Nos. 20-55106 and 20-55107

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA TRUCKING ASSOCIATION, *et al.*,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of the State of California, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California
No. 3:18-cv-02458-BEN-BLM
Hon. Roger T. Benitez

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CORPORATE DISCLOSURE STATEMENT

California Trucking Association ("CTA"), a California nonprofit corporation, has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

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INTRODUCTION

For decades, motor carriers throughout the United States have arranged for freight to be transported by "owner-operators" who drive their own trucks and provide their services as independent contractors. Owner-operators play a critical role in interstate commerce—one that Congress has recognized and protected.

California, however, has adopted a new test for independent-contractor status that upends the owner-operator business model. Under the second prong of the so-called "ABC" test, adopted judicially and then codified in Assembly Bill 5 ("AB-5"), a hiring entity may not lawfully classify a service provider as an independent contractor unless the service provider's work is "outside the usual course of the hiring entity's business." Because no motor carrier that engages a truck driver can possibly satisfy this requirement, motor carriers in California, in order to comply with AB-5, must treat all drivers as employees under the state's Labor Code, wage orders, and Unemployment Insurance Code.

The Federal Aviation Administration Authorization Act of 1994 ("FAAAA") expressly preempts state laws "related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). AB-5's prohibition on using independent-contractor drivers will significantly affect motor carriers' services, routes, and prices. The First Circuit therefore ruled that a Massachusetts law similar to AB-5, as applied to motor carriers, is preempted by the

FAAAA. This Court has likewise held that "an 'all or nothing' rule requiring services be performed by … employee drivers … [is] likely preempted." *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 964 (9th Cir. 2018).

Plaintiffs-Appellees California Trucking Association ("CTA"), Ravinder Singh, and Thomas Odom (together, "Plaintiffs") filed this action for injunctive and declaratory relief. After passage of AB-5 but before it took effect, they sought a preliminary injunction prohibiting the Attorney General and other California officials (the "State Defendants") from enforcing the ABC test against motor carriers in California. They submitted evidence demonstrating that AB-5 will have substantial adverse effects on motor carriers' services, routes, and prices. The district court granted the preliminary injunction, finding that Plaintiffs demonstrated "a likelihood of success on the merits as to their FAAAA preemption challenge," that Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction, and that "on balance, the hardships faced by Plaintiffs" in the absence of a preliminary injunction "significantly outweigh those faced by Defendants."

Neither the State Defendants nor Intervenor-Defendant the International Brotherhood of Teamsters ("IBT") (together, "Appellants"), nor their amici, have come close to showing that the district court abused its discretion in granting the preliminary injunction. On the contrary, the district court faithfully applied the law and made no factual errors. This Court should affirm.

STATEMENT REGARDING JURISDICTION

Plaintiffs-Appellees agree with Appellants' statements regarding jurisdiction.

STATEMENT OF THE CASE

A. Congress Preempted State Law to Ensure Deregulation of the Trucking Industry.

In 1980, Congress substantially deregulated interstate trucking. Finding that federal regulation of motor carriers had "inhibit[ed] market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry," Congress enacted the Motor Carrier Act to "reduce unnecessary regulation." Motor Carrier Act of 1980, Pub. L. 96-296, §§ 2, 3(a), 94 Stat. 793.

Several years after eliminating many of the federal regulations that had restricted the operation of market forces in the trucking industry, Congress acted to end state regulation of motor carriers, which it found had a similar effect. In particular, Congress enacted the FAAAA. Recognizing that the "[t]he sheer diversity" of state regulatory schemes posed "a huge problem for national and regional carriers attempting to conduct a standard way of doing business" (H.R. Conf. Rep. No. 103-677 at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759), Congress declared that state regulation of the trucking industry "imposed an unreasonable burden on interstate commerce" that "impeded the free flow of trade, traffic, and transportation of interstate commerce." FAAAA, Pub. L. No. 103-305,

§ 601(a)(1)(A)-(B), 108 Stat. 1569, 1605. As this Court has noted, Congress believed that "across-the-board deregulation" was both "in the public interest" and "necessary to eliminate non-uniform state regulations of motor carriers." *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998).

"[T]o ensure that the States would not undo federal deregulation with regulation of their own" (*Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) (internal quotation marks omitted)), and to prevent "a patchwork of state service-determining laws, rules, and regulations" (*id.* at 373), Congress expressly preempted state law. Specifically, Congress included in the FAAAA an express-preemption clause providing that no state may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). In Congress's view, the preemption of state law would "help[] ensure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 436 (1st Cir. 2016) (quoting *Rowe*, 552 U.S. at 371).

B. The Role Of The Owner-Operator In Interstate Trucking.

Owner-operators are an integral part of interstate transportation. Most motor carriers depend on owner-operators to move goods throughout the country.

Licensed motor carriers—including many CTA members—organize the movement of property in interstate commerce by motor vehicle. *See* ER269; SER120, 142. Congress has long recognized that "a safe, sound, competitive, and fuel efficient motor carrier system is vital to the maintenance of a strong national economy and a strong national defense." Pub. L. 96-296, § 3(a), 94 Stat. 793. Subject to certain exemptions and numerous requirements (*see* 49 U.S.C. § 13902; 49 C.F.R. Part 365), motor carriers operate pursuant to registration permits issued by the Federal Motor Carrier Safety Administration ("FMCSA"), a division of the U.S. Department of Transportation ("DOT"). *See* ER269; SER142. A motor carrier with such a permit has federal "operating authority." 49 C.F.R. § 365.101T.

Although some (generally large) motor carriers own fleets of trucks driven by employees, many motor carriers provide trucking services to their customers through contracts with "owner-operators"—individuals who own and operate their own trucks. SER142; ER269-70; *see also* H.R. Rep. No. 1812, 95th Cong., 2d Sess. 5 (1978) (describing the "independent owner-operator" as a "small businessman" who "owns and operates one, or a few, trucks for hire"). Typically, owner-operators lack their own operating authority and instead "conduct operations under the …

permit[s]" of the motor carriers with which they contract. *Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 303 (1953); *see also, e.g.*, *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1267 (5th Cir. 1983) ("Owner-operators … are persons owning one or a few trucks who lack [motor carrier] operating authority"). An owner-operator transports property for a motor carrier pursuant to a "lease," which federal law defines as a "contract … in which the owner [of a motor vehicle] grants the use of [the motor vehicle] … for a specified period to a[] [motor carrier possessing operating authority] for use in the regulated transportation of property, in exchange for compensation." 49 C.F.R. § 376.2(e). The DOT "regulate[s] the relationship between owner-operators and motor carriers, including the required terms in their leases." *Owner-Operator Independent Drivers Ass'n, Inc. v. Swift Transp. Co.*, 632 F.3d 1111, 1113 (9th Cir. 2011); *see also* 49 U.S.C. § 14102(a); 49 C.F.R. §§ 376.11, 376.12 (specifying leasing requirements).

The owner-operator business model has long been a "linchpin" of the motor carrier system. ER270. In 1978, a congressional report noted that owner-operators were "one of the most efficient movers of goods and account[ed] for approximately 40 percent of all intercity truck traffic in the United States." H.R. Rep. No. 1812, at 5. The following year, reflecting the essential role of owner-operators in interstate commerce, federal Truth-in-Leasing regulations were adopted to "promote the stability and economic welfare of the independent trucker segment of the motor

carrier industry." 44 Fed. Reg. 4680 (Jan. 23, 1979). And the year after that, when signing the Motor Carrier Act in 1980, President Carter stated that he was "particularly pleased that the bill will … enhance business opportunities ***for independent truckers***." Motor Carrier Act of 1980: Statement on Signing S. 2245 Into Law, Pub. Papers of Jimmy Carter at 1266 (July 1, 1980) (emphasis added). In 2004, this Court observed that "[t]here are hundreds of thousands of owner-operators in the United States, many of whom contract with various federally regulated motor carriers." *Owner-Operator Independent Drivers Ass'n, Inc. v. Swift Transp. Co.*, 367 F.3d 1108, 1110 (9th Cir. 2004).

California has a longstanding hostility to the use of owner-operators by motor carriers. When Congress enacted the FAAAA in 1994 and decreed that no state may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier" (49 U.S.C. § 14501(c)(1)), it specifically noted that then-recent California legislation exempting motor carriers from state regulation had denied the exemption to motor carriers "using a large proportion of owner-operators instead of company employees." H.R. Conf. Rep. No. 103-667, at 87. In adopting the FAAAA, Congress overrode the California legislature's discrimination against motor carriers reliant on owner-operators to service their customers. Congress concluded that "preemption

legislation" barring such state regulation "is in the public interest as well as necessary to facilitate interstate commerce." *Id.*

Many motor carriers, including most motor carriers in California, depend entirely on owner-operators to transport goods in interstate commerce. SER121, 142. Other motor carriers own trucks and employ drivers but contract with owner-operators to secure additional capacity or specialized services. SER142. The widespread use of owner-operators has allowed emerging motor carriers to expand without major capital investment and to compete effectively with larger companies. SER120-21.

Owner-operators function with substantial independence. They supply their own vehicles and are responsible for maintaining them. SER123. They decide whether to contract with a particular motor carrier and, if so, for how long. ER271-72; SER121-22. Some owner-operators work for the same motor carrier for long periods, but others may work for a motor carrier only briefly. SER121. Many owner-operators begin by driving a single truck. Later, however, they may choose to bid on jobs that require multiple trucks and then provide those services through subcontractors or by using trucks that they own and drivers whom they employ. ER272; SER132, 142. "This freedom of choice is a core characteristic of the independent owner-operator and it is what gives independent owner-operators the chance to grow their business into greater prosperity, possibly more trucks, more

drivers, and even their own operating authority down the road." Douglas C. Grawe, *Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators Over Time*, 35 Transp. L.J. 115, 127 (2008).

Motor carriers do not manage owner-operators in the performance of their tasks. SER124. Usually paid by the job, owner-operators have an incentive to maximize their efficiency. SER123. They decide what loads to accept, what days to work, and how to provide the services they contract to perform. ER271-72; SER121-22, 142. Thus, it is the owner-operator, not the motor carrier, who decides what routes to take and when to take the rest breaks mandated by federal hours-of-service rules. ER271-72; SER121-22, 142.

Owner-operators enable motor carriers to provide services that otherwise could not be economically offered.

Owner-operators enable motor carriers to offer their customers specialized trucking services that could not be offered by motor carriers that own their own fleets and depend on employee drivers. Motor carriers dependent on their own fleets and employee drivers "cannot keep infrequently used, specialized equipment on hand because of the capital costs associated with acquiring this equipment." SER127. Many owner-operators, by contrast, have invested in specialized equipment and learned to operate it efficiently. ER272; SER127. Because they can freely move from one motor carrier to another as demand for their specialized equipment and services

shifts (SER127), owner-operators can spread the costs of specialized equipment over more jobs than can motor carriers who own their own fleets. Consequently, motor carriers that provide services through owner-operators are able to provide specialized services that others either can provide only at higher cost or cannot provide at all. *Id*.

The owner-operator model is critical to the trucking industry because it allows motor carriers to efficiently satisfy fluctuating demand for trucking services. ER270. In many segments of the economy, the demand for trucking services varies over time. *Id*. In the agricultural industry, for example, demand varies depending on the time of year, the price of agricultural products, the available markets, the length of the growing season, and the size of the crop. *Id*. The owner-operator business model allows motor carriers to scale up their operations quickly in times of peak demand while avoiding the costs of maintaining idle equipment and employees when demand is lower. ER270-71; SER126-27. Use of owner-operators also allows motor carriers to satisfy periodic demands for equipment efficiently. SER127.

Given the sizable investment needed to acquire and maintain a truck, the fluctuating demand for trucking services, the sporadic demand for specialized trucking services in particular, and other related considerations, it would be extremely difficult if not impossible for a motor carrier doing business in California, particularly a smaller motor carrier with limited access to financing, to own and

maintain a fleet of trucks operated by employee drivers that is sufficiently large to service their customers' needs for specialized trucking services or haulage during times of peak demand. ER271.

C. California's Adoption Of The "ABC" Test To Distinguish Between Employees And Independent Contractors

1. California laws applicable to employees

California law—in particular, wage orders issued by California's Industrial Welfare Commission ("IWC"), the Labor Code, and the Unemployment Insurance Code —imposes numerous obligations on "employers" with respect to "employees."

IWC wage orders, which are "accorded the same dignity as statutes" (*Brinker Rest. Corp. v. Superior Ct.*, 273 P.3d 513, 527 (Cal. 2012)), "impose obligations relating to the minimum wages, maximum hours, and … basic working conditions" of California employees. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 5 (Cal. 2018) ("*Dynamex*"). The transportation industry is governed by IWC Wage Order No. 9-2001, Cal. Code Regs. Tit. 8, § 11090 ("Wage Order No. 9"). Like other wage orders, it imposes detailed requirements regarding, *inter alia*, minimum wages (*id.* § 4), working hours and overtime pay (*id.* § 3),[1] meal and rest periods (*id.* §§ 10-11), and facilities for employees such as lockers and changing rooms (*id.* § 13).

[1] Truck drivers who are subject to federal regulations governing hours of service are exempt from the wage order's provisions governing working hours and overtime pay. *See* Wage Order No. 9, § 3(L).

Wage Order No. 9 also mandates that employers maintain detailed records about each employee, including records regarding time of work, meal periods, and rates of pay. *Id.* § 7.

The Labor Code imposes numerous additional requirements. It addresses, *inter alia*, minimum wages (Cal. Lab. Code § 1197); hours and overtime pay (*id.* § 510); frequency of pay (*id.* § 204); wage statements (*id.* § 226); paid sick days (*id.* § 246); meal periods (*id.* § 512); maximum consecutive working days (*id.* § 552); recordkeeping (*id.* § 1174); expense reimbursement (*id.* § 2802); and many other matters. Where the Labor Code and the applicable wage order address the same subjects, their requirements may differ. *See, e.g.*, *Ward v. United Airlines, Inc.*, 889 F.3d 1068, 1072 (9th Cir. 2018) (observing that "the wage statement requirements in § 226 are far more comprehensive than those in Wage Order 9").

Under other parts of the Labor Code, employers must maintain worker's compensation insurance (Cal. Lab. Code § 3700) and must pay employees worker's compensation benefits for any work-place injury without regard to negligence (*id.* § 3600). Under the Unemployment Insurance Code, employers must make contributions to the State's unemployment and disability funds for each employee. *See generally Skidgel v. Cal. Unemployment Ins. Appeals Bd.*, 234 Cal. Rptr. 3d 528, 533 (Ct. App. 2018) (discussing unemployment insurance obligations applicable to employers).

2. The California Supreme Court's adoption of the "ABC" test

The myriad laws governing the employer-employee relationship in California generally do not apply to independent contractors. *See, e.g., Skidgel,* 234 Cal. Rptr. 3d at 533 (explaining that various obligations owed employees are inapplicable to independent contractors). For decades, California courts applied the test articulated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations,* 769 P.2d 399 (Cal. 1989), to distinguish between independent contractors and employees for purposes of state worker-protection laws. Under the multi-factor *Borello* test, the principal question "is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." 769 P.2d at 404 (internal quotation marks omitted). Courts applying the *Borello* test also consider

> (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Id.

The *Borello* factors "are intertwined" and "cannot be applied mechanically as separate tests." *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989 (9th Cir. 2014) (internal quotation marks omitted). On the contrary, "'their weight depends often on particular combinations.'" *Id.* Thus, when applying the *Borello* test, the decision-maker "must assess and weigh all of the incidents of the relationship" between the worker and the hiring entity, understanding "that no one factor is decisive." *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1097 (9th Cir. 2008).

In 2018, the California Supreme Court announced that the *Borello* test would no longer be used to determine "whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*." *Dynamex*, 416 P.3d at 5. The court declared that henceforth the ABC test would be used to distinguish employees from independent contractors for purposes of the wage orders. *Id.* at 42. Under the ABC test adopted in *Dynamex*, all workers are treated as employees subject to the relevant wage order unless the "hiring entity" establishes:

> (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work …; (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Id. (emphasis added).

The ABC test is incompatible with the owner-operator model. As the district court explained below, because "drivers necessarily perform work *within* 'the usual

course of the [motor carrier's] business,'" Prong B of the ABC test means that "a motor carrier *cannot* contract with independent contractor owner-operators without classifying them as employees." ER013-14 & n.9.

3. The legislature's codification and expansion of the "ABC" test.

Soon after *Dynamex* was decided, the California legislature began considering whether to expand or modify the decision's holding. AB-5 was introduced in December 2018, was enacted on September 18, 2019, and went into effect on January 1, 2020. The legislation's stated purpose is to "codify … *Dynamex* and … clarify the decision's application in state law." AB-5 § 1(d). The statute adopts the ABC test as articulated in *Dynamex* and expands its application beyond just wage orders to the entire Labor Code as well as the Unemployment Insurance Code. *See* Cal. Lab. Code § 2750.3(a)(1). Under AB-5, motor carriers must treat owner-operators as employees under ***all*** of these laws.

While AB-5 expands use of the ABC test beyond wage orders to the Labor Code and Unemployment Insurance Code, it simultaneously exempts many disparate and unrelated economic sectors from its application. AB-5 excludes from the ABC test, either categorically or conditionally, workers in various occupations, including physicians, surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, securities broker-dealers or investment advisers or their agents and representatives, direct sale

salespersons, commercial fishermen, marketing professionals, human resources administrators, travel agents, graphic designers, grant writers, fine artists, persons licensed to represent taxpayers before the Internal Revenue Service, payment processing agents, photographers and photojournalists, freelance writers, estheticians, electrologists, manicurists, barbers, cosmetologists, real estate licensees, and certain subcontractors in the construction industry (including certain subcontractors providing construction trucking services). Cal. Lab. Code § 2750.3(b), (c), (f).

AB-5 also contains an exception for a "bona fide business-to-business contracting relationship." Cal. Lab. Code § 2750.3(e) (the "B-to-B exception"). It provides that if "a business entity … contracts to provide services to another such business," the "employee or independent contractor status of the" entity providing the services "shall be governed by *Borello*" if the other entity demonstrates that "***all***" twelve enumerated prerequisites are satisfied. *Id.* (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.* Plaintiffs submitted evidence that the B-to-B exception does not allow

motor carriers to contract with owner-operators. ER276-78. Plaintiffs showed, for example, that owner-operators often provide services directly to the motor carriers' customers (ER277-78); that it often is impractical for motor carriers to negotiate individually over rates with owner-operators (ER276); and that many owner-operators choose to provide services to the same motor carrier over extended periods—an option that the B-to-B exception would foreclose (ER277).

D. AB-5's Consequences For The Trucking Industry

As the district court held, AB-5 "requires motor carriers to … reclassify all independent-contractor drivers as employee-drivers for all purposes under the California Labor Code, the [IWC] wage orders, and the Unemployment Insurance Code." ER014. Thus, AB-5 prevents motor carriers from obtaining trucking services from owner-operators who work for a flat fee that covers costs and profit, have the incentive to supply their own trucks, and need not be supervised as employees. *See supra* at 8-9.

By classifying every driver as an "employee" for purposes of California's labor laws, AB-5 compels motor carriers to, among other things, hire drivers in compliance with California's Labor Code (Cal. Lab. Code § 2810.5); reimburse drivers for any cost incurred in operating and maintaining vehicles (*id.* § 2802(a)); track and supervise drivers' working hours (Wage Order No. 9, § 7(A)(3); Cal. Lab. Code § 1174(d)); track and supervise drivers' meal and rest periods (Wage Order

No. 9, §§ 7 (A)(3), 11-12); pay drivers as employees (*id.* § 4; Cal. Lab. Code §§ 204, 226, 246, 1197); institute and supervise worker-safety programs (*id.* § 6401.7); and pay worker's compensation and unemployment insurance (*id.* §§ 3600, 3700; Cal. Unemp. Ins. Code § 976).

To comply with these and other requirements made applicable by AB-5, motor carriers will be forced to significantly restructure their operations—to obtain trucks, hire drivers, and create the administrative capacity to manage their new fleets, supervise their new employees, and maintain the employment records mandated by California law. *See* SER127-28, 142-43. Evidence introduced by Plaintiffs below in support of their motion for a preliminary injunction shows that a shift to an all-employee model will have a significant impact on motor carriers' services, routes, and prices.

1. Impact on Services.

Compelling motor carriers to abandon the owner-operator model will significantly affect trucking services. Prohibiting the use of independent drivers who supply their own trucks "eliminat[es] one of the two primary ways in which these services have been provided." ER274. This will change not only how trucking services are provided, but the extent to which they are offered at all. Small motor carriers, especially those that operate primarily in California, may be put out of business because they cannot afford to convert to an all-employee business model.

SER124. Other motor carriers may continue operations but leave the California market. ER274; SER124, 131-33. The result will be "reduced competition" in the motor carrier industry. SER124; *accord* ER274.

Motor carriers that survive and continue operating in California will offer curtailed services. ER274-75; SER126-27. As explained above, motor carriers that use owner-operators can readily scale up or down to meet fluctuating demand, but motor carriers reliant on their own fleets of trucks lack this flexibility. SER126-27. Because employee-driven fleets large enough to satisfy peak demand are prohibitively expensive to maintain, motor carriers barred from using owner-operators will acquire only enough equipment and hire only enough drivers to meet average demand. ER274-75; SER126-27, 147, 150. This will "affect the availability of services." SER126. Certain services will therefore be in short supply when demand is high. For example, at harvest time, "growers in the Central Valley" could well "fac[e] a shortage of refrigerated trucks" needed to "preserve and transport perishable goods." ER274; *see also* SER146-48. Similarly, given the "seasonality" of retail sales, the maintenance of fleets large enough to meet only average demand means that "a significant amount of … demand" for the transportation of retail goods "would not be met due to lack of trucks in October … through December." SER148. Moreover, because it is infeasible for motor carriers to invest in specialized equipment that is infrequently used, they will be unable to offer services requiring

such equipment—services that are currently provided by motor carriers through owner-operators. SER126-27; ER275.

2. Impact On Routes.

Prohibiting use of owner-operators will affect in various ways the routes that motor carriers offer the public.

First, motor carriers will have to reconfigure and consolidate routes to offset the increased costs imposed by an employee-only business model. ER275; *cf. infra* at 22-24 (explaining the costs associated with operating a fleet of employee-driven trucks). Indeed, forcing motor carriers to rely on employees driving trucks supplied by the motor carriers themselves "could also result in certain routes not being offered" at all, "since they will no longer be profitable or worth retaining a full-time employee to service." SER157.

Second, for shipments that cross state lines, motor carriers will need to reconfigure routes to allow the transfer of cargo between trucks driven by out-of-state owner-operators and those driven by employees within California. ER275; SER157.

Third, motor carriers will have to reconfigure routes to ensure that drivers can safely take the meal and rest periods that California law mandates for employees. ER276; SER125-26, 154-57. Although owner-operators are subject to hours-of-service limits under federal law, California imposes other "[m]uch more restrictive

rules" with respect to employees. SER125. As a consequence, arrangements must be made for employee drivers to take more frequent breaks than their owner-operator counterparts. Before taking meal or rest breaks, however, drivers must "legally and safely" park the trucks they are driving. ER276. That is not as straightforward as it may seem. Because "[m]unicipalities and counties have very specific rules defining the routes large trucks can take on their streets … as well as restrictions on where they can park," trucks "cannot just be driven off freeways and parked anywhere." SER154; *see* SER155-57 (citing various such restrictions). Indeed, "[t]his is a particular problem in California," which—according to a U.S. Department of Transportation study of the fifty states—has "the second fewest [parking] locations per 100 kilometers of driving." SER154; *see also* SER125.

As a consequence, "rather than simply routing" trucks to take "the shortest possible legal route," motor carriers forced to use employee drivers will need "to select often impractical routes so that drivers are better positioned to find safe parking to facilitate" state-mandated "meal periods and rest breaks." SER125. This will make the routes "less efficient and less direct" than those currently driven by owner-operators. SER157; *see also* SER125.[2]

[2] Forcing motor carriers to use inefficient routes will exacerbate AB-5's deleterious effect on trucking services as "[i]t is probable that many" of the new routes motor carriers would need to use "are not feasible for some shipments and those services will be eliminated." SER126.

For each of these reasons, "AB-5 will … have a major impact on the routes by which cargo moves in interstate commerce." SER154.

3. Impact on Prices.

Requiring motor carriers to abandon the owner-operator model will significantly increase the prices that shippers pay for trucking services.

Forcing motor carriers to cease using owner-operators will increase motor carriers' costs—possibly by as much as 150% or even more. SER123-24, 157-59. The increased costs are attributable to several factors. No longer able to rely on trucks supplied by owner-operators, each motor carrier will have to acquire its own "fleets of trucks … to replace the vehicles previously supplied by owner operators." SER124. That is an expensive undertaking, as each truck "can cost in excess of $100,000." *Id.*; *see also* SER146 (reporting that "trucks cost $136,000 in 2016"). Motor carriers will not only "have to acquire, finance, or lease their own fleets," but will also need to procure "storage facilities" in which to keep them. SER146, 158. On top of that, motor carriers will have to "set [] up a … maintenance and repair operation" to keep their fleets in service. SER158. In contrast to owner-operators, who must maintain their own vehicles or lose revenue, "employee drivers have little motivation to report … issues requiring preventative maintenance since if their truck fails, the motor carrier provides a replacement at no cost to the driver." SER123. As a result, "[m]otor carriers incur significantly more expenses maintaining a fleet of

company-owned trucks and employee drivers than they do using individual owner-operators who acquire, drive, maintain, and replace their own trucks." *Id.*

The cost of acquiring, storing, and maintaining a fleet of trucks is not the only reason a motor carrier compelled to abandon the owner-operator model will incur higher expenses. There are also the associated labor costs, both direct and indirect. Owner-operators "are far more motivated to work harder and smarter than employee drivers because their form of compensation—primarily by the job—rewards increased productivity." SER123. Additionally, because California law requires employee drivers to take meal and rest period breaks that are not required of owner-operators (*see supra* at 20-21), it takes more employee drivers than owner-operators to move the same amount of cargo within a given amount of time. For that and other reasons, it has been estimated that "it will take roughly 26.6% more employee drivers to move the cargo now handled by" owner-operators. SER151.

The indirect labor costs associated with employee drivers are also substantial. "Beyond observing owner-operators' compliance with federal and state safety regulations, motor carriers do not manage owner-operators in the performance of their tasks." SER124. Employee drivers, by contrast, "have to be trained, retrained, disciplined, and directly observed as to how they follow company rules both generally and while on the road." *Id.* Thus, the use of employee drivers "require[s] a layer of employee supervisors and managers … not present in the owner-operator

model." *Id.* Indeed, motor carriers forced to depend on employee drivers will not only have to recruit drivers, which is itself a costly endeavor (*id.*), but also hire and pay other employees to meet the various recordkeeping requirements made applicable by AB-5. *Cf.* Wage Order No. 9, § 7. The hiring of so many employees will force motor carriers "to set up and staff … personnel department[s]," which of course entails costs of its own. SER159. Furthermore, motor carriers forced to use employee drivers will have to purchase worker's compensation insurance, pay worker's compensation benefits, and contribute to the State's unemployment and disability funds. *See supra* at 11-12. The cost of worker's compensation insurance alone can add 15% to 20% to the cost of labor. SER124.

The increased costs incurred by motor carriers as a result of having to use employees driving company-supplied trucks will mean customers paying higher prices for shipping services. "Motor carriers have the ability to pass cost increases on to their customers through higher prices because trucking services are a 'necessity' to the overwhelming share of their clients." SER160; *see also* SER124. "Farmers," for example, "need their products removed from the fields and brought to buyers while they are still fresh." SER160. Similarly, "importers face penalties if they do not get containers off of docks and airports and on to warehouses." *Id.* As a result, "when costs go up, motor carriers will be able to pass a significant share of[] the cost on to their clients via higher prices without suffering a commensurate loss

of demand." *Id.* For these reasons, AB-5 "will … increase prices" for trucking services "in intra and interstate commerce." *Id.*

E. Proceedings Below

On October 25, 2018, following the California Supreme Court's decision in *Dynamex*, Plaintiffs sued the State Defendants. Plaintiffs sought (and continue to seek) a declaration that the FAAAA preempts application of the ABC test to motor carriers, and an injunction barring the State Defendants from applying the ABC test to motor carriers. ER315-33.[3] The State Defendants moved to dismiss, arguing *inter alia* that Plaintiffs lacked standing because they sought "an advisory opinion of how [*Dynamex*] might be applied to some of their members." Dkt 16-1, at 10-11.

On January 14, 2019, the district court granted IBT's motion to intervene. Dkt. 21. On January 24, 2019, Plaintiffs filed an Amended Complaint raising a new claim under the Supremacy Clause based on an intervening order of the FMCSA, which found that federal law preempts California's meal-and-rest period regulations. Dkt. 25, at 22-23.

On February 7, 2019, the State Defendants and IBT filed separate motions to dismiss. Dkts. 28 & 29.

[3] Plaintiffs also claimed (and continue to claim) that the dormant Commerce Clause precludes application of the ABC test to motor carriers. That claim is not at issue here.

On August 8, 2019, before ruling on the motions, the district court stayed the case pending the appeal of *Western States Trucking Association v. Schoorl*, 377 F. Supp. 3d 1056 (E.D. Cal. 2019) ("*WSTA*"), a case that likewise challenged application of the ABC test to motor carriers as mandated by *Dynamex*. On September 16, 2019, the district court lifted the stay, noting that the plaintiff in *WSTA* had voluntarily dismissed the appeal. ER313.

On September 24, 2019, the district court—taking judicial notice of AB-5's enactment a week earlier—dismissed the Amended Complaint with leave to amend. ER312. The court explained that it was "unclear whether Defendants will enforce the *Dynamex* decision against Plaintiffs before AB-5 takes effect" and that "the passage of AB-5 also raises questions of mootness." ER311.

On November 12, 2019—less than two months after AB-5 was enacted and more than seven weeks before it went into effect—Plaintiffs filed the Second Amended Complaint. ER281-309. The Second Amended Complaint, which remains the operative complaint, challenges the ABC test as codified and expanded in AB-5. On December 2, 2020, Plaintiffs moved for a preliminary injunction barring the State Defendants' enforcement of AB-5.

The district court granted a temporary restraining order (SER001-05) and then issued a preliminary injunction (ER001-023). Finding that AB-5 has "more than a tenuous, remote, or peripheral impact on motor carriers' prices, routes, or services"

(ER019), the district court held that Plaintiffs had demonstrated "a likelihood of success on the merits as to their FAAAA preemption challenge" (ER019-20). The court rejected IBT's argument that Plaintiffs lack standing (ER005-09), as well as its argument that motor carriers may engage owner-operators by invoking the B-to-B exception (ER019).

The court also held that Plaintiffs are likely to suffer irreparable harm in the absence of an injunction. ER020. It noted that motor carriers, to avoid "violat[ing] the law and fac[ing] criminal and civil penalties," would have to "significantly restructure their business model, including by obtaining trucks, hiring and training employee drivers, and establishing administrative infrastructure compliant with AB-5." ER021. It found further that, "on balance, the hardships faced by Plaintiffs significantly outweigh those faced by Defendants," noting that "California still maintains numerous laws and regulations designed … to prevent misclassification." *Id.*

SUMMARY OF ARGUMENT

Since the 1940s, motor carriers have provided trucking services by contracting with independent contractors, specifically, commercial drivers who own and drive their own trucks and are known colloquially as "owner-operators." AB-5 would prohibit this business model in California and require motor carriers to use only employee drivers. The district court did not err in holding that the FAAAA likely preempts this regulatory intrusion in the market for trucking services, nor did it abuse

its discretion in granting a preliminary injunction against enforcement of the law.

I.

The FAAAA preempts state laws that are related to motor carriers' prices, routes, or services. Plaintiffs demonstrated that AB-5 will significantly affect all three and is therefore preempted by the FAAAA.

A.

Under the Prong B of California's ABC test, a worker must be treated as an employee unless "[t]he person performs work that is outside the usual course of the hiring entity's business." Cal. Lab. Code § 2750.3(a)(1)(B). Because owner-operators perform work ***within*** the usual course of motor carriers' business, AB-5 requires motor carriers to treat all owner-operators as employees for purposes of Wage Order No. 9, the Labor Code, and the Unemployment Insurance Code.

The law's mandate to classify all drivers as employees will have a significant impact on motor carriers' services, rates, and prices. By banning use of independent contractors and requiring all-employee fleets, the statute both dictates ***how*** motor carriers provide services to their customers and affects ***which*** services are provided. Plaintiffs demonstrated that AB-5 will prevent motor carriers from meeting peak demand and offering specialized services. Plaintiffs also showed that forcing motor carriers to abandon the owner-operator model will force them to curtail or reconfigure their routes and to increase prices significantly.

This Court's decisions in *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) ("*ATA*") and *Su* confirm that AB-5 is preempted. In *ATA*, the Court held that a regulation requiring motor carriers to use employee drivers rather than independent contractors at a certain port was highly likely to be preempted. In *Su*, the Court rejected a preemption challenge to the *Borello* test because it ***does not*** compel motor carriers to use employees and reiterated that a law compelling motor carriers to use employee drivers likely ***is*** preempted. The Court distinguished the *Borello* test from the Massachusetts ABC test, which is indistinguishable from the ABC test adopted in AB-5, explaining that it (unlike the *Borello* standard) may compel motor carriers to use employee drivers. *ATA* and *Su* show that AB-5—which compels the use of employees—is likely preempted.

Decisions of the First and Third Circuits also support the decision below. In *Schwann*, the First Circuit held that Prong 2 of the Massachusetts ABC test, which is essentially identical to Prong B of California's ABC test, would have a significant impact on motor carriers' services and routes and was preempted by the FAAAA. In *Bedoya v. American Eagle Express Inc.*, 914 F.3d 812 (3d Cir. 2019), the Third Circuit held that New Jersey's ABC test is not preempted, but only because Prong B of the New Jersey test includes additional language—not present in the Massachusetts or California ABC tests—that ***enables*** motor carriers to classify

drivers as independent contractors.

B.

Appellants contend that the district court erred in concluding that Plaintiffs are likely to succeed on the merits, but their arguments are unpersuasive.

1. The State Defendants argue that the ABC test does not require motor carriers to reclassify independent contractors as employees. But they do not explain how a truck driver hired by a motor carrier could possibly satisfy Prong B and therefore qualify as an independent contractor under AB-5.

2. Appellants' efforts to distinguish *ATA* and *Su* also fail. Contrary to Appellants' arguments, the fact that *ATA* addressed regulations specific to trucking is immaterial. If a statute impermissibly regulates motor carriers' prices, routes or services, then it is preempted as applied to motor carriers even if it employs general language and affects other industries as well. And the Court's analysis in *Su* supports the finding of preemption here. The Court's conclusion that the *Borello* test is not preempted rested on its determination that *Borello* does not the prohibit the use of independent contractors, and the Court reiterated that a rule that did compel use of employee drivers would likely be preempted.

Appellants also fail to show that the First Circuit's decision in *Schwann* is inconsistent with this Court's precedent, yet ask the Court to create a Circuit split by rejecting *Schwann.*

3. AB-5 cannot escape preemption as a law of general applicability. Even generally applicable laws are subject to preemption, and AB-5 is ***not*** a law of general applicability in any event: The Legislature excluded numerous occupations from the ABC test while specifically targeting motor carriers' supposedly "outdated" business model. *Dilts* and *Mendonca* are inapposite. They rejected preemption challenges to employment laws as applied to drivers ***already classified*** as employees; they did not approve a law requiring that all drivers ***be classified*** as employees. Unlike the laws at issue in *Dilts* and *Mendonca*, AB-5 does not impose incremental requirements applicable to employees but instead ***completely eliminates*** motor carriers' ability to use independent contractors. Appellants argue that some worker-classification rules have survived preemption challenges and that others were implicitly approved by Congress when it adopted the FAAAA, but, unlike AB-5, none of those rules barred motor carriers from using independent-contractor drivers.

4. Contrary to IBT's argument, the B-to-B exception does not allow motor carriers to continue using owner-operators. A motor carrier would have to establish ***all twelve*** of the statutory requirements, and several of the requirements are incompatible with the owner-operator business model. Tellingly, the State Defendants—*i.e.*, those actually charged with enforcing AB-5—have not contended that motor carriers can engage owner-operators as independent contractors under the

B-to-B exception.

5. Appellants also fail to show that the district court erred in finding that AB-5 will affect motor carriers' prices, routes, or services. Appellants all but ignore Plaintiffs' evidence that a ban on independent contractors will adversely affect all three, arguing that the district court should have examined instead whether the FAAAA preempts California's employment laws. The question here, however, is not whether certain laws applicable to employees are preempted, but whether the FAAAA preempts Prong B of the ABC test as adopted in AB-5—a new worker-classification law that prohibits motor carriers from using drivers who are ***not*** employees. The district court asked the right question and did not abuse its discretion in answering it.

II.

The district court did not abuse its discretion in finding there to be a risk of irreparable harm to CTA's members, who must transform their business operations or risk substantial penalties. Appellants argue that Plaintiffs delayed seeking a preliminary injunction, but Plaintiffs sought one promptly after AB-5 was enacted. Appellants insist that Plaintiffs should be denied relief because they did not seek to preliminarily enjoin the ABC test before legislation codifying and expanding the new test was adopted, but AB-5 expanded the reach of the ABC test and made its enforcement more imminent. Indeed, Appellants undoubtedly would have argued

that an earlier motion was premature. Even now, IBT argues that Plaintiffs cannot show irreparable harm because they do not face a genuine threat of imminent prosecution, but the State Defendants made clear that they plan to enforce AB-5. Indeed, the district court found it necessary to grant a temporary restraining order because the State Defendants would not agree to refrain from enforcing the law even while it considered the preliminary injunction motion.

III.

The district court did not err in concluding that the balance of equities and public interest favor a preliminary injunction. CTA's members will suffer serious hardship if forced to choose between risking liability and changing their business model to comply with an unconstitutional law. A preliminary injunction will merely preserve the status quo while the parties litigate the merits. During this period, California can continue to address worker misclassification under the *Borello* test, which applied for decades and which AB-5 expressly provides will continue to apply to workers who fall within AB-5's many carve-outs. There is a strong public interest in preventing state impediments to interstate commerce and in enjoining a law that violates the Supremacy Clause.

IV.

IBT's argument that Plaintiffs lack standing should be rejected. Plaintiffs have sufficiently pleaded and demonstrated that CTA's members lawfully use owner-

operators properly classified as independent contractors and that AB-5 will force them to change their business model or risk significant penalties. The risk of an enforcement action and the expense of compliance are sufficient to confer standing on CTA.

STANDARD OF REVIEW

The grant or denial of a preliminary injunction is reviewed for abuse of discretion. *ATA*, 559 F.3d at 1052. This review is "limited and deferential." *Id.* (internal quotation marks omitted). A court abuses its discretion "when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* (internal quotation marks omitted). "As long as the district court got the law right," however, "it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Id.* (internal quotation marks omitted).

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). A plaintiff seeking a preliminary injunction must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Security*, 908 F.3d 476, 505 n.20 (9th Cir. 2018)

(quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). In applying this standard, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (internal quotation marks omitted). Thus, even if a court is uncertain that the plaintiff will ultimately prevail, "serious questions going to the merits and a balance of hardships can support issuance of a preliminary junction" if the plaintiff shows "a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

I. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR PREEMPTION CLAIM.

A. The FAAAA Preempts AB-5.

The FAAAA provides that "a State … may not enact or enforce a law … related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). "[D]eliberately expansive" and "conspicuous for its breadth," the phrase "relate[d] to" "express[es] a broad preemptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992) (internal quotation marks omitted) (interpreting identical language in Airline Deregulation Act of 1978). Thus, the phrase "embraces state laws having a connection with or reference to carrier rates, routes, or services, whether directly or indirectly." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251,

260 (2013) (internal quotation marks omitted). Therefore, while laws "that have 'only a tenuous, remote, or peripheral' connection to rates, routes, or services … are not preempted" by the FAAAA, "laws that are significantly 'related to' rates, routes, or services, ***even indirectly***, … are preempted." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014) (emphasis added) (quoting *Rowe*, 552 U.S. at 371). AB-5 is preempted under that standard.[4]

1. The ABC test significantly affects motor carriers' prices, routes, and services.

This Court stated in *ATA* that it "can hardly be doubted" that a regulation requiring motor carriers to use employees rather than owner-operators as drivers "relate[s] to prices, routes or services of motor carriers." 559 F.3d at 1053. In *Su*, the

[4] Two *amici* supporting Appellants argue that the Court should apply a presumption against preemption. *See* California Labor Federation AFL-CIO ("CLF") Amicus Br. at 7-10; California Employment Lawyers Association ("CELA") Amicus Br. at 6-7. As the Supreme Court recently explained, however, when "a statute contains an express pre-emption clause," a court should "not invoke any presumption against pre-emption" but should instead "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks omitted). Because "the Supreme Court has since changed its position on the presumption against preemption where there is an express preemption clause" (*Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258 (5th Cir. 2019) (citing both *Puerto Rico*, 136 S. Ct. at 1946 and *Gobeille v. Liberty Mut. Ins.*, 136 S. Ct. 936, 946 (2016)), this Court's statement in *Dilts* that "[p]reemption analysis begins with the presumption that Congress does not intend to supplant state law" (769 F.3d at 642-43 (internal quotation marks omitted)) is no longer valid with respect to preemption analysis under the FAAAA, which, as discussed above, contains an express-preemption provision codified at 49 U.S.C. § 14501(c)(1).

Court observed that its decision in *ATA* "stands for the obvious proposition that an 'all or nothing' rule requiring services be performed by certain types of employee drivers … [is] likely preempted." 903 F.3d at 964.

Under Prong B of California's ABC test, a worker is considered an employee, not an independent contractor, unless the hiring entity establishes that "[t]he person performs work that is outside the usual course of the hiring entity's business." Cal. Lab. Code § 2750.3(a)(1)(B). Because owner-operators "provid[e] a service within" a motor carrier's "usual course of business," they "will never be considered … independent contractor[s]" under AB-5. *Su*, 903 F.3d at 964. In other words, AB-5 "effectively compel[s] a motor carrier to use employees" rather than owner-operators "for certain services." *Id.* As this Court held in *ATA* and reiterated in *Su*, the FAAAA preempts such laws.

Given the "logical effect" of the ABC test on prices, routes, and services, its "impact … need not be proven by empirical evidence." *Schwann*, 813 F.3d at 437 (internal quotation marks omitted).[5] Nonetheless, Plaintiffs submitted evidence that

[5] For example, a Michigan appellate court found it "clear" that a state law requiring motor carriers use to employees "at all times" when operating vehicles in certain situations "affects routes and services and most probably affects prices." *In re Fed. Preemption of Provisions of the Motor Carrier Act*, 566 N.W.2d 299, 307-09 (Mich. Ct. App. 1997) (internal quotation marks omitted). It explained that "carriers operating in interstate commerce and using independent contractors as drivers have to make special arrangements to operate intrastate traffic in Michigan," because "[a] carrier handling traffic from a point outside Michigan to a point inside Michigan could not use the same vehicle (or at least not the same independent

AB-5 will have a "significant impact" on motor carrier's "prices, routes, or services." *Id.* at 436. In fact, although "the preemption clause of the FAAAA is written in the disjunctive," which means that Plaintiffs need only show that AB-5 is likely to have "an impermissible effect" on "routes ***or*** services ***or*** prices" (*Jasper v. C.R. England, Inc.*, 2012 WL 7051321, at *6 (C.D. Cal. 2012) (citing 49 U.S.C. § 14501(c)(1)), Plaintiffs demonstrated that they will likely prove that AB-5 affects all three.

Services: Because it "compel[s]" motor carriers "to adopt a different manner of providing services from what they otherwise might choose" (*Chambers v. RDI Logistics, Inc.*, 65 N.E.3d 1, 9 (Mass. 2016)), a law that requires motor carriers to provide services using employee drivers is on its face "related to a … service of any motor carrier." 49 U.S.C. § 14501(c)(1). Indeed, precisely because it effectively prevents motor carriers from contracting with independent drivers, the ABC test impermissibly "foreclose[s]" a "method of providing delivery services." *Schwann*, 813 F.3d at 439.

Moreover, Plaintiffs introduced evidence that barring motor carriers from using owner-operators would not only affect ***how*** motor carriers service their customers but also ***which*** services motor carriers offer their customers. As detailed

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contractor as a driver) to transport property wholly within Michigan as part of a return trip." *Id.* at 308.

above, Plaintiffs introduced evidence showing that motor carriers forced to rely on employee drivers cannot provide the same trucking services as motor carriers able to contract with owner-operators. In particular, Plaintiffs showed that application of the ABC test will "affect the availability of services" (SER126) not only because some motor carriers will be put out of business but also because surviving motor carriers, prevented from using owner-operators, will no longer be able to meet peak demand or offer the same specialized services. *See supra* at 18-20.

Routes: Plaintiffs also introduced evidence that application of the ABC test to motor carriers will affect motor carriers' routes in several ways. Specifically, Plaintiffs offered evidence that the effective ban on owner-operators (i) could cause motor carriers to curtail or cancel certain routes because they would no longer be economically viable; (ii) will force motor carriers to reconfigure the routes of interstate shipments to allow the transfer of cargo between trucks driven by owner-operators outside California and those driven by employees within the state; and, (iii) will compel motor carriers to adopt new, less efficient routes to ensure that drivers can safely and legally park their vehicles to take the meal periods and rest breaks that California law mandates for employees. *See supra* at 20-21.

Prices: Finally, Plaintiffs also introduced evidence that compelling motor carriers to use employees rather than owner-operators will cause motor carriers' prices to rise. As recounted above, Plaintiffs showed that forcing motor carriers to

shift to all-employee fleets will materially increase motor carriers' equipment and labor costs, and that because the demand for trucking services is relatively inelastic, these increased costs will be passed on to motor-carriers' customers in the form of higher prices. *See supra* at 22-25.

In light of the evidence—which Appellants largely ignore in their briefs—the district court did not abuse its discretion in "find[ing] [that] AB-5's ABC test has more than a 'tenuous, remote, or peripheral' impact on motor carriers' prices, routes, or services." ER019.

2. Decisions of this Court, two other circuits, and the Massachusetts supreme court confirm that the ABC test is preempted.

In *ATA* and *Su*, this Court addressed other state-law limitations on motor carriers' use of owner-operators. The two decisions confirm that California's ABC test is preempted.

In *ATA*, an association of motor carriers challenged mandatory concession agreements requiring them to "transition … from independent-contractor drivers to employees" when delivering goods to the Port of Los Angeles ("the Port"). 559 F.3d at 1049. While motivated by a variety of concerns, the Port contended that the employee model was preferable to the owner-operator model. It believed that "requiring employee drivers" would promote safety by "provid[ing] control [to] the concessionaires as employers of their employee drivers to a degree not possible with

casual or independent drivers." *Id.* at 1056 (internal quotation marks omitted). The Port also believed that "the employee model is the easiest model to administer because of the administrative cost of maintaining up-to-date records for tens of thousands of independent contractors"; that requiring the use of employees would "ensure sufficient supply of drayage drivers by improvement of wages, benefits, and working conditions"; and, that requiring that drivers be employees would lead to better maintenance of trucks because "for independent contractors, the costs are externalized, but if they were employees, the costs would be borne by their motor carrier employers." *Id*. (internal quotation marks omitted).[6] The district court refused to grant a preliminary injunction, but this Court reversed, concluding that "the independent contractor phase-out provision" was "highly likely to be shown to be preempted" by the FAAAA. *Id*.

The Court had no doubt that "the Concession agreement[] relate[d] to prices, routes, or services of motor carriers," and that its provisions mandating the use of employee drivers were therefore preempted "unless some exception to preemption" applied. 559 F.3d at 1053. It concluded that the provisions were not exempt from preemption. Rejecting the contention that the provisions were permissible safety regulations, the Court found that the Port's "threadpaper" safety arguments

[6] "Drayage" refers to short-distance transport, typically of containers, between one port and another, between a port and a railyard, or between a port and the cargo's final destination.

"denigrate small businesses and insist that individuals should work for large employers or not at all." *Id.* at 1056. And it viewed the Port's other justifications as revealing an impermissible attempt "to reshape and control the economics of the drayage industry." *Id.* at 1055.

Although the Court ruled against preemption in *Su*, the opinion's logic strongly suggests that the FAAAA prohibits a state-law classification rule that prohibits motor carriers from using owner-operators. In *Su*, CTA claimed that the FAAAA preempted application of the *Borello* standard to determine whether motor carriers had properly classified drivers as independent contractors. 903 F.3d at 957. According to the Court, the relevant question was whether the challenged law "compels or binds" the carrier "to a particular price, route or service." *Id.* at 964 (quoting *Air Transp. Ass'n of Am. v. City & County of S.F.*, 266 F.3d 1064, 1074 (9th Cir. 2001)). The Court rejected CTA's argument that the *Borello* standard resulted in such "improper compulsion," finding that—in contrast to the concession agreements at issue in *ATA*—the *Borello* standard "does not compel the use of employees or independent contractors." *Id.*

The Court emphasized that very distinction in its discussion of *Schwann*—a discussion of particular relevance here. As we explain in greater detail below (*see infra* at 44-45), the First Circuit held in *Schwann* that the FAAAA preempts application of the Massachusetts ABC test to motor carriers. In *Su*, this Court

explained that the second prong of the Massachusetts test—which is functionally identical to Prong B of the AB-5 test (*compare* Mass. Gen. Laws ch. 149 § 148B(a)(2) *with* Cal. Lab. Code § 2750.3(a)(1)(B))—"may effectively compel a motor carrier to use employees for certain services because … a worker providing a service within an employer's usual course of business will never be considered an independent contractor." 903 F.3d at 964. Under the *Borello* standard, by contrast, "whether or not the work is a part of the regular business of the principal" (*Borello*, 769 P.2d at 404) is merely "one factor among many—and not even the most important one." *Su*, 903 F.3d at 964. Thus, under *Borello*, an individual may be classified as an independent contractor even if they perform a service within "the usual course of the hiring entity's business." Cal. Lab. Code § 2750.3(a)(1)(B). In *Su*, this Court found that CTA had not "shown how the *Borello* standard makes it difficult for its members to use independent contractors to provide their services." 903 F.3d at 964. In this case, CTA has shown that the ABC test makes it impossible for motor carriers to use owner-operators. *See supra* at 14-15. *Su* therefore strongly suggests that—like the provisions invalidated in *ATA* and *Schwann*—Prong B of the ABC test as adopted in AB-5 is preempted by the FAAAA and that Plaintiffs are likely to succeed on their preemption claim.

Schwann also squarely supports the conclusion that AB-5 is preempted. In *Schwann*, the First Circuit court held that the FAAAA preempted a Massachusetts

statute that would have required motor carriers to classify owner-operators as employees rather than independent contractors. Like AB-5, Prong 2 of the Massachusetts test provided that "an individual performing any service ... shall be considered to be an employee" unless, among other requirements, "the service is performed outside the usual course of the business of the employer." 813 F.3d at 433 (quoting Mass. Gen. Laws ch. 149, § 148B(a)). In another parallel with AB-5, the statute provided that if drivers were deemed employees under this standard, the motor carrier would be obliged to adhere to numerous state laws benefitting employees, including those requiring employers to provide "various days off, parental leave, work-break benefits, and a minimum wage," to "track and record hours worked and amounts paid," and to "pay for or reimburse all out-of-pocket expenses incurred for the benefit of [the motor carrier] such as the maintenance and depreciation of the vehicles they used to perform their services." *Id*.

The First Circuit found that Prong 2, if applied to "bar [a motor carrier] from using any individuals as full-fledged independent contractors" to perform services, would "'relate [] to' the 'service of a motor carrier … with respect to the transportation of property'" and therefore would fall within the FAAAA's express preemption provision. *Schwann*, 813 F.3d at 437 (quoting 49 U.S.C. § 14501(c)(1)). Rejecting the contention that such a bar "does not necessarily follow from the application of Prong 2," the court found that Prong 2 would "foreclose[]" the

defendant motor carrier's preferred "method of providing delivery services":

> [B]ecause Prong 2 would mandate that FedEx classify these individual contractors as employees, FedEx would be required to reimburse them for business-related expenses. ***The logical effect of this requirement would thus preclude FedEx from providing for first-and-last mile pick-up and delivery services through an independent person*** who bears the economic risk associated with any inefficiencies in performance.

Id. at 439 (emphasis added); *see also Mass. Delivery Ass'n v. Healey*, 821 F.3d 187, 193 (1st Cir. 2016) (same). The court further found that the "regulatory prohibition" on using independent drivers "would also logically be expected to have a significant impact on … routes" because "[i]t is reasonable to conclude that employees would have a different array of incentives that could render their selection of routes less efficient, undercutting one of Congress's express goals in crafting" the FAAAA's "express preemption proviso." *Schwann*, 813 F.3d at 439. Having concluded that application of Prong 2 "would transgress Congress's 'view that the best interests of [motor carrier service beneficiaries] are most effectively promoted, in the main, by allowing the free market to operate,'" the First Circuit held Prong 2 "preempted by [49 U.S.C. §] 14501(c)(1)." *Id.* at 439-40 (quoting *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 288 (2014)).

The Supreme Judicial Court of Massachusetts drew the same conclusion, explaining that Prong 2 of the Massachusetts statute "in essence, requires that motor carriers providing delivery services … use employees rather than independent

contractors to deliver those services." *Chambers*, 65 N.E.3d at 9. The court found that forcing motor carriers to use employee drivers would compel motor carriers "to adopt a different manner of providing services from what they otherwise might choose" and "likely also would have a significant, if indirect, impact on motor carriers' services by raising the costs of providing those services." *Id*. Based on these findings, the court held Prong 2 of the Massachusetts statute to be "preempted by the FAAAA." *Id.* at 4.

AB-5 is indistinguishable from the statute held preempted in *Schwann* and *Chambers*. As applied to motor carriers, it too directly regulates the "service of a motor carrier … with respect to the transportation of property" by precluding motor carriers from "providing …. delivery services through an independent person who bears the economic risk associated with any inefficiencies in performance." *Schwann*, 813 F.3d at 437, 439. Like the Massachusetts statute, it is preempted by the FAAAA.

The Third Circuit's analysis concluding that the FAAAA does not preempt New Jersey's version of the ABC test reinforces the conclusion that the California version ***is*** preempted. In *Bedoya*, the Third Circuit determined that New Jersey's ABC test is not preempted because of a critical distinction between it and the ABC test adopted by Massachusetts (and California). Unlike Prong 2 of the Massachusetts test and Prong B of the California, Prong B of New Jersey's ABC test provides that

a worker is an employee unless she performs work "'outside the [employer's] usual course of business … ***or*** [performs such service] outside of all the places of business of [the employer].'" 914 F.3d at 824 (quoting N.J. Stat. Ann. § 43:21-19(i)(6)(B)) (emphasis added). Specifically because the New Jersey version of the test offers an "alternative method for reaching independent contractor status—that is, by demonstrating that the worker provides services outside of the putative employer's 'places of business,'" the Third Circuit found that the New Jersey test "does not bind [the motor carrier] to a particular method of providing services and thus it is unlike the preempted Massachusetts law at issue in *Schwann*." 914 F.3d at 824. Prong B of California's ABC test provides no such alternative.

Guided by these decisions, three district courts within this Circuit, in addition to the district court in this case, have held that the FAAAA preempts the ABC test as applied to motor carriers. *See B&O Logistics, Inc. v. Cho*, 2019 WL 2879876, at *3 (C.D. Cal. 2019) ("*Su*, [*ATA*], and *Schwann* collectively establish that the FAAAA preempts a state law that categorically requires a motor carrier to hire employees—and not independent contractors—as drivers."); *Valadez v. CSX Intermodal Terminals, Inc.*, 2019 WL 1975460, at *8 (N.D. Cal. 2019) ("application of Part B would require carriers to classify all workers who performed trucking work as employees, rather than independent contractors," which is "impermissible"); *Alvarez v. XPO Logistics Cartage LLC*, 2018 WL 6271965, at *4 (C.D. Cal. 2018)

(because the ABC test "bar[s]" motor carriers from using independent contractors to perform services, it "pose[s] a serious potential impediment to the FAAAA's objectives" (internal quotation marks omitted)). The Los Angeles Superior Court likewise has concluded that AB-5 is preempted, explaining that the statute "run[s] afoul of Congress's 1994 determination" in the FAAAA "that a uniform rule endorsing use of non-employee independent contractors … should apply in all 50 states to increase competition and reduce the cost of trucking services." *People v. Cal Cartage Transp. Express, LLC*, 2020 WL 497132, at *1 (Cal. Super. Ct. 2020).

These decisions make clear that Plaintiffs are likely to succeed on the merits of their FAAAA claim.

B. Appellants Fail To Show That The District Court Abused Its Discretion In Ruling That Plaintiffs Are Likely To Succeed On The Merits Of Their Preemption Claim.

Both Appellants insist that the district court misread this Court's precedent; that AB-5 is merely a generally-applicable background rule not subject to preemption; and that the district court's assessment of AB-5's impact on prices, routes, and services was incorrect. Additionally, the State Defendants argue that the language of Prong B does not actually preclude motor carriers' use of owner-operators, while IBT argues that motor carriers can engage owner-operators as independent contractors under AB-5's B-to-B exception. Appellants' arguments are unpersuasive.

1. The district court did not misconstrue the ABC test.

The State Defendants begin by attacking the district court's "premise that 'Prong B of the ABC test requires motor carriers to artificially reclassify all independent-contractor drivers as employee-drivers.'" State Br. 22. They argue that "Plaintiffs did not cite any language in AB-5 prohibiting the use of independent contractors, or, mandating the use of employees." *Id.*; *see also id.* at 25 (insisting that the ABC test "does not, by its terms, compel a carrier to use an employee or an independent contractor") (internal quotation marks omitted).

This argument—which IBT does not join—is puzzling.[7] AB-5 states that "[f]or purposes of … [the Labor Code], the Unemployment Insurance Code, and … wage orders … , a person providing labor or services for remuneration ***shall be considered an employee rather than an independent contractor unless*** the hiring entity demonstrates that," among other requirements, "***[t]he person performs work that is outside the usual course of the hiring entity's business***." Cal. Lab. Code § 2750.3(a)(1) (emphasis added). The district court analyzed this language and properly concluded that it will always require motor carriers to classify owner-operators as employees, not independent contractors. ER013-014. The district court found support for its interpretation in *Su*, where this Court observed that the ABC

[7] IBT acknowledges that under AB-5 "relationships between motor carriers and owner-operators that were previously … classified as independent contractor relationships now must be classified as employment relationships." IBT Br. 27.

test "'may effectively compel a motor carrier to use employees for certain services because … ***a worker providing a service within an employer's usual course of business will never be considered an independent contractor***.'" ER014 (quoting 903 F.3d at 964) (emphasis added).

The State Defendants offer nothing but their *ipse dixit* to contradict the district court's interpretation of AB-5. Indeed, during the hearing on the preliminary injunction, the district court "repeatedly invited Defendants to explain … how a motor carrier could contract with an independent owner-operator as an independent contractor, rather than as an employee, under the ABC test," yet "[n]either the State or [IBT] could provide an example." ER014 n.9. The State Defendants complain that this inquiry "improperly place[d] the burden on Defendants to disprove preemption" (State Br. 27), but that is wrong. The court was inviting Defendants to support their contention that Prong B's language does not require motor carriers to use employee drivers. Then and now, they failed to do so.

2. The district court did not misread *ATA* or *Su*, nor did it err in relying on *Schwann*.

Turning to the case law, Appellants argue that *ATA*—which struck down requirements that motor carriers transition to employee drivers—is inapposite because it "involved regulation specifically directed at motor carriers" and "expressly mandated the phasing out of thousands of independent contractors." State Br. 23 (internal quotation marks and alteration omitted); *see also* IBT Br. 30

(pointing out that "the law at issue in ATA … specifically and expressly prohibited motor carriers from contracting with owner-operator drivers") (emphasis omitted). That the ABC test does not name motor carriers specifically is immaterial, however; as we explain below (*infra* at 56-57), the FAAAA preempts "the particularized application of a general statute" (*Morales*, 504 U.S. at 386) if the law as applied "relate[s] to rates, routes, or services." 49 U.S.C. § 14501(c)(1). If a regulation requiring motor carriers at the Port to use employee drivers meets that standard, then so does a law requiring all motor carriers in California to use employee drivers—even if motor carriers are not mentioned in the statute.

The State argues that "the question of whether [the] regulation had the requisite significant effect to warrant preemption was not on appeal" in *ATA*. State Br. 23-24. True, the Port "[did] not actually dispute … on appeal" that the regulation "relate[d] to prices, routes or services of motor carriers." 559 F.3d at 1053. But this Court addressed the issue anyway: Describing the contention that the regulation related to prices, routes, or services as one that "can hardly be doubted," this Court said that it "fully agree[d] with the district court" that ATA was likely to establish that proposition and had thus "demonstrate[d] a likelihood" of "succeed[ing] on the merits." *Id.* That conclusion strongly supports the district court's decision in this case. In *ATA*, as here, the requirement under review was a directive to "phas[e] out … thousands of independent contractors (many or most of them small businessmen

who own their own trucks)" and to "requir[e] employee drivers." *Id.* at 1055-56. Indeed, *Su* explicitly recognizes the similarity, explaining that ***"like" the requirement at issue in "[ATA]***, the 'ABC' test may effectively compel a motor carrier to use employees for certain services." 903 F.3d at 964 (emphasis added). Thus, this Court's determination in *ATA* that "the independent contractor phase-out provision is one highly likely to be shown to be preempted" applies equally to AB-5. 559 F.3d at 1056.

IBT contends that *ATA* is distinguishable because, supposedly, under AB-5 motor carriers may hire owner-operators as employees and allow them to continue driving their own trucks, while the mandatory concession agreements at issue in *ATA* were "designed to remove from service 'old and polluting' trucks" and "expressly prohibit[ed] contracting with owner-operators and instead requir[ed] motor carriers to use employees driving newer cleaner trucks *owned by the motor-carriers*." IBT Br. 30-31 (quoting *ATA*, 559 F.3d at 1056). IBT is mistaken about what the concession agreements required; as this Court's opinion makes clear, they contained no mandate to purchase trucks. *See* 559 F.3d at 1049-50. Furthermore, IBT does not explain how motor carriers subject to AB-5 could, even in the absence of an express prohibition, continue to rely on owner-operators beyond the immediate future, offering nothing to contradict Plaintiff's evidence that although motor carriers "might hire drivers who own trucks in the very short term, … that is not a long term

solution as employee drivers will have no incentive to own, repair and maintain expensive trucks." SER143; *see also* SER146 (motor carriers will need "to acquire, finance or lease their own fleets as future workers would have no incentive to acquire trucks that cost $136,000 in 2016"). Regardless, this Court held the requirements at issue in *ATA* preempted not because motor carriers were required to purchase trucks, but because motor carriers were required to use employees rather than owner-operators. That "rather blatant attempt to decide who can use whom" to provide trucking services constituted "a palpable interference with prices and services." 559 F.3d at 1056. Precisely the same can be said of AB-5.

Appellants also struggle unsuccessfully to rebut the district court's reading of *Su*. The State Defendants acknowledge this Court's declaration in *Su* that "an 'all or nothing rule' requiring services to be performed by *certain types* of employee drivers … was likely preempted." State Br. 25. They argue, however, that this "rationale is inapplicable" because, supposedly "like the *Borello* test," the ABC test "'does not, by its terms, compel a carrier to use an employee or an independent contractor.'" *Id.* (quoting *Su*, 903 F.3d at 964). As explained above, however, the ABC test ***does*** compel carriers to use employee drivers. *See supra* at 49-50. Indeed, in *Su*, this Court explained that the ABC test "may effectively compel a motor carrier to use employees for certain services," while the *Borello* standard "does not compel the use of employees or independent contractors." 903 F.3d at 964.

IBT also contends that, in *Su*, this Court "*expressly* rejected" the argument that the *Borello* standard was preempted because it "'compel[led] the use of employees,' [] the *exact* alleged injury [Plaintiffs] assert[] here." IBT Br. 21 (quoting *Su*, 903 F.3d at 964). But the Court found no preemption precisely because it concluded that the *Borello* standard "***does not compel*** the use of employees or independent contractors." *Su*, 903 F.3d at 963 (emphasis added). Conversely, this Court also stated that a "directive that carriers must use only employee drivers" was "likely preempted." *Id. Su* therefore shows that AB-5—a law compelling the use of employee drivers and forbidding the use of owner-operators—is likely preempted.

The State Defendants also cite *Bedoya* (State Br. 25), but, as explained above (at 46-47), its holding that New Jersey's ABC test was not preempted hinged on statutory language allowing owner-operators to qualify as independent contractors if they "provide[] services outside of the putative employer's 'places of business.'" 914 F.3d at 824. Unlike AB-5, "[n]o part of the New Jersey test categorically prevents carriers from using independent contractors," and the law accordingly "does not mandate a particular course of action" such as "requiring carriers to use employees rather than independent contractors." *Id.* at 824-25. In contrast, AB-5 does "bind [motor carriers] to a particular method of providing services" (*id.* at 824), and is preempted under *Bedoya*'s reasoning.

Both Appellants note that, in *Su*, the Court reserved the question of "whether

the FAAAA would preempt using the 'ABC' test to enforce labor protections under California law." IBT Br. 32; State Br. 31. IBT suggests that the district court "erred" in relying on *Su* because the case "did not decide the issue before the District Court." *Id.* But the district court did not believe that *Su* "decid[d] the issue"; instead, it simply found that *Su* offered "additional guidance." ER012. Its reliance on this Court's reasoning in *Su* was not error.

Both Appellants also argue that the district court erred in relying on *Schwann.* State Br. 29-31; IBT Br. 33-34. IBT argues that *Schwann* "cannot be squared with this Court's approach to FAAAA preemption" (IBT Br. 33), but that is incorrect. IBT attempts to manufacture a conflict by arguing that in *DiFiore v. American Airlines Inc.*, 646 F.3d 81 (1st Cir. 2011), which *Schwann* cites, the First Circuit departed from this Court's precedent by finding preemption of "generally applicable employment laws." IBT Br. 33. And, indeed, *DiFiore* did hold a "statute governing tips" to be preempted "as applied" to an airline. 646 F.3d at 84, 88. But far from disagreeing with *DiFiore*, this Court ***cited it with approval*** in *Dilts*, quoting the First Circuit's conclusion that the statute "'directly regulates how an airline service is performed and how its price is displayed to customers—not merely how the airline behaves as an employer or proprietor.'" 769 F.3d at 646 (quoting *DiFiore*, 646 F.3d at 88). Moreover, as we discuss further below, this Court in *Su* expressly ***declined*** to hold that "the general applicability of a law is, in and of itself, sufficient to show

it is not preempted." 903 F.3d at 966. Furthermore, AB-5 is ***not*** a law of general applicability: It targets motor carriers and contains dozens of exemptions for other disparate and unrelated occupations. *See infra* at 57-58.

IBT also contends that *Schwann*'s rationale is inconsistent with this Court's reasoning in *Dilts* that "differences between multiple states' laws are relevant only if those laws themselves 'are significantly related to prices, routes, and services.'" IBT Br. 34 (quoting *Dilts*, 769 F.3d at 647). *Schwann* does not hold otherwise: The First Circuit concluded that a prohibition on using independent-contractor drivers was preempted precisely because the ban would significantly affect FedEx's routes and services. *See Schwann*, 813 F.3d at 439. That holding comports with this Court's precedent.

3. AB-5 does not escape preemption as a law of general applicability.

The State and IBT argue that the FAAAA does not preempt AB-5 because AB-5 is, supposedly, a "state labor regulation[] of general application." State Br. 18; *see also* IBT Br. 18-22. But AB-5 is not a law of general applicability, and the FAAAA would preempt it even if it were.

Both the Supreme Court and this Court have rejected the notion that express-preemption provisions such as 49 U.S.C. § 14501(c)(1) "impose[] no constraints on laws of general applicability." *Morales*, 504 U.S. at 386. As the Supreme Court explained, it would create an "utterly irrational loophole" if "state impairment of the

federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Id.*; *see also, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008) (rejecting contention that common-law duties escape preemption as laws of general applicability). Indeed, this Court has long recognized that generally applicable laws are subject to preemption. *See*, *e.g.*, *Su*, 903 F.3d at 966; *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852 n.20 (9th Cir. 2004) (explaining that the fact that "claims are founded upon state laws of general applicability does not counsel against preemption").

Regardless, AB-5 is ***not*** a rule of general applicability. The law exempts dozens of occupations from the ABC test, allowing many Californians to continue working as independent contractors when the ABC test would otherwise have mandated their classification as employees. *See supra* at 15-17. Despite AB-5's severe consequences for the trucking industry, the California Legislature refused to create a carve-out for motor carriers. ER273.[8] Remarks by AB-5's author confirm that one of the statute's purposes was to force motor carriers in particular to abandon their "outdated" owner-operator business model.[9] The statute carries out that intent:

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[8] AB-5 includes an exemption for construction trucking businesses but not for other types of motor carriers. *See* Cal. Lab. Code § 2750.3(f)(8).

[9] *See* Cal. State Assembly Floor Session, at 1:07:12-15, 1:08:20-30 (Sept. 11, 2019) (Statement of Assembly Member Lorena Gonzalez) ("And let me talk for one minute ***about trucking***…. We are [] getting rid of an outdated broker model that allows companies to basically make money and set rates for people that they called

As the district court observed, "the ABC test appears to be rigged in such a way that a motor carrier *cannot* contract with independent contractor owner-operators without classifying them as employees." ER014 n.9.

In any event, this Court's precedent addressing the preemption of generally applicable labor laws casts no doubt on the district court's determination that AB-5 is likely preempted. In arguing otherwise, Appellants rely (State Br. 18-20; IBT Br. 18-22) principally on *Dilts*, 769 F.3d at 647-48, and *Mendonca*, 152 F.3d at 1189, which involved claims that the FAAAA preempted, respectively, the State's meal-period and rest-break rules and its prevailing-wage laws. The Court held that these laws were not preempted because they were "normal background rules," applicable to employees in California, that "do not directly or indirectly mandate, prohibit, or otherwise regulate certain prices, routes, or services." *Dilts*, 769 F.3d at 647.

Contrary to Appellants' suggestion, *Dilts* and *Mendoca* are inapposite. In those cases, the plaintiffs argued that particular labor laws, as applied to drivers ***already classified as employees***, affected trucking services, routes, or rates. The Court held that the impact of these requirements on the prices, routes, and services offered by motor carriers using employee drivers was marginal. *Dilts*, 769 F.3d at 650; *Mendonca*, 152 F.3d at 1189. AB-5 is qualitatively different, however. It

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independent contractors….") (emphasis added), https://www.assembly.ca.gov/media/assembly-floor-session-20190911/video.

mandates a sea change, completely eliminating the ability of motor carriers to use independent contractors. Moreover, unlike the motor carrier in *Dilts*, who "submitted no evidence to show" that the laws in question "would decrease the availability of routes" (*Dilts*, 769 F.3d at 649), Plaintiffs in this case have submitted evidence that requiring motor carriers to shift from an owner-operator model to an all-employee model will have a substantial impact on rates, routes, and services. *See supra* at 18-25.

AB-5 also directly "regulate[s] … services" by "bind[ing] the carrier" to use only employee drivers. *Dilts*, 769 F.3d at 646-47 (quoting *Am. Trucking Ass'ns., Inc. v. City of L.A.*, 660 F.3d 384, 397 (9th Cir. 2011)). This "regulatory interference" in motor carriers' provision of services "is not peripheral." *Schwann*, 813 F.3d at 438. "The decision whether to provide a service directly, with one's own employee, or to procure the services of an independent contractor is a significant decision in designing and running a business." *Id.* Moreover, in forcing motor carriers to abandon the owner-operator model, AB-5 "acutely interfere[s] with the forces of competition" (*Mendonca*, 152 F.3d at 1189 (emphasis omitted)), forcing motor carriers to restructure their operations and use employees even when contracting with owner-operators would be more efficient. *See supra* at 8-11, 17-25.

Unlike the employment laws upheld in *Dilts* and *Mendonca*, moreover, AB-5 would "contribute to an impermissible 'patchwork' of state-specific laws" that

would "defeat[] Congress' deregulatory objectives." *Dilts*, 769 F.3d at 647. Although the FAAAA might tolerate modest variations in state employment laws (*id*. at 647), a complete prohibition on motor carriers' use of independent-contractor drivers is "an anomaly." *Schwann*, 813 F.3d at 438. "[T]hat … novelty cuts against any argument that [AB-5] is simply a type of pre-existing and customary manifestation of the state's police power that we might assume Congress intended to leave untouched." *Id*. Indeed, citing previous California legislation that had discriminated against motor carriers "using a large proportion of owner-operators instead of company employees," Congress enacted the FAAAA to prevent such state regulation, deeming the preemption of state law "necessary to facilitate interstate commerce." H.R. Conf. Rep. No. 103-667, at 87. AB-5 is therefore preempted under the standards articulated in *Dilts* and *Mendonca*.

Both Appellants also cite *People ex rel. Harris v. Pac Anchor Transportation*, 59 Cal. 4th 772 (Cal. 2014) (*see* State Br. 21 & IBT Br. 29), but that case fails to advance their arguments. In *Pac Anchor*, the California Supreme Court held that a claim under California's Unfair Competition Law ("UCL") seeking to enforce existing worker-classification rules against motor carriers was not preempted. 59 Cal. 4th at 784. In so holding, however, the court implied that worker-classification rules that discourage or prohibit the use of independent contractors may be preempted. The court noted that "[t]he congressional record" concerning the

FAAAA "show[s] that Congress disapproved of a California law that denied advantageous regulatory exemptions to motor carriers who used a large proportion of independent contractors." *Id*. at 787 (citing H.R. Conf. Rep. No. 103-677, at 87). In ruling against preemption, the court found that "[n]othing in the People's UCL action would prevent defendants from using independent contractors." *Id*. at 785. Instead, the court explained, defendants remained "free to use independent contractors as long as they are properly classified." *Id*. at 787. AB-5, in contrast, requires motor carriers to use employee drivers. *Pac Anchor* therefore "points to a finding of preemption." *Cal Cartage*, 2020 WL 497132, at *5.

Finally, IBT argues that the FAAAA's legislative history "confirms that Congress did not intend … to preempt states' background regulations covering worker classification." IBT Br. 27. IBT argues that "Congress provided unusually clear indication of which state laws it did *not* intend for the FAAAA to preempt by listing in the legislative history 'ten jurisdictions which ... *did not* regulate intrastate prices, routes, and services.'" *Id*. (quoting *Mendonca*, 152 F.3d at 1187, in turn citing H.R. Conf. Rep. 103-677, at 86). According to IBT, eight of those ten jurisdictions had "generally applicable laws governing when a worker is an independent contractor (or the equivalent) and when a worker is an employee." *Id*. at 28 (quoting *Pac Anchor*, 59 Cal. 4th at 786 (listing the eight laws)). Unlike AB-5, however, none of those laws—which typically applied only in the context of workers'

compensation—automatically classified all drivers as "employees" of motor carriers.[10]

IBT contends that the Wisconsin statute, which included a nine-factor test for independent-contractor status, is comparable to the B-to-B exception in AB-5. IBT Br. 28-29. As we discuss below, however, the Wisconsin test, unlike AB-5's B-to-B exception, did not exclude owner-operators. *See infra* at 65-66 (discussing Wisc. Stat. Ann. § 102.07 (8)(b)(1)-(9)). Furthermore, unlike the ABC test enacted by AB-5, the Wisconsin classification statute applied only to Wisconsin's Worker's Compensation Act; in a case that was "not about worker's compensation … the narrow definition of 'independent contractor' in § 102.07(8)(b)" was inapplicable. *Acuity Mut. Ins. v. Olivas*, 2006 WI App 45 ¶ 15, *aff'd*, 2007 WI 12 ¶ 15.

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[10] Florida's Workers' Compensation Act expressly excluded drivers transporting property for motor carriers. *See* Fla. Stat. § 440.02(13)(d)(1)(c) (1994) ("Employee" does not include "[a]n owner-operator of a motor vehicle who transports property under a written contract with a motor carrier" and assumes responsibility for performance of the contract, including furnishing equipment and incidental costs). Arizona's Workers' Compensation Act deemed workers to be employees only if the putative employer "retain[ed] supervision or control" over the worker (Ariz. Rev. Stat. § 23-902(b) (1994), thus excluding owner-operators. *See Reed v. Indus. Comm'n*, 23 Ariz. App. 591, 596 (1975) (classifying an owner-operator as an independent contractor under Arizona's Workers' Compensation Act)). Under other statutes, a worker could qualify as an independent contractor if it performed services "outside of all the places of business of the enterprise for which the service is performed." Alaska Stat. § 23.20.525(a)(10)(B)(1994); Del. Code Ann. tit. 19, § 3302(9)(K)(ii) (1994) (same); Me. Rev. Stat. Ann. tit. 26, § 1043(E)(2) (1994) (same); N.J. Stat. 43:21-19(i)(l)(J)(6)(B) (1994) (same); 21 V.S.A. § 1301 (6)(A)(x)(B)(ii)(1994) (same).

4. The "business-to-business" exception does not permit motor carriers to continue using independent owner-operators.

IBT and the Cities of Los Angeles and Oakland ("the Cities"), *amici* who have appeared in support of the Appellants, argue that AB-5 is not preempted by the FAAAA because motor carriers can classify some owner-operators as independent contractors by invoking the B-to-B exception.[11] As the district court noted, the State Defendants—the parties charged with enforcing the statute—have not raised this argument and have not "concede[d] that the exception would apply." ER019. The district court was right to reject the contention that the B-to-B exception ameliorates the AB-5's impact on prices, routes, and services.

Having specifically ***targeted*** the owner-operator business model (*see supra* at 57-58), AB-5's drafters did not save it via the B-to-B exception. Instead, the plain language of the B-to-B exception unambiguously excludes owner-operators engaged by motor carriers. Most notably, the exception applies only if the would-be independent contractor "is providing services directly to the contracting business rather than to customers of the contracting business." Cal. Lab. Code § 2750.3(e)(1)(B). That criterion necessarily excludes owner-operators, who

[11] In *Cal Cartage*, 2020 WL 497132, at *7-8, the California Superior Court ruled that the B-to-B exception was inapplicable to owner-operators. The Cities are the plaintiffs in that case and attached to their amicus brief here their petition seeking review of the Superior Court's decision. *See* Cities Amicus Br., Attachment A. The petition has since been denied. *See People v. Super. Ct.*, No. B304240 (Cal. Ct. App. Mar. 26, 2020).

contract with motor carriers to provide services to the motor carriers' customers—the shippers. ER277-78.

IBT argues that the direct-service "provision requires only that the motor carrier manage the provision of services to the customer (*e.g.*, communications, billing, and scheduling)" (IBT Br. 40), but that interpretation flouts the statute's plain language. Although motor carriers "***manage*** the provision of services" to customers (*id.*), it is the owner-operators who ***provide*** the services. The statute also requires that services be provided "***directly*** to the contracting business," thus excluding any theory that the owner-operator provides services to the motor carrier by transporting goods for the motor carrier's customer.

Its unambiguous terms aside, AB-5's legislative history leaves no doubt that the B-to-B exception was not intended to cover owner-operators who contract with motor carriers to service the motor carrier's customers. Explaining how the B-to-B exception would work, AB-5's author gave the example that "if you're a farm and you need to deliver your product, you can hire an individual trucker who has a small business to deliver your product." Cal. State Assembly Floor Session at 1:07:49-57 (Sept. 11, 2019) (Statement of Assembly Member Gonzalez). In that example, the owner-operator "provid[es] services directly to" the farm, which is also "the contracting business." Cal. Lab. Code § 2750.3(e)(1)(B). If, however, the motor carrier was the contracting business and the farm was the motor carrier's customer,

that requirement would not be satisfied.

Other provisions of the B-to-B exception also would disqualify owner-operators that work for motor carriers. To qualify for the exemption, the service provider must "actually contract[] with other businesses to provide the same or similar services and maintain[] a clientele without restrictions from the hiring entity" (Cal. Lab. Code § 2750.3(e)(1)(G)), but many owner-operators elect to provide services exclusively for the same motor carrier for extended periods and do not "maintain" other customers during that period. ER277. The service provider also must "negotiate its own rates" (Cal. Lab. Code § 2750.3(e)(1)(J)), but most motor carriers offer rate sheets and do not negotiate with individual owner-operators. ER276. Although IBT insists that this Court must construe these and other requirements of the B-to-B test "'in such a way as to avoid doubtful constitutional questions'" (IBT Br. 41 (quoting *Arizona v. United States*, 567 U.S. 387, 415 (2012)), the Court is not "required to … adopt an interpretation precluded by [AB-5's] plain language." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998).

As previously noted (at 62-63), IBT argues that Wisconsin—identified in the FAAAA's legislative history as among "ten jurisdictions which … did not regulate intrastate prices, routes, and services" (*Mendonca*, 152 F.3d at 1187 (emphasis omitted))—imposes a nine-factor test for independent-contractor status that is similar to the B-to-B exception in AB-5. IBT Br. 28-29. But the Wisconsin test

includes no "direct services" requirement of the sort that categorically prevents motor carriers from invoking the B-to-B exception. Furthermore, the criteria that are included in the Wisconsin test reflect the economic reality of working as an independent contractor and are easily satisfied by owner-operators. *See* Wisc. Stat. Ann. § 102.07 (8)(b)(1)-(9) (requiring, *e.g.*, that the putative independent contractor "[o]perates under contracts to perform specific services," "[i]ncurs the main expenses related to the service," "[i]s responsible for the satisfactory completion of work," and that "[t]he success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures").

The Cities contend that the B-to-B exception is similar to the *Borello* standard because it supposedly "permits individual owner-operators to work as independent contractors so long as there are objective indicia that they operate a bona fide and independent business." Cities Br. 12. But *Borello* contains no analog to the "direct services" requirement. Moreover, while "no one factor is decisive" under *Borello* (*NLRB*, 512 F.3d at 1097), under AB-5 the contracting company must establish that ***each*** of the twelve enumerated requirements, including the direct-services requirement, is met to satisfy the B-to-B exception.

In sum, the B-to-B exception does not allow motor carriers to use independent contractors and does not save AB-5 from preemption.

5. The district court did not abuse its discretion in concluding that plaintiffs are likely to succeed in demonstrating an impact on rates, routes and services.

The district court found that AB-5's ban on using owner-operators has "more than a tenuous, remote, or peripheral impact on motor carriers' prices, routes, or services." ER018. Appellants criticize this finding but fail to demonstrate any legal or factual error by the district court.

Noting that the ABC test, "on its own," does not "define[e] the rights or benefits that a motor carrier must provide its driver," the State Defendants complain that the district court's opinion "offers no substantive analysis on what impact labeling motor carriers' drivers to be 'employees' will have on prices, routes, and services." State Br. 25-26; *see also* IBT Br. 24-25. Plaintiffs, however, submitted substantial evidence that the mandatory use of employee drivers would significantly affect rates, routes, and services (*see supra* at 17-25), and it was only after a lengthy hearing involving active questioning of both sides that the district court found that "the combined effect of all" California employment laws "has a significant effect on motor carriers' prices, routes, or services." ER018. Appellants, who all but ignore Plaintiffs' evidence in their brief, fail to show that the district court's finding was an abuse of discretion.

IBT argues that the district court should not have asked "whether the ABC test is preempted," but instead should have analyzed "whether the FAAAA preempts

California's employment laws." IBT Br. 24 (brackets, ellipses, and internal quotation marks omitted). IBT even insists that because "the FAAAA does not preempt the substantive requirements of California employment law, the ABC test necessarily cannot be preempted either." IBT Br. 22-23. IBT looks through the wrong end of the telescope. As in *ATA*, the question here is not whether application of any or all employment laws to ***employee*** drivers would affect rates, routes or services. Rather, it is whether a state law may forbid motor carriers from arranging for loads to be delivered by independent owner-operators whom they do not employ—and who instead run their own small businesses, supply and maintain their own equipment, manage their own activities, are responsible for their own profit or loss, and are integral to the nation's transportation system.[12] The court did not abuse its discretion in finding it likely that the FAAAA bans such interference in the market for trucking services.

IBT contends that the district court's focus on the ABC test itself "cannot be squared with this Court's precedent." IBT Br. 24. But IBT ignores *Su*, which

[12] IBT insists that motor carriers can continue to obtain services from owner-operators as long as they classify them as employees (IBT Br. 26-27), but that is nonsensical. Once employed by motor carriers, these drivers would no longer have the independence and other defining characteristics of an independent owner-operator. Moreover, the evidence shows that even if motor carriers could hire current owner-operators as employees in "the very short term, … that is not a long term solution as employee drivers will have no incentive to own, repair and maintain expensive trucks." SER143.

analyzed whether the *Borello* classification rule was preempted and did not suggest that the focus should be on underlying employment laws rather than the classification rule itself. 903 F.3d at 962. Instead, IBT cites *California Tow Truck Ass'n v. City and County of San Francisco*, 693 F.3d 847 (9th Cir. 2009), where the Court remanded an FAAAA challenge to a "comprehensive regulatory regime" for tow trucks with instruction that the Court analyze "each provision individually." *Id.* at 851, 862-63. The Court explained there that "where a multi-faceted law or regulation is challenged as a whole, it is still necessary to analyze each of its essential or major component parts." *Id.* at 860. But Plaintiffs do not seek preemption of an "entire regulatory regime." They challenge Prong B of the ABC test, a single provision of a new law that effectively prohibits motor carriers from providing transportation services in the customary manner.

Amicus CLF argues that the district court, on remand, should examine whether the FAAAA permits use of the ABC test to define employee status for particular state statutory regimes covered by AB-5. CLF Br. 10. These arguments—which are themselves deeply flawed[13]—were not raised below and cannot support

[13] For example, CLF argues that the U.S. Department of Labor ("DOL") "has not notified the Governor that AB 5 'may not be certified'" as valid changes to the unemployment insurance code. CLF Br. 12. While DOL may not have challenged the ABC test "as inconsistent with [the Federal Unemployment Tax Act]" (CLF Br. 13), the question here is whether the test is preempted ***by the FAAAA***—an issue beyond DOL's bailiwick. CLF also contends that ***in 1960***—34 years prior to the FAAAA—twenty-six states "used a form of the ABC test" to determine

reversal of the preliminary injunction. Furthermore, AB-5 sweepingly classifies workers as employees for purposes of the entire Labor Code, the Unemployment Insurance Code, and all wage orders unless the workers qualify as independent contractors under the ABC test or fall within an exemption. Cal. Lab. Code § 2750.3(a)(1). Nothing in the statute suggests any intent that workers be deemed employees for some purposes but not others, and the Court should not impose a piecemeal approach that the Legislature rejected.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT PLAINTIFFS DEMONSTRATED A LIKELIHOOD OF IRREPARABLE HARM.

The district court held that Plaintiffs established the likelihood of irreparable harm because, unless they "significantly transform[] their business operations to treat independent-contractor drivers as employees," they "face the risk of

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independent-contractor status for unemployment insurance. CLF Br. at 12-13. But prong B of that test, like Prong B of the New Jersey ABC test examined in *Bedoya* but unlike Prong B of the ABC test enacted by AB-5, is satisfied if work "is performed outside of all places of business" of the hiring business (*id.* at 13 (internal quotation marks omitted))—and thus allows owner-operators to qualify as independent contractors. Moreover, contrary to CLF's argument (at 22), AB-5 is not a vehicle-safety law and does not fall within the FAAAA's exception for laws enacted under a state's "safety regulatory authority … with respect to motor vehicles." 49 U.S.C. § 14501(a)(2). And Plaintiffs do not seek "a complete escape for motor carriers' from state workers' compensation laws." CLF Br. 24. They merely challenge a worker-classification rule that prohibits motor carriers from obtaining services from non-employee drivers.

governmental enforcement actions" in addition to "criminal and civil penalties." ER020. Appellants fail to show that this finding represents an abuse of discretion.

Appellants principally argue that Plaintiffs waited too long to seek a preliminary injunction. State Br. 32-34; IBT Br. 43-44. They are wrong. AB-5 was signed into law on September 18, 2019. Plaintiffs moved for a preliminary injunction about two-and-a-half months later, approximately one month before AB-5's effective date. That timeline is well within acceptable bounds. This Court, for example, has affirmed a preliminary injunction when the statute in question had been amended more than six months before the plaintiffs moved for injunctive relief. *See Duncan v. Becerra*, 742 Fed. App'x 218 (9th Cir. 2018), *aff'g* 265 F. Supp. 3d 1106 (S.D. Cal. 2017).[14]

Appellants contend, however, that Plaintiffs should be denied relief because they did not move for a preliminary injunction ***before*** AB-5 was even enacted. State Br. 32-33; IBT Br. 42-43. Appellants made the identical argument below (*see* Dkt. No. 55, at 17-19; ER138-40), but the district court rejected it, finding that their "contention that any" claim of "irreparable harm is undermined by Plaintiffs' delay in moving for preliminary injunctive relief does not" alter the court's "conclusion"

[14] The *Duncan* plaintiffs moved on May 26, 2017, to preliminarily enjoin a statutory provision that had been adopted on November 8, 2016 and was scheduled to take effect July 1, 2017. *Compare* Dkt. No. 6, *Duncan v. Becerra*, No. 3:17-cv-1017 (S.D. Cal.) *with* Initiative Measure (Prop. 63, § 6.1, approved Nov. 8, 2016).

that "Plaintiffs have carried their burden to show the likelihood of irreparable harm." ER020. "[W]eighing" a party's "delay in seeking a preliminary injunction" is within the district court's "discretion." *W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012). Here, Appellants do not show that the district court abused its discretion.

Any motion for a preliminary injunction prior to passage of AB-5 would have wasted resources because AB-5 changed California law significantly. It extended the ABC test to the entire Labor Code and the Unemployment Insurance Code and created numerous exceptions—including one that is central to IBT's appeal. The district court recognized that AB-5 represented a significant change: It dismissed without prejudice the Amended Complaint after AB-5's enactment (ER311), explaining that it was "unclear whether Defendants" would "enforce the *Dynamex* decision against Plaintiffs before AB-5 takes effect" and that the passage of the new law "raise[d] questions of mootness." *Id.*

While denying none of this, Appellants argue that failure to seek preliminary relief earlier implies a "lack of urgency and irreparable harm." State Br. 32 (internal quotation marks omitted). That argument ignores that AB-5's enactment itself increased the urgency and made irreparable harm more imminent. Throughout the legislative process, CTA and other interest groups worked toward obtaining changes to the bill that would preserve the owner-operator model. ER273. Had these efforts

been successful, they would have mooted the litigation entirely and avoided the need for a preliminary injunction. But when the statute was ultimately enacted without exempting motor carriers (*id.*), motor carriers faced a now-inexorable "Hobson's choice: continually violate the [state] law and expose themselves to potentially huge liability; or … suffer the injury of obeying the law during the pendency of the proceedings and any further review." *Morales*, 504 U.S. at 381.

Were motor carriers required to "obey[] the law during the pendency of the proceedings" (*Morales*, 504 U.S. at 381), they would suffer irreparable harm. As this Court has held, to require motor carriers to transition from using owner-operators to using employee drivers would "disrupt and change the whole nature of [motor carriers'] business in ways that most likely cannot be compensated with damages alone." *ATA*, 559 F.3d at 1058. Motor carriers would be forced to "incur large costs" to change their business models and, if the law requiring the change were invalidated, they "would be faced with either continuing in that form" or "unwinding that and returning to the old form." *Id.* Plaintiffs thus have strong grounds for a preliminary injunction.

IBT argues, however, that Plaintiffs cannot demonstrate irreparable harm because they fail to show "a genuine threat of imminent prosecution." IBT Br. 42 (internal quotation marks omitted). They argue that *ATA* is distinguishable because, in that case, "***inevitable*** consequences resulted from any refusal to follow the law."

Id. at 45 (emphasis added). But Plaintiffs are not required to show that prosecution is "inevitable"; it is sufficient that continuation of their business model "expose[s]" them "to potentially huge liability." *Morales*, 504 U.S. at 381.

There is, moreover, no basis to doubt that the State Defendants will enforce AB-5. In mid-December, several weeks before AB-5 was to take effect, the state sent notices advising businesses that "[u]nder AB 5, the 'ABC test' ***must be used*** to determine the appropriate classification of workers in most occupations." SER008-10 (emphasis added). Subsequently, the State Defendants "expressly declined to withhold enforcement of AB-5, even for a short time," while the preliminary injunction motion was decided. SER004; *see also* SER112-14. And, if there were any doubt whether the State Defendants intend to enforce AB-5, it was extinguished yesterday when the state filed suit against two ride-hailing companies alleging that they have misclassified drivers as independent contractors rather than employees. In its suit, the state alleges that workers are "presumed to be employees unless the hiring entity can overcome this presumption by establishing each of the three factors embodied in the strict 'ABC' test," and that the defendants "cannot overcome this presumption with respect to their drivers" because each "holds itself out to the public as a transportation company." Compl. ¶¶ 3, 4, 61, *California v. Uber Techs., Inc.*, No. _____ (Cal. Super. Ct. May 5, 2020). Given these circumstances, the court did not err in finding a likelihood of irreparable harm here.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR A PRELIMINARY INJUNCTION.

As this Court found when considering an earlier effort to ban the use of owner-operators, "the balance of equities and the public interest … weigh in favor of a preliminary injunction in this case." *ATA*, 559 F.3d at 1060. The district court did not abuse its discretion in so holding. *See* ER021-22.

CTA's members will suffer serious hardship if forced to choose between risking liability and changing their business model to comply with an unconstitutional law. *See ATA*, 559 F.3d at 1049. While the State contends that it will "suffer[] irreparable injury" if enjoined from giving effect to a state law (State Br. 35), the State is "not injured" when it is preliminarily enjoined from enforcing a law that "Congress expressly preempted." *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("it is clear that it would not be equitable … to allow the state … to violate the requirements of federal law") (internal quotation marks and alterations omitted). Thus, the balance of equities clearly favors Plaintiffs.

That the balance of equities favors Plaintiffs is especially clear given that they seek only "to preserve, rather than alter, the status quo while they litigate the merits of th[eir] action." *Rodde v. Bonta*, 357 F.3d 988, 999 n.14 (9th Cir. 2004). The preliminary injunction merely maintains the status quo while the case moves

forward, which further "strengthens [Plaintiffs'] position" in the analysis of the equitable injunction factors. *Id.*

Furthermore, California can continue to address worker misclassification through the long-standing *Borello* test. Appellants argue that "the *Borello* standard was not adequately protecting against employee misclassification" (State Br. 36; *see also* IBT Br. 47), but California will continue to use the *Borello* test to distinguish employees from independent contractors in the many industries that AB-5 exempts from application of the ABC test. *See, e.g.*, Cal. Lab. Code § 2750.3(b). Moreover, reflecting the legislature's own recognition that the ABC test might be unlawful applied to certain industries, AB-5 also expressly provides that the *Borello* test will continue to apply if "a court of law rules that the [ABC] test … cannot be applied to a particular context." *See id.* § 2750.3(a)(3). Because the *Borello* test will continue to apply, the preliminary injunction is a limited remedy that reasonably balances the severe harms to Plaintiffs against the far lesser harms to the State.[15]

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[15] IBT argues that "the preliminary injunction order denies workers in California the Labor Code protections to which they are entitled." IBT Br. 46. That is not so. The preliminary injunction does not prevent the State Defendants from pursuing misclassification claims under the *Borello* test. Nor does it prevent workers from filing their own actions invoking the ABC test. As the California Supreme Court has explained:

> An employee pursuing a wage-related claim … may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. Or the employee may seek *administrative* relief by filing a wage claim with the [Labor

Finally, the public interest also supports a preliminary injunction. Although California has an interest in protecting misclassified workers (State Br. 38), that interest "must be balanced against the public interest represented in Congress' decision to deregulate the motor carrier industry, and the Constitution's declaration that federal law is to be supreme." *ATA*, 559 F.3d at 1059-60. "Congress has declared that it is in the public interest" to avoid having businesses "subjected to the demands and criteria of numerous legislatures rather than being required to comply only with federal laws and regulations." *Mattox*, 897 F.2d at 784. Moreover, when government action is challenged as unconstitutional, as in this case (which ultimately rests upon the Supremacy Clause (U.S. Const. art. VI, cl. 2)), "[t]he public interest … tip[s] ***sharply*** in favor of enjoining the" law. *Klein v. City of San Clemente*, 584 F.3d 1196,

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Commissioner].

Murphy v. Kenneth Cole Prods., Inc., 155 P.3d 284, 297 (Cal. 2007) (citations and internal quotation marks omitted). Given that drivers who allege that they were misclassified as independent contractors may sue motor carriers in court, and given that the preliminary injunction does not bind any court, IBT members remain free to seek judicial relief under the ABC test (although to prevail they would have to persuade the court that the ABC test is not preempted by the FAAAA despite the numerous decisions holding that it is). The continued ability to sue under the ABC test aside, many owner-operators "have little desire to work as an employee driver because it deprives [them] of the independence, control, and opportunity for real profit that [they] have enjoyed for years working as an independent owner-operator." SER132-33. The Owner-Operator Independent Drivers Association ("OOIDA"), an industry group cited by IBT's expert (ER225) that advocates for the interests of owner-operators, has confirmed that it "does not support AB 5." Letter from OIIDA to its membership (Nov. 18, 2019), https://landline.media/wp-content/uploads/2019/11/CA-AB-5-Position-Statement.pdf.

1208 (9th Cir. 2009) (emphasis added). ***"[A]ll citizens*** have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (emphasis added).

Here, both the balance of equities and the public interest weigh heavily in Plaintiffs' favor.[16]

IV. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT PLAINTIFFS HAVE STANDING.

IBT—and only IBT—argues that Plaintiffs lack standing. The district court correctly rejected IBT's contention.

Although it does not dispute that the ABC test requires motor carriers to classify owner-operators as employees rather than independent contractors (*see supra* at 49 n.7 (citing IBT Br. 27)), IBT argues that Plaintiffs have not "demonstrat[ed] that a CTA member" may lawfully classify drivers as independent contractors under the *Borello* test and is therefore adversely "affected by the use of

[16] The State Defendants point out that, "in another challenge to AB-5," a district court "denied the Plaintiffs' motion for a preliminary injunction" after "concluding that … important state interests … outweighed Plaintiffs' claims of harm." State Br. 38 n.17 (citing *Olson v. State of California*, 2020 WL 905572 (C.D. Cal. 2020). Yet *Olson* did not involve a claim of FAAAA preemption. Moreover, the *Olson* court weighed the interests identified by the plaintiffs less heavily because they were "premised on their claims' success on the merits—an outcome that the Court ha[d] already determined to be unlikely." 2020 WL 905572 at *16. Here, Plaintiffs have demonstrated that they are likely to succeed on the merits, so *Olson* is inapposite.

the ABC test rather than *Borello*." IBT Br. 14. In so arguing, IBT ignores this Court's precedent and Plaintiffs' evidence.

IBT cites no authority for its contention that an individualized showing of a particular member's compliance with current law is necessary to confer standing on a trade association to challenge the legality of a more stringent new law. Nor could they. As this Court has explained,

> [w]here it is relatively clear, rather than merely speculative, that one or more members [of a plaintiff association] have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured.

Nat'l Council of La Raza v. Cegavske, 800 F.3d 1032, 1041 (9th Cir. 2015).

Here, in light of the evidence Plaintiffs submitted, it is "clear, rather than merely speculative" (*Cegavske*, 800 F.3d at 1041), that CTA's members would be injured by enforcement of AB-5. Plaintiffs pleaded that "[m]any" of CTA's members regularly and lawfully contract with owner-operators as independent contractors. Second Amended Complaint ("SAC") ¶¶ 5, 43 (ER283, 294).[17] They

[17] To establish standing to pursue preliminary injunctive relief, "plaintiffs may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their [preliminary-injunction] motion." *City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*, 944 F.3d 773, 787 (9th Cir. 2019) (internal quotation marks omitted) (alterations in original).

also submitted declarations establishing that many of CTA's members—including one named in a declaration—regularly contract with owner-operators. *See* ER269-70; SER121. Furthermore, "[i]n response to [IBT's] challenge" to their standing (ER007), Plaintiffs submitted evidence that factfinders had determined in two cases that CTA members had properly classified owner-operators as independent contractors under the *Borello* standard. *See* SER015-105. The court took judicial notice of these facts (ER007), which belie IBT's improbable suggestion that CTA members cannot lawfully classify owner-operators as independent contractors under *Borello*.[18] In fact, this Court has concluded that the *Borello* standard does not categorically foreclose motor carriers from engaging independent-contractor drivers. *See Su*, 903 F.3d at 964.

Plaintiffs also demonstrated that owner-operators "can no longer be classified as independent contractors under the ABC test." ER007. AB-5 thus forces CTA's members either to "cease using independent contractors to provide trucking services" or "face the risk of significant civil and criminal penalties." SAC ¶¶ 66, 67

[18] IBT notes in a footnote that the California Division of Labor Standards Enforcement ("DLSE") has found in 97% of complaints involving drayage drivers that the hiring entity misclassified the drivers as independent contractors. IBT Br.14 n.5. That statistic raises no inference that motor carriers cannot satisfy the *Borello* standard because the universe of complainants is limited to drivers who believe that they were misclassified. The statistic reveals nothing about the many other drivers classified as independent contractors.

(ER302-03); *see also* ER278. That is sufficient to show that CTA's members have suffered a "concrete and particularized" injury that is "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016).[19]

IBT argues that Plaintiffs must show both that a CTA member has a "concrete plan" to violate AB-5 and "that the ABC test will imminently be used in enforcement proceedings against that company." IBT Br. 15. Plaintiffs demonstrated the serious risk of an enforcement action against CTA members that do not reclassify all owner-operators as employees. *See supra* at 74-75. Such risk is sufficient to confer standing. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("When an individual is subject to [the threatened enforcement of the law], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenge the law.");

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[19] Indeed, courts routinely hold that trade associations have standing to bring preemption challenges to new laws that govern their members. *See, e.g.*, *Airline Serv. Providers Ass'n v. Los Angeles World Airports*, 873 F.3d 1074 (9th Cir. 2017) (air transport trade associations had standing to raise preemption challenge to conditions in airport licensing agreements where members' compliance with challenged provisions would impose costs); *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902 (10th Cir. 2012) ("the probability of future injury" to members gave trade association standing to bring preemption challenge to state identity-theft law: "[T]he existence of a statute implies the threat of its enforcement."); *Associated Builders & Contractors v. Perry*, 115 F.3d 386, 389 (6th Cir. 1997) (district court "did not err" in entertaining trade association's preemption challenge to prevailing-wage law "to ensure that the interests of [its] members were not jeopardized by state interference with their federal rights").

see also Bland v. Fessler, 88 F.3d 729, 737 (9th Cir. 1996) (finding injury-in-fact in a pre-enforcement challenge where "[t]he Attorney General of California has not stated affirmatively that his office will not enforce the civil statute"); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (observing that the "Government's failure to disavow application of the challenged provision" weighs in favor of "a finding of standing"); *Libertarian Party of Los Angeles Cty. v. Bowen*, 709 F.3d 867, 871 (9th Cir. 2013) (credible threat of prosecution existed where the defendant government official posted the challenged requirements on her website as mandatory instructions for covered parties). The fact that CTA members could avoid prosecution by undertaking expensive measures to comply with AB-5 does not nullify their standing: "Courts frequently engage in pre-enforcement review based on the potential cost that compliance (or bearing a penalty) creates." *520 Michigan Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 963 (7th Cir. 2006) (employer had standing to bring preemption challenge to state law where it was "caught between the need to comply with the state law and the desire to reduce the cost of its operations").

IBT relies on *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1140 (9th Cir. 2000) (IBT Br. 15), but it is inapposite. In *Thomas*, landlords challenged a statute that prohibited them from discriminating against prospective tenants on the basis of marital status, but it was unclear that they would ever violate

the statute. The existence of a future violation depended on a chain of speculative possibilities, including: "whether the landlords retain their rental properties" and "whether an unmarried couple will seek to lease available property." *Thomas*, 220 F.3d at 1141. The court concluded that "[t]he landlords do not at this time confront 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Here, the ***current business practices*** of CTA members using owner-operators would violate AB-5. CTA therefore has standing to seek a preliminary injunction.

CONCLUSION

This Court should affirm the preliminary injunction.

Dated: May 6, 2020

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FOR THE NINTH CIRCUIT

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