20-55106, 20-55107

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA TRUCKING ASSOCIATION; ET AL.,

Plaintiffs-Appellees,

v.

ATTORNEY GENERAL XAVIER BECERRA; ET AL.,

Defendants-Appellants.

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

STATE DEFENDANTS' OPENING BRIEF

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[1] Victoria Hassid currently serves as Acting Director of the Department of Industrial Relations. Pursuant to Federal Rule of Civil Procedure 25(d), Ms. Hassid is automatically substituted for André Schoorl as a defendant.

[2] On February 11, 2020, Sharon Hilliard was appointed Director of the Employment Development Department. Pursuant to Federal Rule of Civil Procedure 25(d), Ms. Hilliard is automatically substituted for Patrick Henning as a defendant.

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INTRODUCTION

The California Legislature enacted Assembly Bill 5 (AB 5) in 2019. AB 5 codified and expanded the scope of the "ABC" test, which the California Supreme Court had adopted in 2018, and which is used to determine whether workers are employees or independent contractors for purposes of various California employment laws. This classification is significant because employees are entitled to basic employment protections that independent contractors are not. Neither the ABC test nor AB 5 requires any hiring entity to engage employees rather than independent contractors. If a hiring entity cannot demonstrate that its relationship to a worker meets the criteria of the ABC test (and if there is no applicable exemption), under AB 5 and California law that worker is an employee of the hiring entity, the employee is entitled to certain legal rights, and the hiring entity has related legal duties under California law.

Plaintiffs California Trucking Association and two individuals sued to enjoin AB 5, claiming that it is expressly preempted by the Federal Aviation Administration Authorization Act (FAAAA), which prohibits states from passing laws "related to a price, route, or service of any motor carrier." Plaintiffs obtained a preliminary injunction preventing AB 5's enforcement against property-carrying motor carriers. This order was in error.

The district court erred in concluding that Plaintiffs were likely to succeed on the merits of their preemption claim. The FAAAA preempts state and local regulation that has a significant effect on the prices, routes, or services of motor carriers. In light of this standard, this Court has held that the FAAAA does not preempt generally applicable state labor laws that protect employees, holding that such background regulations do not have the significant effect necessary for preemption. Here, the district court concluded that this authority was inapplicable. Worse, the district court ultimately made no findings on whether AB 5 has any effect on the prices, routes, or services of motor carriers, let alone whether any such effect had the requisite significance.

Indeed, this Court has held that the FAAAA does not preempt the *Borello* test, which is also used to determine when workers will be subject to California's labor laws. Under the *Borello* test, motor carriers' drivers have been found to be employees subject to California's generally applicable labor laws. Given this Court's precedent that the FAAAA does not preempt applying the *Borello* test to motor carriers' drivers, it should not preempt applying the ABC test to the same. If a driver working for a motor carrier can be classified as an employee under *Borello* without having the significant effect triggering FAAAA preemption, by the same logic the same

driver can be classified as an employee under the ABC test without offending the FAAAA.

The district court also abused its discretion in assessing the remaining preliminary injunction factors, erroneously concluding that Plaintiffs established irreparable harm despite the fact that they waited over 19 months to seek injunctive relief, and giving short-shrift to the State's interest in addressing misclassification of state employees.

This Court should reverse.

STATEMENT OF JURISDICTION

The operative complaint purports to bring claims under the United States Constitution, and seeks declaratory and injunctive relief. Accordingly, the district court had jurisdiction under 28 U.S.C. § 1331. On January 16, 2020, the district court granted Plaintiffs' motion for a preliminary injunction. (CD 89, ER 1.)[3] Defendants timely appealed on January 29, 2020 (CD 95, ER 65). Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

[3] CD refers to the docket entry in the district court's docket sheet. ER refers the pagination on Appellants' Joint Excerpts of Record, filed concurrently with the opening briefs.

STATEMENT OF THE ISSUES

1. This Court's case law holds that the Federal Aviation Administration Authorization Act does not preempt generally applicable state labor laws that do not regulate the prices, routes, or services of motor carriers. Did the district court err as a matter of law in concluding that the FAAAA likely preempts AB 5?

2. Plaintiffs delayed over 19 months before moving for a preliminary injunction against enforcement of the ABC test, which was adopted by the California Supreme Court in April 2018. Did the district court abuse its discretion in holding that Plaintiffs demonstrated a risk of irreparable harm given this lengthy and unexplained delay?

3. Did the district court abuse its discretion in assessing the balance of hardships and the public interest?

STATEMENT OF THE CASE

A. The California Supreme Court Adopted the ABC Test in *Dynamex* in April 2018.

The distinction between workers classified as employees and those classified as independent contractors is significant because under California law employers have obligations to employees that they do not owe to independent contractors. *See Dynamex Oper. W. v. Super. Ct.*, 4 Cal. 5th

903, 912 (Cal. 2018). Prior to 2018, California regulatory agencies and courts applying California law used the test enunciated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (Cal. 1989), which considered multiple factors to determine whether a worker is an employee or independent contractor.

In April 2018, the California Supreme Court held that courts applying the "suffer or permit" standard under the Industrial Welfare Commission Wage Orders must apply the ABC test to determine whether a worker is classified as an employee. *Dynamex*, 4 Cal. 5th at 916. *Dynamex* noted that the "critically important objectives" of wage and hour laws, including ensuring low income workers' wages and conditions despite their weak bargaining power, "support a very broad definition of the workers" who fall within the employee classification. *Id.* at 952. Similarly, a broad definition benefits "those law-abiding businesses that comply with the obligations imposed" by state labor laws, "ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices." *Id.* Lastly, the ABC test also benefits "the public at large, because if the wage orders' obligations are not fulfilled, the public often will be left to assume the responsibility of the ill effects to

workers and their families resulting from substandard wages or unhealthy and unsafe working conditions." *Id.* at 953.

Under the ABC test, a worker is considered an employee, rather than an independent contractor, unless the hiring entity establishes: (a) that the worker is "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;" (b) that the worker "performs work that is outside the usual course of the hiring entity's business;" and (c) that the worker is "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *Id.* at 916-17.

B. The California Legislature Enacted AB 5 in September 2019, Codifying the ABC Test.

The Legislature subsequently enacted AB 5, which codified the ABC test and expanded its scope. The Legislature found that "[t]he misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality." (AB 5 § 1(c).) In enacting AB 5, the Legislature intended "to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic

rights and protections they deserve under the law," including a minimum wage, workers' compensation, unemployment insurance, paid sick leave, and paid family leave. (*Id.* § 1(e).)

The Legislature noted that "a 2000 study commissioned by the U.S. Department of Labor found that nationally between 10% and 30% of audited employers misclassified workers," and that a 2017 audit program by the California Employment Development Department that conducted 7,937 audits and investigations "identified nearly *half a million* unreported employees." (Bill Analysis, Assembly Committee on Labor and Employment 7/5/19 at p. 2, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5 [last visited Jan. 24, 2020], emphasis in original.)

By adopting the ABC test, AB 5 "restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law." (AB 5 § 1(e).) AB 5 also extends the scope of the ABC test to contexts beyond those at issue in *Dynamex*, to include (among other things) workers' compensation, unemployment insurance, and disability insurance. Cal. Lab. Code § 2750.3(a)(1); *id.* § 3351(i).

C. Plaintiffs Sued to Enjoin the *Dynamex* Decision, and Subsequently Challenged AB 5.

This case was filed on October 25, 2018. (CD 1, ER 315.) The original complaint challenged the *Dynamex* decision, claiming (as relevant here) that the FAAAA, 49 U.S.C. § 14501, expressly preempts the ABC test and that it violates the dormant Commerce Clause. (CD 1, ER 317-18.) In response to Defendants' motion to dismiss, Plaintiffs amended their complaint. (CD 25.) Defendants again moved to dismiss for failure to state a claim. (CD 28, 29.) On August 5, 2019, the district court stayed the case pending appellate proceedings in a separate unsuccessful challenge to the ABC test, *Western States Trucking Association v. Schoorl*, 377 F. Supp. 3d 1056 (E.D. Cal. 2019) (rejecting trucking association claim that the FAAAA preempted the ABC test). (CD 43, ER 314.)

On September 24, 2019, after the passage of AB 5, and the voluntary dismissal of the appeal in *Western States Trucking Association*, the district court lifted the stay of proceedings, and in view of the enactment of AB 5, dismissed the action, granting Plaintiffs leave to further amend. (CD 46, ER 312.) Plaintiffs did not file their Second Amended Complaint until November 12, 2019. (CD 47, ER 281.) Like the original complaint, the SAC challenged the ABC test under AB 5 as preempted by the FAAAA,

among other claims.[4] (CD. 47, ER 284-85.) Plaintiffs alleged that, after AB 5 codified the ABC test originally adopted in *Dynamex*, its members that use individual owner-operators[5] to provide trucking services "must treat such workers as employees and will be required by law to provide them with all the protections that California law affords to employees." (*Id.* at 283-84 ¶ 6.) Plaintiffs also alleged that it would be "impracticable if not impossible" for motor-carriers[6] to use independent owner-operators and still comply with California's requirements for employees. (*Id.* ER 284 ¶ 7.) As a result, motor carriers will allegedly be discouraged from contracting with owner-operators (like co-Plaintiffs Singh and Odom), which will harm their businesses. (*Id.* ER 284 ¶ 8.) The SAC did not cite any part of *Dynamex* or AB 5 that prohibits motor carriers from employing independent contractors, or that otherwise refers to the prices, routes, or services of motor carriers. (*See generally* CD 47, ER 281-309.)

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[4] The SAC also raised a dormant Commerce Claim, and a preemption claim based on an administrative order issued by the Federal Motor Carrier Safety Administration. (CD 47, ER 305-307.) The district court dismissed these claims on February 10, 2020. (CD 110, ER 32-34.)

[5] The SAC defines "owner-operator" as "individual independent contractors who own and operate their own trucks." (CD 47, ER 283 ¶ 5.)

[6] The SAC does not define "motor carrier." The case law defines this term as "an individual, a partnership, or a corporation engaged in the transportation of goods." *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1049 n.4 (9th Cir. 2009) (citation omitted).

Plaintiffs contend that before *Dynamex* and AB 5, CTA's motor-carrier members contracted with owner-operators as independent contractors and were thus not subject to Wage Order No. 9 (the wage order at issue in *Dynamex*, which sets minimum wages, hours of work, and break requirements for workers in the transportation industry). (CD 47, ER 294 ¶ 43.) According to the SAC, the *Dynamex* decision allegedly prohibits this, through its adoption of the ABC test for classifying workers. (*Id.* ER 294-95 ¶ 46; ER 297 ¶ 52.) Under prong B of this test, an individual is deemed an employee unless the hiring entity establishes, among other things, that the individual "performs work that is outside the usual course of the hiring entity's business." (*Id.* ER 294 ¶ 45.)

The SAC alleged that the ABC test "effectively makes it unlawful" for motor carriers to contract with individual owner-operators to provide trucking services, and "as a practical matter, requires them to use employee drivers." (CD 47, ER 297 ¶ 52.) As a result, *Dynamex* allegedly alters the services that motor carriers provide to their customers because they "will no longer have the ability to provide the diverse and specialized services they were able to provide" before the adoption of the ABC test. (*Id.*) According to Plaintiffs, motor carriers allegedly cannot feasibly acquire the trucks and skilled drivers needed for a given type of job on a short-term basis, and must

choose between not providing certain types of trucking services, or to do so using owner-operators and risk civil and criminal penalties for violations of state labor law. (*Id.*) Plaintiffs also claimed that the application of the ABC test imposes "burdens and constraints on motor carriers far beyond those imposed on the owner-operators," and thus affects motor carriers' ability to provide timely, peak, and specialized services to their customers. (*Id.* ER 298 ¶ 53.)

D. The District Court Granted Plaintiffs' Motion for a Preliminary Injunction, Almost 21 Months After the ABC Test Was Adopted in *Dynamex*.

The district court granted Plaintiffs' preliminary injunction motion on January 16, 2020. (ECF No. 89, ER 1.) The court concluded that Plaintiffs showed a likelihood of success on the merits of their FAAAA preemption claim.[7] Noting that the issue of whether the FAAAA preempts AB 5 and the ABC test is a question of first impression, the court found that "Ninth Circuit jurisprudence touching on the issue strongly suggests preemption." (*Id.* ER 11.) Citing *American Trucking Associations v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009), and *California Trucking Association v. Su*,

[7] The district court did not reach Plaintiffs' alternative Dormant Commerce Clause claim in ruling on the preliminary injunction request. (CD 89, ER 10 n.6.)

903 F.3d 953 (9th Cir. 2018), the district court explained that "an 'all or nothing' rule requiring services be performed by certain types of employee drivers" is likely preempted. (*Id.* ER 12, quoting *Su*, 903 F.3d at 964) The court concluded that the ABC test constitutes this type of rule. (*Id.* ER 13.) According to the district court, "[b]ecause, contrary to Prong B, independent-contractor drivers necessary 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." (*Id.* ER 13-14, emphasis in original.) The district court concluded 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." (*Id.* ER 14, emphasis added.) Without analyzing the effect of this classification, the district court found that the ABC test is preempted by the FAAAA. (*Id.*)

The court found further support for FAAAA preemption in the First Circuit's decision in *Schwann v. FedEx Ground Package System*, 813 F.3d 429 (1st Cir. 2016), and a recent trial court decision in the Los Angeles Superior Court, in *The People of the State of California v. Cal Cartage Transportation Express*, Case No. BC689320 (Los Angeles Superior Court,

Jan. 8, 2020). (CD 89, ER 12-14.) In *Cal Cartage*, the court issued an *in limine* ruling concluding that the FAAAA preempts the ABC test. (CD 89, ER 14.)[8]

The court concluded that this Court's decisions holding that generally applicable labor laws are not preempted were inapposite or otherwise distinguishable. (CD 89, ER 17-18.) The district court explained, "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," and therefore "the combined effect of all such laws has a significant impact on motor carriers' prices, routes, or services." (*Id.* ER 18, emphasis in original.) The court also noted concerns that "effectively prohibiting motor carriers from contracting with independent-contractor drivers . . . would transform California into its own patch in the very 'patchwork' of state-specific laws Congress intended to prevent [in passing the FAAAA]." (*Id.* ER 19.) Further, adopting the reasoning of the *Cal Cartage* decision, the district court concluded that the

[8] The California Court of Appeal is currently considering whether to review the *Cal Cartage* decision. *The People of the State of Cal. v. Super. Ct., Los Angeles Cty., et al.*, No. B304240 (Cal. Ct. App.).

"business-to-business" exception is inapplicable, and therefore does not save AB 5 from preemption. (*Id.*)[9]

The district court also ruled that Plaintiffs met their burden on the remaining preliminary injunction factors. Focusing solely on the time period between the enactment of AB 5 and Plaintiffs' motion for a preliminary injunction, the district court found no undue delay in seeking injunctive relief, and ruled that Plaintiffs have shown a likelihood of irreparable harm because they allegedly face enforcement actions and criminal and civil penalties if they do not transform their business operations. (CD 89, ER 20 & n.12.) The court concluded that Plaintiffs also demonstrated that the balance of equities and the public interest warrants injunctive relief. (*Id.* ER 21.) While acknowledging that Defendants have "legitimate concerns about preventing the misclassification of workers as independent contractors," the court concluded that California has other laws and regulations to prevent this, and noted that the alternative *Borello* test will continue to be used even if an injunction issues. (*Id.*) Lastly, the court found that the public interest

[9] Under California Labor Code section 2750.3(e), the ABC test and the decision in *Dynamex* "do not apply to a bona fide business-to-business contracting relationship," as defined in that section. Because the FAAAA does not preempt the ABC test, the Court need not address whether the business-to-business exception applies here.

weighs in favor of an injunction given "Congress's decision to deregulate the motor carrier industry, and the Constitution's declaration that federal law is to be supreme." (*Id.*, ER 22 (quoting *American Trucking Associations, Inc.*, 559 F.3d at 1059-60).)

Defendants timely appealed.

STANDARD OF REVIEW

This Court reviews the district court's decision granting preliminary injunctive relief for an abuse of discretion. *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015). The underlying legal principles are reviewed de novo. *Id.* "The district court's legal conclusions, such as whether a statute is preempted, are reviewed de novo." *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016). The district court abuses its discretion when it applies the wrong legal standard or bases its decision on factual predicates that are clearly erroneous or legally irrelevant. *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014); *Puente Arizona*, 821 F.3d at 1103.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The movant must demonstrate that it is likely to succeed on the merits of its claims, that it will likely to suffer irreparable harm without preliminary relief, that the balance of equities tips in its favor, and that an injunction is in

the public interest. *Winter*, 555 U.S. at 20; *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

SUMMARY OF ARGUMENT

In enjoining California's application of the ABC test to motor carriers, the district court committed clear legal error. AB 5 and its ABC test are the type of generally applicable background labor regulation that this Court has consistently held is not preempted by the FAAAA. In reaching its conclusion, the district court disregarded case law in this Circuit, relying instead on out-of-circuit precedent at odds with this Court's decisions. This error alone warrants reversal.

To compound this legal error, the court below also erred in assessing the remaining preliminary injunction factors. The court concluded that Plaintiffs had met their burden to establish irreparable harm despite the fact that they waited over 19 months to seek injunctive relief from the ABC test. Further, notwithstanding California's "legitimate concerns about preventing the misclassification of workers," the district court ruled that the balance of equities tips in Plaintiffs' favor, relying on other state laws to address these concerns, despite the conclusion of the Legislature and the California Supreme Court that these other protections are inadequate to address the misclassification problem. Lastly, contrary to the district court's

assessment, the public interest weighs in favor of allowing duly enacted state laws to be implemented, particularly given the weakness of Plaintiffs' legal claims. For these reasons, this Court should vacate the district court's preliminary injunction.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FAAAA PREEMPTION CLAIM.

A. This Court and the California Supreme Court Agree that the FAAAA Does Not Preempt Generally Applicable Labor Regulations.

The FAAAA prohibits a state or its political subdivisions from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). In assessing the FAAAA's pre-emptive scope, courts look to the purpose of the statute. "Concerned that state regulation impeded the free flow of trade, traffic, and transportation of interstate commerce, Congress resolved to displace *certain* aspects of the State regulatory process." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 263 (2013) (internal citation omitted, emphasis in original). Congress specifically targeted "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." *Id.* (internal citation omitted). As the California Supreme Court has noted, "the FAAAA was intended to prevent state regulatory practices including 'entry controls, tariff filing and price regulation, and [regulation of] types of commodities carried." *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal. 4th 772, 779-80 (Cal. 2014) (citing legislative history).

Although the statutory phrase "related to" encompasses state laws "having a connection with or reference to carrier rates, routes, or services, whether directly or indirectly," this statutory language should not be read "with an uncritical literalism." *Dan's City Used Cars, Inc.*, 569 U.S. at 260 (internal citation and quotation marks omitted). "The breadth of the words 'related to' does not mean the sky is the limit." *Id.* Thus, "§ 14501(c)(1) does not preempt state laws affecting carrier prices, routes, and services 'in only a tenuous, remote, or peripheral . . . manner.'" *Id.* at 261 (citing *Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. 364, 371 (2008)).

This Court has specifically held that state labor regulations of general application are not preempted by the FAAAA. In *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), this Court rejected the claim that the FAAAA preempted

California's Prevailing Wage Law, which requires that companies awarded public works contracts pay their workers at least the prevailing wages in the given locality.[10] The court noted that to the extent that the prevailing wage law could potentially impact the plaintiff's costs of labor, performance factors, and working conditions, these effects were "no more than indirect, remote and tenuous," and did not establish preemption. *Id.* at 1189. This was so despite the plaintiff's claim that complying with the Prevailing Wage Law would increase its prices 25%. *Id.*

Similarly, in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), this Court held that the FAAAA does not preempt California's meal and rest break laws. "The sorts of laws that Congress considered when enacting the FAAAA included barriers to entry, tariffs, price regulations, and laws governing the types of commodities that a carrier could transport." *Id.* at 644. "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services." *Id.* Thus, while "laws are more likely to be preempted when they operate at the point where carriers provide

[10] The prevailing wage includes a worker's basic hourly rate and any required employer payments for various benefits. *See* Cal. Lab. Code §§ 1770, 1773, 1773.1.

services to customers at specific prices," a state's "generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted." *Id.* at 646.

This Court recently reaffirmed this line of cases in *Ridgeway v. Walmart, Inc.*, 946 F.3d 1066 (9th Cir. 2020). Wal-Mart argued that the FAAAA preempts a law regarding minimum wages for layovers in California. *Id.* at 1083. This court rejected that argument, holding there was no preemption because "California laws governing layovers 'do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly.'" *Id.* (quoting *Dilts*, 769 F.3d at 647). Ultimately, "California's meal and rest break laws plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt." *Id.* at 647; *see also Cal. Trucking Ass'n v. Su*, 903 F.3d 953 (9th Cir. 2018) (pre-*Dynamex*, holding that California's common-law *Borello* test to classify employees is not preempted).

The California Supreme Court has likewise rejected the argument that the FAAAA preempts state regulation of employment conditions.[11] In *People ex rel Harris v. Pac Anchor Transportation, Inc.*, 59 Cal. 4th 772 (Cal. 2014), California sued a trucking company for unfair business practices, based in part on alleged violations of state employment laws, including Order No. 9. *Id.* at 776. The California Supreme Court rejected the defendants' argument that the state law claims were preempted by the FAAAA. *Id.* at 784. "[T]he FAAAA embodies Congress's concerns about regulation of motor carriers with respect to the transportation of property; a UCL [unfair competition law] action that is based on an alleged general violation of labor and employment laws does not implicate those concerns." *Id.* at 783. In this regard, the challenged state laws "make no reference to motor carriers, or the transportation of property," but instead "are laws that regulate employer practices *in all fields* and simply require motor carriers to comply with labor laws that apply to the classification of their employees." *Id.* at 785.[12] Notably, this Court has adopted the interpretation of FAAAA

[11] State courts have jurisdiction to decide federal preemption issues. *See, e.g., Mack v. Kuckenmeister*, 619 F.3d 1010, 1021 (9th Cir. 2010) (addressing ERISA preemption).

[12] The United States Supreme Court denied certiorari. *Pac Anchor Transport., Inc. v. Calif., ex rel. Harris*, 135 S. Ct. 1400 (2015).

preemption the California Supreme Court took in *Pac Anchor Transportation*. *Su*, 903 F.3d at 967 (noting that the decision in *Su* "brings us in accord with the California Supreme Court – and, as that court discussed, Congress' intent for the FAAAA's preemptive reach") (citing *Pac Anchor*).

B. The District Court Erroneously Concluded that the ABC Test Is Preempted by the FAAAA.

While acknowledging the case law discussed above, the district court nevertheless concluded that "Ninth Circuit jurisprudence touching on the issue strongly suggests preemption." (CD 89, ER 11.) The district court concluded that this Court's decisions in *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009), and *California Trucking Association v. Su*, 903 F.3d 953 (9th Cir. 2018), pointed towards preemption here. This was legal error.

The district court's conclusion rested on the premise that "Prong B of the ABC test requires motor carriers to artificially reclassify all independent-contractor drivers as employee-drivers for all purposes" under California law. (CD 89, ER 13-14.) But the Plaintiffs did not cite any language in AB 5 prohibiting the use of independent contractors, or, mandating the use of employees, for any business or hiring entity. AB 5 codifies the ABC test,

and states a rebuttable presumption that a worker is an employee. Cal. Lab. Code § 2750.3(a)(1) ("A person providing labor or services for remuneration shall be considered an employee rather than independent contractor *unless the hiring entity demonstrates*" certain conditions) (emphasis added); *see Schoorl*, 377 F. Supp. 3d at 1072 (pre-AB 5, rejecting FAAAA preemption challenge to the ABC test because "[n]othing in either *Dynamex* or Wage Order No. 9 precludes a motor carrier from hiring an independent contractor for individual jobs or assignments").

By contrast, the two decisions the district court relied on are distinguishable and demonstrate what constitutes the type of rule preempted by the FAAAA. *American Trucking Associations* involved regulation specifically directed at motor carriers and that expressly "mandate[d] the phasing out of thousands of independent contractors," the hiring of certain types of drivers, and other detailed requirements in order for motor carriers to provide drayage services at the Ports of Los Angeles and Long Beach. 559 F.3d at 1050, 1055. This Court noted that the challenged provisions involved "an extensive attempt to reshape and control the economics of the drayage industry in one of the largest ports in the nation." *Id.* Given the specific targeting of motor carriers and the extensive regulation entailed, the question of whether that regulation had the requisite significant effect to

warrant preemption was not on appeal. *Id.* at 1051 (noting that the district court's conclusion that the plaintiff "could likely demonstrate that the Concession agreements 'related to a price, route, or service' of motor carriers and thus, unless saved by an exception, were preempted" was not on appeal). Rather, the only question on appeal was whether the regulation fit within the provision saving safety regulations from preemption. *Id.* Given that question, the Court determined that a provision was "[r]equiring that all drivers be employees" did not fit within the safety exemption and, therefore, "the independent contractor phase-out provision is one highly likely to be shown to be preempted." *Id.* at 1056.

In *Su*, the Court rejected a challenge to the *Borello* test, noting that "the *Borello* standard does not compel the use of employees or independent contractors." 903 F.3d at 964.[13] *Su* contrasted the broadly-applicable *Borello* test with the local directive targeting motor carriers at issue in *American Trucking Associations*, which *explicitly mandated* that carriers use only employee drivers *and* give hiring preference to drivers with more

[13] Contrary to the district court's decision, *Su* did not determine that the FAAAA preempts a law that compels use of employees. Instead, as noted above, the Court there simply rejected CTA's contention that the *Borello* test had any such compulsion. *Su*, 903 F.3d at 964. Given this, *Su*'s discussion of what is an "all-or-nothing" rule and the ABC test is preempted by the FAAAA is dicta.

experience. As this Court pointed out in *Su*, "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." 903 F.3d at 964 (emphasis added). That rationale is inapplicable to AB 5 and the ABC test, which like the *Borello* test is a law that generally applies to all employers (except as specifically exempted) within the state, does not require the use of certain employees, and which, like the *Borello* test, "does not, by its terms, compel a carrier to use an employee or an independent contractor." *Id.* If the FAAAA does not preempt classification as an employee under the *Borello* test of a driver working for a motor carrier, the FAAAA should not preempt the same driver from also being classified as an employee under the ABC test. No court has held that the possibility that more workers may be properly classified as employees under the ABC test than under *Borello* (or any other test) is relevant in any way to the preemption analysis. *See Bedoya v. American Eagle Express Inc.*, 914 F.3d 812, 820-23 (3rd Cir 2019) (collecting cases and analyses).

Indeed, all *Borello* and the ABC test do is define the test used to determine whether the label of independent contractor or employee applies to a worker. Neither test—on its own—defines the rights or benefits that a

motor carrier must provide its drivers. Given this, not surprisingly, the district court's decision offers no substantive analysis on what impact labeling motor carriers' drivers to be "employees" will have on prices, routes, and services. Instead, the decision offers only a general observation that AB 5 applies to all of California's employment laws. (CD 89, ER 17-18.) Such an observation, devoid of any analysis of what those laws require, falls well short of answering the question of whether AB 5 has the required significant effect on a motor carrier's prices, routes, and services to warrant preemption. *See Dilts*, 769 F.3d at 648-650 (rejecting preemption notwithstanding plaintiffs' proffered effects on services and routes); *Mendonca*, 152 F.3d at 1189 (rejecting preemption notwithstanding plaintiff's contention that 25% increase in prices); *Su*, 903 F.3d at 961. As *Dilts* observed, although a motor carrier may need to consider various state laws when "allocating resources and scheduling routes," those laws are not preempted if they "do not 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; *see also Ridgeway*, 946 F.3d at 1083 (same); *Su*, 903 F.3d at 961 (the FAAAA does not preempt a law "when the law is a generally applicable background regulation in an area of traditional

state power that has no significant impact on a carrier's prices, routes, or services").

In concluding that Plaintiffs showed a likelihood of success on their preemption claim, the district court also improperly shifted the burden, requiring Defendants "to explain how a motor carrier could contract with an independent owner-operator as an independent contractor." (CD 89, ER 14 n.9.) But, as explained above, this is not the inquiry and, even if it were, it improperly places the burden on Defendants to disprove preemption. As the proponent of preemption, *Plaintiffs* must demonstrate that the ABC test has the type of prohibited impact on the prices, routes, or services of a motor carrier. *Stengel v. Medtronic, Inc.*, 704 F.3d 1224, 1227 (9th Cir. 2013) ("Parties seeking to invalidate a state law based on preemption bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law.") (citation omitted). This burden should be all the heavier here because Plaintiffs sought the extraordinary remedy of a preliminary injunction.[14] *Garcia v. Google, Inc.*, 786 F.3d 733,

[14] *Cf. Su*, 903 F.3d at 965 ("There is no allegation that if a current driver is found to be an employee, CTA's members will no longer be able to provide the service it was once providing through that driver, or that the route or price of that service will be compelled to change. At most, carriers will face modest increases in business costs, or will have to take

740 (9th Cir. 2015) (en banc) ("The Supreme Court has emphasized that preliminary injunctions are an 'extraordinary remedy never awarded as of right.'") (citation omitted); *Western Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 441 (1974) ("[T]he party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief"). At the district court, the proper inquiry should have been whether Plaintiffs established that the ABC test significantly affects the prices, routes, or services of motor carriers. They did not.

C. The District Court Improperly Relied on an Unpublished California Trial Court Decision and Non-Binding Out-of-Circuit Authority at Odds With Ninth Circuit Case Law.

In concluding that the ABC test "requires motor carriers to artificially reclassify all independent-contractor drivers as employee drivers," the district court relied in part on the trial court's *in limine* ruling in *People v. Cal Cartage Transportation Express*, No. BC 689320 (Los Angeles Sup. Ct., Jan. 8, 2020), which concluded that the B prong of the ABC test under *Dynamex* and AB 5 is preempted by the FAAAA. (ECF No. 89, ER 13-15.) That conclusion is contrary to Ninth Circuit case law discussed above. The

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the *Borello* standard and its impact on labor laws into account when arranging operations.").

district court (and the *Cal Cartage* decision) also improperly relied on out of circuit authority.

For example, the district court cited as "persuasive" the decision in *Schwann v. FedEx Ground Package System*, 813 F.3d 429 (1st Cir. 2016). (ECF No. 89 at 12-13.)[15] *Schwann* held that a Massachusetts statute that is substantially the same as the ABC test adopted in *Dynamex* was preempted by the FAAAA as applied to a motor carrier that used independent contractors for the actual pick-up and delivery services for customers. 813 F.3d at 437; *see also Mass. Delivery Ass'n v. Healey*, 821 F.3d 187 (1st Cir. 2016) (applying *Schwann* to hold statute preempted). *Schwann* largely hinged on First Circuit precedent that is inapplicable in this Circuit. 813 F.3d at 439-440 (noting that the ABC test "exceed[s] the interference found excessive in *DiFiore* [*v. American Airlines*, 646 F.3d 81 (1st Cir. 2011)], where the necessity of a solution . . . . highlighted how the state tips law 'require[d] changes in the way the service is provided."). As a district court in the First Circuit has pointed out, precedent in that jurisdiction has rejected "a categorical rule that the FAAAA does not preempt generally applicable

[15] The district court also cited *Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812 (3d Cir. 2019), which held that another iteration of the ABC test is *not* preempted by the FAAAA. (CD 89, ER 12-13.)

state employment laws." *DaSilva v. Border Transfer of MA, Inc.*, 227 F. Supp. 3d 154, 158 (D. Mass. 2017). Likewise, *Schwann* "suggested that state laws that are anomalous relative to laws of other states would logically have a greater effect on prices, routes, and services." *Id.* at 159. This Court has rejected that proposition. *Dilts*, 769 F.3d at 647 ("The fact that laws may differ from state to state is not, on its own, cause for FAAAA preemption.") And, as explained above, this Circuit has repeatedly held that California's generally applicable labor laws are not preempted, even if they add to the cost of doing business or cause carriers to reconfigure routes and raise expenses. *Dilts*, 769 F.3d at 647; *Mendonca*, 152 F.3d at 1189.

For this reason, courts in this circuit have rejected the *Schwann* approach. In another trucking association challenge to the ABC test under *Dynamex*, the district court concluded that "*Schwann* is contrary to the Ninth Circuit's FAAAA preemption decisions in *Dilts* and *Mendonca*." *Western States Trucking Ass'n*, 377 F. Supp. 3d at 1072 n.5; *see also Phillips v. Roadrunner Intermodal Serv.*, No. 16-cv-01072-SVW, 2016 WL 9185401, at *7 (C.D. Cal. Aug. 16, 2016) ("[T]he unique facts in the First Circuit cases combined with current Ninth Circuit jurisprudence sufficiently distinguish this case from the First Circuit's"); *contra B & O Logistics, Inc. v. Cho*, No. CV 18-5400 DMG, 2019 WL 2879876, at **2-4 (C.D. Cal.

April 15, 2019). The district court improperly relied on law contrary to the law applicable in this Circuit.

As noted above, the court below also relied in part on dicta in *California Trucking Association v. Su*, 903 F.3d 953 (9th Cir. 2018). (CD 89, ER 14-15.) As explained above, the issue in that case was "whether the [FAAAA] preempts the California Labor Commissioner's use of a common law test, often referred to as the *Borello* standard." *Id.* at 957. As the appellate record there demonstrates, the briefing did not address or discuss the ABC test, since the *Dynamex* decision postdated briefing and oral argument. And this Court explicitly disavowed a ruling on this point: "As previously discussed, we need not and do not decide whether the FAAAA would preempt using the 'ABC' test to enforce labor protections under California law." 903 F.3d at 964 n.9.[16]

[16] While some district court decisions have reasoned that *Su* does not dictate a preemption finding in similar circumstances, others have concluded otherwise. *Compare Western States Trucking Ass'n*, 377 F. Supp. 3d at 1017-72; *see also B & O Logistics, Inc. v. Cho*, No. CV 18-5400 DMG, 2019 WL 2879876, at *3 (C.D. Cal. April 15, 2019) ("*Su* did not squarely address the viability of the B prong"), *with Valadez v. CSX Intermodal Terminals, Inc.*, No. 15-cv-05433-EDL, 2019 WL 1975460, at **8-9 (N.D. Cal. March 15, 2019); *see also Alvarez v. XPO Logistics Cartage LLC*, No. CV 18-03736-SJO, 2018 WL 6271965, at *5 (C.D. Cal. Nov. 15, 2018). What is clear is a difference of opinion, not amounting to a likelihood of success sufficient to support a preliminary injunction.

II. PLAINTIFFS' DELAY IN SEEKING PRELIMINARY RELIEF UNDERMINES THEIR CLAIMS OF IRREPARABLE HARM.

In enjoining application of AB 5 to motor carriers, the district court also erred in disregarding Plaintiffs' long and unexplained delay in seeking injunctive relief. This error also warrants reversal.

Plaintiffs argued that both owner-operators and motor carriers will be harmed absent injunctive relief. (CD 54-1, ER 265-266.) But these allegations are undermined by Plaintiffs' 19-month delay in seeking relief from enforcement of the ABC test. Plaintiffs became subject to the ABC test for classification in 2018 with *Dynamex*. 4 Cal. 5th at 903. Plaintiffs waited until December 2, 2019, less than one month before AB 5 was scheduled to go into effect, before seeking preliminary injunctive relief. (CD 54, ER 234.) Plaintiffs' effort to explain this undue delay by noting that Defendants had moved to dismiss and that the district court had stayed the matter during part of this period is unavailing. (CD 73, ER 116.) Nothing prevented Plaintiffs from seeking injunctive relief during this period of time, particularly if they in fact faced irreparable harm absent such relief.

This Court has pointed out that a plaintiff's "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Miller for and on behalf of N.L.R.B. v. Cal. Pac. Medic. Ctr.*, 991 F.2d 536,

544 (9th Cir. 1993) (citation omitted); *Garcia*, 786 F.3d at 746. Other courts are in accord. *See, e.g.*, *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1091 n.27 (3d Cir. 1984) ("[T]he district court may legitimately think it suspicious that the party who asks to preserve the status quo through interim injunctive relief has allowed the status quo to change through unexplained delay."). Thus, "[a]bsent a good explanation . . . 17 months is a substantial period of delay that militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief." *High Tech Medic. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995). Courts in this Circuit have found unexplained delays of three to four months in seeking injunctive relief supported a finding of lack of irreparable harm. *Metromedia Broad. Corp. v. MGM/UA Entm't Co, Inc.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985) (concluding that four month delay warranted denying injunctive relief); *Kiva Health Brands LLC v. Kiva Brands Inc.*, 402 F. Supp.3d 877, 898-99 (N.D. Cal. 2019).

Plaintiffs' argument that AB 5 imposes added burdens above and beyond those imposed by *Dynamex*, (CD 73, ER 116), is unpersuasive. The FAC and SAC make substantially the same allegations and claims challenging the ABC test. For example, Plaintiffs' original Complaint

alleges that, after *Dynamex*, "[i]t would be impracticable if not impossible for CTA's motor-carrier members to contract with owner-operators as employees entitled to protections of Wage Order No. 9." (CD 1, ER 317 ¶ 4.) The SAC likewise alleges, after AB 5, that "it would be impracticable if not impossible for CTA's motor-carrier members to provide interstate trucking services by contracting with independent owner-operators and to simultaneously comply with California's onerous requirements for employees." (CD 47, ER 284 ¶ 7.) Both iterations of the complaint allege that the FAAAA preempts the ABC test because that test is a "*de facto* prohibition on motor carriers using individual owner-operators to perform trucking services in California [that] directly impacts the services, routes, and prices" offered by Plaintiffs. (*Compare* CD 1, ER 317 ¶ 5, *with* CD 47, ER 284-285 ¶ 9.) The district court glossed over this 19-month delay, instead focusing on the time period between the passage of AB 5 and Plaintiffs' preliminary injunction motion. (CD 89, ER 20 n.12.) Where a district court's analysis of irreparable harm is premised on illogical or unsupported factual findings, the district court abuses its discretion. *Arc of Cal. v. Douglas*, 757 F.3d 975, 984 (9th Cir. 2014).

This error warrants reversal.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH AGAINST ENJOINING AB 5.

Additionally, the district court erred in assessing the balance of equities and the public interest in its injunction order. (CD 89, ER 21-22.)

Where, as here, the government is a party, the final two preliminary injunction factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Here, Defendants are suffering irreparable injury as a result of the district court's injunction. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, ___, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.").

The district court concluded that Plaintiffs will suffer harm without an injunction because they will have to contend with AB 5's application and enforcement against them. (CD 89, ER 21.) But that argument presupposes that Plaintiffs' substantive claims will prevail, which is undermined by the case law discussed above, and the fact that similar preemption challenges have been rejected by other district courts in this Circuit. *Western States*

Trucking Ass'n, 377 F. Supp. 3d at 1074 (rejecting FAAAA preemption challenge to ABC test under *Dynamex*); *Henry v. Central Freight Lines, Inc.*, No. 2:16-cv-00280-JAM-EFB, 2019 WL 2465330, at *7 (concluding that the ABC test under *Dynamex* is not preempted by the FAAAA).

The court below acknowledged the State's paramount interests in "preventing the misclassification of workers as independent contractors," (CD 89, ER 21), but gave this concern short shrift because "California still maintains numerous laws and regulations designed to protect workers classified as employees," noting that the *Borello* standard "will continue as the applicable classification test." (*Id.*, citing Cal. Lab. Code § 2750.3(a)(3).) This conclusion overlooks the fact that both the California Supreme Court and the California Legislature concluded that the *Borello* standard was not adequately protecting against employee misclassification. *Dynamex*, 4 Cal. 5th at 955 ("[T]he use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities . . . "). The trial court's injunction further delays the State's ability to effectively address the misclassification of workers and the public consequences of such misclassification, which the Legislature concluded warranted remediation. (AB 5 § 1(c).) These

paramount state interests outweigh Plaintiffs' interests in delaying complying with the law.

The district court erred as well in assessing the public interest. (CD 89, ER 22.) "In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). The public interest is involved when an injunction impacts individuals beyond the parties. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). The Legislature concluded that misclassification of workers as independent contractors has harmed workers, and has contributed to the shrinking of the middle class, and to that end enacted the protections of AB 5. (AB 5 § 1(c) & (e).) Given that AB 5 was enacted after a full legislative process, including discussion about its impact and the necessity for it, and negotiation with various stakeholders including industry, labor, and others, the public

interest weighs against a preliminary injunction.[17] Although the district court recognized California's interests in protecting misclassified workers, it erroneously concluded that this interest is outweighed by Congress' decision to deregulate the motor carrier industry. (CD 89, ER 22.) Since, as explained above, AB 5 is not preempted, congressional policy is not at issue here.

As noted above, courts hold that states suffer harm when enforcement of their laws is enjoined. *Maryland v. King*, 567 U.S. 1301, ___, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). Where, as here, "responsible public officials" have considered the public interest and enacted a statute, the public interest weighs against enjoining such legislation. *Golden Gate Restaurant Ass'n*, 512 F.3d at 1126-27. "[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943).

[17] Notably, in another challenge to AB 5, the district court recently denied the Plaintiffs' motion for a preliminary injunction, concluding that the important state interests reflected in this legislation outweighed Plaintiffs' claims of harm. *Olson v. State of Calif.*, No. 19-cv-10956-DMG, 2020 WL 905572, at ** 15-16 (C.D. Cal. Feb. 10, 2020).

CONCLUSION

For these reasons, this Court should reverse the district court's order granting Plaintiffs' motion for a preliminary injunction.

Dated: March 11, 2020

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA TRUCKING ASSOCIATION; ET AL.,

Plaintiffs-Appellees,

v.

ATTORNEY GENERAL XAVIER BECERRA; ET AL.,

Defendants-Appellants.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: March 11, 2020

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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