APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-55106

CALIFORNIA TRUCKING ASSOCIATION; et al.,

Plaintiffs-Appellees,

v.

ROBERT ANDRES BONTA, Esquire, in his official capacity as the Attorney General of the State of California; et al.,

Defendants-Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant

D.C. No. 3:18-cv-02458-BEN-BLM
Southern District of California, San Diego

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted September 1, 2020
Pasadena, California

Filed April 28, 2021

Before: Sandra S. Ikuta and Mark J. Bennett, Circuit Judges, and Douglas P. Woodlock, District Judge.

Opinion by Judge Ikuta;
Dissent by Judge Bennett

OPINION

IKUTA, Circuit Judge:

The Federal Aviation Administration Authorization Act of 1994 (F4A or FAAAA) preempts any state 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). California's Assembly Bill 5 (AB-5) codified a judge-made test (referred to as the "ABC test") for classifying workers as either employees or independent contractors. This appeal raises the question whether application of AB-5 to motor carriers is preempted by the F4A. Because AB-5 is a generally applicable labor law that affects a motor carrier's relationship with its workforce and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers, we conclude that it is not preempted by the F4A. *See, e.g., Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647 (9th Cir. 2014).

I

We first provide the context for this challenge. Before 2018, the California Supreme Court's framework for classifying workers as either employees or independent contractors was set forth in *S.G. Borello Sons, Inc. v. Department of Industrial Relations,* 48 Cal. 3d 341 (1989). *Borello* set out indicia of an employer-employee relationship as opposed to an independent-contractor relationship. *Id.* at 350-51. The indicia included "the right to control work," "the right to discharge at will, without cause," and, most important

here, "whether or not the work is a part of the regular business of the principal." *Id.*[1]

Almost thirty years after *Borello*, the California Supreme Court revisited the framework for classifying workers as employees or independent contractors for purposes of California's Industrial Welfare Commission (IWC) Wage Orders.[2] *See Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903, 912, 957 (2018). *Dynamex* adopted a standard commonly referred to as the "ABC" test. *Id.* at 957. Under Prong B of that test, a worker is presumed to be an employee and may be classified as an independent contractor only if "the worker performs work that is outside the

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[1] The other indicia are:

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

Borello, 48 Cal. 3d at 351.

[2] As explained in *Dynamex,* California's IWC Wage Orders "are constitutionally-authorized, quasi-legislative regulations that have the force of law" and "impose obligations relating to minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees." *Dynamex Operations W. v. Superior Ct.,* 4 Cal. 5th 903, 913-14 & n.3 (2018).

usual course of the hiring entity's business." *Id.*[3] The ABC test was thus significantly different from the *Borello* test: while *Borello* considered "whether or not the work is a part of the regular business of the principal" as only one factor in the classification analysis, 48 Cal. 3d at 351, the ABC test presumed a worker was an employee unless the worker met that condition, *Dynamex*, 4 Cal. 5th at 957.

In September 2019, the California legislature enacted AB-5, which codified the ABC test and expanded its applicability. *See* Cal. Lab. Code § 2775.[4] The statutory text of AB-5 classifies certain workers as employees, stating that a person "shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied":

> (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

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[3] In full, the ABC test as enunciated by *Dynamex* provides that workers are presumed to be employees unless each of the following conditions is met:

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

Id. at 957.

[4] AB-5 was originally codified at section 2750.3 of the California Labor Code. Section 2750.3 was repealed effective September 4, 2020, and the ABC test is currently codified at section 2775 of the California Labor Code. Cal. Lab. Code § 2775(b)(1)(A)—(C).

> 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.

Id. § 2775(b)(1)(A)—(C).

AB-5 exempts certain occupations and services. *Id.* § 2778. It also contains a number of exemptions, including a "business-to-business" exception, which exempts any "business service provider" that meets several requirements. *Id.* § 2776(a).[5] If an exemption from AB-5 applies, then the *Borello* test controls the classification of workers as employees or independent contractors. *Id.* §§ 2775(b)(3), 2776(a), 2778(a).

California Trucking Association (CTA) is a trade association representing motor carriers that hire independent contractors who own their own trucks (referred to as "independent owner-operators") to transport property throughout California. The change from the *Borello* test to *Dynamex* and then to AB-5 concerned CTA. It viewed the new rule statutorily classifying a worker as an employee unless the hiring

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[5] In September 2020, the California legislature revised some of AB-5's exemptions and created additional exemptions. *See* Assembly Bill 2257 (AB-2257); Cal. Lab. Code §§ 2775-2787. California voters added further exemptions by adopting Proposition 22 in November 2020. Proposition 22 provides that app-based drivers (drivers who provide delivery and transportation services in personal vehicles through a business's online application or platform) are independent contractors if certain conditions are met. *See* Cal. Bus. & Prof. Code § 7451 (codifying Proposition 22). Neither AB-2257 nor Proposition 22 changed the portion of AB-5 that set forth the ABC test itself.

entity demonstrates that the worker performs "work that is outside the usual course of the hiring entity's business," *id.* § 2775(b)(1)(B), as effectively precluding the business model employed by CTA's members. *Cf.* Scott L. Cummings & Emma Curran Donnelly Hulse, *Preemption As A Tool of Misclassification,* 66 UCLA L. Rev. 1872, 1880 (2019).

A

In October 2018, after *Dynamex* was decided, CTA, along with Ravinder Singh and Thomas Odom, two independent owner-operators (the plaintiffs), filed this lawsuit against Xavier Becerra, the Attorney General of California; Julie Su, Secretary of the California Labor Workforce; and several other California officials (collectively referred to as "California" or "the state"), seeking a declaration that the F4A preempted the ABC test as applied to motor carriers. The district court allowed the International Brotherhood of Teamsters (IBT), a labor union that represents owner-operators classified as employees, to intervene. Dist Ct. Dkt. No. 31. In February 2019, IBT and California filed motions to dismiss. Dist. Ct. Dkt. No. 28, 29.

On September 24, 2019, about a week after the California legislature enacted AB-5, the district court dismissed CTA's amended complaint with leave to amend, explaining that it was unclear whether the state would enforce *Dynamex* now that AB-5 had been enacted. On November 12, 2019, the plaintiffs filed the now-operative Second Amended Complaint, raising their challenge that the F4A preempts AB-5, and moved to enjoin its enforcement.

The district court held that CTA had standing and was likely to succeed on the merits of its claim. It therefore enjoined the state from enforcing AB-5

against any motor carrier doing business in California. The state and IBT timely appealed.

B

The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1292(a)(1). We review de novo whether CTA has standing. *Taylor v. Westly,* 488 F.3d 1197, 1199 (9th Cir. 2007). We review for an abuse of discretion the district court's grant of a preliminary injunction. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir. 2009). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def Council, Inc.,* 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.[6] A district court abuses its discretion when it "base[s] its decision on an erroneous legal standard." *Puente Arizona v. Arpaio,* 821 F.3d 1098, 1103 (9th Cir. 2016) (citation omitted). Thus, the district court's "legal conclusions, such as whether a statute is preempted, are reviewed de novo." *Id.*

II

Before reaching the merits, we must determine whether any plaintiff has standing to bring this pre-

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[6] In our circuit, "serious questions going to the merits," as well as "a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011) (citation omitted).

enforcement challenge. We focus on the associational standing of CTA.[7] To have standing, CTA must allege "a case or controversy within the meaning of Art. III of the Constitution," and not just "abstract questions not currently justiciable by a federal court." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 297 (1979). There needs to be "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 298. We have listed three factors for evaluating "the genuineness of a claimed threat of prosecution": "[1] whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, [2] whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and [3] the history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1139 (9th Cir. 2000). "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" of demonstrating Article III standing. *City & County of San Francisco v. U.S. Citizenship Immigr. Servs.,* 944 F.3d 773, 787 (9th Cir. 2019) (cleaned up).

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[7] An association has standing if "(1) its individual members would have standing in their own right, (2) the interests at stake in the litigation are germane to the organization's purposes, and (3) the case may be litigated without participation by individual members of the association." *Airline Serv. Providers Ass'n v. L.A. World Airports,* 873 F.3d 1074,1078 (9th Cir. 2017). So long as standing can be shown for one plaintiff, we need not consider the standing of the other plaintiffs. *See Watt v. Energy Action Educ. Found.,* 454 U.S. 151,160 (1981). We note that the parties dispute only whether CTA's members would have standing in their own right.

Applying these factors, we conclude that CTA has standing to bring this complaint. Based on the allegations in its complaint, CTA and its members have "demonstrated that their policies are presently in conflict with" the challenged provision, *City & County of San Francisco v. Trump,* 897 F.3d 1225, 1237 (9th Cir. 2018), and they have a concrete plan to violate AB-5. The complaint alleges that CTA and its members currently contract with independent owner-operators, rather than employees. CTA alleges that this is permissible under the *Borello* test but not under AB-5. The complaint further alleges that AB-5 requires CTA to terminate its independent-contractor arrangements and instead hire only employees, which (according to CTA) would require "an immediate and significant change in the plaintiffs' conduct of their affairs." *Abbott Lab'ys v. Gardner,* 387 U.S. 136, 153 (1967). CTA's members are continuing with their current business practices, and thus CTA alleges that if not for the district court's injunction, its members would be in violation of AB-5. Because CTA's members are maintaining policies that "are presently in conflict with" AB-5, according to the allegations in the complaint, they are deemed to have articulated a concrete plan to violate it. *See Trump,* 897 F.3d at 1237.

Second, CTA has established that there is a threat to initiate proceedings against its members. Here, the state's refusal to disavow enforcement of AB-5 against motor carriers during this litigation is strong evidence that the state intends to enforce the law and that CTA's members face a credible threat. *See LSO, Ltd. v. Stroh,* 205 F.3d 1146, 1154-56 (9th Cir. 2000) (holding that "the Government's failure to disavow application of the challenged provision [is] a factor in favor of a finding of standing"). Plaintiffs are also deemed to

have established that there is a realistic threat to initiate proceedings against them if the government has declared its "intention to enforce" the new law. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary,* 268 U.S. 510, 533 (1925). In this case, the state has notified the regulated community that it intends to enforce AB-5. On December 13, 2019, several weeks before AB-5 took effect, the state sent letters to businesses notifying them that, under AB-5, the ABC test "must be used to determine the appropriate classification of workers in most occupations." And after AB-5 took effect, California began "moving aggressively to enforce" it. Carolyn Siad, *AB5 Gig Law Enforced: California Sues Uber and Lyft to Make Drivers Employees,* San Francisco Chronicle (May 5, 2020). The state has commenced a number of prosecutions against companies for misclassifying workers under AB-5. *See, e.g.,* Complaint, *People v. Uber Techs., Inc.,* No. CGC-20-584402 (Cal. Super. May 5, 2020).

As to the history of enforcement, this factor has "little weight" when the challenged law is "relatively new and the record contains little information as to enforcement or interpretation." *Wolfson v. Brammer,* 616 F.3d 1045, 1060 (9th Cir. 2010). CTA filed its operative complaint several weeks before AB-5's effective date, and thus it was not possible for the state to have enforced AB-5 before that date. *See Sacks v. Off. of Foreign Assets Control,* 466 F.3d 764, 774 (9th Cir. 2006) (explaining that standing is determined "as of the date the complaint was filed"). Nonetheless, in September 2019, before AB-5 became effective and before CTA filed its operative complaint, the state sued Instacart and sought civil penalties based on allegations that Instacart misclassified its workers under *Dynamex. See* Complaint, *State v. Maplebear Inc. et al.,* No. 37-2019-00048731-CU-MC-CTL (Cal. Super. Ct. Sept. 13, 2019).

Given that AB-5 codified *Dynamex*'s ruling regarding the ABC test, this "history of past enforcement against parties similarly situated to the plaintiffs cuts in favor of a conclusion that a threat is specific and credible." *Lopez v. Candaele,* 630 F.3d 775, 786-87 (9th Cir. 2010).

Because our three-factor test, as applied to the enactment of a new law, establishes that the plaintiffs face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," Babbitt, 442 U.S. at 298, we hold that CTA and its members have standing to bring this complaint.

III

We next consider whether the district court abused its discretion by enjoining the state from enforcing AB-5 against motor carriers doing business in California on the ground that such enforcement is preempted by the F4A.

A

The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, if a state law "conflicts with, or frustrates, federal law, the former must give way." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 663 (1993). When a federal statute like the F4A contains an express preemption clause, "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Id.* at 664. In focusing on congressional intent, we take into account "the presumption that Congress does not intend to supplant state law, particularly in

areas of traditional state regulation." *Miller v. C.H. Robinson Worldwide, Inc.,* 976 F.3d 1016, 1021 (9th Cir. 2020) (cleaned up). "We therefore presume that Congress has not preempted the historic police powers of the States unless that was the clear and manifest purpose of Congress." *Id.* (cleaned up).

We begin with the plain language of the statute. The F4A expressly preempts any state law "related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). In interpreting these words, and thus determining the F4A's preemptive scope, we are bound by a long line of precedent that requires us, among other things, to consider "Congress' deregulatory and pre-emption-related objectives" in enacting the F4A. *Rowe v. N.H. Motor Transp. Ass'n,* 552 U.S. 364, 371 (2008). Therefore, we begin by providing the relevant historical and interpretive background.

Before 1978, the trucking and airline industries were extensively regulated. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). In 1978, Congress concluded that "maximum reliance on competitive market forces" would favor lower airline fares and better airline service, and it enacted the Airline Deregulation Act (ADA). *Id*. (citation omitted). To preclude states from eliminating the benefits of increased competition by imposing their own regulations on the airlines, the ADA included a preemption provision "prohibiting States from enacting or enforcing any law related to rates, routes, or services of any air carrier." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 256 (2013) (citation omitted).

Congress then focused its deregulatory efforts on the trucking industry. It engaged in a two-step process. First, Congress enacted the Motor Carrier Act of

1980 (MCA), which extended federal deregulation to the trucking industry but "explicitly preserved state authority to regulate intrastate trucking." Jill E. Fisch, *How Do Corporations Play Politics?: The Fedex Story,* 58 Vand. L. Rev. 1495, 1528-29 (2005). For this reason, state economic regulation of trucking continued to be a "huge problem for national and regional carriers attempting to conduct a standard way of doing business." *City of Columbus v. Ours Garage Wrecker Serv., Inc.,* 536 U.S. 424, 440 (1994) (citation omitted). For instance, although the ADA preempted state regulation of FedEx's trucking operations because FedEx was organized as an air carrier, *Fed. Exp. Corp. v. Cal. Pub. Utilities Comm'n,* 936 F.2d 1075, 1078-79 (9th Cir. 1991), many of FedEx's competitors, which were organized as motor carriers, did not receive similar protection from state regulation.

In 1994, Congress enacted the F4A, which preempted state authority to regulate intrastate trucking and created a level playing field so that all companies using motor carriers and air carriers received the same protections, regardless of how they were organized. *See* H.R. Conf. Rep. No. 103-677, at 87 (1994). Adopting language from the ADA's preemption clause, the F4A states: "[A] State…. may not enact or enforce a 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); *see also id.* § 41713(b)(4)(A) (similar provision for combined motor/air carriers).

Because the F4A uses "text nearly identical" to the ADA's, we have held that analysis of the ADA's preemption clause "is instructive for our FAAAA analysis as well." *Dilts,* 769 F.3d at 644. There is one difference between the preemption provisions of the ADA

and the F4A, however: the latter "contains one conspicuous alteration the addition of the words 'with respect to the transportation of property,'" a phrase that "massively limits the scope of preemption ordered by the FAAAA" compared to the ADA. *Dan's City,* 569 U.S. at 261 (cleaned up).[8] In sum, the state law at issue is preempted to the extent it relates to the price, route, or service of a motor carrier in its operations involving the transportation of property.

B

The interpretation of the words "related to a price, route, or service of any motor carrier" likewise has a long history. The Supreme Court first interpreted similar language in the ADA's express preemption provision in *Morales v. Trans World Airlines*. *Morales* held that the ADA preempts states from enforcing guidelines related to how airlines may advertise fares. 504 U.S. at 391. *Morales* reached this conclusion because the guidelines established "binding requirements as to how tickets may be marketed." *Id.* at 388. In interpreting "related to," which is the "key phrase" in the preemption provision, *Morales* stated that "the ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with'—and the words thus express a broad preemptive purpose." *Id.* at 383 (quoting Black's Law Dictionary 1158 (5th ed. 1979)). For this reason, *Morales*

[8] The Supreme Court has suggested that this additional limiting language means that the F4A preempts "only laws, regulations, and other provisions that single out for special treatment motor carriers of property." *Ours Garage,* 536 U.S. at 449 (Scalia, J., dissenting) (cleaned up); *see also Dan's City,* 569 U.S. at 261 & n. 4 (agreeing with the *Ours Garage* dissent's characterization of the F4A).

rejected the argument that "only state laws specifically addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of general applicability." *Id.* at 386. According to the Court, such a construction would create "an utterly irrational loophole" and "ignores the sweep of the 'relating to' language." *Id.* Nevertheless, *Morales* acknowledged that "state actions may affect airline fares in too tenuous, remote, or peripheral a manner to have pre-emptive effect." *Id.* at 390 (cleaned up).

In subsequent cases, the Supreme Court refined its interpretation of "related to." As the Court has explained, "the breadth of the words 'related to' does not mean the sky is the limit." *Dan's City,* 569 U.S. at 260. A court cannot take an uncritically literal reading of "related to," otherwise "for all practical purposes pre-emption would never run its course." *Id.* Perhaps the author of *Morales* said it best: "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Lab. Standards Enf't v. Dillingham Const., NA., Inc.,* 519 U.S. 316, 335 (1997) (Scalia, J., concurring). Further, the "related to" language "provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended—which it is not." *Id.* at 335-36. In this vein, the Supreme Court's decisions about F4A preemption after *Morales* have tended to construe the F4A narrowly, holding, for instance, that a state law is "related to" prices, routes, and services if it "aim[s] directly at the carriage of goods" and requires motor carriers "to offer a system of services that the market does not now provide," or "freeze[s] into place services that carriers might prefer to discontinue in the future." *Rowe*, 552 U.S. at 372, 376.

In light of this guidance, we have attempted to "draw a line between laws that are significantly related to rates, routes, or services, even indirectly, and thus are preempted, and those that have only a tenuous, remote, or peripheral connection to rates, routes, or services, and thus are not preempted." *Dilts,* 769 F.3d at 643 (citation omitted). A law's general applicability, while not dispositive, "will likely influence whether the effect on prices, routes, and services is tenuous or significant." *Cal. Trucking Ass'n v. Su,* 903 F.3d 953, 966 (9th Cir. 2018), *cert. denied,* 139 S. Ct. 1331 (2019). "What 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… and what result it is compelling." *Id.*

When a generally applicable law compels a motor carrier to a certain result in its relationship with consumers, such as requiring a motor carrier "to offer a system of services that the market does not provide" or that "would freeze into place services that carriers might prefer to discontinue in the future," and "that the market would not otherwise provide," the law's effect is more likely to be significantly related to rates, routes or services. *Dilts,* 769 F.3d at 645-46 (citation omitted). Such a law may be preempted because it "directly or indirectly, *binds* the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry." *Id.* at 646 (citation omitted). Similarly, a state's common law rule may be preempted if it "otherwise regulate[s]" prices, routes, and services by impacting the motor carrier's relationship with its customers. *Miller,* 976 F.3d at 1025 (emphasis omitted) (citing *Dilts,* 769 F.3d at 647). For instance, a negligence claim that seeks to hold a broker (or motor carrier) liable at the point at which it provides a service to its customers is

directly (and significantly) related to rates, routes or services, and thus preempted. *Id.* at 1024.

By contrast, laws of general applicability that affect a motor carrier's relationship with its workforce, and compel a certain wage or preclude discrimination in hiring or firing decisions, are not significantly related to rates, routes or services. *See Su,* 903 F.3d at 966. Therefore, enforcement of California's prevailing wage law against motor carriers, the application of California's meal and rest break laws, and "the use of California's common-law test for determining whether a motor carrier has properly classified its drivers as independent contractors" are not preempted, because they impact motor carriers' business at the point where the motor carriers interact with their workers. *Miller,* 976 F.3d at 1023.

A generally applicable law is one that affects individuals "solely in their capacity as members of the general public," *Rowe,* 552 U.S. at 375, and applies "to hundreds of different industries," *Dilts,* 769 F.3d at 647 (citation omitted). When such generally applicable laws impact motor carriers' relationship with their workforce, they are not "related to a price, route or service" "even if they raise the overall cost of doing business," or "shift[] incentives and make[] it more costly for motor carriers to choose some routes or services relative to others, leading the carriers to reallocate resources or make different business decisions." *Dilts,* 769 F.3d at 646-47 (emphasis omitted); *see also Ridgeway v. Walmart Inc.,* 946 F.3d 1066, 1083 (9th Cir. 2020) (holding that a law was not preempted, even if employers had to factor the law "into their decisions about the prices they set, the routes that they use, or the services that they provide, because the law did not "set prices, mandate or prohibit certain routes,

or tell motor carriers what services that they may or may not provide, either directly or indirectly" (cleaned up)).

In *Dilts* we applied these principles and determined that California's meal and rest break laws, as applied to motor carriers, are not preempted by the F4A. *See* 769 F.3d at 640. The state laws at issue, which required "a 30-minute meal break for every five hours worked, and a paid 10-minute rest break for every four hours worked," might have increased the costs of doing business, because they might have required motor carriers to hire more drivers, change their current schedules, and make "minor deviations" from their routes. *Id.* at 640, 649 (citations omitted). But because these generally applicable labor laws did not bind motor carriers to specific rates or services, meaningfully interfere with the ability of motor carriers to set routes, or compel a certain result at the level of the motor carriers' consumers rather than their workforce, we determined that the laws were not "related to" prices, routes or services, and thus were not preempted by the F4A. *Id.* at 640; *see also Ridgeway,* 946 F.3d at 1083-86 (holding that the F4A does not preempt a California minimum-wage law that would require Walmart to pay long-haul-truck-drivers minimum wages for layovers in California).

Four years after *Dilts,* we concluded that the F4A does not preempt the *Borello* test for classifying California workers as either employees or independent contractors. *See Su,* 903 F.3d at 957. We rejected the plaintiff's contentions that application of the *Borello* standard to its workforce bound or compelled it to certain prices, routes, or services. *Id.* at 964-65. Rather, consistent with *Dilts* and *Californians for Safe Competitive Dump Truck Transportation v. Mendonca,* 152

F.3d 1184 (9th Cir. 1998), we held that "[a]t most, carriers will face modest increases in business costs, or will have to take the *Borello* standard and its impact on labor laws into account when arranging operations." *Id.* at 965. The *Borello* test was not preempted by the F4A, we held, because it was "a generally applicable background regulation in an area of traditional state power" that merely affected the relationship "between a carrier and its *workforce,"* where "the impact is on the *protections* afforded to that workforce." *Id.* at 961-62. In reaching this conclusion, we rejected the plaintiff's contentions that the *Borello* standard improperly compelled motor carriers to use employees, but we did not decide whether such compulsion would cause a law to be preempted by the F4A. *Id.* at 959 n.4.

Based on *Dilts*, *Su*, and related precedent, a generally applicable state law is not "related to a price, route, or service of any motor carrier" for purposes of the F4A unless the state law "*binds* the carrier to a particular price, route or service" or otherwise freezes them into place or determines them to a significant degree. *Dilts*, 769 F.3d at 646. We have generally held that the state law at issue does not have such a binding or freezing effect unless it compels a result at the level of the motor carrier's relationship with its customers or consumers. *See id.* at 640, 646; *Su*, 903 F.3d at 966. Such a law does not have a binding or freezing effect, and thus is not preempted, merely because a motor carrier must take the law into account when making business decisions, or merely because the law increases a motor carrier's operating costs. *See Dilts*, 769 F.3d at 646-47.

IV

We now turn to the question whether the F4A preempts the ABC test, as codified in AB-5 and applied to motor carriers. This requires us to determine whether AB-5 is "significantly related to rates, routes, or services ... and thus [is] preempted," or whether it has "only a tenuous, remote, or peripheral connection to rates, routes, or services" and therefore is not preempted. *Id.* at 643 (cleaned up).

A

We first consider whether AB-5 is generally applicable, because this determination "will likely influence whether the effect on prices, routes, and services is tenuous or significant." *Su,* 903 F.3d at 966. Under our precedent, AB-5 is a generally applicable law because it applies to employers generally; it does not single out motor carriers but instead affects them solely in their capacity as employers. *Cf. Rowe,* 552 U.S. at 375. Even if some businesses are exempt from AB-5, it certainly applies "to hundreds of different industries."[9] *Dilts,* 769 F.3d at 647.

We next consider where in the chain of a motor carrier's business AB-5 is acting to compel a certain result, and the result it is compelling. *Su,* 903 F.3d at 966. AB-5 affects the way motor carriers must classify their workers, and therefore compels a particular result at the level of a motor carrier's relationship with its workforce. It does not compel a result in a motor

[9] CTA claims that AB-5 is not generally applicable because it includes a number of exemptions. We disagree. Labor laws typically include exemptions. For instance, the meal-and-rest-break requirements were deemed to be generally applicable in *Dilts*, even though they do not apply to certain categories of workers. *See* Cal. Lab. Code § 512(b)(2)—(f).

carrier's relationship with consumers, such as freezing into place a particular price, route or service that a carrier would otherwise not provide. *See Dilts,* 769 F.3d at 646-47. Indeed, CTA does not argue that AB-5 does so. Therefore, it does not have the sort of binding or freezing effect on prices, routes, or services that are preempted under the F4A.

Because AB-5 is a generally applicable law that impacts a motor carrier's business at the point where the motor carrier interacts with its workers, and the law affects motor carriers' relationship with their workers in a manner analogous to the worker classification laws we have previously upheld in *Su,* AB-5 is not significantly related to rates, routes, or services. Therefore, we conclude that the F4A does not preempt AB-5 as applied to motor carriers.

B

CTA raises two main arguments in support of its claim that the F4A preempts AB-5.

The first is that AB-5's impact is so significant that it indirectly determines price, routes, or services. According to CTA, the ABC test requires that motor carriers use employees rather than independent contractors as drivers.[10] Given the impact such a requirement has on its members' business models, CTA contends, AB-5 necessarily has a significant effect on prices, routes, and services. In detailing the impact of AB-5 on prices, routes, and services, CTA begins by

[10] IBT disputes this claim, and argues that AB-5's business-to-business exemption "permits motor carriers to contract with truly independent owner-operators without necessarily creating an employment relationship." For purposes of determining whether the F4A preempts AB-5, however, we need not address this issue.

alleging that AB-5 will increase its members' costs "by as much as 150% or more." According to CTA, motor carriers will have to buy a "fleet of trucks" and maintain and repair those trucks, provide for meal and rest breaks, train employees, set up staff, and provide worker's-compensation insurance. As a result, CTA alleges, its members would pass these increased costs off to customers as increased prices.[11]

Moreover, CTA contends that its members would have to "reconfigure and consolidate routes" to offset increased costs. Its members might eliminate certain routes all together and might have to reconfigure routes to ensure their drivers can take meal and rest breaks. All of this would make the routes of CTA's members less efficient.

And finally, CTA contends that the increased labor costs caused by AB-5 would likely put small motor carriers out of business and force other motor carriers to leave California. The remaining motor carriers would therefore offer "diminished services."

We have routinely rejected similar arguments that the F4A preempts California labor laws that impose such indirect effects. *See, e.g., Dilts,* 769 F.3d at 646 (holding that California's meal-and-rest-break laws "are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment").

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[11] Although CTA's allegations of increased costs rely heavily on its claim that motor carriers will be forced to buy a fleet of trucks, CTA conceded that its members could avoid incurring such costs by hiring owner-operators (i.e., drivers who own their own trucks) as employees. Given the undeveloped record in the district court, CTA's allegations with respect to prices, routes, and services are merely speculative.

In *Mendonca,* for example, the plaintiffs argued before the district court that California's prevailing wage law would increase motor carriers' costs by 75%, and this increase in costs would increase prices by 25% because wages constituted 33% of the eventual price charged by motor carriers. *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca,* 957 F. Supp. 1121, 1127 & n. 11 (N.D. Cal. 1997). This price increase would, the plaintiffs alleged, require the motor carriers to use independent owner-operators and compel them "to redirect and reroute equipment to compensate for the additional costs imposed on them by the Prevailing Wage Law," and it would "interfere[] with their California segment of operations, which in turn [would disrupt] their interstate services." *Id.* Despite the motor carriers' dire predictions about increased costs leading to changes in routes and services, we concluded that California's prevailing wage law was not the sort of law that Congress intended to preempt. *Mendonca,* 152 F.3d at 1189. As the district court explained, "if preemption was based on percentages of price, then numerous areas of state regulation would be preempted based solely on their percentage effect on motor carrier prices," contrary to "the Supreme Court's requirement of 'clear and manifest' Congressional intent to preempt." *Mendonca,* 957 F. Supp. at 1127 n.11. We affirmed the district court, holding that the law's effect "is no more than indirect, remote, and tenuous" and did not fall "into the 'field of laws' regulating prices, routes, or services." *Mendonca,* 152 F.3d at 1189; *see also Ridgeway,* 946 F.3d at 1083.

Our decision in *California Trucking Association v. Su* supports this conclusion. In that case, the plaintiff argued that the *Borello* worker-classification test would impact its prices, routes, and services. 903 F.3d

at 958. But we held that the test would at most impose "modest increases in business costs" or require motor carriers "to take the *Borello* standard and its impact on labor laws into account when arranging operations." *Id.* at 965. Because the state worker-classification law would not "have an impermissible effect, such as binding motor carriers to specific services, making the continued provision of particular services essential to compliance with the law, or interfering at the point that a carrier provides services to its customers," the law was not preempted. *Id.* The same analysis applies to the impact of AB-5 here.

The dissent argues that we have given insufficient weight to the effect that AB-5 may have on a motor carrier's prices, routes and services. Dissent at 49-50. According to the dissent, even a generally applicable law that impacts a motor carrier's relationship with its workforce may have such a significant impact on prices, routes and services that it is preempted by the F4A. *See generally* Dissent. While our precedents do not rule out the possibility that a generally applicable law could so significantly impact the employment relationship between motor carriers and their employees that it effectively binds motor carriers to specific prices, routes, or services at the consumer level, the dissent has not identified any case where we have done so. Rather, as noted above, our precedents have consistently considered and rejected predicted effects similar to those raised by CTA. We see no basis for departing from our precedent holding that a law increasing motor carriers' employee costs, but not interfering at the point where the motor carrier provides a service to its customers, does not simply fall "into the field of laws" that Congress intended to preempt. *Mendonca,* 152 F.3d at 1189 (cleaned up).

C

Second, CTA and the dissent argue that because the ABC test requires an employer to hire employees, rather than independent contractors, language in *American Trucking Associations v. City of Los Angeles* and *Su* compels us to conclude that AB-5 is related to the prices, routes, and service of a motor carrier. Again, we disagree.

American Trucking Associations involved a challenge to city ordinances requiring that trucks providing drayage services to the Port of Los Angeles and the Port of Long Beach enter into mandatory concession agreements. *See generally* 559 F.3d at 1046. The Ports acknowledged that the principal purpose of the concession agreements was to reduce truck emissions and address other environmental concerns. *Id.* at 1055. A provision in the Port of Los Angeles's concession agreement required motor carriers operating at the Port of Los Angeles to "transition over the course of five years from independent-contractor drivers to employees." *Id.* at 1049. The district court held that the plaintiff demonstrated a likelihood of success in showing that the agreements were preempted by the F4A, because the agreements "directly regulate[d] the carriers themselves" and might have "force[d] motor carriers to change their prices, routes, or services in a way that the market would not otherwise dictate." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 577 F. Supp. 2d 1110, 1117 (C.D. Cal. 2008), *rev'd,* 559 F.3d at 1046. According to the district court, defendants did "not seem to dispute this," but rather argued that the concession agreements were exempted from preemption because, among other things, the F4A's safety exemption likely applied. *See id.; see also* 49 U.S.C. § 14501(a)(2) (providing that the F4A's

preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles"). The district court agreed with this rationale and refused to enjoin the implementation of the concession agreements, because there was a significant probability that the concession agreements fell under the safety exception to the F4A. *Am. Trucking Ass'ns,* 577 F. Supp. 2d at 1125.

On appeal, we likewise focused on the F4A's safety exemption. Although we agreed that it "can hardly be doubted" that the concession agreements "relate[d] to prices, routes or services of motor carriers," we noted that the defendants did not "actually dispute that on appeal." *Am. Trucking Ass'ns,* 559 F.3d at 1053; *see also id.* at 1051 (noting that the district court's ruling that the plaintiff could likely demonstrate that the concession agreements "related to a price, route, or service" of motor carriers was "a ruling left unchallenged" on appeal). We reversed the district court on the ground that the concession agreements were aimed at environmental and economic concerns, not safety concerns, and so the concession agreements did not qualify for the safety exemption from preemption. *Id.* at 1056, 1060-61. We remanded so that the district court could determine whether, absent the safety exemption, the "specific terms of each agreement" were likely to be preempted. *Id.*

CTA focuses on our passing statement that it "can hardly be doubted" that the concession agreements "relate to prices, routes or services of motor carriers." *Id.* at 1053. According to CTA, this language compels us to hold that AB-5 is preempted. This argument fails. We did not have occasion in *American Trucking Associations* to address the question whether or how

the concession agreements related to the motor carrier's prices, routes, or services, because that issue was not on appeal. Moreover, any determination that the concession agreements did "relate to prices, routes or services of motor carriers" would not be controlling here, because *American Trucking Associations* did not involve a generally applicable law, but rather a targeted agreement that "directly regulate[d] the carriers themselves." *Am. Trucking Ass'ns,* 577 F. Supp. 2d at 1117. As we have since explained, "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services." *Dilts,* 769 F.3d at 644. Accordingly, our dicta in *American Trucking Associations,* which was "made casually and without analysis, uttered in passing without due consideration of the alternatives, [and] done as a prelude to another legal issue that command[ed] the panel's full attention," *United States v. McAdory,* 935 F.3d 838, 843 (9th Cir. 2019) (cleaned up), does not control our analysis here.

CTA also argues that our discussion of *American Trucking Associations* in *Su* compels the conclusion that a state law that requires a motor carrier to employ only independent contractors must be deemed to relate to the prices, routes, and services or motor carriers for purposes of F4A preemption. For several reasons, we do not read *Su* as going that far.

CTA relies on a portion of *Su* discussing the plaintiff's claim that the *Borello* test imposed an "improper compulsion" of the sort preempted by the F4A, because it compelled the use of independent contractors. 903 F.3d at 964. *Su* rejected that argument. Rather than determine whether such compulsion is preempted by the F4A, however, *Su* instead concluded

that the *Borello* test "does not, by its terms, compel a carrier to use an employee or an independent contractor." *Id.* Distinguishing *American Trucking Associations,* we stated that the case "stands for the obvious proposition that an 'all or nothing' rule requiring services be performed by certain types of employee drivers and motivated by a State's own efficiency and environmental goals was likely preempted." *Id.*

Despite our passing characterization of *American Trucking Associations,* we recognized that the question whether the F4A preempted a labor law like the ABC test was not before us, and we expressly left that question open: after recognizing that *Dynamex* had adopted the ABC test while the appeal in *Su* was pending, we clarified that "we need not and do not decide whether the FAAAA would preempt using the 'ABC' test to enforce labor protections under California law." *Id.* at 964 n.4, 964 n.9. Because *Su* "did not make a deliberate decision to adopt" a rule regarding the ABC test—and indeed expressly disclaimed doing so—we are neither bound nor meaningfully assisted for analytical purposes by its statements made without reasoned consideration. *Seven Up Pete Venture v. Schweitzer,* 523 F.3d 948, 953 (9th Cir. 2008). Given that the issue was not on appeal, it is not surprising that *Su* provided no reasoning as to why a state law requiring the use of employees would necessarily be "related to" the prices, routes, or services of motor carriers. Indeed, *Su* itself acknowledged that "Congress did not intend to hinder States from imposing normative policies on motor carriers as employers." *Id.* at 963. Rather, *Su*'s statement was solely based on its erroneous characterization of *American Trucking Associations* as deciding that the F4A likely preempted an "all or nothing" rule requiring employee drivers. As explained above, however, this issue was not even on

appeal in that case. We are therefore not constrained or materially instructed by *Su's* passing discussion of the ABC test. *Schweitzer,* 523 F.3d at 953.

Finally, the dissent argues that *Miller* supports CTA's position. Dissent at 44. We disagree. *Miller* held that a common-law negligence cause of action, not a generally applicable labor law, was preempted by the F4A. *See* 976 F.3d at 1023-24. In reaching this conclusion, *Miller* reaffirmed that the F4A does not prohibit California from enforcing normal background rules applying to employers doing business in California, which are not "related to" carrier prices, routes, or services. *Id.* Rather, *Miller* held that common law negligence was distinguishable from laws governing employment relations, because negligence claims sought to hold a company "liable at the point at which it provides a 'service' to its customers," which is "directly connected with" services "in a manner that was lacking in *Mendonca*, *Dilts*, and *Su." Id.* at 1024 (cleaned up). Here, of course, AB-5 is a generally applicable statutory labor law that affects motor carriers' business at the level of the carriers' workforce, not their consumers. Thus, *Mendonca*, *Dilts*, and *Su* control, and *Miller* does not.[12]

D

We likewise reject the arguments made by CTA and the dissent based on *Schwann v. FedEx Ground Package Sys., Inc.,* 813 F.3d 429,437-40 (1st Cir. 2016)

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[12] The dissent claims that AB-5 is "like the common law of negligence at issue in *Miller* and unlike the employment regulations at issue in *Mendonca*, *Dilts*, and *Su*." Dissent at 44. Because AB-5 is a generally applicable law governing employment, closely analogous to the worker-classification test in *Su*, and does not impose liability for negligence, we are puzzled by this argument.

and *Bedoya v. Am. Eagle Express Inc.,* 914 F.3d 812,816 (3d Cir. 2019), *cert. denied,* 140 S. Ct. 102 (2019). The language relied upon is contrary to our precedent.

In *Schwann*, the First Circuit determined that Prong 2 of Massachusetts' ABC test (which is identical to Prong B of the California ABC test codified in AB-5) sufficiently relates to a motor carrier's services and routes, because interfering with the employer's decision whether to use an employee or an independent contractor could prevent a motor carrier from using its preferred methods of providing delivery services, raise the motor carrier's costs, and impact routes. *Schwann*, 813 F.3d at 438-39; *see also Bedoya*, 914 F.3d at 824-25 (opining in dicta that the F4A preempts Massachusetts' ABC test because it "mandate[s] a particular course of action—e.g., requiring carriers to use employees rather than independent contractors"). But we have previously concluded that such indirect consequences have "only a tenuous, remote, or peripheral connection to rates, routes or services." *Dilts*, 769 F.3d at 643 (cleaned up).[13]

In light of our case law, we also reject CTA's argument that the legislative history of the F4A supports

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[13] CTA also relies on two state-court opinions holding that Prong B of the ABC test is preempted by the F4A. *See People ex rel. Harris v. Pac Anchor Transp., Inc.,* 59 Cal. 4th 772, 783 (2014); *People v. Cal Cartage Transp. Express, LLC,* 2020 WL 497132, at *1 (Cal. Super. Ct. Jan. 8, 2020), *vacated by People v. Superior Ct. of L.A. Cnty.*, 271 Cal. Rptr. 3d 570, 582 (Ct. App. 2020). But we are bound by our precedent, not contrary state-court rulings. Moreover, two California Courts of Appeal recently held that the F4A *does not* preempt AB-5 as applied to motor carriers. *See Superior Ct. of L.A. Cnty,* 271 Cal. Rptr. 3d at 582; *Parada v. E. Coast Transp. Inc.*, No. B296566, 2021 WL 1222007 (Cal. Ct. App. Mar. 26, 2021).

holding that the F4A preempts AB-5. In *Su,* we found "nothing in the FAAAA's legislative history indicat[ing] that Congress intended to preempt the traditional power to protect employees or the necessary precursor to that power, i.e., identifying who is protected." 903 F.3d at 967. This further supported our conclusion that "Congress did not intend to foreclose States from applying common law tests to discern who is entitled to generally applicable labor protections." *Id.* CTA argues that a passage in a 1994 House report makes clear that Congress intended for the F4A to preempt state laws that discriminated against motor carriers whose business model was based on hiring owner-operators. H.R. Conf. Rep. No. 103-677, at 87 (1994). We disagree. The House report states that "[t]he need for [preemption] has arisen from this patchwork of regulation and in a June 25, 1991 9th Circuit Court of Appeals decision…." *Id.* The Ninth Circuit opinion at issue had held that the ADA preempted state regulation of FedEx, which was organized as an air carrier, even though it did not preempt state regulation of companies engaged in similar operations that were organized as motor carriers. *Fed. Exp. Corp.,* 936 F.2d at 1078-79. While one of Congress's purposes may have been to level the playing field for motor carriers like FedEx' s competitors, the House report does not indicate any intent to allow motor carriers full discretion in how they classified their workforce.[14]

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[14] The dissent claims that our holding "undermines the balance of state and federal power contemplated by the F4A." Dissent at 53. The dissent gets it backward. We begin with the presumption that Congress did not intend to preempt a law that is within a state's historical police powers, unless that "was the clear and manifest purpose of Congress." *Miller,* 976 F.3d at 1021. It is the

Because AB-5 is a generally applicable labor law that impacts the relationship between a motor carrier and its workforce, and does not bind, compel, or otherwise freeze into place a particular price, route, or service of a motor carrier at the level of its customers, it is not preempted by the F4A. Because CTA is unlikely to succeed on the merits, the district court erred by enjoining the state from enforcing AB-5 against motor carriers operating in California. *Winter,* 555 U.S. at 20. By failing to follow our precedent regarding labor laws of general applicability, the district court committed a legal error to which we cannot defer, even at the preliminary-injunction stage. *See Arpaio,* 821 F.3d at 1103.[15]

REVERSED.

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dissent that would tip the balance of power against the states and in favor of the federal government by holding that federal law preempts AB-5, a state law clearly within an area of traditional state power, without citing any evidence that Congress clearly and expressly intended to do so. The dissent relies on *Rowe* to support its claim that Congress intended to preempt laws like AB-5, but this reliance is misplaced. In *Rowe,* the regulation at issue required, among other things, that a driver delivering tobacco products verify the identity and age of the recipient of the package, and obtain the recipient's signature. 552 U.S. at 369. Such a law is clearly the sort of "service-determining law" that Congress intended to preempt. *See id.* at 373. By contrast, AB-5 does not mandate that motor carriers provide or withhold any service.

[15] Because the F4A does not preempt AB-5 as applied to motor carriers, we do not address the remaining preliminary-injunction factors.

BENNETT, Circuit Judge, dissenting:

I agree with the majority that for purposes of F4A preemption, we "draw a line between laws that are significantly related to rates, routes, or services, even indirectly, and thus are preempted, and those that have only a tenuous, remote, or peripheral connection to rates, routes, or services, and thus are not preempted." Majority Opinion at 22 (quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014)). I also agree that "laws of general applicability that affect a motor carrier's relationship with its workforce… are not significantly related to rates, routes or services," Majority Opinion at 23—*if* those laws significantly affect *only* a motor carrier's relationship with its workforce. I do not agree, however, that a law like AB-5—which affects motor carriers' relationships with their workers *and* significantly impacts the services motor carriers are able to provide to their customers is not related to motor carriers' services and thus is not preempted.[1] Therefore, I respectfully dissent.

We review the grant of a preliminary injunction for abuse of discretion. *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009). "Our review is limited and deferential, and we do not review the underlying merits of the case." *Id.* (quotation marks, citation, and alteration omitted). There are four factors we must consider: (1) the likelihood of success on the merits, (2) the likelihood of irreparable harm, (3) the balance of equities, and (4) the public interest. *Short v. Brown,* 893 F.3d 671, 675 (9th Cir.

[1] I agree with the majority that amendments to AB-5 and the passage of Proposition 22 do not affect our analysis. Majority Opinion at 11 n.5.

2018). The majority reverses the district court under the first prong, concluding that CTA is "unlikely to succeed" in proving that AB-5 is preempted. Majority Opinion at 39.

"[T]he [F4A's] central objective is to avoid frustrating the statute's deregulatory purpose by preventing states from imposing a patchwork of state service-determining laws." *Bedoya v. Am. Eagle Express Inc.,* 914 F.3d 812, 818 (3d Cir. 2019) (quotation marks and citation omitted). Thus, the F4A preempts any state law that is "related to" a motor carrier's prices, routes, or services. 49 U.S.C. § 14501(c)(1). While the Supreme Court has instructed that "the breadth of the words 'related to' does not mean the sky is the limit," *Dan's City Used Cars, Inc. v. Pelkey,* 569 U.S. 251, 260 (2013), it has also made clear that the words "express a broad preemptive purpose," *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Accordingly, the Supreme Court held in *Morales* that a state law is not "related" for preemption purposes if its impact is "too tenuous, remote, or peripheral." *Id.* at 390 (citation omitted). But *Morales* also made clear that "preemption occurs *at least* where state laws have a 'significant impact'"—specifically on prices, routes, or services in the context of the F4A. *Rowe v. New Hampshire Motor Transp. Ass'n,* 552 U.S. 364, 371 (2008) (emphasis added) (quoting *Morales,* 504 U.S. at 390). This rule applies both to laws that target motor carriers and to laws of general applicability. *See Morales,* 504 U.S. at 386. Consistent with Supreme Court precedent, then, the straightforward question we should have answered today is whether AB-5's impact on CTA members' prices, routes, or services is significant or instead merely tenuous, remote, or peripheral.

Applying this critical distinction, our court has repeatedly held that state employment laws with a significant impact on motor carriers' relationships to their workforces, but only a tenuous, remote, and peripheral effect on their prices, routes, and services, are not preempted by the F4A. In *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca,* 152 F.3d 1184 (9th Cir. 1998), we considered California's Prevailing Wage Law that required contractors who were awarded public works contracts to pay their workers "not less than the general prevailing rate." *Id.* at 1186. The motor carriers argued that the law was "related to" prices, routes, and services because, among other things, it forced them to increase prices and redirect and reroute equipment to compensate for lost revenue. *Id.* at 1189. We held that the law was not "related to" the carriers' prices, routes, or services because it did not "*acutely* interfer[e]" with them. *Id.*

In *Dilts,* we considered California labor laws requiring "a 30-minute meal break for every five hours worked, and a paid 10-minute rest break for every four hours worked." 769 F.3d at 640 (citation omitted). We held that the laws were not preempted because they "[did] not bind motor carriers to specific prices, routes, or services," would cause "nothing more than a *modestly* increased cost of doing business" and *"minor* deviations" in drivers' routes, and would not *"meaningfully* decrease the availability of routes to motor carriers." *Id.* at 647-49 (emphasis added) (quotation marks and citation omitted). In accord with *Morales,* we reaffirmed that "state laws like California's, which do not directly regulate prices, routes, or services, are not preempted by the [F4A] unless they have a 'significant effect' on prices, routes, or services." *Id.* at 649-50. Thus, because "there [was] no showing of an actual or

likely significant effect on prices, routes, or services," we concluded that "the California laws at issue [were] not preempted." *Id.* at 650.

Finally, in *California Trucking Association v. Su,* 903 F.3d 953 (9th Cir. 2018), we considered the *Borello* test, which used to be California's common law test for determining whether someone was an employee or independent contractor. *Id.* at 957. The *Borello* test was essentially a totality of the circumstances balancing analysis: there were eight to ten factors, and no factor was dispositive. *See S.G. Borello Sons, Inc. v. Dep't of Indus. Rels.*, 769 P.2d 399,407 (Cal. 1989). We held that the *Borello* test was not preempted by the F4A because "[a]t most, carriers [would] face *modest* increases in business costs, or [would] have to take the *Borello* standard and its impact on labor laws *into account* when arranging operations." *Su,* 903 F.3d at 965 (emphasis added). Such impacts were "not significant, and so [did] not warrant preemption." *Id.* at 964.

Out of these cases, the majority crafts the general rule that "laws of general applicability that affect a motor carrier's relationship with its workforce… are not significantly related to rates, routes or services." Majority Opinion at 23. But the majority's rule ignores the possibility that a state law might affect a motor carrier's relationship with its workforce *and* have a significant impact on that motor carrier's prices, routes, or services, which would mandate F4A preemption under Supreme Court precedent. *See Rowe*, 552 U.S. at 371 ("[P]re-emption occurs *at least* where state laws have a significant impact [on prices, routes, or services]." (emphasis added) (quotation marks and citation omitted)).

Our prior F4A preemption decisions did not overlook this point. In *Mendonca,* we stated that "state regulation in an area of traditional state power *having no more than an indirect, remote, or tenuous effect on a motor carrier[' prices, routes, and services* [is] not preempted" not that *any* regulation in an area of traditional state power, such as employment, is not preempted. 152 F.3d at 1188 (emphasis added). In *Dilts,* we similarly stated that in enacting the F4A, "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules *that do not otherwise regulate prices, routes, or services.*" 769 F.3d at 644 (emphasis added). And in *Su,* we stated that "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.*" 903 F.3d at 961 (emphasis added). We clarified that "[w]hat matters is ... where in the chain of a motor carrier's business it is acting to compel a certain result … *and what result it is compelling." Id.* at 966. We thus held that the *Borello* test was not preempted precisely "because the *Borello* standard [did] not compel the use of employees or independent contractors; instead, at most, it impact[ed motor carriers] in ways that…. [were] not significant." *Id.* at 964.

Despite that holding, the majority mischaracterizes dicta in *Miller v. C.H. Robinson Worldwide, Inc.,* 976 F.3d 1016 (9th Cir. 2020), as reaffirming that "the F4A does not prohibit California from enforcing normal background rules applying to employers doing business in California." Majority Opinion at 35. But *Miller* did not embrace such a categorical rule, which would have been at odds with *Morales.* Instead, *Miller* reaffirmed that "[t]he phrase 'related to' in the [F4A]

embraces state laws having a connection with or reference to… rates, routes, or services, whether directly or indirectly." 976 F.3d at 1022 (ellipsis in original) (quotation marks and citation omitted). *Miller* then held that when a generally applicable state law "seeks to hold [a motor carrier] liable at the point at which it provides a 'service' to its customers," the state law is "directly connected with" a motor carrier's service (and thus preempted) "in a manner that was lacking in *Mendonca*, *Dilts*, and *Su." Id.* at 1024 (quotation marks, citation, and alteration omitted).

AB-5 seeks to interfere with motor carriers' operations at the point at which they provide a service to their customers, like the common law of negligence at issue in *Miller* and unlike the employment regulations at issue in *Mendonca*, *Dilts*, and *Su.* Whereas the wage law in *Mendonca* did not *require* motor carriers to raise their prices, the meal and rest break laws in *Dilts* caused only "*modestly* increased cost[s]" and "*minor* deviations" in routes, and the *Borello* test "[did] not *compel* the use of employees or independent contractors," AB-5 mandates the very means by which CTA members must provide transportation services to their customers. It requires them to use employees rather than independent contractors as drivers, thereby significantly impacting CTA members' relationships with their workers *and* the services that CTA members are able to provide to their customers.

AB-5's ABC test includes three factors. If the employer fails to establish all three, then the worker "*shall be considered an employee* rather than an independent contractor." Cal. Lab. Code § 2750.3(a)(1) (emphasis added). The factor at issue is B: whether the worker "performs work that is outside the usual course of the hiring entity's business." *Id.*

§ 2750.3(a)(1)(B). The district court found that under B, "drivers who may own and operate their own rigs will *never* be considered independent contractors under California law."[2] *Cal. Trucking Ass'n v. Becerra*, 433 F. Supp. 3d 1154, 1165 (S.D. Cal. 2020). And this is self-evident: independent-contractor truckers hauling goods for the hiring entity are perforce *not* performing work outside the usual course of the hiring entity's business, which is, of course, hauling goods. Thus, as the district court correctly found, motor carriers would have to "reclassify all independent-contractor drivers as employee-drivers for all purposes under the California Labor Code, the Industrial Welfare Commission [(IWC)] wage orders, and the Unemployment Insurance Code." *Id.* at 1166.

The appellants do not present any arguments to the contrary. In fact, the district court "repeatedly invited [the state] to explain how the ABC test was not an 'all or nothing test' specifically "how a motor carrier could contract with an independent owner-operator as an independent contractor, rather than as an employee"—and neither the State Defendants nor Intervenor-Appellant International Brotherhood of Teamsters did so. *Id.* at 1165 n.9. These same parties were just as stumped when asked the same question during oral argument. Though they insisted that we were asking the wrong question, they did not dispute that

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[2] As discussed below, this court made the same point in even stronger terms in *Su:* "[T]he '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." 903 F.3d at 964 (emphasis added).

the ABC test would automatically characterize as employees all those with whom CTA members contracted to haul goods.

In the absence of any dispute that AB-5 will "categorically prevent[] motor carriers from exercising their freedom to choose between using independent contractors or employees," *id.* at 1165, the obvious conclusion is that AB-5 *will* significantly impact motor carriers' services by mandating the means by which they are provided. At the very least, the district court did not abuse its discretion in so concluding, especially given that the differences between transportation services provided by independent contractor drivers and those provided by employee drivers are neither superficial nor "peripheral." *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 438 (1st Cir. 2016). Whether to provide a service directly through employees or indirectly through independent contractors "is a significant decision in designing and running a business.… [T]hat decision implicates the way in which a company chooses to allocate its resources and incentivize those persons providing the service." *Id.*

First, the record demonstrates that in addition to altering motor carriers' relationships to their workers, AB-5 will significantly impact motor carriers' services to their customers by diminishing the specialized transportation services that motor carriers are able to provide through independent contractor drivers. As the declaration of Greg Stefflre, an officer of one of CTA's members, explains in great detail:

> Many individual owner-operators have invested in specialized equipment and have obtained the skills to operate that equipment efficiently. Some of these owner-operators have

> unique and expensive equipment not available in the fleet of other trucking companies. Therefore, an owner-operator fleet by definition consists of a variety of specialists who can bring on their specialized equipment as needed and, when the need abates, the owner-operator can move to another motor carrier where the equipment is needed. In contrast, employee fleets cannot keep infrequently used, specialized equipment on hand because of the capital costs associated with acquiring this equipment. As a result, employee-based motor carriers will be unable to offer services requiring such equipment services currently available through owner-operator based motor carriers.

Dist. Ct. Dkt. No. 54-2 at 8. This lack of specialization will deprive motor carriers' *consumers* of particular services—consumers who depend on motor carriers to hire independent contractors to transport unwieldy, hazardous, or otherwise unusual goods that could not be transported with typical trucks and equipment.

Second, the record also demonstrates that by requiring motor carriers to hire employee drivers, AB-5 will eliminate motor carriers' flexibility to accommodate fluctuations in supply and demand, given that California's IWC Wage Order No. 4-2001(9)(B) requires employers to supply their employees' tools and equipment. Stefflre's declaration also elaborates on this predictable outcome:

> The use of owner-operators permits expansion in times of plenty and contraction during shortages in business. Employee driver fleets cannot expand and contract as easily and certainly not as inexpensively as independent

> contractor fleets. To use employee drivers, one needs to acquire trucks. Even if leased, such leases require fixed terms when establishing price so the size of the fleet cannot be lowered without incurring penalties. In owned fleets, the unused tractors become a completely non-productive asset and a drain on profitability. Owner-operator fleets can relatively easily expand and contract. When existing business goes to a competitor, the owner-operators working with the incumbent simply move to the successful bidder eliminating the drain that would occur with an employee fleet.

Dist. Ct. Dkt. No. 54-2 at 7-8. Thus, as further explained by the declaration of Shawn Yadon, the CEO of CTA, hiring only employee drivers will limit motor carriers to "obtaining just enough equipment and employee drivers to meet the typical demand," so that they "[can]not provide additional resources to provide truck services during times of peak demand." Dist. Ct. Dkt. No. 54-3 at 6. Again, this inability to meet temporary rises in demand will deprive motor carriers' *consumers* of particular services—consumers such as farmers and retail sellers who depend on motor carriers to seasonally hire independent contractors during harvests and peak retail seasons, respectively. Dist. Ct. Dkt. No. 54-3 at 6; Dist. Ct. Dkt. No. 54-5, Ex. B at 12.

The majority mischaracterizes my argument as suggesting "that AB-5's impact is so significant that it indirectly *determines*… services," Majority Opinion at 28 (emphasis added), an argument that the majority then brushes aside because "[w]e have routinely rejected similar arguments that the F4A preempts California labor laws that impose such indirect effects,"

Majority Opinion at 29. However, rather than suggesting that AB-5 determines services, I argue that AB-5 determines the *means* of providing said services, thereby significantly impacting them—which is enough to trigger F4A preemption. *Cf. Miller*, 976 F.3d at 1024-25 ("We have occasionally suggested that preemption occurs only when a state law [binds motor carriers to specific prices, routes, or services].… But even these cases acknowledged that the scope of [F4A] preemption is broader than this language suggests."). Furthermore, although "[w]e have routinely rejected" arguments that the F4A preempts California labor laws that indirectly affect prices, routes, or services—by raising wages, requiring brief meal and rest breaks, or causing motor carriers to take "into account" state standards for labeling workers as independent contractors—these arguments are not "similar" to my argument that an "all or nothing" rule mandating the very means by which a motor carrier can provide its services is preempted. My argument is more akin to the Supreme Court's holding in *Rowe,* that a state law has a significant impact on services not only when it determines said services, but also when it regulates "the essential details of a motor carrier's system for picking up, sorting, and carrying goods essential details of the carriage itself" *Rowe,* 552 U.S. at 373.

The majority concedes that "our precedents do not rule out the possibility that a generally applicable law could so significantly impact the employment relationship between motor carriers and their employees that it effectively binds motor carriers to specific prices, routes, or services at the consumer level." Majority Opinion at 31. In fact, this court has twice endorsed my position that "all or nothing" rules requir-

ing the use of employee rather than independent contractor drivers are preempted by the F4A. In *American Trucking Associations v. City of Los Angeles,* 559 F.3d 1046 (9th Cir. 2009), we considered a city-imposed concession agreement requiring that motor carriers transition from using independent contractors to employees in order to operate at the Port of Los Angeles. *Id.* at 1049. We made clear at the outset: "That the Concession agreements relate to prices, routes or services of motor carriers can *hardly be doubted.* Thus, we fully agree with the district court that it is likely that ATA will establish that proposition." *Id.* at 1053 (emphasis added). The district court had concluded that preemption was likely because the "concession agreements [would possibly] force motor carriers to change their prices, routes, or services in a way that the market would not otherwise dictate." *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 577 F. Supp. 2d 1110, 1117 (C.D. Cal. 2008).

In *Su,* we considered the ABC test at issue here, as a counterpoint to *Borello's* totality of the circumstances test. We began by characterizing *American Trucking Associations* as "stand[ing] for the obvious proposition that an 'all or nothing' rule requiring services be performed by certain types of employee drivers… was likely preempted." 903 F.3d at 964. We then explained: "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." *Id.*

Two other circuits have also held or signaled that all or nothing rules like California's ABC test are or should be preempted. In *Schwann,* the First Circuit

held that the F4A preempts Prong 2 of Massachusetts's 1-2-3 test.[3] *See* 813 F.3d at 442. The First Circuit recognized the obvious reality that "Prong 2 would *significantly* affect how [motor carriers] provide[] good and efficient service" by *"mandat[ing]* that [motor carriers] classify… individual contractors as employees," thereby *"significant[ly] impact[ing]* ... the actual routes followed for the pick-up and delivery of packages." *Id.* at 439 (emphasis added). The court held that such "regulatory interference" would not be "peripheral." *Id.* at 438. Rather, "[s]uch an application of state law [would] pose[] a serious potential impediment to the achievement of the [F4A'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.*

In *Bedoya,* the Third Circuit upheld New Jersey's ABC test against an F4A preemption defense. 914 F.3d at 824. New Jersey's test is identical to California's and Massachusetts's tests with one key difference: the New Jersey test does not "categorically prevent[] carriers from using independent contractors" because its Prong B includes an "alternative method for reaching independent contractor status . .. by demonstrating that the worker provides services outside of the putative employer's places of business." *Id.*; *see id.* at 816-17. The Third Circuit thus held that New Jersey's ABC test was not preempted because it "[did] not have a significant effect on prices, routes, or services," "[did] not bind [motor carriers] to a particular method of providing services," and "[did] not mandate a particular course of action"—*"unlike the preempted*

[3] The only difference between the 1-2-3 test and the ABC test is the name—all three prongs are identical. *Compare* Mass. Gen. Laws ch. 149, § 148B(a), *with* Cal. Lab. Code § 2750.3(a)(1).

Massachusetts law at issue in Schwann." *Id.* at 824-25 (emphasis added).

The majority brushes all of these cases aside: "We did not have occasion in *American Trucking Associations* to address the question whether the concession agreements related to the motor carrier's prices, routes, or services, because that issue was not on appeal." Majority Opinion at 33. And "[b]ecause *Su* did not make a deliberate decision to adopt a rule regarding the ABC test—and indeed expressly disclaimed doing so—we are neither bound nor meaningfully assisted for analytical purposes by its statements made without reasoned consideration." Majority Opinion at 35 (quotation marks and citation omitted). As for *Schwann* and *Bedoya,* the majority claims that they are "contrary to our precedent," citing *Dilts*. Majority Opinion at 36. But *Dilts* did not address an "all or nothing rule" like California's ABC test, and even if the majority is correct as to the cases' precedential value, the majority understates or ignores each case's persuasive value. I agree that it can "hardly be doubted" that an "all or nothing" rule requiring motor carriers to hire employees rather than independent contractors relates to motor carriers' services and is thus preempted. No one—not even the majority—argues that AB-5 will not compel motor carriers to use employees rather than independent contractors.

The majority's holding undermines the balance of state and federal power contemplated by the F4A and in doing so, unnecessarily creates a circuit split.[4] AB-

[4] The majority charges that I "would tip the balance of power against the states and in favor of the federal government by holding that federal law preempts AB-5, a state law clearly within an area of traditional state power, without citing any evidence that

5 is preempted as applied to CTA's members, a conclusion compelled by binding precedent from the Supreme Court and our circuit. That ends the inquiry. But even were the question close (and it isn't), we would have no basis for reversing here, given the standard of review and given that the majority does not even try to suggest that the district court abused

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Congress clearly and expressly intended to do so." Majority Opinion at 38 n.14 (citing *Miller*, 976 F.3d at 1021). However, in *Rowe*, the Supreme Court held that "state service-determining laws" are "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." 552 U.S. at 373. The Court reiterated in *Dan's City* that the "target at which [the F4A] aimed was a State's direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." 569 U.S. at 263. As already explained with the support of record evidence, AB-5 will determine the services that motor carriers are able to provide to their customers. Therefore, it is not my dissent, but rather AB-5 and the majority's decision to uphold it that conflict with the balance of state and federal power mandated by the F4A. The majority attempts to distinguish this case from *Rowe* with the conclusory statement that the law at issue was "clearly the sort of 'service-determining law' that Congress intended to preempt," whereas "AB-5 does not mandate that motor carriers ... withhold any service." Majority Opinion at 38 n.14. The majority seems to forget its own acknowledgment only two sentences prior that the law at issue in *Rowe* also did not mandate that motor carriers withhold any service, but instead "required, among other things, that a driver delivering tobacco products verify the identity and age of the recipient of the package, and obtain the recipient's signature." Majority Opinion at 38 n.14. In other words, the law at issue in *Rowe* was a "service-determining law" preempted by the F4A because it regulated "the essential details of a motor carrier's system for picking up, sorting, and carrying goods," 552 U.S. at 373—exactly the same as AB-5.

its discretion in finding that the other injunction factors—irreparable harm,[5] balance of the equities, and the public interest[6]—favor the plaintiff.

The majority concludes that "[b]y failing to follow our precedent regarding labor laws of general applicability, the district court committed a legal error to which we cannot defer, even at the preliminary-injunction stage." Majority Opinion at 39. But as I have shown, none of the cases on which the majority relies dealt with a law like AB-5, which affects motor carriers' relationships with their workers *and* significantly impacts their services. In the absence of directly applicable precedent, I do not see how the district court could have abused its discretion after thoroughly analyzing our F4A precedent and applying the exact standard the majority adopts to the facts of this case.[7]

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[5] "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." *Cal. Trucking*, 433 F. Supp. 3d at 1169.

[6] "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 Associations*, 559 F.3d at 1059-60. Therefore, the public interest tips sharply in Plaintiffs' favor." *Cal. Trucking*, 433 F. Supp. 3d at 1171.

[7] The district court and the majority agree as to the law governing this case. Like the majority, the district court described the applicable legal standard as follows: "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. Still, where a state law significantly

impacts a carrier's prices, routes, or services, it is forbidden." *Cal. Trucking*, 433 F. Supp. 3d at 1163-64 (quotation marks and citations omitted). *Cf.* Majority Opinion at 22 ("[W]e have attempted to draw a line between laws that are significantly related to rates, routes, or services, even indirectly, and thus are preempted, and those that have only a tenuous, remote, or peripheral connection to rates, routes, or services, and thus are not preempted." (quotation marks and citation omitted)). The district court and the majority disagree only as to the *application* of that law to the *facts* of this case. Whereas the majority believes that "AB-5 is a generally applicable labor law that impacts [only] the relationship between a motor carrier and its workforce, and does not bind, compel, or otherwise freeze into place a particular price, route, or service of a motor carrier at the level of its customers," Majority Opinion at 38-39, the district court reached the opposite conclusion: "Plaintiffs have shown the ABC test is ... likely preempted by the [F4A] because it compels a certain result—by compelling a motor carrier to use employees for certain services." *Cal. Trucking*, 433 F. Supp. 3d at 1168 (quotation marks, citation, and alteration omitted). The district court elaborated that unlike *Mendonca*, *Dilts*, and *Su*, the facts of this case show that AB-5 will significantly impact not only motor carriers' relationships to their workers, but also their prices, routes, or services:

> [T]he 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 carries' prices, routes, or services.

Id. at 1168-69.

See Am. Trucking, 559 F.3d at 1052 ("As long as the district court got the law right, [its preliminary injunction] will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." (citation and alteration omitted)). The majority's holding that the district court abused its discretion is especially perplexing given the abundance of opinions by our court and sister circuits holding or strongly suggesting that the F4A preempts "all or nothing" rules like the AB-5, and given the majority's own concession that "our precedents do not rule out the possibility that a generally applicable law could so significantly impact the employment relationship between motor carriers and their employees that it effectively binds motor carriers to specific prices, routes, or services at the consumer level," Majority Opinion at 31.

Nonetheless, California will now be free to enforce its preempted law. CTA's members will now suffer irreparable injury. And the damage to the policies mandated by Congress will likely be profound. Thus, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

CALIFORNIA TRUCKING ASSOCIATION, et al.,

Plaintiffs,

v.

ATTORNEY GENERAL XAVIER BECERRA, et al.,

Defendants,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant.

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

[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 the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395

California 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

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(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.

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.

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 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

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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.

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

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

is likely to be redressed by a favorable decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547-48 (2016). "At least one plaintiff 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

[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.

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.

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, Interve-

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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.

nor 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

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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.

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 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

[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.

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.*, 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 quo-

tation 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,

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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.

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, 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

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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'").

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 [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

[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.

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 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]

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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-

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

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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.

carried their burden at this preliminary stage of showing a likelihood of success on the merits as to their FAAAA 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

[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.

"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 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

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 20-55106-20-55107

CALIFORNIA TRUCKING ASSOCIATION; et al.,

Plaintiffs-Appellees,

v.

ROBERT ANDRES BONTA, Esquire, in his official capacity as the Attorney General of the State of California; et al.,

Defendants-Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant

D.C. No. 3:18-cv-02458-BEN-BLM
Southern District of California, San Diego

June 21, 2021

ORDER

Before: IKUTA and BENNETT, Circuit Judges, and WOODLOCK[1], District Judge.

Appellees' Petition for Rehearing En Banc (Dkt. 104) is DENIED. Judge Ikuta voted to deny the petition for rehearing en banc, and Judge Woodlock so recommended. Judge Bennett voted to grant the petition for rehearing en banc. The petition for rehearing en

[1] The Honorable Douglas P. Woodlock, United States District Judge for the District of Massachusetts, sitting by designation.

banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing en banc is DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 20-55106-20-55107

CALIFORNIA TRUCKING ASSOCIATION; et al.,

Plaintiffs-Appellees,

v.

ROBERT ANDRES BONTA, Esquire, in his official capacity as the Attorney General of the State of California; et al.,

Defendants-Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant

D.C. No. 3:18-cv-02458-BEN-BLM
Southern District of California, San Diego

June 23, 2021

ORDER

Before: IKUTA and BENNETT, Circuit Judges, and WOODLOCK[1], District Judge.

Appellees' Motion to Stay Issuance of the Mandate is GRANTED. Pursuant to Fed. R. App. P. 41(d)(2), the mandate in the case is stayed to permit appellees to file a petition for writ of certiorari in the Supreme Court. Should the Supreme Court grant certiorari, the

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mandate will be stayed pending its disposition of the case. Should the Supreme Court deny certiorari, the mandate will issue immediately. The parties shall advise this court immediately upon the Supreme Court's decision.