# ROAD TRANSPORT FORUM NEW ZEALAND INC

## SUBMISSION ON NZ GOVERNMENT/ MBIE CONSULTATION DOCUMENT: BETTER PROTECTIONS FOR CONTRACTORS

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# ROAD TRANSPORT FORUM NEW ZEALAND INC

## 1. Representation

1.1 Road Transport Forum New Zealand (RTF) is made up of several regional trucking associations for which RTF provides unified national representation. RTF members include Road Transport Association NZ, National Road Carriers, and NZ Trucking Association. The affiliated representation of RTF is some 3,000 individual road transport companies which in turn operate 16-18,000 trucks involved in road freight transport, as well as companies that provide services allied to road freight transport.

1.2 The RTF is the peak body and authoritative voice of New Zealand's road freight transport industry which employs 32,868 people (2.0% of the workforce), and has a gross annual turnover in the order of $6 billion. Road transport in its totality transports about 70% of New Zealand's land-based freight measured on a tonne/kilometre basis.

1.3 RTF members are predominately involved in the operation of commercial freight transport services both urban and inter-regional. These services are entirely based on the deployment of trucks both as single units for urban delivery and as multi-unit combinations that may have one or more trailers supporting rural or interregional transport.

## 2. Introduction

2.1 The RTF's comments in response to the MBIE consultation document are confined to the potential for policy changes to impact on the relationship between independent owner driver entities (businesses typically contracted to provide road transport freight services) to other transport enterprises, or contracted freight transport services provided directly to companies allied to the commercial road freight sector, such as freight consolidators or logistics companies.

2.2 In this context we are talking about the heavy vehicle freight sector environment, although we understand proposals in the discussion document reach across all contracted services and occupational disciplines.

2.3 The recalibration of contracting relationships will dramatically impact commerce; the trucking industry is just one example. The opportunity to be one's own boss will be removed if the premise behind the discussion document occurs as a result of being unchallenged.

2.4 The MBIE document makes reference to asset management (page 13), in particular trucks, which is obviously a key interest of RTF.

2.5 There are range of contractual relationships for truck-related contracted services across a number of different industry sectors, but the relationship between principal and contractor being a contract for service in the road freight sector is probably the most vulnerable to any recalibration of the present independent arrangements.

2.6 In RTF's opinion, the discussion document is a thinly disguised response to a well-established union plan to increase its coverage. The document proposes to recalibrate the current independent contractor models that exist in the industry.

2.7 In many ways, the core features of the discussion document and potential changes reflect a documented desire by FIRST Union to overturn the precedent setting interpretation of an independent contractor model settled by Cunningham vs TNT Express Worldwide (NZ) (1993). The union aspiration was articulated in this 2018 press release https://www.scoop.co.nz/stories/PO1808/S00005/when-is-a-worker-a-contractor-versus-an-employee.htm

2.8 The courier model is discussed in some detail on pages 20, 21 and 22 however, the capital resource for this group and other example cited, the IT worker, in the commentary bear no semblance to the sort of investment committed to by truck-owning independent contractors. This raises the question, should a financial commitment, or asset value test, form part of the contractor determination?

2.9 The issue with the legal case cited (Ike versus NZ Couriers LTD 2012 NZHC 558) is the lack of ability to freely negotiate the contract, and relative difference in authority and control, to get an outcome that is free from duress, not the fact that one of the parties was an independent contractor. It's difficult to imagine whether the relative difference in influence in the relationship would be any different if the parties were employer or employee.

2.10 In the courier example, the commentary acknowledges the lack of influence in the negotiations but overlooks the fact that in the transport field, intense competition between participants at all levels is the norm and end-line customers dictate the price and frequency of payments that are made to contractors. This flows through to the logistics companies providing the transport service and consequently, to the contractors providing the service to move the product with their equipment.

## 3. The economics of truck transport

3.1 The reality of being held to ransom by the customer is not unique to couriers and occurs across the road freight sector. It isn't confined solely to independent contractor/principal arrangements.

3.2 Some of New Zealand's biggest industry players and largest value-added enterprises and processors apply the same approach to their transport service providers and they are continually squeezing the cost factors to the point the profitability of many large trucking companies is less than 3%. This places the trucking companies' ongoing sustainability in a constant state of jeopardy.

3.3 As an example, a substantial processing company has not increased its rate schedules to transport operators for about eight years. Over that time, truck operating costs have risen significantly. While the introduction of additional efficiencies by way of 50MAX and HPMVs with their increased payload has helped manage some of the impact of the cost increases, this has to be offset by the increased capital equipment investment required to remain competitive.

## 4. The risk of policy change to road freight transport

4.1 Any change to the status quo relationship between contractors (owner-drivers) and principals in the trucking industry has the potential to totally up-end the commercial equilibrium. This will have unintended consequences for the freight consumer markets, and the country's economic performance.

4.2 Deregulation, enabling the growth of the independent contractor, has resulted in transport cost benefits across the economy, fostering business growth for a lot of transport companies. This has occurred without the need to have unnecessary inventories of trucks and equipment, or having to find and pay drivers for down time in what can be a very fickle and cyclic service market. The additional transport service to keep the transport chain fully functional in a cyclic market has been taken up by owner-driver contractors.

4.3 Most of these drivers want the lifestyle choices that contracting provides and of course, the ability to determine where their revenues might be spent.

## 5. California's recent experience at recalibrating the owner-driver contractor model

5.1 The recent California experience is a real touchstone for how a simple aspirational change to independent contracting norms can have absolutely perverse outcomes, even when the change is allegedly being put in place to assist vulnerable contractors. The recent California experience has demonstrated how such changes can have significant consequences on legitimate existing contractual relationships, particularly for those in the transport and logistics sector.

5.2 We have real concerns that the same impact may unfold here if the policy framework and philosophical approach presented in the discussion

document overlooks the "full picture" market implications of what is being considered.

5.3 We are pleased to be able to offer a New Zealand transport sector perspective and draw upon the experiences of our colleagues in the American Trucking Association and the California Trucking Association who stepped in to stop the Californian legislative process Assembly Bill 5 destroying the businesses of some 70,000 owner-drivers.

## 6. Where it all began

6.1 Throughout 2018-2019 the State of California introduced new tests for determining contractor independence and it was planned to finally pass a new independent contractor determination titled AB5 to come into law, through California Legislature Assembly Bill 5 in January 2020.

6.2 If this had passed unchallenged, overnight, the state legislature would have destroyed the ability for some 70,000 owner-drivers to operate their trucking services in the State.

6.3 This fiasco came about as California was actually trying to sort out the contractual vulnerability of Gig workers such as those employed in the film industry, or drivers working for passenger transport entities such as Uber and Lyft. A similar sentiment is expressed in the MBIE discussion document.

6.4 We will cover in more detail why the California proposal ended up being so destructive to the transport sector and how a managed solution had to be put in place through firstly, a temporary restraining order (TRO), followed by an injunction in January 2020. Before looking at the California experience in detail we need to quantify the risk to commerce should the same approach as proposed by the discussion document get traction in New Zealand.

## 7. Owner-driver (independent) contractors - how they do they fit in the road freight transport sector?

7.1 The owner-driver (independent) contractor numbers in the road freight trucking sector should not be under estimated. Based on Statistics NZ data (2019) there are an estimated 3,318 owner-driver geographic units and they represent more than 10% of the full-time equivalents (FTE). Their businesses represent in excess of 65% of the transport service licence (TSL) road freight businesses in New Zealand.

7.2 A further factor that complicates things in the road freight transport sector is a number of owner-drivers own multiple trucks, but still consider themselves to be an owner-driver because they drive one of the vehicles regularly, or intermittently. Various models of contractual

arrangement exist in the freight sector and possibly some owner-drivers fall into the grey zone interpretation because they are primarily contracted to one entity, but have sufficient independence (Ref Determination Tests, Page 14) not to be considered dependant contractors (ref Key Terms, Page 8).

7.3 Others are clearly independent, but what model suits the two parties is often dictated by the contractor's financial commitments and the principal's customer obligations. The reality for owner-drivers, given the capital expenditure of about $500,000 for a truck and trailer combination, is a desire to avoid the inherent vulnerability of complete independence where the fluctuating work availability would mean financial commitments to pay for fuel, vehicle repayments, RUC, and repairs, are unable to be met or would be jeopardised. What the principal gets is a dedicated reliable service able to meet customer demands; so, the grey zone contractor model automatically is a better relationship fit for both parties.

7.4 Furthermore, the large logistics companies rely heavily on the competence and professionalism of their owner-driver contracting service providers, even in situations where the principal may have their own trucks. Therefore, the concept of being a grey zone contractor has considerably more appeal than the independent model, for both parties. For some others, the fully independent model suits.

7.5 Given the various scenarios, the best option is to allow the parties to agree to the most appropriate arrangement as opposed to having the outcome dictated by a government mandated legislative framework that goes beyond the status quo situation we have now.

## 8. Answering the Status quo questions pages 12/13

8.1 From our perspective, the present owner-driver arrangements - being the status quo model - are the best arrangement for the road freight transport sector. In this context, we don't see any merit in importing employee rights into the types of independent contracting relationships that exist now in the road transport sector.

## 9. General aspects of the contractor/principal relationship as referred to in the discussion document

9.1 The Minister's introductory message (page 4) highlights the vulnerability of some contractors in their work situations. The trucking sector is by and large an exception to the anomalies that overpower contracting relationships associated with the Gig economy, or labour only environments. The labour-only option for contractors is often used by government agencies when they come up against the employee number cap.

9.2 The difference from many contracting environments is most of the control aspects for trucking are externalised through present regulatory norms. Driver's work hours for example, are actually set outside the contract relationship by NZTA legislation; Land Transport Rule: Work Time and Logbooks 2007. The condition and safety of the vehicles is dictated by regular independent safety inspections, also set in legislation, as well as the statutory requirements that all transport service licence (TSL) holders are expected to meet, set out in the Land Transport Act 1998 ***Part 2; Primary responsibilities of participants in the land transport system*** and ***Part 2 Sec 4 general responsibilities for participants in the land transport system.*** These duties flow into the detail in the relevant sections of the LTA 98 that follow the summary of responsibilities.

9.3 Overlaying these obligations are those explicitly set by the Health and Safety at Work Act 2015 (HSWA) that relate to principals and those who engage contractors.

9.4 In a number of recent but unpublicised examples, logistics companies have taken a hardnosed approach to non-compliance by owner-driver contactors as part of the principal's reputational management. This inevitably leads to tension between the parties, but that's not unusual for these types of commercial arrangements. Breakdown of contractual arrangements between parties is typically contestable through independent arbitration or the court. However, most are resolved by agreement. For all the alleged criticism of principals and contractors that do the rounds, there is little or no evidence of owner-drivers leaving their contracts prematurely. This all serves to confirm the present arrangements are relatively stable.

9.5 The discussion document attempts to portray an environment where contractors are hard done by and working under financial and task demand duress (the courier example page 21/22). In reality, the intensity of these relationships is not unlike the typical employee-employer model. There are plenty of media articles citing employee exploitation across a wide range of occupations.

9.6 We are not saying that some contracting arrangements don't require investigation, but doing due diligence has to be one of preliminaries before committing to become a contractor in any type of employment environment.

## 10. Page 23 - Q3 to Q7 characterisation of the issues and urgency for change

10.1 RTF's member associations provide cost modelling and can show the financial viability of contracts offered, but they often find the contractor has already decided what they want and no amount of logic or persuasion

will change their mind. In the model case the courier, Matiu, liked the idea of being his own boss (Page 21). In our interpretation of the offer made, he failed to fully evaluate the demands the role imposed on him or the service expectations of the principal. In other words, he overlooked the characteristics of the job having already committed himself to be his own boss.

10.2 The example provided in the text illustrates the susceptibility of those who have elected to make a decision without fully evaluating the consequences. But this is not exploitation in any context, certainly not to the level that requires a reset in the independent contract(or) model. It illustrates that people can make a wrong or poor decision whether its committing to buy a car, something on Trade Me, a contract, or employment.

**11. Page 24 - The options for change**

11.1 The three outcomes (page 24) do little to support the independent contractor model and the first, arguably shifts the contractor to an employee.

11.2 The second, rebalancing the power between the parties, is a positive but altruistic sentiment which in practice will do little to achieve a better outcome. There is little attraction for independence or being your own boss, as Matiu wanted, if the parties are umbilically linked together, as opposed to being at some distance apart. This is not the right tool to correct the failings of the process and understanding between the parties.

11.3 The third outcome suggests some form of market manipulation and contractual arrangement to pit one contractor against another.

11.4 This approach completely ignores the fact that any contractor rewards are almost entirely dependent on the marketing success of the principal. Contractors increase their rewards by growing their business. That has been the common model in the transport industry and that's why a number of owner drivers have more than one truck.

11.5 In some cases, they eventually break away from the independent contracting arrangement and setup their own, fully independent freight service. It was this approach that helped rebuild the New Zealand economy following difficult times.

11.6 Government recognised that trying to control cartage charge rates, truck licencing, and distances trucks were allowed to travel, was never going to result in economic growth. The deregulation of 1983 to 1986, then to 1989, was a watershed change in freight service productivity and transport efficiency. Stepping back in time to a de facto "services control model" to help small contractors will have economic consequences for consumers and national productivity across the board.

## 12. Page 25 - guidance and information availability

12.1 We have already articulated our view of changing the legislation and the California Assembly Bill 5 is an example of moving too hastily to reframe the legislative platform. By all means make more information available however, based on our experience, individuals determined to go into business (be their own boss) will commit even when the risks and frailties are well documented.

## 13. Page 25, 26, 27 - operational and legislative reform

13.1 Page 26 is really setting the policy options out having almost decided there is a case to answer on the basis of misclassification of independent contractors with the option 8 (page 27) defining some occupations of workers as employees, extending the right to bargain collectively (option 10) with others, and creating new category of workers with some employment rights and protections, option 11.

## 14. Pages 27 & 45 - Option 9 - Change the test used by courts to determine employment status to include vulnerable contractors

14.1 RTF is completely opposed to Option 9. The other corresponding options are simply a thinly veiled attempt to drive contractors into a type of employee relationship, a step only slightly removed from option 8. We would argue there is no appetite whatsoever for any change in the status quo definitions as they apply to commercial road freight transport contractual arrangements.

14.2 The typical road freight environment is volatile for a number of reasons that go way beyond the contractual relationship between the parties. Economic rises and falls inevitably lead to business failures that have little to do with the contracting situation, although contractors as well as principals can be casualties of such vagaries. Imposing significant costs on the employer by requiring them to included contractors as some sort of quasi employee should not even be contemplated.

## 15. Page 29 - Option1: Increase proactive targeting by Labour inspectors to detect non-compliance

15.1 Labour inspectors are only scratching the surface at present, being able to carry out only a few employment exploitation investigations.

15.2 We doubt they have the experience and capacity to cover off contracting arrangements, or to fully grasp the nuances of how transport related enterprises actually work through the established interfaces with contractors or clients. Changing the legal frame work and instituting penalties won't change the level of detection of malpractices, but it could completely misrepresent good working relationships and undermine business entrepreneurship, particularly in the road freight field. This outcome would be catastrophic for the New Zealand economy.

15.3 The individuality of each case would have to be investigated on its own unique merits and that assumes a level of cooperation from the parties. Either way any investigation would be labour and time intensive.

**16. Page 30 - Option 2: Give Labour inspectors the ability to decide workers' employment status**

16.1 The response to this option is the same as the above, for the same reasons. Option 2 is only available once an option 1 investigation has been undertaken.

**17. Page 32 - Option 3: Introduce penalties for misrepresenting an employment relationship as a contracting relationship**

17.1 Successive New Zealand Governments have a history of making everything illegal, but they actually have very limited capacity for correcting ethical failings in the working environment. A few cases may get to court and the errant party may receive a significant penalty, but we would expect to see very few successful prosecutions brought. New Zealand's labour laws are littered with good intentioned aspirations but only a few poor employers actually end up in court getting fined.

17.2 RTF is not confident the revision to legislation will help the situation of poor contractor decision-making. Fining employers under the grounds cited in 27, c suggests MBIE is already convinced minimum employment standards will apply, irrespective submissions on the discussion document.

**18. Page 35 - Option 4: Introduce disclosure requirements for firms when hiring contractors**

18.1 There is some merit in this approach, with some form of model contract with the capacity for variations. This would assist both parties as it would define the participation arrangement of the parties in the contractual agreement making the status beyond doubt. The risk is low with this approach although as stated in the discussion document there would be some compliance costs. This would be a discoverable document in the event a situation arose where legal proceedings had to be initiated. However, mandating a form approach to the contract won't necessarily mean every contract for service will be supported by a contract.

18.2 The very same situation that exists now between a few employers and their employees in a contract of service arrangement and that's also despite the requirement for an employment contract being mandated.

**19. Page 37 – Option 5: Reduce costs for workers seeking employment status determinations**

19.1 Based on the discussion on page 37, the benefits alluded to this option do have some merit particularly for low-paid contractors where the equipment investment to carry out their contact is relatively small compared to say, investing in a heavy-duty truck. It's a matter of gauging the scale of financial status of the contracting arrangement at which the

ERA or the employment court might be employed to issue a determination.

19.2 We agree there could be significant costs for the Crown in the approach discussed and these costs would invariably fall on the tax payer. On the other hand, if the process can prevent unnecessary court action to resolve contract status issues, then the ERA determination might be useful step forward. We only support this option assuming the current contract for service interpretations stay as they are. If they morph in to the new approach outlined in the document, that is, redefining and recalibrating the contracting independent contractor definition, then this option would not be necessary.

**20. Page 38 - Option 6: Put the burden of proof a worker is contractor on firms**

20.1 RTF is totally opposed to this approach. The ERA and employment court provide a venue in which to categorise determinations. Both parties have the option to appeal the outcome so at least for legal clarity, there is some independence in the declaratory process.

**21. Page 40 - Option 7: Extend the application of employment status determinations to workers in fundamentally similar circumstances**

21.1 The approach outlined has considerable risk, as each contracting situation is entirely unique although on the face of things, two or more situations may appear similar. Whenever there is situation where there is desire to wash everything with one broad brush approach, individualism is lost and the risk of miscarriages of justice arise. We see this a poor version of recalibrating contracting relationships into the models that the discussion document is seeking to initiate. We are also wary of unions petitioning to have allied unrelated employment situations across different occupations drawn in to one determination outcome thereby, inadvertently trapping what would be otherwise independent contractors in to an employment situation as employees, which they have no desire to be in.

**22. Pages 41 to 53 - Options 8 to 11: Options to change who is an employee under New Zealand law**

22.1 This has been discussed at the beginning of our submission where we confirmed our opposition to any changes in the present key interpretations of independent contractor.

22.2 Our final points of evidence in support of our opposition to the change proposed by the discussion document are based entirely on extracts from two well-respected US transport industry publications. Both extracts highlight the negative features of reclassifying independent trucking contractors as employees because they can’t meet one aspect of the new California AB5 test which rests on three features referred to as A, B, and C.

22.3 The article (**Appendix 1**) from *Heavy Duty Trucking* magazine presents a summary of the situation alluding to considerable union influence to foster the introduction of the ABC test to replace the established Borello test applied to independent contracts. Note also, the evidence for change arose out of one case of April 2018 heard in the California Supreme Court: Dynamex Operations West Inc versus Superior Court. This is referenced in the second (**Appendix 2**) extract from *Transport Topics* magazine.

**23. Summary of court process contesting Assembly Bill AB5 outcomes**

23.1 In an action against the intent of the Bill California Trucking Association (CTA), Judge Roger Benitez from the Southern District Court of California, issued a temporary restraining order (TRO) against the implementation of Assembly Bill 5 on the last day of December 2019. The TRO stymied the bill, which was intended to reclassify tens of thousands of independent contractors as employees.

23.2 The TRO exclusively related to the legislation's impact on the commercial trucking sector, although it was recognised the AB5 determination impacted all commercial independent contractor work relationships. The TRO was issued in response to a CTA filing of 24 December against AB5, because the association represented commercial truck drivers who wanted to remain independent contractors. The proposition amplified the fact that the drivers had the ability to set their own schedules, owned their own vehicles, and had the ability to profit from the transport service they provided. The argument was that enforcing AB5 and the associated ABC independence test would force the drivers not only to be treated as employees, but to forego the monetary benefits that independent contracting provides them.

23.3 Benitez found that, in his view, a TRO was warranted as the plaintiffs were seeking emergency relief. They were likely to suffer significant harm if relief was not granted and their case had merit because the balance of inequities tipped in their favour and relief was in the public interest.

23.4 The key issue was irreparable harm that would arise from transforming the independent contractor arrangements to meet the employee definition and the potential risk of not being entirely successful acting within the scope of the new definition, of then contravening California governmental laws resulting in either civil or criminal law suits, or both.

23.5 Benitez recognised this risk and the potential harm AB5 presents to the trucking industry, and put forward the suggestion that workers can be protected without the need to crush independent owner-drivers in the process.

23.6 Consequently, he proposed the TRO remain in place until 13 January 2020 when he would hear a motion to seek a preliminary judgement against the law.

23.7 In the order, Benitez stated that CTA's contention warranted further consideration. "Plaintiffs have shown that AB 5's Prong B is likely pre-

empted by the FAAAA because AB 5 effectively mandates that motor carriers treat owner-operators as employees, rather than as the independent contractors that they are".

23.8 Separately, on 30 December, Uber, delivery start-up Postmates, and two contractors who work for the companies, also sued the State over AB 5, alleging the Bill unconstitutional.

23.9 In an entirely unrelated action, a California state judge ruled federal law exempts a New Jersey-based motor carrier from reclassifying independent contractor truck drivers as company employees.

23.10 The 8 January ruling by Los Angeles Superior Court Judge William Highberger said that an independent contractor/employee test required by the new state law, known as Assembly Bill 5, is pre-empted by the Federal Aviation Administration Authorization Act of 1994, aimed at increasing competition and reducing the cost of trucking services.

Highberger wrote: *"The record before the court in this case confirms the common sense conclusion that AB 5 would have a substantial impact on trucking prices, routes and services, as motor carriers in California revamp their business models either to utilize only employee drivers or attempt to satisfy the business-to-business exception. As the evidence shows, in those circumstances where defendants have contracted with licensed motor carriers to transport loads, the cost of such transport was nearly triple the cost of using independent owner-operators for the same route."*

23.11 According to US trucking publication reports, Highberger's ruling came in a lawsuit filed by the Los Angeles City Attorney's office against NFI Industries and its subsidiaries, drayage operator Cal Cartage Transportation Express, CMI Transportation, and K&R Transportation California, for alleged misclassification of truck drivers under AB 5.

23.12 California's AB 5 "ABC test" can be summed up as this: That motor carriers render their workers employees unless the employer demonstrates that the worker is free from the control of the hiring entity; the worker performs work outside the usual course of the hiring entity's business; and that the worker is customarily engaged in an independent trade or occupation.

23.13 As can be seen, Highberger's ruling came only days after Judge Benitez temporarily halted the AB 5 application to trucking in response to the lawsuit filed by the California Trucking Association.

23.14 NFI attorney Joshua Lipshutz of Los Angeles firm Gibson Dunn stated following Highberger's ruling.

*"Independent owner-operator truck drivers have been a vital part of the trucking industry, and a path to achieving the American dream, for many decades. Judge Highberger's decision confirms that California cannot*

*simply eliminate that business model and force truck drivers to be employees*."

23.15 On 16 January, a federal judge in San Diego issued a preliminary injunction against the trucking component of a California law that would restrict how independent workers can be classified by companies. The judge's ruling meant the state of California couldn't implement the law as it pertains to the trucking industry.

23.16 Judge Benitez of the Southern District Court of California extended indefinitely his order banning implementation of the trucking component in California's Assembly Bill 5. following his previously issued temporary restraining order.

In his order judge Benitez wrote: *"There is little question that the State of California has encroached on Congress' territory by eliminating motor carriers' choice to use independent contractor drivers, a choice at the very heart of interstate trucking. In so doing, California disregards Congress' intent to deregulate interstate trucking, instead adopting a law that produces the patchwork of state regulations Congress sought to prevent. With AB 5, California runs off the road and into the pre-emption ditch of the FAAAA. Accordingly, plaintiffs' motion for a preliminary injunction is GRANTED*."

The preliminary injunction can be accessed here although a PDF copy is attached AB 5 Preliminary Injunction... by Transport Topics on Scribd

**24. Concluding comments**

24.1 The concepts described above that resulted in the associated court actions to amend the situation in the California state jurisdiction are provided as an illustration of the risks to the road freight sector here in New Zealand if MBIE's position on reclassifying independent contractors outlined in the discussion document *Better Protections for Contractors* goes unchallenged.

24.2 RTF submits the discussion and subsequent decisions in the California AB 5 cases re affirm that the idea of reclassifying owner-drivers as employees, even in a New Zealand context, is destructive to all the participants in the transport service chain. Any proposal to recalibrate independent contractors across the trucking sector to be employees threatens not only the livelihood of the same contractors, but will have significant negative impacts on the New Zealand economy.

24.3 Regrettably, in New Zealand, we don't have the same legislative framework that exists in the State of California. Nor does New Zealand have an overarching Federal legal system that can provide an avenue to measure the validity of a change in labour laws.

24.4 The risk to commerce is obvious and we can only submit that MBIE rethinks what it is suggesting in respect of independent contractors,

specifically as it might apply to the road freight sector and the deployment of independent contractors.

24.5 From our perspective, the present owner-driver arrangements - being the status quo model - are the best arrangement for the road freight transport sector. In this context, we don’t see any merit in importing employee rights into the types of independent contracting relationships that exist now in the road transport sector.

# Appendix 1

### AB5 injunction: Judge Benitez decision issued 16 January, 2020.

### Attached

### Reference article to support RTF submission

Source: *Heavy Duty Trucking Magazine*

Dated November 13, 2019 • by Steven Martinez

## Trucking Group Challenges California Independent Contractor Law

**The California Trucking Association is challenging the employment test included in California's recently passed independent contractor law that the group says threatens the livelihood of independent truck drivers.**

The California Trucking Association and two California-based owner-operators filed a lawsuit against the "ABC" employment test mandated by California's recently passed independent contractor law, which the group says threatens the livelihood of independent truck drivers.

The CTA filed an amended complaint with the U.S. Southern District Court seeking declaratory and injunctive relief against the employment test that was codified in Assembly Bill 5.

AB 5's purpose is to prevent businesses from classifying workers as independent contractors who are, in practice, only working for one company. Proponents of the law claim that these workers are being denied the wages and benefits that would be guaranteed to them if they were properly classified as employees.

The law was originally aimed at workers for ride-sharing companies like Uber and Lyft, as well as at some trucking companies that have been accused of misclassifying drivers. However, the line between an employee and an independent contractor is fuzzy, so included in the law was an ABC test to clarify under which circumstances workers need to be considered employees.

Which brings us back to the CTA's lawsuit. With owner-operators making up a sizable chunk of the trucking workforce, and the ABC test potentially preventing drivers who have always considered themselves as independent entities from remaining so, CTA says the bill wrongfully restricts their ability to work.

"AB 5 threatens the livelihood of more than 70,000 independent truckers," said CTA CEO Shawn Yadon. "The bill wrongfully restricts their ability to provide services as owner-operators and, therefore, runs afoul of federal law."

**What's the ABC test?**

Under California's AB5 law, which goes into effect in January, the burden of proof is on the company doing the classifying, using newly adopted ABC test:

A: that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

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.

It's the second provision that is the problem for trucking, as drivers are generally not considered to be outside the course of a motor carrier's business.

CTA's suit argues that the classification test codified by AB 5 is preempted by the supremacy and commerce clauses in the U.S. Constitution and is in direct conflict with the Federal Motor Carrier Safety Act and the Federal Aviation Administration Authorization Act of 1994. (Part of the FAAAA bans states from enacting laws that affected a motor carrier's prices, routes and services.)

The CTA says the test would force owner-operators in California to abandon thousands of dollars of investments in their equipment and cost drivers the right to be self-employed. The group says the AB 5's one-size-fits-all testing method has highly restrictive criteria and is riddled with carve-outs and exemptions for specific businesses and industries.

"Independent truckers are typically experienced drivers who have previously worked as employees and have, by choice, struck out on their own." Yadon says. "We should not deprive them of that choice. Some of the country's most successful trucking companies were started by entrepreneurial independent truckers. We can protect workers from misclassification without infringing upon independent truckers' right to make a living in California."

A representative from the Brotherhood of Teamsters Union, a group that has been actively fighting the related issue of driver misclassification at the ports of Southern California, blasted the CTA's suit. The move to block implementation of AB 5 was, "presumably to allow California trucking companies to continue to violate multiple state and federal laws that define 'employee' vs. 'independent contractor," said Fred Potter, vice president-at-large of the Teamsters and director of the Teamsters' Port Division, in a statement.

"It's no surprise that their trucking contractors are going to court to perpetuate a scheme – deemed illegal by multiple regulatory agencies and courts long before Assembly Bill 5 was introduced in the California Legislature – that has robbed the typical driver of tens of thousands of dollars a year due to their misclassification as independent contractors," Potter said. "The gig is up, and it's time for the drayage industry to comply with local, state, and federal laws or risk being kicked out of the ports altogether, and it's time for the cargo owners – America's largest retailers – to stop doing business with recidivist lawbreakers."

# Appendix 2

**Reference article in support of RTF submission.**

Eric Miller | Staff Reporter *Transport Topics Magazine*

November 13, 2019 5:00 PM, EST

## California Trucking Association Challenges New State Labor Law

I-405 in Los Angeles by Patrick T. Fallon/Bloomberg

Trucking fleets in California are stepping up the fight against a new state labor law that opponents say would prevent thousands of motor carriers from contracting with owner-operators.

The California Trucking Association on Nov. 12 amended a federal lawsuit it originally filed in October 2018. The amendment was in opposition to California Assembly Bill 5, which will require an "ABC" test be used to determine whether a worker is an employee or independent contractor. The amendment was filed after California Gov. Gavin Newsom on Sept. 11 signed the bill into law, a move that raised the stakes for the trucking industry.

"AB 5 threatens the livelihood of more than 70,000 independent truckers," Shawn Yadon, CEO of CTA, said in a statement. "The bill wrongfully restricts their ability to provide services as owner-operators and, therefore, runs afoul of federal law." The amendment filed by CTA seeks declaratory and injunctive relief that would prohibit California Attorney General Xavier Becerra from enforcing the law.

In signing AB 5 into law, Newsom told legislators the bill was "landmark legislation for workers and our economy."

The ABC test requires that for a worker to be considered an independent contractor, the worker must satisfy all three parts:

A. The person is free from the control and direction of the hiring entity, both in contract and in fact.

B. The person performs work that is outside the usual course of the hiring entity's business.

C. The person is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

It has been the B prong that has most concerned motor carriers, which have indicated the test makes it difficult or impossible to engage independent contractors for work.

"Plaintiffs suffer irreparable harm from the existing and future enforcement of the ABC test," the lawsuit said. "Such irreparable harm to the CTA motor carriers includes, but is not limited to, civil and criminal liability authorized under the California Labor Code and Wage Order No. 9, costly litigation, including class actions initiated by private parties who claim to be improperly classified as independent contractors, and being compelled to cease providing to

their customers the trucking services which can be afforded only by specialized independent owner-operators."

The law is the latest development related to independent contractors in California, after new state administrative labor requirements were upheld in April 2018 by the California Supreme Court in the Dynamex Operations West Inc. v. Superior Court case.

Two independent owner-operators are also listed as plaintiffs with CTA in the lawsuit. Both Ravinder Singh of Fremont and Thomas Odom of Madera have contracts with and are treated by motor carriers as independent contractors, and not employees, the lawsuit said.

In the suit, plaintiffs argue that the classification test in the Dynamex decision and codified by AB 5 is pre-empted by the supremacy and commerce clauses in the U.S. Constitution and is in direct conflict with the Federal Motor Carrier Safety Act and the Federal Aviation Administration Authorization Act of 1994. The federal pre-emption clause generally prohibits state laws from interfering with trucking services that directly impact carriers' services, routes and prices.

The lawsuit contends that independent contractors are essential for carriers to meet the fluctuating demand for highly varied services, and motor carriers contract with owner-operators to provide trucking services.

"Because the demand for shipment of goods fluctuates depending on the season, consumer demand, overseas orders, natural disasters, type of truck and a multitude of other factors, many motor carriers depend on the use of individual owner-operators to provide consistent, uninterrupted, skilled, and specialized trucking services to their customers," the lawsuit said.

CTA attorney Robert Roginson said AB 5's implications go beyond employment classification in California.

"With more than 350,000 independent owner-operators registered in the United States, the new test imposes an impermissible burden on interstate commerce under the U.S. Constitution's commerce clause and infringes upon decades-old congressional intent to prevent states from regulating the rates, routes and services of the trucking industry," Roginson said in a statement.

In a memo, Newsom said AB 5 will "help reduce worker misclassification — workers being wrongly classified as 'independent contractors,' rather than employees, which erodes basic worker protections like the minimum wage, paid sick days and health insurance benefits."

The complaint also asks the court to issue a declaration that California's meal-and-rest-period requirements be pre-empted and not be enforced with respect to drivers of property-carrying commercial motor vehicles subject to federal hours-of-service rules.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA TRUCKING ASSOCIATION, et al.,

Plaintiffs,

v.

ATTORNEY GENERAL XAVIER BECERRA, et al.,

Defendants,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant.

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

**ORDER GRANTING PRELIMINARY INJUNCTION**

Plaintiffs California Trucking Association, Ravinder Singh, and Thomas Odom move for a preliminary injunction. Having carefully considered the parties' arguments, the motion is **GRANTED**.

## I. BACKGROUND

The following facts are taken from the Second Amended Complaint and the declarations filed related to Plaintiffs' preliminary injunction motion.[1] Plaintiff California

[1] Plaintiffs and Intervenor filed various declarations and numerous evidentiary objections, Docs. 56, 74. Notably, "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on

Trucking Association ("CTA") is an association of licensed motor-carrier companies that manage, coordinate, and schedule the movement of property throughout California. Many of CTA's motor-carrier members contract with owner-operators as independent contractors. Plaintiff Ravinder Singh is one example. He owns and operates his own truck, and he contracts as an independent contractor with different motor carriers and brokers in California to perform various trucking services. Plaintiff Thomas Odom also owns and operates his own truck. He contracts as an independent contractor with a national motor carrier to haul property within California and between California and Texas.

For decades, the trucking industry has used an owner-operator model to provide the transportation of property in interstate commerce. That model generally involves a licensed motor carrier contracting with an independent contractor driver to transport the carrier-customer's property. The volume of trucking services needed within different industries can vary over time based on numerous factors. For example, in the agriculture industry, demand for trucking services varies depending on the time of year, the price at which the produce can be sold, the available markets, the length of the growing season, and the size of the crop, which itself varies based on temperature, rainfall, and other factors. Motor carriers offer many types of trucking services, including conventional trucking, the transport of hazardous materials, refrigerated transportation, flatbed conveyance, intermodal container transport, long-haul shipping, movement of oversized loads, and more. Motor carriers meet the fluctuating demand for highly varied services by relying upon independent-contractor drivers.

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the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Thus, "the Federal Rules of Evidence do not strictly apply to preliminary injunction proceedings." *Disney Entertainment, Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 966 (C.D. Cal. 2016), *aff'd.* 869 F.3d 848 (9th Cir. 2017). Moreover, evidentiary issues at this stage properly go to weight rather than admissibility, *see id.* at 966, and the Court can easily assess the weight of the evidence without the parties' arguments.

Individual owner-operators use a business model common in both California and across the country. They typically buy or lease their own trucks, a significant personal investment considering that the record reflects a single truck can cost in excess of $100,000. *See, e.g.*, Doc. 54-2 at 5. Then, the owner-operators typically work for themselves for some time to build up their experience and reputation in the industry. Once the owner-operator is ready to expand their business, they contract for or bid on jobs that require more than one truck, at which time, the owner-operator will subcontract with one or more other owner-operators to complete the job. Many individual owner-operators have invested in specialized equipment and have obtained the skills to operate that equipment efficiently.

Whether certain laws and regulations in the California Labor Code apply to truck drivers, generally, depends on their status as employees or independent contractors. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 350 (1989). For nearly three decades, California courts have used a test, based on the *Borello* decision, to determine whether workers are correctly classified as employees or independent contractors. *See id.* at 341. The *Borello* standard considers the "right to control work," as well as many other factors, including (a) whether the worker is engaged in a distinct occupation or business, (b) the amount of supervision required, (c) the skill required, (d) whether the worker supplies the tools required, (e) the length of time for which services are to be performed, (f) the method of payment, (g) whether the work is part of the regular business of the principal, and (h) whether the parties believe they are creating an employer-employee relationship. *Id.* at 355. In April of 2018, the California Supreme Court replaced the *Borello* classification test for Wage Order No. 9 with the "ABC test." *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903 (2018).

California's Assembly-Bill 5 ("AB-5") codified the ABC test adopted in *Dynamex* and expanded its reach to contexts beyond Wage Order No. 9, including workers' compensation, unemployment insurance, and disability insurance. As applied to the motor carrier context, AB-5 provides a mandatory test for determining whether a person driving

or hauling freight for another contracting person or entity is an independent contractor or an employee for all purposes under the California Labor Code, the Industrial Welfare Commission wage orders, and the Unemployment Insurance Code. *See* Cal. Labor Code § 2750.3(a)(1). Under AB-5's ABC test, an owner-operator is presumed to be an employee *unless* the motor carrier establishes each of three requirements:

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

AB-5 also includes certain exceptions that were not part of the *Dynamex* test, including an exception for "business-to-business contracting relationship[s]."[2] *Id.* at § 2750.3(a)(1)(e). The statute additionally provides that "[i]f a court of law rules that the three-part [ABC] test . . . cannot be applied to a particular context" due, for example, to federal preemption, "then the determination of employee or independent contractor status in that context shall instead be governed by [*Borello*]." *Id.* at § 2750.3(a)(1)(3).

On September 18, 2019, California Governor Gavin Newsom signed AB-5 into law. AB-5 went into effect on January 1, 2020. On December 2, 2019, Plaintiffs filed their motion for a preliminary injunction with a hearing set for December 30, 2019. When the Court continued the hearing to January 13, 2020, Plaintiffs filed a motion for a temporary restraining order on December 24, 2019. After considering the parties' arguments in their

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[2] The statute identifies numerous exempted occupations to which *Borello*, rather than the ABC test, will continue to apply. The exempted occupations include doctors, lawyers, accountants, investment advisers, commercial fishermen, and others. *See* Cal. Labor Code § 2750.3(b)(1)-(6). Motor carriers are not exempted.

briefing, the Court granted the temporary restraining order and enjoined Defendants from enforcing AB-5 as to any motor carrier operating in California until this Court's resolution of Plaintiffs' motion for a preliminary injunction. On January 13, 2020, the Court heard argument on Plaintiffs' motion for a preliminary injunction. At the hearing, the Court extended the temporary restraining order until the date of the Court's decision on Plaintiffs' motion. For the following reasons, the Court finds a preliminary injunction is warranted.

## II. DISCUSSION

In support of their motion for preliminary injunction, Plaintiffs argue they are highly likely to show AB-5 is preempted by the FAAAA and by the Dormant Commerce Clause. According to Plaintiffs, unless the Court enjoins Defendants from enforcing AB-5, its members will suffer irreparable injury, including constitutional injuries, as well as enforcement actions imposing civil and criminal penalties. The State Defendants oppose, contending that Plaintiffs are unlikely to succeed on the merits of their claims, that Plaintiffs' delay in seeking injunctive relief undermines their claim of irreparable injury, and that the public interest weighs in the State Defendants' favor. Intervenor-Defendant International Brotherhood of Teamsters opposes on the same grounds as the State Defendants but with the additional contention that Plaintiffs CTA and Odom lack standing.[3] Accordingly, as a threshold matter, the Court first addresses Plaintiffs' standing and then the four elements required for a preliminary injunction.

### A. Article III Standing

"One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue." *Trump v. Hawaii*, 138 S.Ct. 2392, 2416 (2018). To demonstrate Article III standing, a plaintiff must show a "concrete and particularized" injury that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547-48 (2016). "At least one plaintiff

[3] Throughout this Order, the Court refers to the State Defendants and Intervenor-Defendant collectively as "Defendants."

must have standing to seek each form of relief requested, and that party bears the burden of establishing the elements of standing with the manner and degree of evidence required at the successive stages of the litigation." *City & Cty. of San Francisco v. U.S. Dept. of Homeland Security*, 944 F.3d 773, 786-87 (9th Cir. 2019) (internal quotation marks and citations omitted). "At this very preliminary stage, plaintiffs may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their preliminary-injunction motion to meet their burden." *Id.* at 787.

Intervenor attacks Plaintiffs' standing on three grounds, none of which have merit. First, Intervenor argues that Plaintiffs lack standing because they do not establish the ABC test *will* be used against them, and thus, they do not establish the requisite actual or imminent injury. For the same reasons discussed in the Court's Order granting Plaintiffs' temporary restraining order, the Court disagrees. Plaintiffs have satisfied the imminent injury requirement where, assuming their interpretation of AB-5 is correct, they face the choice of either implementing significant, costly compliance measures or risking criminal and civil prosecution. *See, e.g.*, Cal. Unemp. Ins. Code § 2117; Cal. Labor Code § 1199.5; Cal. Labor Code §§ 226.6 and 226.8. Indeed, as recently as December 23, 2019, Defendants expressly declined to withhold enforcement of AB-5, even for a short time. That is sufficient for standing in a pre-enforcement challenge. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 168 (2014) (finding petitioners in pre-enforcement challenge demonstrated an injury-in-fact sufficient for Article III standing); *see also id.* at 158 ("When an individual is subject to [the threatened enforcement of a law], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law.").

Next, Intervenor contends that to show a concrete injury, CTA must definitively show that some of its members' drivers would be classified as independent contractors under the pre-AB-5 *Borello* classification test. The Court is not persuaded that such proof is required at this very preliminary stage. In other words, Plaintiffs need not show with complete certainty that a CTA member would be harmed by the ABC test but not by the

*Borello* test; rather, plaintiffs "need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement." *City & Cty. of San Francisco*, 944 F.3d at 787 (quoting *Harris v. Bd. of Supervisors*, 366 F.3d 754, 762 (9th Cir. 2004) (emphasis in original)). CTA has done so here by claiming that many of its members contract with independent-contractor drivers, who can no longer be classified as independent contractors under the ABC test.

Regardless, even if CTA were held to the higher standard proposed by Intervenor, CTA would satisfy it. In response to Intervenor's challenge, CTA offers evidence showing that some of its members' drivers have been classified as independent contractors under *Borello* or tests like *Borello*.[4] Furthermore, Intervenor's apparent position—that CTA members' drivers will always be classified as employees under *Borello* and thus, the new ABC test's classification of them as employees cannot harm them—is undermined by the Ninth Circuit's own observations about the two tests. *See, e.g., California Trucking Ass'n v. Su*, 903 F.3d 953, 964 (9th Cir. 2018) (distinguishing *Borello* test as "contrary" to ABC tests adopted in other states because under *Borello*, "[w]hether the work fits within the usual course of an employer's business is one factor among many—and not even the most important one") ("[T]he *Borello* standard does not compel the use of employees or independent contractors."). Accordingly, the Court finds that, at this very preliminary stage, Plaintiffs have carried their burden to show some of its members face the risk of having their drivers, who would be classified as independent contractors under *Borello*, instead be misclassified as employees under the ABC test.

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[4] Plaintiffs' request for judicial notice of Exhibits A-C [Doc. 73-3] is GRANTED. "[A] court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases." *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). The Court is not persuaded by Intervenor's arguments opposing judicial notice, particularly where Plaintiffs offered their evidence in response to Intervenor's attack on their standing. Nonetheless, Intervenor's request for judicial notice, [Doc. 78], is GRANTED for the same reasons as Plaintiffs' request, but Intervenor's cases do not compel a different conclusion as to Plaintiffs' standing.

Finally, Intervenor argues that CTA lacks "associational standing" because it has not identified any single CTA member who will be injured by use of the ABC test to determine whether drivers are employees. In support, Intervenor cites *Summers v. Earth Island Inst.*, which held that an association has standing to represent its members' interests when "at least one identified member had suffered or would suffer harm." 555 U.S. 488, 498 (2009). Intervenor further reasons that, if Defendants were enjoined from enforcing the ABC test, employment status would be decided based on the prior *Borello* test. Thus, again, Intervenor contends that because CTA does not submit evidence that any of its members' drivers are *not* employees under *Borello*, there is no evidence that the ABC test injures a single CTA member.

The Court disagrees. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343 (1977). Associational standing is present here where CTA claims that many of its members use independent-contractor drivers to provide interstate trucking services to customers in California and other states, and that, as a result, those members have a concrete interest in knowing whether they must fundamentally change their longstanding business structure by shifting to using only employee drivers when operating within California.

Moreover, *Summers* is distinguishable from CTA's case. *Summers* involved a dispute about a timber project that had settled, and "no other project [was] before the court in which respondents were [even] threatened with injury in fact." *Summers*, 555 U.S. at 491-92. Unlike *Summers*, the dispute here facing CTA's members is still very much alive because without preliminary injunctive relief, AB-5 will apply to them and likely be enforced against CTA's members to the full extent of the law. The Ninth Circuit, too, has expressed doubt that "*Summers*, an environmental case brought under the National Environmental Policy Act, stands for the proposition that an injured member of an

organization must always be specifically identified in order to establish Article III standing for the organization." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). The Ninth Circuit explained:

> where it is relatively clear, rather than merely speculative, that one or more members 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.

*Id.* Such is the case here. Intervenor offers no reason why it cannot address the predominately legal claims brought by CTA without the identification of a particular CTA member. Thus, for the previous reasons, the Court is satisfied that Plaintiffs have standing at this very preliminary stage.[5]

**B. Preliminary Injunction**

"Generally, the purpose of a preliminary injunction is to preserve the status quo and the rights of the parties until a final judgment issues in the cause." *City & Cty. of San Francisco*, 944 F.3d at 789. Plaintiffs can obtain a preliminary injunction where they establish four factors: "(1) that [they are] likely to succeed on the merits, (2) that [they are] likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in [their] favor, and (4) that an injunction is in the public interest." *Id.* at 788-89 (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008)). In the alternative, however, "'serious questions going to the merits' and a balance of hardship that tips sharply towards the plaintiff[s] can support issuance of a preliminary injunction, so long as the plaintiff[s] also

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[5] At the January 13, 2020 oral argument, Plaintiffs' counsel clarified that they seek relief only as to their motor carrier members. Thus, the Court need not consider Intervenor's challenge to owner-operator Odom's standing. Odom's standing bears no relevance on whether the Court can enjoin enforcement of AB-5's ABC test as to motor carriers because Odom is not a motor carrier.

show[] that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 789 (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

1. Likelihood of Success on the Merits

To prevail on their motion for a preliminary injunction, Plaintiffs must establish, at a minimum, that there are "serious questions" on the merits of at least one of their challenges to AB-5's ABC test. *See Cottrell*, 632 F.3d at 1135. For the following reasons, Plaintiffs have done so with their FAAAA preemption challenge.[6]

Within the FAAAA, Congress included an express preemption provision, which provides that states "may not 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). The preemption provision is a broad one. "The phrase 'related to' embraces state laws 'having a connection with or reference to' carrier 'rates, routes, or services,' whether directly or indirectly." *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 960 (9th Cir. 2018). As the Ninth Circuit has explained, "[t]here can be no doubt that when Congress adopted the FAAA Act, it intended to *broadly* preempt state laws that were 'related to a price, route or service' of a motor carrier." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009) (emphasis added).

Similarly, the First Circuit has explained that Congress had "dual objectives" for adopting a "broad reach" by copying the language of the Airline Deregulation Act of 1978 into the FAAAA's preemption clause: (1) "to ensure that the States would not undo federal deregulation with regulation of their own" and (2) "to avoid a patchwork of state service-determining laws, rules, and regulations." *Schwann v. FedEx Ground Pkg. System, Inc.*,

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[6] For purposes of preliminary injunctive relief, Plaintiffs have satisfied this prong based on the FAAAA preemption ground. Thus, the Court declines at this time to analyze Plaintiffs' alternative Dormant Commerce Clause challenge to AB-5.

813 F.3d 429, 436 (1st Cir. 2016) (internal quotation marks and citations omitted). To be sure, the breadth of the FAAAA's preemption clause "does not mean the sky is the limit": "Congress did not intend to preempt laws that implement California's traditional labor protection powers, and which affect carriers' rates, routes, or services in only *tenuous* ways." *Su*, 903 F.3d at 960-61 (emphasis added) (citing *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647-50 (9th Cir. 2014) (meal and rest break laws) and *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (prevailing wage law)); *see also id.* at 960 ("[T]he FAAAA does not preempt state laws that affect a carrier's prices, routes, or services in only a tenuous, remote or peripheral manner with no significant impact on Congress's deregulatory objectives.") (internal quotation marks omitted). Still, where a state law "significantly impacts a carrier's prices, routes, or services," it is "forbidden." *Id.*

Whether the FAAAA preempts AB-5 and its ABC test is a matter of first impression in this circuit, but Ninth Circuit jurisprudence touching on the issue strongly suggests preemption. For example, in *American Trucking Associations, Inc. v. City of Los Angeles*, the Ninth Circuit reversed the district court's denial of American Trucking Association's ("ATA") motion for a preliminary injunction and even took the unusual step of remanding with instructions to the district court to issue a preliminary injunction. 559 F.3d 1046, 1060-61 (9th Cir. 2009). ATA contended that the FAAAA preempted various provisions in the Port's mandatory concession agreements for drayage trucking services at ports. As to the provision requiring motor carriers to use employee drivers rather than independent-contractor drivers, the Ninth Circuit concluded it could "hardly be doubted" that the FAAAA preempted the provision and that, unless the Port could demonstrate an exception to the FAAAA's preemption provision applied, the motor carriers would likely prevail on

their challenge.[7] *Id.* at 1053. The Ninth Circuit went on to conclude that the concession agreement's provision requiring the "phasing out" of thousands of independent contractors "is one likely to be shown to be preempted." *Id.* at 1056.

*California Trucking Association v. Su* offers additional guidance. 903 F.3d 953 (9th Cir. 2018). There, the Ninth Circuit considered whether the FAAAA preempted the *Borello* multi-factor test for distinguishing between employees and independent contractors. In so doing, the Ninth Circuit noted the "obvious proposition" for which *American Trucking* stood: "that an 'all or nothing' rule requiring services be performed by certain types of employee drivers . . . was likely preempted [by the FAAAA]." *Id.* at 964. The court then distinguished the *Borello* test as "wholly different from [the provision at issue in] *American Trucking*" because neither the *Borello* standard or "the nature of the *Borello* standard compell[ed] the use of employees to provide certain carriage services." *Id.* The Ninth Circuit distinguished the *Borello* test from the ABC test adopted in other states, noting "the application of which courts have then held to be preempted." *Id.* It did so by explaining that, "[l]ike *American Trucking*, the 'ABC' test may effectively compel a motor carrier to use employees for certain services because, under the 'ABC' test, *a worker providing a service within an employer's usual course of business will never be considered an independent contractor*." *Id.* (emphasis added). The court further explained that, under *Borello* and in contrast to the ABC test, "whether the work fits within the usual course of an employer's business is *one* factor among many—and not even the most important one." *Id.* (emphasis added).

Although not binding on this Court, the First Circuit's recent analysis of an ABC test identical to California's is persuasive. In *Schwann v. FedEx Ground Package System*,

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[7] Here, Defendants do not argue a similar exception to the FAAAA's preemption provision applies to the ABC test; instead, they contend the ABC test does not fall within the broad scope of the FAAAA's preemption provision.

*Inc.*, the First Circuit held the FAAAA preempted Massachusetts' ABC test's Prong B as applied to FedEx.[8] 813 F.3d 429 (1st Cir. 2016). In so holding, the First Circuit reasoned:

> The regulatory interference posed by Plaintiffs' application of Prong 2 is not peripheral. 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. . . . Such an application of state law poses a serious potential impediment to the achievement of the FAAAA's objectives because a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them.

*Id.* at 438.

Together, these cases show that the FAAAA likely preempts "an all or nothing" state law like AB-5 that categorically prevents motor carriers from exercising their freedom to choose between using independent contractors or employees. *See also Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 824 (3d Cir. 2019) (holding New Jersey's ABC test is not preempted by the FAAAA because contrary to Massachusetts' test, it includes 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,'" and "[n]o part of the New Jersey test categorically prevents carriers from using independent contractors."). Yet, that is precisely the case here. Because contrary to Prong B, independent-contractor drivers necessarily perform work *within* "the usual course of the

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[8] In both statutes, Prong B is the Achilles heel. California's Prong B is identical to the preempted Massachusetts test because neither test permits an alternative method for using an independent-contractor driver. *Cf. Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 824 (3d Cir. 2019) (finding New Jersey's ABC test not preempted by FAAAA because New Jersey test provided an alternative method by which a motor carrier could still use independent contractors via the additional clause: "*or* [performs such service] outside of all the places of business of [the employer]") (emphasis added) (distinguishing between Massachusetts' ABC test by explaining "[t]he Massachusetts statute does not include New Jersey's 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'").

[motor carrier] hiring entity's business," drivers who may own and operate their own rigs will *never* be considered independent contractors under California law.[9] Thus, it follows that Prong B of the ABC test requires motor carriers to artificially reclassify all independent-contractor drivers as employee-drivers for all purposes under the California Labor Code, the Industrial Welfare Commission wage orders, and the Unemployment Insurance Code. *See* Cal. Labor Code § 2750.3(a)(1). Indeed, the Ninth Circuit has already acknowledged the likelihood of such a test being preempted by the FAAAA. *See Su*, 903 F.3d at 964 ("Like *American Trucking*, the 'ABC' test may effectively compel a motor carrier to use employees for certain services because, under the 'ABC' test, *a worker providing a service within an employer's usual course of business will* ***never*** *be considered an independent contractor*.") (emphasis added).

Notably, the first and only court thus far to consider an FAAAA preemption challenge to AB-5 agreed. On January 8, 2020, the Los Angeles Superior Court ruled that because the ABC test effectively prohibits motor carriers from using independent contractors to provide transportation services, the test has a significant, impermissible effect on motor carriers' "prices, routes, and services," and thus, is preempted by the FAAAA. *The People of the State of California v. Cal Cartage Transportation Express, LLC*, Case No. BC689320 (Los Angeles Superior Court January 8, 2020). Moreover, other district courts considering FAAAA preemption challenges to California's ABC test, albeit

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[9] During the January 13, 2020 hearing, the Court repeatedly invited Defendants to explain how the ABC test was not an "all or nothing" test. Specifically, the Court invited them 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. Neither the State nor Intervenor could provide an example. Instead, Defendants repeatedly asserted that a broker company that did not perform trucking work could plausibly contract with an independent owner-operator. Brokers, however, are *not* motor carriers. Accordingly, the Court observes that 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.

under the pre-AB-5 *Dynamex* standard, have applied similar logic and found the FAAAA preempts Prong B. *See, e.g., B&O Logistics, Inc. v. Cho*, 2019 WL 2879876, at *2-4 (C.D. Cal. April 15, 2019) (holding "*Su, American Trucking*, 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. Here, the B prong of *Dynamex*'s ABC test would require Plaintiff to reclassify Defendant as an employee for the purposes of California's wage orders (which regulate, *inter alia*, minimum wages, maximum hours, and meal and rest breaks) because Defendant performs work that is in the usual course of Plaintiff's business (*i.e.*, transporting property)," and thus, "Plaintiff may seek a declaration that the B prong is preempted by the FAAAA"); *Valadez v. CSX Intermodal Terminals, Inc.*, 2019 WL 1975460, at *7-8 (N.D. Cal. March 15, 2019) (finding the FAAAA preempts Prong B of the ABC test in *Dynamex* in part because Prong B "effectively prevents motor carriers from using independent contractors to perform services within their usual course of business," and "*Su* strongly indicates that a state law that would prevent a motor carrier, like Defendant, from hiring independent contractors, rather than employees, to perform its services would be preempted by the FAAAA"); *Alvarez v. XPO Logistics Cartage LLC*, 2018 WL 6271965, at *4-5 (C.D. Cal. Nov. 15, 2018) (relying in part on *Su* and finding "the ABC test [as adopted in *Dynamex*] 'relates' to a motor carrier's services in more than a 'tenuous' manner and is therefore preempted by the FAAAA"); *contra. Henry v. Central Freight Lines, Inc.*, 2019 WL 2465330, at *5 (E.D. Cal. June 13, 2019) (holding the FAAAA does not preempt the *Dynamex* ABC test because "[t]he *Dynamex* ABC test is a general classification test that does not apply to motor carriers specifically and does not, by its terms, compel a carrier to use an employee or an independent contractor."); *Western States Trucking Ass'n v. Schoorl*, 377 F. Supp. 3d 1056, 1070-71 (E.D. Cal. 2019) (relying on *Dilts* to hold the FAAAA does not preempt *Dynamex*'s ABC test); *Phillips v. Roadrunner Intermodal Svcs.*, 2016 WL 9185401, at *4-7 (C.D. Cal. Aug. 16, 2016) (same).

Defendants offer a variety of arguments against FAAAA preemption, but none are persuasive. For example, Defendants argue that *Su* and *American Trucking* have no bearing on the ABC test. In so doing, however, Defendants attempt to characterize the ABC test as "not requir[ing] that motor carriers—or anyone at all—transition from independent contractors to employees," but "[i]nstead, [as] merely provid[ing] the applicable test to assess whether a worker is an independent contractor or an employee." Doc. 55 at 18. Defendants' curious argument is that "the ABC test itself imposes no legal obligations" because it only sets forth the test for determining whether California's labor laws apply to a worker. Doc. 58 at 19. Although it is technically true that nothing in the ABC test prohibits motor carriers from contracting with independent contractors, that argument merely poses a distinction without a difference. Put another way, it is true that the statute does not expressly state that motor carriers *cannot* contract with independent contractors, but Prong B permits motor carriers to contract with independent contractors *only if* they classify and treat those independent contractors *as employees* under California law.

The Court is similarly unpersuaded by Defendants' contention that this Court lacks the ability to consider whether AB-5 is preempted because, according to Defendants, the ABC test is merely a "test for employment." Doc. 58 at 19. According to Defendants, "[t]he question for purposes of Plaintiffs' FAAAA preemption claim is . . . whether *California's employment laws* that attach through the ABC test are preempted," rather than the ABC test, itself. Doc. 58 at 19 (emphasis added). To support their theory, Defendants rely upon the unpublished district court opinion from which the parties appealed in *Su*. That opinion, however, is both not binding and lacks persuasive value, particularly in light of the Ninth Circuit's decision. *See Su*, 903 F.3d at 955 (distinguishing *Borello* standard from Massachusetts ABC test by explaining "the ABC test may effectively compel a motor carrier to use employees for certain services because, under the ABC test, a worker providing a service within an employer's usual course of business will never be considered an independent contractor"). Contrary to Defendants' position, the Court finds that "the

question is not whether the FAAAA preempts California's wage orders [and other employment laws]; rather, it is whether [AB-5's] ABC test—used to interpret the wage orders [and other employment laws]—is preempted." *Alvarez v. XPO Logistics Cartage LLC*, 2018 WL 6271965, at *5 (C.D. Cal. Nov. 15, 2018).

Next, Defendants argue that the FAAAA's preemption provision does not apply to the ABC test because, according to Defendants, that test is a "law of general applicability." First, to the extent Defendants posit that a law of general applicability cannot be preempted, they are incorrect. *See Su*, 903 F.3d at 966 ("This is not to say that the general applicability of a law is, in and of itself, sufficient to show it is not preempted.") (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992)). For the same reason, the Court rejects Defendants' reliance on *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal. 4th 772 (2014). Contrary to Defendants' reading, *Pac Anchor* does not foreclose FAAAA preemption of the ABC test. As the Los Angeles Superior Court reasoned, "the better reading of *Pac Anchor* is not that laws of general applicability are always immune from FAAAA preemption. Rather, *Pac Anchor* left open the possibility that state laws prohibiting motor carriers from using independent owner-operator truck drivers might be preempted—and even suggested that they would." *Cal Cartrage*, Case No. BC689320, at 11. Still, "[w]hile general applicability is not dispositive, . . . it is a relevant consideration because it will likely influence whether the effect on prices, routes, and services is tenuous or significant." *Su*, 903 F.3d at 966. The Ninth Circuit further explained that "[w]hat matters is not solely that the law is generally applicable, but where in the chain of a motor carrier's business it is acting to compel a certain result (e.g., a consumer or workforce) and what result it is compelling (e.g., a certain wage, non-discrimination, a specific system of delivery, a specific person to perform the delivery)." *Id.* Here, the Court is not persuaded that the ABC test is a law of general applicability, but even if it were, Plaintiffs have shown the ABC test is still likely preempted by the FAAAA because it compels a certain result—by "compel[ling] a motor carrier to use employees for certain services." *Id.* at 964.

Defendants argue that *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014) and *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) require the opposite conclusion. The preemption issues in those cases, however, are significantly different from the preemption issue raised here. *Dilts* and *Mendonca* concerned workers that had already been properly classified as "employees." In *Dilts*, the Ninth Circuit held that *specific* California Labor Code protections for employees—meal and rest break laws—were not preempted by the FAAAA because they were "normal background rules for almost *all* employers doing business in the state of California" and did not, either directly or indirectly "set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly." *Dilts*, 769 F.3d at 647 (emphasis in original); *see also Mendonca*, 152 F.3d at 1187-89 (holding FAAAA did not preempt California's prevailing wage law as applied to employees); *Ridgeway et al. v. Walmart, Inc.*, Case No. 17-15983 (9th Cir. Jan. 6, 2020) (holding FAAAA did not preempt California's wage law requiring trucking company to pay minimum wages for driver rest time during which the company retains control over the driver because the law did not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may provide).

In contrast, the present case concerns the test used to *classify* workers for the purpose of determining whether *all* of California employment laws do or do not apply, rather than a small group of those laws, such as the meal break regulations in *Dilts*. Thus, the combined effect of all such laws has a significant impact on motor carriers' prices, routes, or services. Accordingly, *Dilts* and other similar cases are distinguishable because they focus on whether discrete wage-and-hour laws and regulations had more than a tenuous impact on motor carriers' prices, routes, or services, not whether the combined impact of applying all of California's employment laws to independent owner-operators had more than a tenuous impact on motor carriers' prices, routes, or services. Moreover, while *Dilts* reasoned that "applying California's meal and rest break laws to motor carriers would *not* contribute to an impermissible 'patchwork' of state-specific laws, defeating Congress's

deregulatory objectives," the ABC test certainly would. *Dilts*, 769 F.3d at 647 (emphasis added). By effectively prohibiting motor carriers from contracting with independent-contractor drivers, AB-5 and its ABC test would transform California into its own patch in the very "patchwork" of state-specific laws Congress intended to prevent.[10]

Finally, the Court is not persuaded by Intervenor's brief, conclusory argument that "Plaintiffs fail to establish that motor carriers cannot avail themselves of AB-5's business-to-business exception." Doc. 58 at 25. To the extent Intervenor contends a motor carrier could contract with an independent contractor under AB-5's business-to-business exception, Intervenor has not shown how that is possible. Further, like the Los Angeles Superior Court, this Court is skeptical that motor carriers could, in fact, avail themselves of that exception, particularly where the State Defendants, who are tasked with enforcing AB-5, do not expressly concede that the exception would apply.[11] Accordingly, the Court adopts the thorough reasoning of the Los Angeles Superior Court's January 8, 2020 order rejecting that argument. *See Cal Cartrage*, Case No. BC689320, at 12-14 (rejecting plaintiff's argument that the "business-to-business" exception saves AB-5 from FAAAA preemption as applied to motor carriers).

The Court finds AB-5's ABC test has more than a "tenuous, remote, or peripheral" impact on motor carriers' prices, routes, or services, particularly in light of our Ninth Circuit jurisprudence casting serious doubt on the type of "all or nothing rule" that AB-5 implements. Thus, for the previous reasons, Plaintiffs have carried their burden at this preliminary stage of showing a likelihood of success on the merits as to their FAAAA

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[10] The Court is aware of only one state, Massachusetts, that has adopted an identical ABC test to that adopted in California's AB-5. Notably, the First Circuit struck down the identical Massachusetts test as preempted by the FAAAA. *See Schwann v. FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016).

[11] In fact, until the January 13, 2020 hearing, the State Defendants were silent on the business-to-business exception. During the hearing, for the first time, the State Defendants expressed that the exception could potentially apply to motor carriers, but not that it definitively would.

preemption challenge. In the alternative, Plaintiffs have certainly raised "serious questions" going to the merits.

2. Irreparable Harm

As to the second element, the Court finds Plaintiffs have carried their burden to show the likelihood of irreparable harm. As this Court previously concluded at the temporary restraining order stage, Plaintiffs have shown that irreparable harm is likely because without significantly transforming their business operations to treat independent-contractor drivers as employees for all specified purposes under California laws and regulations, they face the risk of governmental enforcement actions, as well as criminal and civil penalties. *See, e.g.*, Cal. Unemp. Ins. Code § 2117; Cal. Labor Code § 1198.5; Cal. Labor Code §§ 226.6 and 226.8.[12] Just as the Ninth Circuit noted in *American Trucking*, "motor carriers are being put to a kind of Hobson's choice, not entirely unlike that which faced the airlines in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)." *American Trucking*, 559 F.3d at 1057 (9th Cir. 2009). In *Morales*, several states' attorneys general set out to regulate airline advertising and the compensation of passengers who gave up their seats on overbooked flights. *Morales*, 504 U.S. at 379. Noting that the attorneys general "had made clear that they would seek to enforce the challenged portions of the guidelines," the Supreme Court observed that injunctive relief is available where there exists a threat of imminent proceedings of a criminal or civil nature against parties who are affected by an unconstitutional act. *Id.* at 380-81. The Supreme Court further opined that the respondents faced "a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of

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[12] Defendants' contention that any irreparable harm is undermined by Plaintiffs' delay in moving for preliminary injunctive relief does not require a different conclusion. It is true that Plaintiffs could have moved for a preliminary injunction within weeks, rather than months, of AB-5's adoption in September 2019, but the Court is not persuaded that a two month delay in filing the motion wholly undermines their showing of irreparable harm.

obeying the law during the pendency of the proceedings and any further review." *Id.* at 381.

Similarly, in remanding to the district court to issue a preliminary injunction, the Ninth Circuit in *American Trucking* found the motor carriers faced a sort of Hobson's choice because "a very real penalty attaches to the motor carriers regardless of how they proceed," and "[t]hat is an imminent harm." *American Trucking*, 559 F.3d at 1058. Here, motor carriers wishing to continue offering the same services to their customers in California must do so using only employee drivers, meaning they must significantly restructure their business model, including by obtaining trucks, hiring and training employee drivers, and establishing administrative infrastructure compliant with AB-5. The only alternative available to motor carriers is to violate the law and face criminal and civil penalties. The Court is satisfied that Plaintiffs have shown a likelihood of irreparable injury without injunctive relief.

3. Balance of Equities; The Public Interest

If after the preliminary injunction stage, the Court finds that AB-5 is preempted by the FAAAA, motor carriers will have suffered harm due to AB-5's application to and enforcement against them. *See American Trucking*, 559 F.3d at 1059 (finding the balance of equities and public interest weighed in favor of motor carriers, explaining, "[W]e have outlined the hardships that motor carriers will suffer if, as is likely, many provisions of the Concession agreements are preempted and are, thus, being imposed in violation of the Constitution"). On the other side of the scale, Defendants have legitimate concerns about preventing the misclassification of workers as independent contractors. Nonetheless, with or without the ABC test, California still maintains numerous laws and regulations designed to protect workers classified as employees and to prevent misclassification, and the pre-AB-5 *Borello* standard will continue as the applicable classification test. *See* Cal. Labor Code § 2750.3(a)(3) (mandating that should a court rule that the ABC test cannot be applied to a particular context, the pre-AB-5 *Borello* test will apply). Thus, on balance, the hardships faced by Plaintiffs significantly outweigh those faced by Defendants.

Similarly, the Court finds that the public interest supports preliminary injunctive relief. The Court recognizes the Legislature's public interest in protecting misclassified workers, which it attempted to further address with AB-5. That public interest, however, "must be balanced against the public interest represented in Congress's decision to deregulate the motor carrier industry, and the Constitution's declaration that federal law is to be supreme." *American Trucking*, 559 F.3d at 1059-60. Therefore, the public interest tips sharply in Plaintiffs' favor.

## III. CONCLUSION

FAAAA preemption is broad but not so broad that the sky is the limit: states retain the ability to execute their police power with laws that do not significantly impact rates, routes, or services. Here, however, there is little question that the State of California has encroached on Congress' territory by eliminating motor carriers' choice to use independent contractor drivers, a choice at the very heart of interstate trucking. In so doing, California disregards Congress' intent to deregulate interstate trucking, instead adopting a law that produces the patchwork of state regulations Congress sought to prevent. With AB-5, California runs off the road and into the preemption ditch of the FAAAA. Accordingly, Plaintiffs' motion for a preliminary injunction is **GRANTED**.

It is further **ORDERED**:

1. Defendant Xavier Becerra, in his official capacity as the Attorney General of the State of California, Julia A. Su, in her official capacity as the Secretary of the California Labor and Workforce Development Agency, Andre Schoorl, in his official capacity as the Acting Director of the Department of Industrial Relations of the State of California, Lilia Garcia Brower, in her official capacity as the Labor Commissioner of the State of California, and Patrick Henning, in his official capacity as Director of the California Employment Development Department are temporarily enjoined from enforcing Assembly Bill 5's ABC test, as set out in Cal. Labor Code § 2750.3(a)(1), as to any motor carrier operating in California, pending the entry of final judgment in this action.

2. Because there is no realistic likelihood of harm to Defendants from granting

a preliminary injunction as to the enforcement of AB-5's ABC test, a security bond is not required.

**IT IS SO ORDERED.**

Date: January 16, 2020

HON. ROGER T. BENITEZ
United States District Judge