. ECF 190 at 31; Brewster, Owner-Operators/Independent Contractors In The Supply Chain, American Transportation Research Institute, p. 1 (no singular federal classification test exists and variations exist at the state level).[6]

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

As the Supreme Court 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 dormant Commerce Clause "is driven by concern about economic protectionism," "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (citation omitted). Plaintiffs and OOIDA have not shown that AB 5 discriminates between intrastate and interstate truckers. It is a neutral law that applies equally to

[6] Plaintiffs assert that "courts in other jurisdictions" have found that the F4A preempts the ABC test. However, they cite to only one such decision, which the Ninth Circuit explicitly rejected. ECF 189 at 29 n.9, citing *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016). In fact, 20 states and the District of Columbia use some variation of the ABC test for employment classification. Rebecca M. Brewster, Owner-Operators/Independent Contractors In The Supply Chain, American Transportation Research Institute, p. 11, available at: https://truckingresearch.org/wp-content/uploads/2021/12/ATRI-OO-IC-in-the-Supply-Chain-12-1-21.pdf.

hundreds of industries, including trucking. Any burden on interstate commerce applies equally to intrastate commerce and is incidental. Any such burden is also justified by the significant state interests in preventing misclassification and ensuring that law-abiding employers—employers that properly classify their workers as employees—are not harmed by unfair competition from employers that engage in misclassification.[7]

A. AB 5 Does Not Discriminate 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 Famers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013). 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 & n.12 (stating same). Plaintiffs and OOIDA have not shown that AB 5 or its exemptions discriminate against interstate commerce. Plaintiffs cite to *American Trucking Associations, Inc.v. Scheiner*, 483 U.S. 266 (1987), to support their argument. ECF 189 at 28. But in *Scheiner*, the state law facially treated out-of-state registered vehicles differently than in-state registered vehicles, and therefore did not treat out-of-state vehicles "with an even hand." *Scheiner*, 483 U.S. at 282. The ABC test and exemptions are all neutral and do not distinguish between in-state and out-of-state operators.[8] *See, e.g.* §§ 2775-

[7] Plaintiffs and OOIDA also base their dormant Commerce Clause argument on the mistaken premise that there exists a nationwide preference for truck drivers to be classified as independent contractors. *See*, *e.g.*, ECF 189 at 27-28. Not so. *See supra* at 3-5; *see also* ECF 190 at 39 (discussing Department of Labor statistics on driver misclassification); ECF 190-1 at 87 (same).

[8] A state requirement that certain professions or occupations hold a license issued by that state does not violate the dormant Commerce Clause. See *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2475 (2019) (striking down a residency requirement but implicitly recognizing the authority of the state to require in-state licensing); *see also Nat'l Conf. of Pers. Managers, Inc. v. Brown*,

2787.

And while Plaintiffs have failed to prove the practical "effect" that they assert, it would not matter if they had: The Supreme Court has made clear that a law is not impermissibly discriminatory, for dormant Commerce Clause purposes, merely because the practical effect may be to favor certain in-state entities. *See, e.g.*, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126-127 (1978); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (even where out-of-state dairies will be burdened more than in-state, the burden is not clearly excessive in light of substantial state interest).

OOIDA admits that AB 5 imposes the same burdens on in-state and out-of-state truckers. ECF 193 at 37. Plaintiffs and OOIDA have not shown that AB 5 favors intrastate businesses.

B. AB 5 Puts No Excessive Burden on Interstate Commerce

All nine Supreme Court justices have 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 to "'smoke out' a hidden protectionism." *Nat'l Pork*, 598 U.S. at 379; *id.* at 394. The *Pike* standard 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 such situations, it is near impossible to show a Commerce Clause violation. *See Nat'l Pork*, 598 U.S. at 370; ECF 190 at 33-34 (compiling cases).

Plaintiffs and OOIDA have not met this exacting standard. In a "small number" of 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). Not so here: the F4A does

690 F. App'x 461, 463 (9th Cir. 2017) (California Talent Agency Act that requires a license issued by the Labor Commissioner does not violate Commerce Clause because it does not preclude out-of-state entities from obtaining the license).

not impose or sanction a uniform national rule of determining employee status; nor does such a rule exist. *Supra* at 9. Plaintiffs and OOIDA contend that laws like AB 5 have historically been struck down as they "try to regulate the interstate transportation of goods or services in commerce." See ECF 189 at 27. In support of this argument, Plaintiffs again invoke inapposite cases. ECF 189 at 27, citing *Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520 (1959), *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761 (1945) (*Southern Pacific*), and *Scheiner*, 483 U.S. at 284. *Scheiner* is a discrimination case discussed, and distinguished, *supra* at 10-11. And *Bibb* and *Southern Pacific* may really have been discrimination cases (*see Nat'l Pork*, 598 U.S. at 379 n.2), and in any event involved highly anomalous restrictions that directly burdened the flow of commerce across state borders. *See Bibb*, 359 U.S. at 530 (mud flap restrictions that required trucks to stop for hours at state border had 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). AB 5 creates no analogous burdens: it does not impede the free movement of commerce. Contrary to Plaintiffs' assertion and as discussed in State Defendants' memorandum, the Ninth Circuit has previously rejected *Pike* challenges to California labor laws that are quite similar to AB 5.[9] ECF 190 at 37-38 (discussing *Ward v. United Airlines, Inc.*, 986 F.3d 1234 (9th Cir. 2021), *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127, 1133 (9th Cir. 2021)).

Plaintiffs and OOIDA further assert, without basis or evidence, that the ABC test forces them to stop using individual owner-operators for their trucking services. The Commerce Clause does not protect a party's preferred business model or

[9] OOIDA attempts to use *Ward*, and another California case, *Oman v. Delta Air Lines, Inc.*, 9 Cal. 5th 762, 773 (Cal. S. Ct. 2020), to argue that California's regulatory interest is limited to workers who are based in California. However, California also has an interest when an employee performs at least some work in California and "California serves as the physical location where the worker presents himself or herself to begin work." *Ward*, 986 F.3d at 1238.

preferred "methods of operation" in the marketplace. *Nat'l Pork*, 598 U.S. at 384 (controlling plurality opn.); *Exxon Corp. v. Governor of Md.*, 437 U.S. at 127. Moreover, as detailed above, AB 5 does not preclude motor carriers working with owner-operators, much as they do now, "as employees," *CTA*, 996 F.3d at 659 n.11, or under the discussed options for independent contracting. *See supra* at 5-8.

In addition, Plaintiffs and OOIDA argue that AB 5 imposes excessive costs because motor carriers would have to overhaul their business practices to comply with AB 5. ECF 193 at 21 (costs of reclassifying their drivers as employees); ECF 193 at 20-21 (tax consequences of becoming a motor carrier). Plaintiffs and OOIDA both exaggerate the burdens of compliance with AB 5.[10] *Cf.* EFC 173-12, ¶¶ 10-15; ECF 173-7, ¶¶ 8-9; ECF 173-11, ¶¶ 11-12. And given that AB 5 has been in effect for well over a year and half for motor carriers without any serious or widespread disruptions to the State's or national trucking industry, Plaintiffs' speculation is belied by recent experience. *Nat'l Pork*, 598 U.S. at 385 (speculative possibility of substantial harm not enough to prove Commerce Clause violation).

Moreover, the declarations to which Plaintiffs cite reflect decisions by specific *motor carriers* to avoid compliance with AB 5. ECF No. 172-4, ¶ 15; ECF 172-3, ¶¶ 9-10; ECF 155-5, ¶¶ 11-12; *but cf.* ECF 173-4, ¶ 6 (describing no change to work since being classified as an employee); ECF 173-5, ¶ 10 (same); ECF 173-6, ¶ 13 (same). At most, the law incidentally burdens carriers' preferred method of doing business, which does not trigger a *Pike* balancing of costs and benefits under the Commerce Clause. *See*, *e.g.*, *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1033 (9th Cir. 2021), *aff'd*, 598 U.S. 356. *Nat'l Pork Producers Council*, (citing *Exxon*, 437 U.S. at 127-28).

OOIDA's additional claimed harms stemming from becoming an employee do

[10] The Ninth Circuit held in a similar challenge by CTA to complying with the *Borello* test, that at most, motor carriers will face a "modest increase in business costs" if a worker is found to be an employee. *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 965 (9th Cir. 2018).

not substantially harm interstate commerce and none are based on more than pure speculation. ECF 193 at 21-23. And each of these harms have been rebutted by Defendants' experts. Employee drivers do not make less than independent contractors on a net basis. *See* Viscelli Rebuttal Decl., ¶¶ 6-10; *see also* ECF 173-1, ¶¶ 60-66. As discussed above, drivers need not lose their independence if classified as employees.[11] ECF 190 at 15. They need not lose the discretion they already have over how to do their work.[12] ECF 190 at 15-16.

At most, AB 5 imposes an incidental burden on 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 at 1032.

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

The Supreme Court long ago made clear that the Commerce Clause tolerates incidental burdens on interstate commerce in light of the substantial state interest in legislating in areas of legitimate local concerns. *Clover Leaf Creamery Co.*, 449 U.S. at 473. As discussed at ECF 190 at 39-40, AB 5 serves the important interest of ensuring that employees receive benefits guaranteed by law, including minimum wage, unemployment insurance, workers' compensation, sick leave, and others and to level the playing field for compliant employers. Stats. 2019, ch. 296, § 1(e) (Cal. 2019); ECF 190-1 at 113:19-114:13 (legislative hearing discussing harms to compliant employers). Plaintiffs have not proven that the exemptions in AB 5 undercut this stated goal. The Legislature carefully evaluated which industries to

[11] OOIDA also asserts that drivers, if reclassified as employees, "will be unable to choose the freight they haul." ECF 193 at 21. This is false for the same reasons listed above. But this statement also contradicts their contention that all types of freight are the same, and there is nothing distinguishing different types of trucking, including construction trucking. *See* ECF 193 at 41. As explained below, this contention is also wrong. *See infra* at 18-20.

[12] OOIDA fears that employee drivers may now "be subject to the whims of their employers' dispatchers." ECF 193 at 21; ECF 193-1 at ¶¶ 55, 57. But as several drivers have testified in their sworn declarations, when classified as independent contractors, they were already at the whims of motor carriers' dispatchers. ECF 173-4, ¶ 9; ECF 173-5, ¶ 5; ECF 173-6, ¶ 5; ECF 173-9, ¶¶ 7, 9.

include to further the State's interest. ECF 190 at 41-42; *infra* at 16, 18. The Legislature concluded that the evidence of misclassification of truck drivers justified applying the ABC test to the trucking industry. *See* ECF 190 at 40.

OOIDA's contention that AB 5's benefits are illusory is premised on the faulty notion that owner-operators were properly classified as independent contractors prior to the law's passage. ECF 193 at 36. OOIDA's argument that there is no evidence that the *Borello* test did not result in properly classifying employee drivers (ECF 193 at 36) belies the California Supreme Court's explicit acknowledgement that the test was not sufficient to root out misclassification. *Dynamex Oper. W. v. Super. Ct.*, 4 Cal. 5th 903, 954 (Cal. 2018) (*Borello* test affords hiring entities "greater opportunity to evade its fundamental responsibilities under a wage and hour law" than the ABC test). The argument also ignores the evidence of widespread truck driver misclassification and the multitude of legal challenges under *Borello*.[13] *Supra* at 4; ECF 90 at 39.

Plaintiffs and OOIDA have not proven that AB 5 imposes clearly excessive burdens on interstate commerce and thus their challenge under the dormant Commerce Clause fails.

III. AB 5 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

AB 5 readily passes rational basis review, which strongly presumes the validity of state law. Plaintiffs and OOIDA have not negated "*every conceivable* basis that might support [AB 5]." *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012) (emphasis added, citations omitted). The constitutional inquiry ends if, as here, there are plausible reasons for the classification. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993).

[13] OOIDA's suggestion that AB 5 should only apply to in-state truckers because the law's benefits somehow "wane" when applied to out-of-state truckers, ECF 193 at 38, misses the mark. Such an application would raise serious Commerce Clause concerns.

A. AB 5's Rational Inclusion of Trucking is Not Due to Animus.

AB 5 seeks to remedy the widespread misclassification of workers as independent contractors. AB 5 § 1(c); *see also* ECF 190 at 39-40. The Legislature weighed several factors when determining the professions to which the ABC test should apply: "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." *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 965 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2870 (2022) (*ASJA*); *see also* ECF 190-1 at 76-78; ECF 190 at 40-42 (discussing legislative history). In the motor carrier industry, the Legislature had before it evidence, confirmed by Defendants' experts, of the rampant misclassification of truck drivers.[14] ECF 190 at 14-16; *see*, *e.g.*, ECF 190-1 at 88.

AB 5's inclusion of the motor carrier industry (among hundreds of other industries) therefore serves legitimate state interests. "That 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). Moreover, Plaintiffs and OOIDA have not established anything close to animus. The legislative materials demonstrate that the ABC test applies to motor carriers because, as Assemblywoman Lorena Gonzalez stated, drivers "act a lot like employees." ECF 190-1 at 641:21-25. This, and all of the quotes from the legislative history to which Plaintiffs cite, underscore the Legislature's concern with addressing worker misclassification in the trucking industry.[15] OOIDA also

[14] The legislature need not articulate its reason for enacting a statute; even in the absence of "legislative facts" explaining the distinction, "a legislative choice is not subject to courtroom fact-finding[.]" *F.C.C.*, 508 U.S. at 315.

[15] The other statements to which Plaintiffs and OOIDA point are tweets that are not part of the legislative history of AB 5, and do not demonstrate any animus to motor carriers, as discussed at ECF 190 at 45 n.11. The statements expressing union sentiment have nothing to do with motor carriers, much less reflect animus against them.

points to an AB 5 fact sheet as evidence of animus. But the fact sheet is about misclassification in general, across *all* industries affected by AB 5, and how it is exploitative and creates unfair competition with companies properly classifying their employees.[16] ECF 193 at 18-19. Moreover, the cited statements come only from the sponsor of the bill, which the entire state legislature was involved in crafting. There is no evidence that the Legislature was motivated by animus.

Nor does AB 5 benefit "favored constituents" at the expense of motor carrier services, as Plaintiffs assert (without evidence). ECF 189 at 34, 36. "Accommodating one interest group is not equivalent to intentionally harming another." *Gallinger v. Becerra*, 898 F.3d 1012, 1021 (9th Cir. 2018); *cf. U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (invalidating law targeting disfavored group). Plaintiffs' cited cases are inapposite as there is no evidence that AB 5 fails to further its goals of targeting misclassification in hundreds of industries or that motor carriers are similarly situated to the exempted occupations. *See Merrified v. Lockyer*, 547 F.3d 978, 991 & n.15 (9th Cir. 2008) (no rational basis for statutory exemptions other than "economic protectionism for its own sake"); *Santos v. City of Houston, Tex.*, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (ordinance excluded jitneys from city streets while numerous other similarly situated businesses providing ground transportation operated without restriction); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty., W. Va.,* 488 U.S. 336 (1989) (uniform assessment system resulted in devaluing comparable property); *Diaz v. Brewster*, 656 F.3d 1008, 1015 (9th Cir. 2011) (terminating health care benefits for same-sex but not heterosexual partners is impermissible).

Similarly, *Olson v. State of California*, 62 F.4th 1206 (9th Cir. 2023) and *Fowler Packing v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) are inapplicable as the facts and procedural posture are different.[17] *See Quinn v. LPL Fin. LLC*, 91 Cal.

[16] The fact sheet is available at https://www.californiansforthearts.org/ab5-about-blog/2020/2/7/ab-5-fact-sheet-from-assemblywoman-lorena-gonzalez.

[17] The State strenuously disagrees with *Olson*; rehearing petition is pending.

App. 5th 370, 380-382 (2023), review denied (Aug. 9, 2023) (rejecting application of *Olson* to Equal Protection challenge to AB 5 exemption). The Ninth Circuit held that *Olson* plaintiffs had plausibly alleged animus—at the motion to dismiss stage—and in *Fowler*, the court found that the narrow carve-outs were intended to "procure the support" of a single labor union. *Olson*, 62 F.4th at 1220; *Fowler*, 844 F.3d at 815. There is *no* evidence that anything remotely similar occurred here: Plaintiffs and OOIDA have failed to demonstrate animus against the motor carrier industry or interstate truckers and carriers.

B. AB 5's Exemptions Do Not Violate Equal Protection.

Plaintiffs and OOIDA raise no new arguments with respect to AB 5's exemptions of occupations and industries from the ABC test that they have not already raised. As explained at length, the exemptions are rational and Plaintiffs and OOIDA cannot establish that there is no conceivable basis for them, including that the exempted professions—such as barbers and in-home cosmetic sellers—are similarly situated to motor carrier drivers for the purposes of their Equal Protection claim.[18] ECF 190 at 41-42. AB 5's exemptions do not undermine its goals. In fact, several courts have already held that AB 5's exemptions meet the rational basis test. *See Quinn*, 91 Cal. App. 5th at 380-382 (exemption of registered securities-broker-dealers and investment advisers); *Whitlach v. Premier Valley Inc.,* 86 Cal.App.5th 673, 706-708, (2022*)* (exemption of real estate agents); *ASJA*, 15 F.4th at 965 (9th Cir. 2021) (exemption of freelance writers and photographers).

C. Construction Trucking's Time-Limited Extension is Rational.

The State has the power to "impose widely different" treatments "on various trades or professions" and not run afoul of the Equal Protection Clause. *ASJA*, 15 F.4th at 965, n.11. "For example, a rule can apply to opticians but not optometrists." *Id.* (citing *Williamson v. Lee Optical of Okla. Inc*., 348 U.S. 483,

[18] OOIDA's argument that the B2B exemption is only available to intrastate truckers because of the TIL regulations similarly fails. *See supra* at 6-8.

486–91 (1955)). The carve-out for construction trucking services, which imposes multiple strict requirements and expires next year, is rational. The Legislature rationally sought to avoid "significant operational impacts within the heavy civil construction industry for a limited period of time." Cal. Labor Code § 2781; ECF 190 at 43 (discussing requirements); ECF 190-1 at 713.

OOIDA and Plaintiffs have not proven that the Legislature was motivated by animus against the independent contractor trucker driver model, or that there is no rational basis for the distinction between the construction industry truck drivers and truck drivers serving any other industry. ECF 193 at 42; ECF 189 at 38. While Plaintiffs and OOIDA disagree with the rationale for treating the construction trucking industry differently, there is a plausible policy reason for doing so, supported by substantial unrebutted evidence.[19] *See* ECF 190 at 43-44 (discussing construction trucking); ECF 173-8, ¶¶ 4-5. Plaintiffs and OOIDA have not shown that the time-limited construction trucking service carve-out to its overall goal is so attenuated as to render the distinction arbitrary or irrational." *Armour,* 566 U.S. at 681.

Legislatures may act incrementally, as they see fit, to remedy problems. *See ASJA*, 15 F.4th at 965; *Williamson,*348 U.S. at 487-88.). And as discussed in State Defendants' memorandum, the time-limited exemption does not exclude the construction industry, but rather phases in its compliance with AB 5. ECF 190 at 42-45. The Legislature reasonably determined that the remainder of the trucking industry did not need such a transition period—underscored by the lack of disruption to the trucking industry as AB 5 has applied to it for the past year.[20]

[19] OOIDA criticizes one declaration on the basis that the declarant is not an expert. ECF 193 at 41. But his testimony comes from his experience in the construction industry and is not offered as expert testimony. *See* ECF 173-8. They also selectively quote his declaration while ignoring his testimony that construction contractors use subcontractors with *specialized* vehicles and drivers. ECF 173-8 at ¶ 5. OOIDA fails to address the differences between construction trucking and non-construction trucking.

[20] Even if the carve-out were irrational, the remedy would be to invalidate the

Supra at _; *see also* ECF 173-6, ¶¶ 5-7; ECF 173-12, ¶ 4. Therefore, Plaintiffs' and OOIDA's Equal Protection claims fail.

IV. PERMANENT INJUNCTIVE RELIEF IS NOT WARRANTED HERE.

Even if Plaintiffs and OOIDA succeed on the merits, which they do not, they have not established irreparable harm from AB 5. *See* ECF 190 at 49-50. They raise no new arguments in their memoranda.[21] Their asserted harms—that "[e]ntire lifeworks are at stake," ECF 189 at 41, that AB 5 is "a major disruption to interstate commerce," ECF 193 at 46—have not been borne out by recent experience, are unsupported by evidence, and are legally flawed. By contrast, the public interest will be greatly disserved, and Defendants and workers irreparably harmed, if AB 5 is enjoined. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012).

CONCLUSION

For these reasons, judgment should be entered in State Defendants' favor.

carve-out, not AB 5 wholesale. ECF 190 at 45. And any remedy would be moot at the end of 2024, when the carve-out expires.

[21] The Ninth Circuit in *CTA* did not review this Court's finding of irreparable harm at the preliminary injunction stage because Plaintiffs were unlikely to succeed on the merits. *CTA*, 996 F.3d at 664-665.

Dated: October 27, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General
STEPHANIE ALBRECHT
Deputy Attorney General

s/ Lara Haddad
LARA HADDAD
Deputy Attorney General
Attorneys for Defendants Attorney General Rob Bonta, Director Katrina S. Hagen, Secretary Stewart Knox, Labor Commissioner Lilia García-Brower, and Director Nancy Farias, in their official capacities

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 October 27, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

STATE DEFENDANTS' OPPOSITION TO CTA'S AND OOIDA'S MEMORANDA 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 October 27, 2023, at Los Angeles, California.

Lara Haddad
Declarant

Lara Haddad
Signature

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