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

[Additional Counsel on Following Page]

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA TRUCKING ASSOCIATION, RAVINDER SINGH, and THOMAS ODOM,

Plaintiffs,

v.

ROB BONTA, in his official capacity as the attorney general of the state of California; NATALIE PALUGYAI, in her official capacity as secretary of the California labor workforce and development agency; KATRINA HAGEN, in her official capacity as the acting director of the department of industrial relations of the state of California; and LILIA GARCIA-BROWER, in her official capacity as labor commissioner of the state of California, division of labor standards enforcement, NANCY FARIAS, in her official capacity as the director of the employment development department

Defendants,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant.

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

RESPONSE BRIEF IN SUPPORT OF MEMORANDUM OF CONTENTIONS OF FACT AND LAW

Complaint Filed: October 25, 2018
Trial Date: November 13, 2023
District Judge: Hon. Roger T. Benitez Courtroom 5A, 221 W. Broadway, San Diego
Magistrate Judge: Hon. Daniel E. Butcher Courtroom 2B, 221 West Broadway, San Diego

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

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

Provided by: The Cullen Law Firm, PLLC, www.cullenlaw.com info@cullenlaw.com

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I. INTRODUCTION

The State defendants and intervenors fail to contest what this Court and the Ninth Circuit have already found to be self-evident: Prong B of the ABC test is a requirement that a motor carrier and owner-operator cannot possibly satisfy. There is likewise no dispute that AB-5 and AB-2257 have upended a long-established system—not just here in California but across the United States—that has flourished for more than 40 years since Congress deregulated the trucking industry.

The key question—now, as it was in 2020 when Plaintiffs originally sought relief—is whether California can impose its own values and in doing so interrupt the operations of the interstate trucking industry. The Court should again find that it cannot do so for several compelling reasons. They include not only express preemption under the Federal Aviation Administration Authorization Act ("FAAAA"), but also implied preemption under the FAAAA and for violating the Dormant Commerce Clause. Further, because of the way that AB-5 and AB-2257 target the trucking industry, Plaintiffs also succeed on the merits based on the Equal Protection Clauses of the United States and California Constitutions.

II. A PERMANENT INJUNCTION IS SUPPORTED

For the following reasons, Plaintiffs prevail on the merits.

A. California Seeks To Eliminate Owner-Operator Drivers

As this Court already found in its order granting the original Motion for Preliminary Injunction, AB-5 and now AB-2257 would radically and materially impact how motor carriers and owner-operators function. Namely, because an owner-operator can never satisfy Prong B of the ABC test, motor carriers cannot legally contract with them as independent contractors.

1. Owner-Operators Are An Integral And Intentional Part Of A Deregulated System For Interstate Trucking.

There is no dispute that the use of owner-operators is "common in both California and across the country" or that this "generally involves a licensed motor

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carrier contracting with an independent contractor driver to transport the carrier-customer's property." *California Trucking Ass'n v. Becerra*, 433 F. Supp. 3d 1154, 1158 (S.D. Cal. 2020). The "independent owner-operator" is a "small businessman" who "owns and operates one, or a few, trucks for hire." H.R. Rep. No. 95-1812, at 5 (1978).

Not only are owner-operators an integral part of interstate commerce, they were specifically intended beneficiaries of a deregulated market for trucking services. As discussed further in Plaintiffs' moving papers, the legislative history is full of references to how the Motor Carrier Act ("MCA") and other legislation were intended to "enhance business opportunities for independent truckers"[1] and to "promote the stability and economic welfare of the independent trucker segment of the motor carrier industry"[2] because of the recognition that independent contractor drivers were "one of the most efficient movers of goods"[3] in the trucking industry.

2. California Seeks To Impose Its Own View That Owner-Operators Are Not Independent Businesses.

Notwithstanding federal encouragement of the owner-operator model (or perhaps in reaction against this federally authorized scheme), California has elected to impose its own view that owner-operators cannot play a role in interstate trucking. This was made clear from the passage of AB-5, including Assemblywoman Gonzalez observing during a floor session that the statute was intended to "get[] rid of an outdated broker model that allows [trucking] companies to basically make money and set rates for people that they called independent contractors . . . ."[4] To be

[1] Motor Carrier Act of 1980: Remarks on Signing S. 2245 Into Law, Pub. Papers of Jimmy Carter at 1266 (July 1, 1980).

[2] Part 1057 – Lease and Interchange of Vehicles, 44 Fed. Reg. 4680, 4680 (Jan. 23, 1979).

[3] H.R. Rep. No. 95-1812, at 5.

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

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1 clear, the "outdated" model targeted by California is the very same system,
2 developed under the MCA and other federal statutes, whereby motor carriers rely on
3 owner-operators to transport freight.
4 The hostility to the owner-operator model carries over to the State's
5 opposition, including their assertion that the independent of owner-operators is a
6 "myth" because they often "do not have their own operating authority" such that the
7 "terms and conditions of drivers" are routed through the motor carriers. (ECF No.
8 190, 6:8-19. This not only glosses over the intricacies of the relationships between
9 motor carriers and owner-operators, but contradicts federal rules like the Truth-In-
10 Leasing ("TIL") regulations that specifically contemplate that many owner-operators
11 will not have their own operating authority.
12 Indeed, the U.S. Supreme Court has recognized that owner-operators typically
13 lack their own operating authority and instead "conduct operations under the …
14 permit[s]" of the motor carriers with which they contract. *Am. Trucking Ass'ns. v.*
15 *United States*, 344 U.S. 298, 303 (1953). Under federal law, the DOT "regulate[s]
16 the relationship between owner-operators and motor carriers, including the required
17 terms of their leases." *Owner-Operator Independent Drivers Ass'n v. Swift Transp.*
18 *Co.*, 632 F.3d 1111, 1113 (9th Cir. 2011).
19 The fact that owner-operators may not have their own authority does not
20 eliminate their independence, and is consistent with *federal* regulations intended to
21 promote safety in interstate trucking. Most significantly, the TIL regulations
22 comprise a complex statutory scheme under which owner-operators transport goods
23 under the motor carrier's authority, including the requirement that an owner-operator
24 lease his or her vehicle to the motor carrier. Even though an owner-operator operates
25 under the motor carrier's authority and is prohibited from driving the vehicle for
26 anyone else for safety reasons, the TIL regulations recognize that "[a]n independent
27 contractor relationship may exist". 49 C.F.R. § 376.12(c)(4).
28 Thus, to the extent that the State and its experts contend that owner-operators

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do not have "true" independence, it is another example of California seeking to superimpose its values over those of the federal authorities.

3. California's Rule Interferes With Both California And Non-California Owner-Operators.

While it reversed the preliminary injunction on other grounds, the Ninth Circuit agreed with this Court that owner-operators were unable to satisfy the ABC test. As such, owner-operators who live in California—including Plaintiff Odom and other declarants—are forced to choose between becoming employee drivers or abandoning their chosen profession. Further Odom Decl. ¶ 16; Estrella Decl. ¶ 16; Medina Decl. ¶ 14.

The harm from AB-5, however, is not limited to California citizens. Neither the State nor the IBT have ever suggested that the ABC test only applies to California-based workers. To the contrary, the State cites approvingly to cases like *Sullivan v. Oracle Corp.* (ECF No. 190, 25:3-7), where the Ninth Circuit applied the state's labor laws to non-residents who came into California only briefly. 662 F.3d 126 (9th Cir. 2011). As such, an owner-operator who lives in Pennsylvania and who mostly delivers goods in the other states will be deemed an "employee" while working in the State of California. If anything, as discussed below, AB-5 appears to benefit California-based businesses who may have more incentive and ability to comply with its onerous laws for employees than non-California motor carriers and owner-operators.

4. An Employee Driver Is Not Equivalent To An Owner-Operator.

In an effort to minimize the harm from the forced abandonment of the owner-operator model, the State suggest that motor carriers "can continue to work with owner-operators . . . by treating them as employees . . . .'" (ECF No. 190, 21:28-22:2 (citing *CTA*, 996 F.3d at 659 n.11)). The possibility that an owner-operator may still be able to drive a truck, however, does not eliminate the conflict between

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California and the rest of the country. Just as it would frustrate and impede interstate trucking to have a state declare that only independent contractor drivers were permitted within its borders, California impeding the use of owner-operators promotes the balkanization of the trucking industry. It also does not diminish the harm to owner-operators, many of whom have invested decades into establishing their own businesses and who do not want to become employees.

5. There Is No Evidence That Owner-Operators Can Satisfy The Business-To-Business Exception.

Another red herring advanced by the State and IBT is that owner-operators can avail themselves of the business-to-business ("B-to-B") exception which is found at Labor Code § 2776. *See* (ECF No. 190, 22:2-3. Significantly, at no point in the life of this case, has the State ever explained how a motor carrier and owner-operator could possibly satisfy all of the elements of this exemption. Nor does it attempt to do so here. Without even bothering to reference the twelve required elements, the State conclusorily states that, "[i]f these conditions are met, the applicable test is the *Borello* standard." (ECF No. 190, 18:13-14.

Turning to test at hand, the B-to-B exception applies only if the hiring entity demonstrates that "***all***" twelve enumerated prerequisites are satisfied. Labor Code § 2776(a) (emphasis added). Among other requirements, the contracting entity must show that the service provider "provid[es] services directly to the contracting business rather than to customers of the contracting business"; "maintains a business location that is separate from the business or work location of the contracting business"; "actually contracts with other businesses to provide the same or similar services"; and "can negotiate its own rates." *Id.* Here, Plaintiffs have submitted evidence that the B-to-B exception does not allow motor carriers to contract with owner-operators. *See, e.g.*, ECF No. 54-3 (¶¶ 29-34). Plaintiffs showed, for example, that owner-operators often provide services directly to the motor carriers' customers; that it often is impractical for motor carriers to negotiate individually

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1 over rates with owner-operators; and that many owner-operators choose to provide
2 services to the same motor carrier over extended periods—an option that the B-to-B
3 exception would foreclose. *Id.*
4 In response, the State has again failed to articulate how a motor carrier can
5 satisfy the B-to-B exemption, instead citing to the California Court of Appeal's
6 decision in the Cal Cartage case—*People v. Superior Court*, 57 Cal. App. 5th 619
7 (2020) ("*CalCartage*"). To avoid a finding of preemption, *Cal Cartage* found that
8 the defendants has not met their burden in showing that AB-5 barred the use of
9 owner-operators, including "offer[ing] no evidence demonstrating it would be
10 impossible to meet the requirements of the business-to-business exemption." 57 Cal.
11 App. 5th at 634. In contrast to *Cal Cartage* (where no evidence was submitted), the
12 record here includes several declarations establishing the impossibility of motor
13 carriers satisfying the narrow B-to-B exemption. As such, the State's suggestion that
14 motor carriers might avail themselves of the B-to-B exemption remains as
15 unsupported now as it was when the preliminary injunction was granted in 2020.
16 In their most recent submission, the State purports to show each of the criteria
17 "and how drivers can satisfy them if they wish to work as independent contractors."
18 (ECF No. 190, 19:6-7.) This includes a chart, at pages 19 through 20 of their brief,
19 outlining each criteria. As for the requirement that services be provided directly to
20 the contracting business and not to customers of the contracting business, the State
21 simply quotes to generic language from *Cal Cartage* about how an owner-operator
22 could seek to satisfy the exemption. The State also argues that this requirement
23 would not apply "'if the business service provider's ***employees*** are solely performing
24 services under the contract under the name of the business service provider and the
25 business service provider regularly contracts with other businesses.'" (*Id.* at 19:13-
26 18 (quoting Labor Code § 2776(a)(2)). **But this simply confirms again that the**
27 **only thing offered by the State is for an owner-operator to exclusively provide**
28 **services to a motor carrier as an employee, not as an owner-operator.**

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6. AB-5 Has Already And Will Continue To Materially Change How Motor Carriers And Owner-Operators Function.

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As shown by Plaintiffs' moving papers, the forced conversion of owner-operators to employee drivers negatively impacts both motor carriers and independent truckers. *See, e.g.*, Further Odom Decl. ¶ 25; Medina Decl. ¶¶ 12-13; Steffire Decl. ¶ 13 ("our inability to continue to use independent contractors has resulted in the loss of approximately $4,000,000 in annual revenue"). While the State and IBT argue that this will instead benefit some drivers, there does not appears to be any real dispute that AB-5 and now AB-2257 represent a sea change in how the trucking industry works in California. As with the original preliminary injunction motion, the question remains *whether* California can do this.

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According to the State and IBT, motor carriers and owner-operators do not have any way to challenge AB-5 or AB-2257. They contend that the Ninth Circuit has fully insulated the statute from legal challenge under FAAAA, and that no other constitutional pathway exists. They are mistaken, as the next sections confirm.

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B. <u>AB-5 Remains Preempted By The FAAAA</u>

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The State contends that the issue of FAAAA preemption has been conclusively decided by the Ninth Circuit regardless of the facts or rationale. Not so.

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In the renewed Motion, Plaintiffs addressed the Ninth Circuit's decision, which (as is the case with all decisions) was based on the underlying evidence and arguments presently before the court. Specifically, Plaintiffs' original motion focused on whether "an all-or-nothing rule precluding independent contractors is barred by the FAAAA." ECF No. 73 (Reply, p. 1). That was the key issue on appeal, where the Ninth Circuit did not dispute that AB-5 was an all-or-nothing rule but instead focused on *where* the rule applied. Specifically, because AB-5 "compels a particular result at the level of a motor carrier's relationship with its workforce" but "does not compel a result in a motor carrier's relationship with consumers," the Ninth Circuit (in its 2-1 decision) reasoned that AB-5 "does not have the sort of

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binding or freezing effect on prices, routes, or services that are preempted under the F4A." 996 F.3d at 659.

Plaintiffs do not read the Ninth Circuit's decision, however, as insulating AB-5 from all future legal challenges, including under the FAAAA. The Ninth Circuit was tasked with addressing whether an all-or-nothing rule is preempted, but it did not consider what would happen if motor carriers were unable to convert owner-operators to employee drivers, including if the practical impact might rise to the level that "related to a price, route, or service" in a manner sufficient to trigger preemption. 49 U.S.C. § 14501(c)(1).

Indeed, the Ninth Circuit's decision *assumed* that motor carriers could simply reclassify owner-operators as employee drivers. Even the State, in recapping the Ninth Circuit's decision, notes that the panel "pointed out that, under California law, carriers could avoid the asserted harms by working with drivers 'as employees.'" (ECF No. 190, 11:16-17 (quoting 996 F.3d at 659 n.11).)

Here, Plaintiffs pursue an argument that was not before the Ninth Circuit. Namely, if sufficient numbers of owner-operators refuse to work under an employee model and no longer provide trucking services, AB-5 and now AB-2257 necessarily constrain—and thus have an outsized impact—on the prices, routes, and service of motor carriers. It is not simply a question of a motor carrier having to bear the higher costs associated with an employee model in order to provide services, but with motor carriers unable whatsoever to provide them.

The State further argues that at least some owner-operators have already—or will in the future—become employee drivers. That misses the point. Plaintiffs have never argued that *all* owner-operators would be unwilling to become employees, simply that many of them will not. In fact, a loss of even 1 out of 10 owner-operators would remove thousands of drivers from the California marketplace. At this preliminary stage, the declarations submitted by Plaintiffs and OOIDA—as well as the recent shutdowns at the ports and other evidence—establishes that many

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1 owner-operators will not convert over to employee drivers.[5] It is this loss of owner-
2 operators—and the concomitant effect on prices, routes, and service—that justifies
3 preemption, not the all-or-nothing aspect of AB-5 that the Ninth Circuit already
4 considered.

5 **C. AB-5 Is Impliedly Preempted By The FAAAA.**

6 The State argues that if AB-5 is not subject to FAAAA's express preemption
7 clause, then the Court cannot find implied preemption. By that same token, it would
8 make even less sense to find implied preemption where a statute lacks a preemption
9 clause. In reality, "neither an express pre-emption provision nor a saving clause
10 'bar[s] the ordinary working of conflict preemption principles.'" *Buckman Co. v.*
11 *Plaintiffs' Legal Com.*, 531 U.S. 341, 352 (2001) (*quoting Geier v. Am. Honda*
12 *Motor Co.*, 529 U.S. 861, 869 (2000)). If anything, the narrow way in which the
13 Ninth Circuit has interpreted the FAAAA's express preemption clause militates for a
14 robust application of implied preemption, since otherwise Congress's goals would
15 not be met.

16 Most importantly, AB-5 and now AB-2257 frustrate Congress' goal of
17 avoiding a "patchwork" of differing state regulations and presents "a huge problem
18 for national and regional carriers attempting to conduct a standard way of doing
19 business." H.R. Rep. 103-677, at p. 87, 1994 U.S.C.C.A.N. 1715, 1759. To evade
20 this argument, the State contends that that there "has long been . . . a plethora of
21 differing state worker classification standards across the 50 States in our federal
22 economy." (ECF No. 190, 222:8-10.)

23 While there are different tests for independent contractor status, when the
24 preliminary injunction was lifted California became the only state where the ABC
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[5] *See, e.g.*, Further Odom Decl., ¶ 24 (moving to Texas); Williams Decl., ECF 155-6, ¶ 12 (moved to Arizona); Estrella Decl. ¶ 17 (has considered buying moving to another state, but not willing to do that yet "since my family, my friends, and my church are all here"); Estrella Decl. ¶ 18 ("At the point at which I can no longer work as an owner-operator, I will just leave the trucking field."); Sauer Decl. ¶ 8.

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1 test made it impossible for owner-operators to exist. In fact, in those few states that
2 adopted the same narrow formulation of the ABC test as California, federal or state
3 courts have halted its application as to motor carriers and owner-operators. *See, e.g.,*
4 *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016);
5 *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95 (2016). Thus, the Ninth Circuit's
6 reversal of the preliminary injunction not only created a circuit split, but allowed a
7 situation where California is now an outlier among the 50 states. In order to prevent
8 the exact "patchwork" of regulations that Congress intended to eliminate when it
9 deregulated the trucking industry and enacted the FAAAA, the Court should find that
10 implied preemption applies to AB-5 even if the express preemption provision does
11 not.

12 **D. <u>AB-5 Violates The Dormant Commerce Clause.</u>**

13 In the event that the Court finds that the FAAAA is inapplicable here, then it
14 should instead find that AB-5 runs afoul of the Dormant Commerce Clause, which
15 prohibits laws that promote "tendencies toward economic Balkanization" by causing
16 market participants to favor conducting intrastate as opposed to interstate commerce.
17 *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

18 The State argues that AB-5 "does not facially discriminate against interstate
19 commerce" ((ECF No. 190, 24:11-12), but that is immaterial. Here, AB-5 was
20 expressly aimed at the trucking industry so that California could "rid [itself] of an
21 outdated broker model"[6] arising from the federal deregulation of the trucking industry.
22 In seeking to achieve this goal, the California legislature denied the *interstate* trucking
23 industry the same type of exemption that it offered to dozens of other *intrastate*
24 professions (like California construction companies) or persons licensed by the State
25 (like lawyers and doctors).
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[6] Remarks of Assembly Member Lorena Gonzalez, Assembly Floor Session, at 1:08:20-1:08:30 (Sept. 11, 2019), available at https://www.assembly.ca.gov/media/assembly-floor-session-20190911/video.

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1 The fact that the exemptions are not expressly limited to individuals operating
2 in intrastate commerce is a distinction without a difference. The fact that an out-of-
3 state lawyer may come to California to argue a motion on a pro hac vice basis is not
4 comparable to an interstate truck driver whose core function is to cross state lines for
5 work. Similarly, the possibility that a construction company on the Nevada border
6 might cross into California for a construction job (a possibility made less likely by the
7 requirements imposed on licensed contractors) is not comparable to a motor carrier
8 that derives all of its earnings from the transportation of goods.
9 The holdings in *Ward* and *Bernstein*, which are discussed at pages 28-29 of the
10 State's pre-trial brief, illustrate why the application of AB-5 and AB-2257 is so
11 insidious. *Bernstein v. Virgin America, Inc*., 3 F.4th 1127 (9th Cir. 2021); *Ward v.*
12 *United Airlines, Inc*., 986 F.3d 1234 (9th Cir. 2021). **Both *Ward* and *Bernstein***
13 **involved classes of people who were based in California**. For example, the inquiry
14 in *Ward* was limited to flight attendants and pilots whose "principal place of work" is
15 in California. *Ward*, 986 F.3d at 1238. Likewise, the proposed class in *Bernstein* was
16 limited to "California-based flight attendants". *Bernstein*, 3 F.4th at 1133. No such
17 limitation has been imposed on AB-5 or AB-2257, which apply to all persons
18 performing services in California even if this is not their principal place of work.
19 Consequently, under AB-5, interstate motor carriers will have to take costly
20 steps to ensure that a driver moving the cargo in California is an employee driver,
21 whereas the driver may be an independent contractor when driving in other states. To
22 avoid being subjected to a patchwork of differing laws in connection with a single
23 movement of goods, California companies will face "an inexorable hydraulic
24 pressure" to focus more on intrastate commerce. *Am. Trucking Ass'ns, Inc. v.*
25 *Scheiner*, 483 U.S. 266, 286-87 (1987). At the same time, AB-5 will cause non-
26 California transportation companies to avoid crossing California state lines whenever
27 possible.
28 The Supreme Court has held time and time again that statutes or regulations that

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have these kinds of effects violate the Dormant Commerce Clause.[7] Under these precedents, Plaintiffs' Dormant Commerce Clause claim is highly likely to succeed.

E. AB-5 Violates The Equal Protection Clause.

No law may draw classifications that fail to "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). In its opposition, the State: (1) does not, and cannot, identify a single legitimate governmental end that aligns with the means the legislature employed in AB-5 and AB-2257; and (2) does nothing to counter Plaintiffs' showing that the statutes were motivated by animus against motor carriers and owner-operators.

1. AB-5/AB-2257's Irrational Exemptions Demonstrate That The Statute Does Not Further A Legitimate State Interest.

Even under rational basis review, there must be some legitimate end that aligns with the distinctions the government has drawn. *See Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) (classificatory scheme must "rationally advanc[e] a reasonable and identifiable governmental objective" (emphasis added)); *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."); *City of Cleburne, Tex. v.*

[7] *See Southern Pac. Co. v. Arizona*, 325 U.S. 761, 771, 773 (1945) (holding that Arizona's limit on train lengths violated Commerce Clause because "the operation of long trains . . . is standard practice over the main lines of the railroads of the United States," and "[c]ompliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527 (1959) (holding that Illinois requirement that trucks use a specific design of mudguard on their rear fenders violated the Commerce Clause because the statute "seriously interferes . . . the interchanging of trailers between an originating carrier and another carrier when the latter serves an area not served by the former," a practice that "is particularly vital in connection with shipment of perishables, which would spoil if unloaded before reaching their destination"); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (holding that Wisconsin regulations that effectively prohibited motor carriers from moving double trailers through the state violated the Commerce Clause because "the regulations slow the movement of goods in interstate commerce by forcing appellants to haul doubles across the State separately, to haul doubles around the State altogether, or to incur the delays caused by using singles instead of doubles to pick up and deliver goods").

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1 *Cleburne Living Ctr*., 473 U.S. 432, 446 (1985) ("The State may not rely on a
2 classification whose relationship to an asserted goal is so attenuated as to render the
3 distinction arbitrary or irrational.").

4 The State asserts that AB-5 sought "to remedy the widespread classification of
5 workers as independent contractors[.]" (ECF No. 190, 30:17-18.) To that end,
6 defendants claim the Legislature wanted to ensure that workers were afforded the
7 appropriate protections, like minimum wage, liability insurance, and paid leave. *Id*.
8 Yet one glance at the patchwork exemption scheme found in AB-5 and AB-2257
9 reveal its glaring incongruity with this proffered motive.

10 There are *more than one hundred* exemptions and exceptions grafted onto the
11 law. AB-5 and now AB-2257 exempt not only surgeons and psychologists, but also
12 barbers, cosmetologists, manicurists, tutors, persons who provide minor home
13 repairs, home cleaners, errand runners, furniture assemblers, dog walkers, dog
14 groomers, picture hangers, pool cleaners, yard cleaners, fishermen, direct sellers, and
15 in-home cosmetics sellers—to name a few. Labor Code §§ 2778(b)(2);
16 2777(b)(2)(B); 2783.

17 The State claims that the ABC test is a benefit to the middle class and an
18 engine of income equality. That is incorrect. But even if the State was right, the
19 claim is illusory, given that, for many exempted groups, AB-5 and then AB-2257
20 renders *Dynamex* inapplicable to wage order claims to which it previously applied—
21 and even states that the exemptions that "would relieve an employer from liability . .
22 . shall apply retroactively to existing claims and actions to the maximum extent
23 permitted by law." Labor Code § 2785(b). If the Legislature truly enacted these
24 statutes to further the proffered reason, it would not have exempted dozens of
25 industries. Instead, the Legislature readily granted exemptions for these industries
26 while interposing any exemption for motor carriers or owner-operators.

27 Put simply, AB-5 and then AB-2257 took the generally applicable *Dynamex*
28 ABC test, rendered it inapplicable to some groups and expanded its applicability for

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other, similarly situated, groups, without any rational basis for doing so. That is the epitome of an irrational and discriminatory statute. As the Ninth Circuit recently found, "the exclusion of thousands of workers from the mandates of A.B. 5 is starkly inconsistent with the bill's stated purpose of affording workers the 'basic rights and protections they deserve.'" *Olson v. California*, 62 F. 4th 1206, 1219 (9th Cir. 2023).

A statute fails rational basis review when its exemptions contradict the justification put forward by its proponents. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) ("We cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold Merrifield's exclusion from the exemption based on a completely contradictory rationale."). And that is exactly what this slapdash carve-out scheme does. For motor carriers and owner-operators, AB-5 and AB-2257 has already started, and will continue, to "inflict[] on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Romer*, 517 U.S. at 635.

The real explanation for the exemptions is clear: They were crucial to procuring the interest group support necessary to ensure AB-5's passage, as Assemblywoman Gonzalez and other legislators openly acknowledged. *See* Supplemental Brief (ECF 172-7) p. 7 (recounting that Assemblywoman Gonzalez admitted that she "had no other choice" to add one particular exemption "as a condition of AB 5's passage" and that one legislator reported that "if you" could curry favor with legislators and "hire fancy lobbyists, you got a carve out").

This fact dooms the constitutionality of AB-5 (and then AB-2257) because "legislatures may not draw lines for the purpose of arbitrarily excluding individuals," even to "protect" those favored groups' "expectations." *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016); *see also St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013) ("economic protection of a particular industry" is not "a legitimate governmental purpose"); *Metro. Life Ins. Co. v. Ward*, 470 U.S.

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869, 878 (1985) (law unconstitutional where its "aim [was] designed only to favor domestic industry within the State").

Further, even if motor carriers are not the only type of business to which AB-5 still applies, a law does not survive rational basis review just because it burdens more than the target of its animus. For example, in *Moreno*, the Court struck down a statute intended "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). The statute, however, swept up more than just "hippies," making various other groups of individuals also ineligible for food stamps. *Id*. at 530–32. Nevertheless, the Supreme Court invalidated the statute under the "[t]raditional equal protection analysis." *Id*. at 538. The law's broad sweep beyond the targeted class of persons played no role in the Court's rational basis analysis. Rather, as here, the critical facts were the glaring incompatibility between the statute's means and its stated ends, and evidence that it was designed to irrationally target a particular group. *Id*.

The fact that motor carriers and owner-operators may not be members of a suspect class or politically unpopular group makes no difference. *See, e.g.*, *Baumgardner v. Cty. of Cook*, 108 F. Supp. 2d 1041, 1054 (N.D. Ill. 2000) ("Simply because a class of individuals is not part of a suspect or quasi-suspect class does not mean that they are not protected under the Equal Protection Clause. In the absence of a suspect of quasi-suspect class, the state action must still bear a rational relationship to the legitimate state objectives and interest." (citing *Cleburne*, 473 U.S. at 442)). The Supreme Court invalidated the challenged provisions in *Moreno* and *Romer* not because they involved suspect classes—they did not (under the Court's precedent at the time)—but under rational basis review, given that the provisions created irrational distinctions between similarly situated persons. *Moreno*, 413 U.S. at 538; *Romer*, 517 U.S. at 632. The same is true here.

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2. The Construction Trucking Services Exemption Underscores The Unequal Treatment Towards Plaintiffs

As discussed in Plaintiffs' moving papers, the Legislature further demonstrated its preference for intrastate occupations and industries by also exempting the construction industry, including particularly construction trucking services.

In response, the State contends that this differential treatment is justified because, supposedly, the "construction industry's use of trucking services 'is different from how trucking services are used in many other industries.'" (ECF No. 34:20-21 (quoting Hannan Decl., ¶ 4). According to the State, this includes "much more oversight and direction of drivers than in the regular trucking industry" including that drivers "often must take direction from onsite contractors not only in the delivery of the material, but in putting it to immediate use in the project, such as pouring concrete, or transporting and setting up equipment." (ECF No. 190, 35:1-5.)

If that was true—including a greater need to closely supervise drivers—then that would suggest a *greater need to fully enforce the ABC test* as to drivers in the construction field. Namely, if drivers in that industry are subject to "much more oversight" than interstate truckers who may not experience any control whatsoever, that is consistent with a greater need to state intervention and protection, rather than less.

The State also argues that a specific exemption was needed for construction trucking services because "[c]onstruction bids . . . are fixed-price and often entered into years in advance, such that the immediate application of AB 5 could have disrupted operations because contractors may have struggled to incorporate any increased costs of reclassification of drivers into their contracts." (ECF No. 190, 35:6-10.) Putting aside the acknowledgment that reclassification "could have disrupted operations" including impose significant costs and impair contracts (an issue not limited to the construction industry), the claimed fix through the exemption

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1 does not even align with the claimed need. In its brief, the State focuses on just the
2 "three additional years permitted by the AB 5 exemption . . . to come into
3 compliance with the law[.]" In truth, the Legislature has provided an exemption that
4 will last nearly seven years (even if it is not extended again).

5 The *Dynamex* decision came out in April 2018. Therefore, the construction
6 industry already had 18 months "to come into compliance with the law" before AB-5
7 was even enacted. AB-5 then provided an exception that would sunset on January 1,
8 2022 (through Labor Code § 2750.3) and then provided an additional three years
9 through AB-2257 (through Labor Code § 2781). Those exemptions also served to
10 apply "retroactively" to the period from April 2018 through December 31, 2019.
11 Labor Code § 2785(b) ("Insofar as the application of Sections 2776 to Section 2784
12 would relieve an employer from liability, those sections shall apply retroactively to
13 existing claims and actions to the maximum extent permitted by law.").

14 So, in reality, the construction industry was provided an exemption that will
15 last nearly *seven* years from April 2018 through December 2024. Further, if the
16 Legislature was truly seeking to aid businesses that had locked in "[c]onstruction
17 bids", as the State now suggests, then it would have done so by grandfathering in
18 contracts that were already entered into by a certain date. When given even
19 moderately close scrutiny, the proffered reasons for the construction trucking
20 services exemption do not pass muster, and instead confirm the unequal treatment
21 offered by the Legislature to similarly situated group.

22 Finally, the State argues that the construction trucking services exemption, if it
23 supports a finding of unequal treatment, cannot invalidate the entire statute. The
24 State fails to account, however, for the fact that AB-5/AB-2257 contains its own
25 requirements for what should happen if the statute is found to be impermissible.
26 Specifically, "[i]f a court of law rules that the three-part test . . . cannot be applied . .
27 . then the determination of employee or independent contractor status in that context
28 shall instead be governed by" the *Borello* test. Labor Code § 2775(b)(3).

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Consequently, the State cannot belatedly offer the same construction trucking services exemption to the broader trucking industry, since a finding of unequal treatment returns us to a pre-AB-5 state.

3. The Record Demonstrates Animus Towards Motor Carriers.

Through their Second Amended Complaint and supplemental brief, Plaintiffs have shown the irrational animus toward motor carriers that motivated AB-5's sponsors. In response, the State argues that Lorena Gonzalez's own comments are immaterial. Plaintiffs might be correct that an individual legislators' statements have no bearing on the interpretation of AB-5 or AB-2257. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 403 (2010) ("The manner in which the law could have been written has no bearing; what matters is the law the Legislature did enact. We cannot rewrite that to reflect our perception of legislative purpose[.]" (quotation, emphasis, and citation omitted)). But those statements are probative of the animus AB-5's primary sponsor Lorena Gonzalez harbors toward motor carriers, in violation of their equal protection rights. *Ninety Three Firearms* dealt with the interpretation of a statute, but has no bearing on the question whether the enforcement of the statute would violate equal protection.

As described in the Third Amended Complaint (¶¶ 52-58), the sponsor of AB-5 openly communicated her desire to target trucking. This is not surprising, since former representative Gonzalez was, before entering the Legislature, an employee and union organizer for the IBT. She did not abandon her allegiance to the IBT when she joined the Legislature, proudly announcing on May 30, 2019 that "I am a Teamster" and "I am the union."[8] And her animus towards motor carriers who have been able to operate in a deregulated and open marketplace for interstate trucking was made clear from floor debate on the bill, including Assemblywoman Gonzalez's

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

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intention to "get[] rid of an outdated broker model that allows companies to basically make money and set rates for people that they called independent contractors."

At the very least, Plaintiffs have shown "serious questions" about the statute's constitutionality and "a fair chance of success on the merits" of their equal protection claims. *Shell Offshore, Inc. v. Greenpeace, Inc*., 709 F.3d 1281, 1291 (9th Cir. 2013); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988).

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

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

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

Provided by: The Cullen Law Firm, PLLC, www.cullenlaw.com info@cullenlaw.com