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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 OPPOSITION TO DEFENDANTS' MEMORANDA OF CONTENTIONS OF FACT AND LAW

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

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INTRODUCTION

Defendants' briefs attempt to confuse the issues in numerous ways: They emphasize several different ways that truck drivers can work under AB-5; they minimize the significance of the federal regulations applicable to all leased interstate operations; and they focus on classification and worker exploitation issues in California generally. In so doing, they leave unrebutted the primary premises supporting OOIDA's claims:

- AB-5's ABC eliminates the independent contractor driver model, burdening thousands of small business trucking companies;
- AB-5's business-to-business exemption directly conflicts with the federal Truth-in-Leasing rules, resulting in an exception that favors intrastate over interstate operations; and
- Political animus motivated AB-5's sponsor and her specific intent to eliminate the independent contractor driver model and expand union participation.

These unrefuted facts establish that AB-5 discriminates against and imposes undue burdens on interstate commerce in violation of the dormant Commerce Clause, and that the disparate treatment of AB-5's business-to-business and construction exemptions violates the U.S. and California Constitutions' Equal Protection clauses.

ARGUMENT

I. Independent contractor drivers, however labeled, cannot operate under AB-5's ABC test[1].

The parties and the Court agree that AB-5 eliminates the small businesses of independent contractor truck drivers. *See* State Defendants' Memorandum of Contentions of Fact and Law ("State Brief") (ECF 190) at 16-18; Intervenor-

[1] OOIDA uses "AB-5" to refer to AB-5, as modified by AB-2257.

Defendant International Brotherhood of Teamsters' Memorandum of Contentions of Fact and Law ("Teamsters Brief") (ECF 186) at 12, 16; *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 at the preliminary injunction hearing that Defendants could not provide an example of how a motor carrier could contract with an owner-operator as an independent contractor).

Defendants attempt to obfuscate the substantive issues by inventing various monikers for truck drivers who own their vehicles and lease their equipment and services to licensed motor carriers but are neither employees nor motor carriers operating under their own U.S. Department of Transportation authority. Cutting through that confusion, OOIDA refers to these drivers as independent contractor drivers ("IC drivers").

Similarly distracting is Defendants' insistence that IC drivers can continue to drive under AB-5. None of their examples involves a driver operating as an independent contractor for a motor carrier, and most require these drivers to give up their small businesses and change their business model to become employees or obtain their own federal operating authority as motor carriers to work in California. *See* Intervenor-Plaintiff OOIDA's Memorandum of Contentions of Fact and Law ("OOIDA Brief") (ECF 193) at 9-10. Among other reasons, because IC drivers are performing the same work of the hiring entity's business—hauling freight—they could never meet Prong B of the AB-5's ABC test to allow them to remain independent contractors. Cal. Lab. Code § 2775(b)(1). Although AB-5 purports to address misclassification, the law was, in part, designed to eliminate the IC driver role, motivated by support for increased unionization. *See* OOIDA Brief (ECF 193) at 37-38 (quoting AB-5's sponsor's statements disparaging and "getting rid of" the IC driver model); *id.* (quoting sponsor's pro-union statements); *cf.* Judy Lin, *Who's in, who's out of AB 5?*, CalMatters.org (Sept. 11, 2019),

https://calmatters.org/economy/2019/09/whos-in-whos-out-of-ab-5/ (noting that one of AB-5's sponsor's goals "from the beginning" was to expand unions).

Defendants' arguments that OOIDA waited too long to challenge the constitutionality of AB-5 is baseless. When a statute inflicts continuing or repeated harm, a new claim arises, and limitations period commences, with each new injury. *See Flynt v. Shimazu*, 940 F.3d 457, 462 (9th Cir. 2019) (citing *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 521-22 (6th Cir. 1997) (quoting *Palmer v. Bd. of Educ. of Comm. Unit Sch. Dist. 201-U*, 46 F.3d 682, 686 (7th Cir. 1995) ("A series of wrongful acts . . . creates a series of claims.") and *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) ("Each discrete discriminatory act starts a new clock for filing charges alleging that act.")). The State has not indicated when—or even how—it intends to enforce AB-5, but the law is plainly discriminatory and protective of in-state interests. OOIDA's challenge is timely.

II. AB-5 discriminates against interstate commerce because the business-to-business exemption treats local, intrastate truckers differently than interstate truckers.

Defendants apparently misunderstand OOIDA's discrimination claim, asserting that federal worker requirements cannot decide worker classification. OOIDA does not argue that the federal Truth-in-Leasing rules dictate driver classification. Rather, because these federal rules require a relationship between interstate motor carrier and IC driver that requires carrier control of the driver, interstate operators cannot both comply with the federal rules and satisfy the business-to-business ("B2B") exemption. Cal. Lab. Code § 2776(a). But drivers operating intrastate and not subject to those rules could. Thus, AB-5 discriminates against IC drivers working in interstate commerce and burdens interstate commerce itself. OOIDA Brief (ECF 193) at 21-25.

Moreover, Defendants imply that because AB-5 does not state that it discriminates against interstate or out-of-state interests, it does not violate the dormant Commerce Clause. State laws may discriminate in intent or effect; here,

AB-5's B2B exemption favors intrastate truckers at the expense of interstate operations. In short, Defendants do not refute OOIDA's showing that AB-5 discriminates against interstate commerce in violation of the Commerce Clause.

A. Interstate operators cannot simultaneously comply with the federal leasing rules and satisfy the B2B exemption.

The Teamsters argue that "[t]he Truth-in-Leasing regulations [] say on their face that they are not dispositive of employee status." Teamsters Brief (ECF 186) at 16 (citing 49 C.F.R. § 376.12(c)(4)). The statement is accurate but irrelevant to OOIDA's point. The State, on the other hand, says that OOIDA fails to explain how the requirements conflict or even how the regulations come into play.

OOIDA does not argue that the Truth-in-Leasing regulations directly determine a driver's employment status. Those rules are not worker classification standards and specifically leave the classification question to state law. But the Truth-in-Leasing rules mandate the fundamental nature of the carrier-driver relationship in interstate operations, while California (and other state) law controls how to classify this relationship. Reviewing both sets of laws, OOIDA's point is undeniable: an interstate driver cannot both comply with the Truth-in-Leasing regulations and satisfy the B2B exception.

The Truth-in-Leasing rules apply to all "transportation by motor carrier . . . (1) between a place in—(A) a State and a place in another State"—in other words, all drivers and carriers operating in interstate commerce. 49 U.S.C. § 13501; 49 U.S.C. § 14102 (referring to 49 U.S.C. chapter 135 to define scope of Truth-in-Leasing rules' application). And those rules dictate key features of the interstate carrier-driver relationship.

The rules explicitly require that the lease agreement provide that the motor carrier—the lessee of the IC driver's equipment—"have exclusive possession, control, and use of the equipment [and] assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. § 376.12(c)(1).

The B2B exception requires the opposite: that the "service provider [the driver] is free from the control and direction of the contracting business entity [the hiring entity] in connection with the performance of the work, both under the contract for the performance of the work and in fact." Cal. Lab. Code §§ 2275(b)(1)(A); 2276(a)(1). The direct conflict between these two provisions means that the B2B exception is unavailable to any IC driver or motor carrier engaged in interstate commerce (as defined by 49 U.S.C. § 13501). Contrary to Defendants' assertion, this is no mere paperwork requirement: "The required lease provisions shall be adhered to and performed by the authorized carrier." 49 C.F.R. § 376.12. The rules directly contradict Defendants' implicit suggestion that carriers could ignore the lease provisions and federal rules so that their drivers can be independent contractors under the B2B exemption.

Defendants' citation to cases that stand for the proposition that government regulations should not be used to determine a worker's classification (*e.g.*, Teamsters Brief (ECF 186) at 16-17) do not bear on this conflict. That is, the Truth-in-Leasing rules do not require specific carrier or driver conduct that could be disregarded in a classification determination. Rather, they dictate the relationship between carrier and IC driver that involves a level of control of drivers' work; ignoring that actual relationship in classifying a driver is an absurd proposition.

The federal rules do not define "exclusive possession and control." But Defendants seemingly suggest, without example, that carriers *could* exercise such "exclusive possession and control" (49 C.F.R. § 376.12(c)(1)) over drivers yet not be exercising "control and direction of the" drivers (Cal. Lab. Code § 2776(a)(1)), thus simultaneously satisfying both standards. This argument fails for multiple reasons. First, it fails on its face, as words in statutes are given their ordinary meaning unless otherwise indicated, and both standards refer to a hiring entity exercising "control" over its workers. *See HollyFrontier Cheyenne Ref. v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176 (2021) (quoting *FDIC v. Meyer*, 510

U.S. 471, 476 (1994)). Moreover, in the worker classification context, the question of "control" is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal.3d 341, 350 (1989). The "control" in the B2B exemption, therefore, strikes at the core of the carrier-driver relationship, as defined by the Truth-in-Leasing rules. Defendants have not shown that there is *any* space between the federal rules' "exclusive possession and control" and the B2B exemption's "free from the control and direction" that would allow for a carrier-driver relationship that meets both requirements.

Accordingly, the B2B exception is available to motor carriers and their drivers from California who do not haul loads outside of the state because they do not have to comply with the Truth-in-Leasing regulations. But it is *not* available to drivers working as independent contractors for carriers engaged in interstate commerce. Under AB-5, these interstate drivers cannot fit within the B2B exemption and be classified as independent contractors under *Borello*, but intrastate drivers not subject to the Truth-in-Leasing rules can. Hence, AB-5 discriminates against interstate IC drivers and against interstate commerce itself and is protectionist of intrastate drivers.

B. AB-5 discriminates against interstate commerce because it has the effect of favoring intrastate over interstate counterparts.

Prohibiting states from discriminating against interstate commerce "strikes at one of the chief evils that led to the adoption of the Constitution." *Comptroller of Treas. of Md. v. Wynne*, 575 U.S. 542, 549 (2015). "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 99 (1994). Courts judge a law's practical effects to determine whether it discriminates against interstate commerce. *See, e.g., Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 654 (1994) (emphasizing that Supreme

Court has "repeatedly . . . focused [its] Commerce Clause analysis on whether a challenged scheme is discriminatory in 'effect'" (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984)); *see also Wynne*, 575 U.S. at 561 n.4 (noting that Commerce Clause restricts state laws that are discriminatory in effect); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350-51 (1977) (finding that North Carolina law discriminated against interstate commerce in practical effect).

Defendants argue that because AB-5 does not expressly declare its discrimination against interstate commerce, it does not discriminate. *E.g.*, Teamsters Brief (ECF 186) at 21 ("AB 5 does not discriminate within the meaning of the Commerce Clause because AB 5 does not adopt different rules based on the location of a trucking company."); *see also* State Brief (ECF 190) at 24. But AB-5 plainly gives preferential treatment to local trucking operations: Interstate truckers who must comply with the Truth-in-Leasing rules cannot also satisfy the elements of the B2B exemption; only *intrastate* carriers and IC drivers can ever utilize the exemption to be classified under *Borello*. State laws need not be accompanied by a flashing neon sign that declares "this law discriminates against interstate commerce" to in fact illegally discriminate against interstate commerce. Here, it is the effect of AB-5's B2B exemption as applied to trucking, giving access to the less rigid *Borello* classification only to local intrastate drivers and carriers, that establishes OOIDA's discrimination claim.

III. Defendants' focus on other ways formerly independent drivers can work under AB-5 ignores the burdens on drivers, carriers, and the market.

Defendants' primary rebuttal to OOIDA's evidence that AB-5 eliminates IC drivers is that these operators can work as employees or (federally designated) motor carriers, and that some IC drivers would prefer to work as employees. *E.g.*, Teamsters Brief (ECF 186) at 6. Worse, they insist that drivers can drive under AB-5 by working for multiple employers on a job-by-job basis. State Brief (ECF 190) at 16. First, this arrangement has not been shown to be anything other than

theoretical. Second, part-time workers employed by a variety of employers are not entitled to the same benefits as full-time employees—and thus the State's suggestion contradicts the stated purpose of AB-5. Even assuming that some IC drivers would prefer to be employees does not change the fact that drivers, carriers, and the trucking industry as a whole suffer significant burdens from automatic employee classification under the ABC test.

A. Independent contractor drivers face substantial burdens from either becoming employees or motor carriers.

When companies properly utilize IC drivers in keeping with the Truth-in-Leasing regulations and statutes, their drivers are able to set their own schedules, choose the freight they want to transport, select the routes they choose to deliver that freight, purchase the equipment that best serves their business needs, choose where and how their equipment is maintained, and make decisions that contribute to the success of their business, preferred lifestyle, and working conditions. Absent AB-5, IC drivers could operate freely throughout the country. But AB-5 closes California's borders to IC drivers from other states. *See* Declaration of Todd Spencer in Support of OOIDA's Trial Brief (ECF 193-1) ¶¶ 42, 54, 59.

Interstate IC drivers who wish to continue to drive in California must give up the small businesses they worked hard to create. As employees, they will lose the flexibility they enjoyed. Moreover, they will likely have to sell their trucks and other equipment and—due both to AB-5 and to the aggressive schedule at which California intends to change to zero-emission vehicles, *see, e.g.,* Cal. Code of Regs. § 1963.5—in a market that will almost certainly be flooded, contributing to a diminution of the equipment's value, making it likely that they will lose a significant portion of their investment in their equipment. *See* Spencer Dec. (ECF 193-1) ¶ 57. In addition, employee drivers generally receive lower compensation than IC drivers. Declaration of Barry G. Fowler, EA in Support of Intervenor/Plaintiff OOIDA's Trial Brief (ECF 193-2) ¶ 7.

B. Eliminating IC drivers also greatly burdens motor carriers.

The State itself has articulated to the public in detail that hiring employees instead of independent contractors imposes tremendous burdens on employers. *See* Employment Development Department, 2023 California Employer's Guide (DE 44) (January 2023), https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de44.pdf. Carriers forced to change their business model to employ drivers will be subject to requirements that will require them to expend substantial time and money.

Motor carriers forced to switch to an employee model will suffer economic burdens that they have avoided. They will be responsible for employee taxes, for managing employees, and for following all state and federal regulations imposed on employers. They will need to purchase, register, insure, and maintain trucking equipment. They will lose the flexibility to quickly respond to changing market conditions and seasonal requirements. And failure to comply with AB-5 exposes motor carriers to civil and criminal liability. Spencer Dec. (ECF 193-1) ¶¶ 59-64.

C. The independent contractor model serves as a critical training ground for new carriers.

The opportunity to work as an independent contractor owner-operator gives drivers the ability to develop the knowledge and experience needed to establish successful motor carrier businesses. Eliminating the position of IC drivers will deprive truck drivers of the experience of running a small business that makes them better candidates for becoming successful managers of motor carriers. *Id.* ¶¶ 36-38.

D. These burdens significantly outweigh AB-5's minimal local benefits.

Defendants offer nothing to counter OOIDA's demonstration that, as applied to interstate trucking, AB-5 provides minimal, if any, local benefits. First, the law purports to remedy worker misclassification but, for trucking, the ABC test adds to misclassification by converting independent workers into employees. Moreover, there's no indication that the previous *Borello* standard failed to adequately classify

truck drivers. Notably, the State implies but does not expressly claim that *Borello* failed to properly classify truckers. Instead, the State argues that *Borello*'s flexibility made the test subject to manipulation and that there is misclassification in the trucking industry. *See* State Brief (ECF 190) at 31. Even accepting these facts as true, they do not lead to the conclusion that *Borello* was the source of misclassification in trucking. Indeed, the State and workers succeeded in the vast majority of *Borello* actions. *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); *see also* State Brief (ECF 190) at 3-4 (citing cases decided under *Borello* that determined drivers were misclassified). In sum, as applied to interstate trucking, AB-5 "combats" worker misclassification by displacing a standard that has not been shown to result in misclassification with one that actively misclassifies legitimate independent drivers. California enjoys no benefit from AB-5 when it comes to interstate trucking.

Moreover, the State has not refuted OOIDA's argument that California enjoys virtually *no* benefits from applying AB-5 to interstate truckers who are not based in California (or perform most of their work in the state). That is, California has no interest in applying its labor laws to these out-of-state workers and therefore gains no benefit from classifying those workers. *See, e.g.*, OOIDA Brief (ECF 193) at 31 (citing *Ward v. United Airlines, Inc.*, 9 Cal.5th 732 (2020), and *Oman v. Delta Air Lines, Inc.*, 9 Cal.5th 762 (2020)).

In *Pike*, the burden of requiring a single company to construct an otherwise-unnecessary $200,000 facility clearly exceeded a legitimate state interest in buttressing the reputation of Arizona cantaloupes. *See, e.g.*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-46 (1970). Here, contra to *Pike*, AB-5 imposes significant burdens "on an entire industry" (*id.* at 146), and the law as applied to trucking provides only illusory benefits. Weighing illusory local benefits against the indisputable substantial burdens on carriers, drivers, and the interstate trucking

industry leads to only one result: AB-5 imposes an undue burden on interstate commerce in violation of the dormant Commerce Clause.

IV. AB-5 violates truckers' right to equal protection under the law.

Defendants fail to refute the straightforward conclusions supporting OOIDA's equal protection claim: AB-5's architect sought to eliminate all, even legitimate, independent contractor drivers based on political animus; AB-5's ABC test does just that; and AB-5's effects (*e.g.*, reclassifying properly independent drivers and exempting only local drivers from the ABC test) contradict the law's claimed purpose of combating *mis*classification of California workers. Under controlling authority, these facts establish an equal protection violation.

A. *Merrifield* is relevant and controlling here.

Defendants argue that *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), does not apply because there the court simply held that "economic protectionism for its own sake" is irrational (State Brief (ECF 190) at 38) and that the State's litigation position taken to defend (successfully) a Due Process Claim contradicted its defense of an Equal Protection Claim (Teamsters Brief (ECF 186) at 36). But that case did not turn on a mere litigation position, and economic protectionism was only one of that law's flaws. *See, e.g.*, *Merrifield*, 547 F.3d at 991. Instead, the Ninth Circuit focused on the fact that the law's rationale undermined its language and effects. There, a California licensing law aimed at pesticide-based pest control applied to all pest controllers, regardless of pesticide use, with the rationale that all pest controllers may come into contact with pesticides and need to know about their use. *Id.* But the law exempted a class of controllers who did non-pesticide control of certain pests. The plaintiff, who engaged in non-pesticide control of non-exempted pests, challenged this exemption on equal protection grounds.

Critical to the analysis was the fact that "those exempted under the current scheme are more likely to be exposed to pesticides than individuals like" the plaintiff. *Id.* Thus, the State justified applying the licensing regime generally

because even non-pesticide users like the plaintiff were likely to encounter pesticides, but it exempted those non-pesticide users who were *most likely* to interact with pesticides. The challenged exemption undermined the law's rationale: "Needless to say, while a government need not provide a perfectly logical[] solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality." *Id.* Moreover, the law's irrational exemption of certain pests was "designed to favor economically certain constituents at the expense of others similarly situated." *Id.*

Thus, in short, *Merrifield* confirms the proposition that even economic classifications do not survive rational basis review if they are rooted in logical contradictions and the result of political targeting. This principle dooms AB-5's B2B exemption: AB-5 purports to target misclassification of California workers, but the B2B exemption as applied to trucking can only ever exempt local workers. *See supra* 3-6. There is no rational basis for exempting only intrastate, and not interstate, workers from a law meant to apply to California workers.

The Teamsters attempt to distinguish *Merrifield*'s holding by claiming that AB-5's purposes can't possibly contradict its effects because "[t]he legislature simply chose to apply different tests for employee status to different occupations." Teamsters Brief (ECF 186) at 36. But, of course, if one ignores the elements that contradict one another (like a law's purposes and effects), an oversimplified description could be accurate. Indeed, it would even fit *Merrifield*: Divorce the pest control licensing law from its contradictory elements, and the California legislature simply chose to require different licensing for different kinds of pest control. 547 F.3d at 980. But equal protection requires examining the law's purposes and effects.

Thus, the inherent contradictions at issue here cut even deeper than those at issue in *Merrifield*. The effect of the B2B exemption contradicts AB-5's claimed purposes. AB-5's exempting (at most) in-state workers from the ABC test but denying that exemption to truckers operating in interstate commerce is irrational.

And AB-5's effect of classifying all truck drivers as employees, even those properly classified as independent contractors, rather than simply rooting out misclassified drivers is also irrational.

B. Legislative animus combined with an effect that contradicts or undermines a law's stated purpose establishes that a law violates Equal Protection.

Defendants take issue with OOIDA's reliance on *Olson v. California*, 62 F.4th 1206 (9th Cir. 2023), based primarily on that case's posture as a review of a motion to dismiss. State Brief (ECF 190) at 39; Teamsters Brief (ECF 186) at 34. That the Ninth Circuit was only reviewing allegations does not undo the principles it relied on. Moreover, OOIDA and Plaintiffs have presented evidence proving the elements that the *Olson* court highlighted. Lawmaker "disfavor" of a business model that contradicts the law's purposes demonstrates an irrational basis. 62 F.4th at 1219. In *Olson*, excluding thousands of gig workers was "starkly inconsistent" with AB-5's stated purpose of fighting worker exploitation through misclassification and providing workers "the basic rights and protections they deserve." *Id.* The same is true here. AB-5's architect wanted to eliminate the independent contractor driver model, a category of worker that includes thousands of properly classified IC drivers. ECF 167 at 6-8. Eliminating a class of workers who are properly and voluntarily classified contradicts AB-5's claimed goal of combating worker misclassification and exploitation. Moreover, AB-5's B2B exemption can only ever apply to intrastate—and not interstate—carriers and drivers. Thus, a law aimed at properly classifying California workers features an exception that can only apply to California workers. Under *Olson*, this kind of disparate treatment is irrational and an Equal Protection violation.

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C. Defendants' arguments demonstrate the construction exemption's irrationality, and the exemption's time limitation does not save it from Equal Protection scrutiny.

Defendants make much of the fact that the construction exemption expires at the end of 2024. *See* State Brief (ECF 190) at 33-36 (referring to the exemption's time-limited nature 8 times); *see also* Teamsters Brief (ECF 186) at 36-38 (referring to "time-limited" 6 times). Reiterating its time limitation does not change that the construction exemption, as applied to truckers, lacks a rational basis. Indeed, there exists no meaningful difference between truckers in those industries, and the exemption instead serves to favor a local, economically and politically relevant constituency. *See* OOIDA Brief (ECF 193) at 34-36.

Significantly, like the B2B exemption, the construction exemption's practical effects undermine its purported purpose, establishing the exemption's irrationality. State Defendants claim that there exist differences between construction trucking and the rest of the industry that justify exempting certain construction services from the ABC test. *See* State Brief (ECF 190) at 34-35. According to the State, chief among those distinctions is that a construction project "generally involves *much more oversight and direction of drivers* than in the regular trucking industry." *Id.* (emphasis added). This distinction wholly undermines AB-5's purpose.

That is, AB-5 purportedly exists to combat misclassification and exploitation of workers who should be treated as employees through a more rigid classification standard, yet AB-5 singles out for exemption an industry segment that features "much more" worker control, with the result of those workers being classified under a test that is less likely to consider them employees. The Ninth Circuit in *Merrifield* rejected precisely this kind of illogical and irrational contradiction.

CONCLUSION

Defendants rely primarily on evidence supporting the policy reasons for passing AB-5, namely, combating worker misclassification and exploitation. OOIDA readily concedes that there are bad actors in the trucking industry, as in

many industries, who misclassify and exploit workers. But Defendants cannot justify *eliminating* the independent contractor driver business model, heedlessly reclassifying genuine independent contractors as employees. On the other hand, OOIDA has presented evidence that this remains an important business model, freely chosen by many individuals, including OOIDA members, who have put in hard work and ingenuity to invest in a business and make it successful. Indeed, Congress and federal regulations recognize and support the IC driver model.[2]

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 (*i.e.*, regulated under 49 U.S.C. § 13501), 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 asks 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 applying only to California motor carriers and drivers operating in intrastate

[2] The State questions OOIDA's characterization of the IC driver business model, arguing that some misclassification in the industry means that the role lacks a "long, federally sanctioned history." State Brief (ECF 190) at 33. Bad actors who exploit drivers do not change that the federal government has been protecting and regulating these operations since the 1950s. *See* OOIDA Brief (ECF 193) at 6-8.

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 drivers operating for the construction industry and not give that exemption to all IC drivers and 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 under the *Borello* standard as independent contractors and, therefore, are treated equally under the law.

OOIDA also prays for all appropriate attorneys' fees and costs.

Dated: October 27, 2023

Respectfully submitted,

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

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