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12  
13 **UNITED STATES DISTRICT COURT**  
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 CALIFORNIA TRUCKING  
ASSOCIATION *et al.*,

16 Plaintiffs,

17 OWNER-OPERATOR  
18 INDEPENDENT DRIVERS  
ASSOCIATION, INC.,

19 Intervenor- Plaintiff,

20 v.

21 ATTORNEY GENERAL ROB  
22 BONTA, *et al.*,

23 Defendants.  
24  
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Case No. 3:18-CV-02458-BEN-DEB

**SUPPLEMENTAL MEMORANDUM  
OF POINTS AND AUTHORITIES  
REGARDING INTERVENOR  
OUIDA’S EQUAL PROTECTION  
CLAIM IN SUPPORT OF A  
MOTION FOR A PRELIMINARY  
INJUNCTION**

Judge: Hon. Roger T. Benitez

Date: August 28, 2023

Time: 10:30 a.m.

**Courtroom: 5A**

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1           **I.       INTRODUCTION**

2           Intervenor/Plaintiff Owner-Operator Independent Drivers Association, Inc.  
3 (OOIDA) submits this supplemental memorandum presenting an additional  
4 argument in support of its motion for a preliminary injunction: the defendants are  
5 violating OOIDA’s members’ rights protected by the Equal Protection clauses of  
6 the California and U.S. Constitutions.

7           AB-5 grants an exemption to the ABC test for independent contractors who  
8 serve the construction industry but does not grant the same exemption to  
9 independent contractor drivers who serve other industries. There is no relevant or  
10 practical difference between independent contractor truckers who serve the  
11 construction industry and those who serve the wide spectrum of other industries  
12 that rely on trucking. In fact, it is not unusual for the same truckers routinely serve  
13 both the construction industry and other industries in the course of their work.

14           The equal protection violation is first established because there is no rational  
15 basis for this differential treatment of independent contractor truckers. The equal  
16 protection violation is also established by two irrational bases for the law: the  
17 legislature’s demonstrable animus toward the independent contractor business  
18 model and the economic protection of the construction industry. Each irrational  
19 basis for AB-5 is sufficient to establish an equal protection violation.

20           **II.       ARGUMENT**

21           **A.       The Legislature’s stated reason for an exemption to the ABC**  
22 **test for the construction industry has no relationship to the**  
23 **purposes of AB-5.**

24           The only purpose for the construction industry exemption articulated within  
25 California’s legislative materials is focused on the business needs of the  
26 construction industry, not the working condition of workers, including truckers,  
27 serving that industry. In the original AB-5 legislation, a version of the construction  
28 trucking exemption was passed without comment or explanation in committee or

1 hearing reports. In 2021, however, when the legislature considered an amendment  
2 to extend the exemption to 2025, the Senate Rules Committee Report from  
3 September 3, 2021 stated:

4 According to the California State Council of Laborers, “Trucking services in  
5 the heavy civil construction industry are fluid and variable services.  
6 Construction contractors in most cases need different numbers of trucks  
7 delivering road materials in different configurations daily and weekly. One  
8 workday a contractor may need 20 trucks, tomorrow 80 and next week 100 or  
9 none at all. If the negotiated language for the construction trucking safe  
10 harbor provided for in AB-5 is not extended, our members will be back to  
11 having to make the difficult decision of laying off all employee truck drivers  
12 so they can comply with the requirements of prong B of the ABC test in the  
13 *Dynamex* decision to protect their ability to contract out, to legitimate  
independent owner operators, for their trucking needs which require a  
varying amount of construction trucking services from day to day. If not  
extended, there will be significant operational impacts within the heavy civil  
construction industry that could shut down jobs.”

14 Sen. Rules Comm. AB 1561, 2021-22 Reg. Sess., at 5 (Cal. September 3, 2021).  
15 The legislature’s focus on the economic needs of the construction industry rather  
16 than serving the stated purposes of AB-5, to focus on the conditions of workers,  
17 supports each of the elements of OOIDA’s equal protection claim.

18 **B. Independent contractor drivers who serve the construction**  
19 **industry are indistinguishable from those who serve a wide**  
20 **variety of industries.**

21 In *American Society of Journalists & Authors, Inc. v. Bonta*, the Ninth  
22 Circuit held that “[t]he Equal Protection Clause prohibits states from denying to  
23 any person within its jurisdiction the equal protection of the laws.” 15 F.4th 954,  
24 964 (9th Cir. 2021) (citation, alteration, and internal quotation marks omitted),  
25 *cert. denied*, — U.S. —, 142 S. Ct. 2870 (2022). “To prevail on an Equal  
26 Protection claim, plaintiffs must show that a class that is similarly situated has  
27 been treated disparately.” *Galanti v. Nevada Dep’t of Corr.*, 65 F.4th 1152 (9th Cir.  
28 2023), quoting *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir.

1 2017). (“The Equal Protection Clause . . . keeps governmental decisionmakers  
2 from treating differently persons who are in all relevant respects alike.”). *See also*  
3 *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017) quoting  
4 *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). California Labor Code § 2781 grants  
5 an exemption to the ABC test for sole proprietor independent contractor truckers  
6 serving as subcontractors to the construction industry. *See* § 2781(h)(1)(c). It does  
7 not provide an exemption for those same drivers serving other industries.

8 Section 2781 first lays out the conditions under which a subcontractor of any  
9 relevant trade serving the construction industry may be exempt from the ABC test  
10 established under AB-5 and *Dynamex*. *See* § 2781(a)-(g). One of those  
11 requirements, subsection (b), is that such subcontractors be licensed by the  
12 Contractors State License Board for the type of work to be performed under the  
13 contract. *See* § 2781(b). But subsection (h) of AB-5 relieves trucking companies  
14 from complying with subsection (b) if several additional conditions apply.

15 Among those conditions is that the subcontractor is registered with the  
16 Department of Industrial Relations as a public works contractor, and that the  
17 subcontractor uses its own employees to perform the work “unless the  
18 subcontractor is a sole proprietor who operates their own truck to perform the  
19 entire subcontract and holds a valid motor carrier permit issued by the Department  
20 of Motor Vehicles.” § 2781(h)(1)(B) & (C). Sole proprietorship is the  
21 predominant business structure of the vast majority of independent contractor truck  
22 drivers serving the full spectrum of industries, including construction. *See*  
23 Declaration of Todd Spencer (Spencer Decl.) at ¶13-14, attached hereto as Exhibit  
24 1. Therefore, this section of the statute creates a disparity between independent  
25 contractor truck drivers who serve the construction industry and those who serve  
26 other industries.

27 There is no difference, however, between independent contractor drivers  
28 who serve the construction industry and those who serve other industries. *Id.* at

1 ¶15 In fact, many independent contractor truckers serve the construction industry  
2 and other industries interchangeably day to day or week to week. *Id.* at ¶17-18.  
3 Owner-operators serving the construction industry operate the same equipment  
4 (with a few exceptions), under the same contracts and agreements, and under the  
5 same form of compensation when serving other industries. *Id.* at ¶15-16.

6 One reason that independent contractor truckers for the construction industry  
7 are indistinguishable from those for other industries is that the needs of the  
8 construction industry for independent contractor drivers, as described in AB-5's  
9 legislative history, are not unique among the other industries served by those  
10 truckers. Many industries have varied and seasonal demands for trucking, such as  
11 different growing seasons across the country in the agricultural industry, increased  
12 freight from ports to retailers before the holiday shopping season, increases and  
13 decreases in oil production depending on the price of fuel (requiring more or fewer  
14 trucks to haul drilling equipment to oil fields and oil to refineries), and many other  
15 businesses whose need for truck drivers comes in waves of high and low demand.  
16 *Id.* at ¶17. Just as the legislative history describes, these factors do not allow those  
17 companies to sustain, as year-round employees, the peak number of truck drivers  
18 their businesses needs at any one time. *Id.* at ¶19.

19 Independent contractor truckers have held a unique place in the industry  
20 because of their flexibility to meet the ebb and flow of demand for trucking from  
21 different sectors of our economy, *id.* at ¶20, the same conditions the construction  
22 industry explained to the California legislature in lobbying for its truckers'  
23 exemption from the ABC test. Truckers who drive for a multitude of industries,  
24 including construction, rely upon the independent contractor model for their  
25 livelihood; conversely, those businesses, just like construction, rely upon  
26 independent contractors to run efficiently and economically. *Id.*

27 Particularly with respect to the stated purpose of AB-5, to protect workers  
28 who have faced historic misclassification, the independent contractor truckers who



1 serve the construction industry are indistinguishable from those who serve other  
2 industries. Independent contractor truckers who serve both the construction and  
3 other industries are indistinguishable because they are one and the same  
4 individuals.

5  
6 **C. With no rational basis for the distinction between independent**  
7 **contractors for the construction industry and those for other**  
8 **industries, AB-5 violates the Equal Protection Clause of the**  
9 **Constitution.**

10 If a statute does not concern a suspect or semi-suspect class or a fundamental  
11 right, courts apply rational basis review and ask whether the ordinance “is  
12 rationally related to a legitimate governmental interest.” *See Olson v. California*,  
13 62 F.4th 1206, 1218-19 (2023) (applying rational basis review to AB-5). “Rational  
14 basis review is ‘a fairly forgiving standard,’ as it affords states ‘wide latitude ... in  
15 managing their economies.’” *Olson*, 62 F.4th at 1219 (quoting *American Soc’y of*  
16 *Journalists & Authors*, 15 F.4th at 965). That standard applies here as independent  
17 contractor truckers do not comprise a suspect or semi-suspect class. To determine  
18 whether the exemption of one class of worker is rationally related to furthering a  
19 legitimate state purpose, the Supreme Court asks, “(1) Does the challenged  
20 legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers  
21 to believe that use of the challenged classification would promote that purpose?  
22 *W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 668,  
(1981).

23 Applying this standard in *Olson*, the Ninth Circuit recently overturned the  
24 District Court’s dismissal of Uber and Postmates’ challenge to AB-5 as amended,  
25 noting that AB-5 targeted specific app-based companies operating exactly as did  
26 other app-based companies that the legislature exempted from the application of  
27 AB-5. *See Olson* at 1219. The distinction between truck drivers in the construction  
28 industry and those not in construction is equally suspect.

1 At no point in the legislative history of AB-5 is there any explanation that  
 2 the working conditions of truckers for the construction industry are different than  
 3 those serving any other industry. Nowhere did any legislator assert that  
 4 construction-related truckers enjoy better working conditions than other truckers or  
 5 give any other reason to suggest that construction-related truck drivers are in less  
 6 need of the purported protections of ABC classification test. The justification for  
 7 the construction trucking exemption to the ABC test to protect the economic  
 8 interests of construction industry is completely unrelated to the purpose of AB-5.  
 9 Thus, there is no rational basis for creating and treating separate classes of  
 10 indistinguishable independent contractor drivers differently based on what industry  
 11 they serve, especially when such individuals often serve both the construction and  
 12 other industries from load to load.

13 **D. The legislature was motivated by two irrational reasons in**  
 14 **enacting AB-5 and the construction industry exemption: animus**  
 15 **toward the independent contractor business model, and the**  
 16 **economic protection of the construction industry.**

17 **1. Political animus against the independent contractor trucker**  
 18 **model irrationally animated the legislature’s purpose in**  
 19 **eliminating that model under AB-5.**

20 As the United States Supreme Court said in *United States Dep’t of Agric. v.*  
 21 *Moreno*, 413 U.S. 528, 534 (1973), “if the constitutional conception of ‘equal  
 22 protection of the laws’ means anything, it must at the very least mean that a bare  
 23 congressional desire to harm a politically unpopular group cannot constitute a  
 24 legitimate governmental interest.” As in *Olson*, Plaintiffs’ allegations here  
 25 plausibly state a claim that the “singling out” of Plaintiffs by AB-5, as amended,  
 26 “fails to meet the relatively easy standard of rational basis review.” *Olson* at 1220  
 (citing *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008), as amended).

27 Plaintiffs can demonstrate the Legislature’s—and in particular  
 28 Assemblywoman Gonzalez’—animus toward the independent contractor model in

1 the trucking industry. In enacting AB-5 and its amendments, the Legislature sought  
2 to eliminate the longstanding relationship between motor carriers and independent  
3 contractor truckers. In a committee hearing report on AB-5 from April 3, 2019, a  
4 sponsor of the bill, the California Labor Federation, described AB-5 in part: “It  
5 distinguishes carefully between a trucking company that has no employee drivers  
6 (misclassification) and a trucking company that contracts with a mechanic  
7 (legitimate contractor).” *See also* Assembly. Comm. on Lab. & Empl. AB5, 2019-  
8 20 Reg. Sess., at 6 (Cal. April 3, 2019). The only way that a trucking company can  
9 have no employee drivers is if it contracts with independent contractor drivers.  
10 Thus, the rationale of the legislature here was specifically to preordain that such  
11 motor carriers were misclassifying their drivers, and, therefore, abolish the use of  
12 independent contractors by trucking companies. This demonstrates an intent to do  
13 away with a particular business model and is a clear expression of animus against  
14 independent contractor drivers and motor carriers who contract with them.

15 To complete its attack on the owner-operator trucker model, the legislature  
16 also went after brokers who contract with such truckers. In a floor session in  
17 advance of the passage of AB-5, California Assemblywoman Lorena Gonzalez  
18 said, “And let me talk for one minute about trucking . . . . We are [] getting rid of  
19 an outdated broker model that allows companies to basically make money and set  
20 rates for people that they called independent contractors.” *See* video record of  
21 Assembly Floor Session, at 1:08:20-1:08:30 (Sept. 11, 2019)  
22 (<https://www.assembly.ca.gov/media/assembly-floor-session-20190911>).

23 In addition:

- 24 • In her own Fact Sheet regarding AB-5, Ms. Gonzalez referred to trucking  
25 industry worker misclassification and described the independent contractor  
26 model as “exploitative” and dubbed it an “illegal business model.”  
27 ([https://www.californiansforthearts.org/AB-5-about-blog/2020/2/7/AB-5-  
28 fact-sheet-from-assemblywoman-lorena-gonzalez](https://www.californiansforthearts.org/AB-5-about-blog/2020/2/7/AB-5-fact-sheet-from-assemblywoman-lorena-gonzalez)). Ms. Gonzalez wrote,  
“Companies have used the practice of misclassification to cut costs at the  
expense of workers and in turn, created an insurmountable challenge for

1 working families trying to make ends meet. This exploitative business  
 2 practice has proliferated in industries such as *trucking*, delivery, janitorial  
 and construction for decades.” *Id.*

- 3
- 4 • It is no secret that AB-5 was promoted by labor unions, who have long  
 5 wanted to organize drivers at the state ports but could not because federal law  
 6 prohibits independent contractors from joining unions. “Pushing AB-5  
 7 through the legislature is perhaps one of the most significant labor wins in  
 8 decades,” reported Alexia Fernandez Campbell of Vox when the law passed.  
 Alexia Fernandez Campbell, “Gig workers’ win in California is a victory for  
 9 workers everywhere,” Vox (September 11, 2019)  
 ([https://www.vox.com/2019/9/11/20851034/california-ab-5-workers-labor-  
 unions](https://www.vox.com/2019/9/11/20851034/california-ab-5-workers-labor-unions)).
  - 10 • Ms. Gonzalez repeatedly said that the goal was to classify more workers as  
 11 employees so that they could more easily unionize and be eligible for  
 12 minimum wage and benefits. Before running for office, Ms. Gonzalez was  
 13 the leader of San Diego’s organized labor council. In a tweet posted May 30,  
 2019, Ms. Gonzalez wrote: “Dude. I am a Teamster. I ran for office as an  
 14 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.”  
 15 (<https://twitter.com/LorenaSGonzalez/status/1134087876390428672>).  
 Obviously, independent contractors cannot be unionized.
  - 16 • On February 8, 2020, John Myers of the Los Angeles Times wrote, “Few  
 17 disputes over AB-5 were more intense than those Gonzalez had with the  
 18 trucking industry . . . .” John Myers, “Lorena Gonzalez likes a good fight.  
 She got it with hotly debated AB-5,” Los Angeles Times (February 8, 2020).  
 19 ([https://www.latimes.com/california/story/2020-02-08/lorena-gonzalez-  
 20 california-assembly-AB-5-profile](https://www.latimes.com/california/story/2020-02-08/lorena-gonzalez-california-assembly-AB-5-profile)).

21 Ms. Gonzalez and the Legislature, influenced by labor unions, were  
 22 motivated by political animus against the independent contractor model in passing  
 23 AB-5. Their goal was to destroy the independent contractor model in trucking and  
 24 to attract more union members – neither of which is the stated goal of AB-5. This  
 25 animus against independent contractor truckers is an irrational basis for not  
 26 exempting all independent truck drivers under AB-5 and, therefore, does not  
 27 survive rational basis review.  
 28

1                   **2. Economic protectionism for the construction industry is an**  
2                   **irrational basis for selectively granting an exemption to some**  
3                   **independent contractor truck drivers under AB-5.**

4                   The Ninth Circuit has held that “mere economic protectionism for the sake  
5 of economic protectionism is irrational with respect to determining if a  
6 classification survives rational basis review. *Merrifield v. Lockyer*, 547 F.3d 978,  
7 991 n. 15 (9th Cir. 2008). The *Merrifield* court reasoned that, “...there might be  
8 instances when economic protectionism might be related to a legitimate  
9 governmental interest and survive rational basis review. However, economic  
10 protectionism for its own sake, regardless of its relation to the common good,  
11 cannot be said to be in furtherance of a legitimate governmental interest.” *Id.*

12                   In this instance, the legislature’s purpose for the construction industry  
13 exemption is plainly economic protectionism for that industry: to render the  
14 economic fortunes of that industry undisturbed by the intention of AB-5’s sponsor,  
15 to abolish the independent contractor trucking model. The exemption allows the  
16 construction industry to continue to use independent contractors for times when  
17 they need more trucking services, saving those companies the cost and  
18 inconvenience of having to employ (or fire) unneeded drivers during times when  
19 their demand for trucking services is less. This reasoning is “starkly inconsistent  
20 with the bill’s stated purpose of affording workers the “basic rights and protections  
21 they deserve.” A.B. 5 § 1(e).” *Olson* at 1219, and antithetical to the legislature’s  
22 specific design for independent contractors in the trucking industry, to abolish that  
23 economic business model.

24                   Additionally, the legislature was not acting for the common good. Rather, it  
25 was acting for a narrow good, *i.e.*, the interests of one industry, by selectively  
26 counteracting the purpose of the legislation. If the legislature were truly acting for  
27 a common good, *i.e.*, to prevent the widespread damage AB-5 will cause  
28 independent contractor truckers and their customers beyond construction, it would  
29 have exempted all industries who rely upon independent contractor truckers to

1 meet their variable needs for trucking services. This selective economic  
2 protectionism of one industry is an irrational basis for the construction exemption  
3 from AB-5, and as such it does not survive rational basis review.

4 **III. CONCLUSION**

5 AB-5 in its current form, exempting from the ABC test independent  
6 contractor truckers who serve the construction industry but not those identical  
7 independent contractor truckers when they serve other businesses, violates the  
8 Equal Protection clauses of the U.S. and California Constitutions.  
9 Intervenor/Plaintiff OOIDA is likely to succeed in this equal protection claim, and  
10 it provides an additional basis to support the Court’s granting of the pending  
11 motion for a preliminary injunction as to the state’s enforcement of AB-5 against  
12 the trucking industry.

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Dated: May 19, 2023

Respectfully submitted,  
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