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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYDIA OLSON; MIGUEL PEREZ; POSTMATES, INC., (Successor Postmates LLC); UBER TECHNOLOGIES, INC., *Plaintiffs-Appellants*, v. STATE OF CALIFORNIA; ROB BONTA, in his capacity as Attorney General of the State of California, *Defendants-Appellees*.	No. 21-55757 D.C. No. 2:19-cv-10956-DMG-RAO OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding.

Argued and Submitted En Banc March 20, 2024
San Francisco, California

Filed June 10, 2024

Before: Mary H. Murguia, Chief Judge, and Ronald M. Gould, Jacqueline H. Nguyen, Mark J. Bennett, Bridget S. Bade, Kenneth K. Lee, Gabriel P. Sanchez, Holly A. Thomas, Salvador Mendoza, Jr., Roopali H. Desai and Anthony D. Johnstone, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

Equal Protection/California Assembly Bill 5

In an action brought by Postmates, Inc., Uber Technologies, Inc., and two individuals challenging the constitutionality of California Assembly Bill 5, enacted by the California legislature to address a systemic problem of businesses improperly characterizing their workers as independent contractors to avoid fiscal responsibilities owed to employees, the en banc court affirmed the district court's dismissal of plaintiffs' state and federal Equal Protection claims and its denial of preliminary injunctive relief.

A.B. 5 does not directly classify any particular workers as employees or independent contractors. Rather, under A.B. 5, as amended, arrangements between workers and referral agencies that provide delivery or transportation services are automatically subject to the ABC test adopted by the California Supreme Court in *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018), while arrangements between workers and referral agencies that provide other types of services, such as dog walking or handyman services, are subject to the multifactor test set forth in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 769 P.2d 399 (Cal. 1989), provided certain statutorily defined criteria are met.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Under the deferential rational basis standard, the en banc court concluded that there were plausible reasons for treating transportation and delivery referral companies differently from other types of referral companies, particularly where the legislature perceived transportation and delivery companies as the most significant perpetrators of the problem it sought to address—worker misclassification. That A.B. 5 may be underinclusive because it does not extend the ABC test to every industry and occupation that has historically contributed to California's misclassification woes does not render it unconstitutionally irrational.

The en banc court did not disturb the prior panel's disposition of plaintiffs' Due Process, Contract Clause, and Bill of Attainder claims. Accordingly, the en banc court reinstated Parts III.B, III.C, and III.D of *Olson v. California*, 62 F.4th 1206, 1220–23 (9th Cir. 2023).

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OPINION

NGUYEN, Circuit Judge:

Drawing the line between "employee" and "independent contractor" is a difficult task, with significant consequences for workers and businesses, that has long vexed courts and lawmakers across the country. California is no exception.

In an effort to address what it perceived as a systemic problem of misclassification—that is, businesses improperly characterizing their workers as independent contractors to avoid fiscal responsibilities owed to employees—the California legislature enacted Assembly Bill 5. *See* Act of Sept. 18, 2019, ch. 296, 2019 Cal. Stat. 2888 (A.B. 5). A.B. 5 does not directly classify any particular workers as employees or independent contractors. Rather, A.B. 5 provides that workers in certain industries who meet specific criteria will be subject to one test to ensure proper classification, while others will be subject to another such test. It is an elaborate statutory scheme providing various conditions, exemptions, and exclusions from exemptions that, taken together, reflect the California legislature's judgment as to how the fraught task of classifying workers as employees or independent contractors is best performed.

We must decide whether A.B. 5's differential treatment of app-based work arrangements in the transportation and delivery service industry, on the one hand, and app-based work arrangements in other industries, on the other hand, survives rational basis review. In other words, we must determine whether it was rational for the California legislature to apply one test to determine the classification of Uber drivers and a different test to determine the classification of

dogwalkers who provide services through Wag!, the "Uber for dogs."

Under the deferential rational basis standard, we approach A.B. 5 with "a strong presumption of validity," and we will invalidate it only if Plaintiffs negate "every conceivable basis" which might justify the lines it draws. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993). Plaintiffs have failed to carry that burden here. There are plausible reasons for treating transportation and delivery referral companies differently from other types of referral companies, particularly where the legislature perceived transportation and delivery companies as the most significant perpetrators of the problem it sought to address—worker misclassification.

We therefore affirm the district court's orders granting Defendants' motion to dismiss and denying Plaintiffs' motion for a preliminary injunction.

I.

We begin with an overview of how California courts have historically grappled with the issue of worker classification before turning to the legislature's enactment of A.B. 5 and the procedural history of the present case.

A.

Throughout much of the 20th century, California courts classifying workers as "employees" or "independent contractors" under various state employment laws applied the common law "control of details" test. *See S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 769 P.2d 399, 403–04 (Cal. 1989). Under this test, the primary question was "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *Id.*

at 404 (quoting *Tieberg v. Unemp. Ins. Appeals Bd.*, 471 P.2d 975, 977 (Cal. 1970)).

But in *Borello*, the California Supreme Court "recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements." *Id.* While emphasizing that the "right to control the manner and means of accomplishing the result desired" remained the primary consideration, the *Borello* court identified several other non-exhaustive, secondary factors that it deemed "logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." *Id.* at 404, 407. Those factors, which were drawn from the Restatement Second of Agency and case law from other jurisdictions, include the right to discharge at will, whether the worker is engaged in a distinct occupation or business, the skills required in the particular occupation, whether the worker supplies her own tools, the length or degree of permanence of the working relationship, and whether or not the work is an integral part of the regular business of the hiring principal. *Id*. The *Borello* court held that when determining whether a worker is an employee or an independent contractor, courts must balance these factors and evaluate service arrangements based on their specific facts. *Id.* at 407.

For nearly three decades, California courts followed *Borello* and applied the multifactor balancing test to classify workers as employees or independent contractors. That changed in 2018, when the California Supreme Court held that a different test applied to determine "whether workers should be classified as employees or as independent contractors *for purposes*

of California wage orders" issued by the state Industrial Welfare Commission. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 5 (Cal. 2018). Recognizing that the proper classification of a worker "has considerable significance for workers, businesses, and the public generally," and acknowledging the "significant" risk of workers being misclassified by businesses seeking to avoid fiscal obligations owed to employees, the *Dynamex* court adopted the "ABC test" to determine whether a worker is subject to California wage orders. *Id.* at 4–5, 7.

> Under the ABC test,
>
> > a worker is properly considered an independent contractor to whom a wage order does not apply only if 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 7.

The ABC test places the burden on the hiring entity to establish that a worker is an independent contractor, and the hiring entity's failure to establish any one of the ABC factors "will be sufficient in itself to establish that the worker is an . . . employee" included in the wage order. *Id.* at 40. The *Dynamex* court opined that the ABC test "provide[s] greater clarity

and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis." *Id.* It also noted that the ABC test adequately accounts for the "traditional independent contractor who has never been viewed as an employee of a hiring business and should not be interpreted to do so." *Id.* at 40 n.32. The *Dynamex* decision left the *Borello* test in place for purposes of classifying workers under labor and employment laws other than wage orders. *Id.* at 29.

B.

The legislature was quick to embrace the California Supreme Court's ruling in *Dynamex*. Concerned with the widespread misclassification of workers, the legislature enacted A.B. 5 in 2019. A.B. 5 codified the California Supreme Court's *Dynamex* decision and extended the application of the ABC test beyond wage orders to other labor and employment legislation, including workers' compensation, unemployment insurance, and disability insurance. A.B. 5 § 2. The legislature's stated intent in enacting A.B. 5 was "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," and to restore these important rights and protections, "including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave," to "potentially several million workers." A.B. 5 § 1(e).

While A.B. 5 expanded the reach of the ABC test beyond wage orders, it also exempted certain occupations from the application of that test, including, for example, physicians, certain licensed professionals,

and commercial fishermen. *See* A.B. 5 § 2. Under A.B. 5, the *Borello* test continues to apply to determine the employee or independent contractor status of individuals engaged in those professions. *Id.* A.B. 5 also included an exemption for referral agencies, or "business[es] that provide[] clients with referrals for service providers to provide services." Cal. Lab. Code § 2777(b)(C). A.B. 5 provides that the *Borello* test, rather than ABC test, applies to the relationship between a referral agency and a service provider *if* certain statutorily defined criteria are met.[1] In deciding which occupations and service relationships may be exempt from automatic application of the ABC test, "California weighed several factors: the workers' historical treatment as employees or independent contractors, the centrality of their task to the hirer's business, their market strength and ability to set their own rates, and the relationship between them and their clients." *Am. Socy' of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 965 (9th Cir. 2021) (citing Cal. Bill Analysis, A.B. 5 (July 10, 2019)).

One year later, the legislature amended A.B. 5 with additional exemptions to the ABC test for

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[1] A.B. 5 states that "the determination whether the service provider is an employee of the referral agency shall be governed by Borello, if the referral agency demonstrates that" each of the enumerated conditions are satisfied. A.B. 5 § 2. Those conditions include showing the worker is free from the control of the agency, that the worker provides their own tools and supplies, that the worker is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client, and that the worker is free to set their own rates, hours, and terms of work. *Id.* These factors reflect similar considerations as those articulated in *Borello*. *Compare* Cal. Lab. Code § 2777(a) (listing conditions), *with Borello*, 769 P.2d at 404 (listing factors).

various professions and occupations, such as certain musical recording professionals, live performers, insurance underwriters, and real estate appraisers. *See* Act of Sept. 4, 2020, ch. 38, 2020 Cal. Stat. 1836 (A.B. 2257).[2] At the same time that A.B. 2257 added these exemptions, it also revised the applicable definition of "referral agencies" to expressly exclude ten enumerated types of services, including "businesses that provide . . . delivery, courier, [and] transportation . . . services." Cal. Lab. Code § 2777(b)(2)(C). In other words, under A.B. 5 as amended, arrangements between workers and referral agencies that provide delivery or transportation services are automatically subject to the ABC test, while arrangements between workers and referral agencies that provide other types of services, such as dog walking or handyman services, are subject to the multifactor *Borello* test—provided the hiring referral agency can show that the eleven statutory criteria described in California Labor Code section 2777(a) are satisfied.

It is this differential treatment that Plaintiffs challenge in this action.

C.

Plaintiff Postmates, Inc. (Postmates) is a network company that provides and maintains an online marketplace and mobile platform that connects local merchants, consumers, and drivers to facilitate the purchase and delivery of goods from merchants—often restaurants. When consumers place orders through the Postmates app, nearby drivers can elect to pick up

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[2] The legislature also amended A.B. 5 to add an exemption to the ABC test for certain newspaper distributors and carriers. *See* Act of Oct. 2, 2019, ch. 415, § 1, 2019 Cal. Stat. 3747, 3750.

the order from a local merchant and complete the requested delivery.

Plaintiff Uber Technologies, Inc. (Uber) is also a network company that operates app-based platforms that connect individual consumers with providers. Uber offers the UberEats, Uber Rides, and Uber Driver mobile platforms. The UberEats app, like the Postmates app, connects merchants, consumers, and drivers to facilitate the delivery of food orders. The Uber Rides app allows riders to connect with available drivers based on their location. The Uber Driver app connects app-based drivers to those requesting rides.

Plaintiff Lydia Olson uses the Uber Driver mobile platform to connect with riders in need of transportation. Plaintiff Miguel Perez uses the Postmates app to accept and complete deliveries of food orders.

D.

On December 30, 2019, Olson, Perez, Uber, and Postmates (collectively Plaintiffs) jointly filed a complaint against the State of California and the Attorney General of California (collectively Defendants) seeking declaratory, injunctive, and other relief based on their allegations that A.B. 5 violates the Equal Protection Clauses, the Due Process Clauses, and the Contract Clauses of the United States and California Constitutions. They sought a preliminary injunction to prevent Defendants from enforcing A.B. 5.

The district court denied Plaintiffs' motion for preliminary injunctive relief. *See Olson v. California*, No. CV 19-10956-DMG (RAOx), 2020 WL 905572 (C.D. Cal. Feb. 10, 2020). Evaluating the factors set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), the district court first determined that Plaintiffs were unlikely to succeed on the

merits of their claims. 2020 WL 905572, at *5. It determined that A.B. 5 was rationally related to a legitimate state interest and did not unconstitutionally target gig economy companies. *Id.* at *6. The district court rejected Plaintiffs' claims that A.B. 5's many exemptions undermined its stated purpose of protecting workers because the exemptions aligned with "traditional distinctions between independent contractors and employees." *Id.* at *8. The district court also determined that A.B. 5 did not deprive gig workers of the right to pursue a career in violation of due process, *id.* at *10, nor did A.B. 5 unconstitutionally impair Plaintiffs' contracts, *id.* at *11. Turning to the other *Winter* factors, the district court deemed Plaintiffs' alleged harm "speculative" and found that the balance of equities and public interest weighed against issuing injunctive relief. *Id.* at *14–16. The district court later dismissed Plaintiffs' First Amended Complaint. *See Olson v. California*, No. CV 19-10956-DMG (RAOx), 2020 WL 6439166, at *12 (C.D. Cal. Sept. 18, 2020).

Plaintiffs appealed the district court's denial of the preliminary injunction. In November 2020, shortly before we heard argument in that appeal, California voters approved Proposition 22 (Prop. 22), a ballot initiative that classifies rideshare and delivery drivers—like Plaintiffs Olson and Perez—as independent contractors, notwithstanding A.B. 5 or any other provision of law. *See* Cal. Bus. & Prof. Code § 7451. Prop. 22 took effect on December 16, 2020, in accordance with the default rule provided by the California Constitution. *See* Cal. Const. art. II, § 10(a).

After Prop. 22 passed, but before we issued a decision in the appeal of the preliminary injunction, Plaintiffs filed the operative Second Amended

Complaint.[3] Defendants moved to dismiss the Second Amended Complaint for failure to state a claim. The district court granted the motion. *Olson v. Bonta*, No. CV 19-10956-DMG (RAOx), 2021 WL 3474015 (C.D. Cal. July 16, 2021). It incorporated by reference its previous order dismissing Plaintiffs' claims as pled in the First Amended Complaint. *Id.* at *1. The district court determined that Plaintiffs' new allegations concerning the amendments to A.B. 5 and Prop. 22 did not rescue their claims. *Id.* at *10.

Plaintiffs timely appealed that order. We granted Plaintiffs' motion to consolidate the appeals of the order denying the preliminary injunction and the order dismissing Plaintiffs' claims.

A three-judge panel reversed in part, concluding that the district court erred by dismissing Plaintiffs' Equal Protection claims. *See Olson v. California*, 62 F.4th 1206, 1218–20 (9th Cir. 2023). The panel concluded that Plaintiffs plausibly alleged that "the exclusion of thousands of workers from the mandates of A.B. 5 is starkly inconsistent with the bill's stated purpose of affording workers the 'basic rights and protections they deserve.'" *Id.* at 1219 (quoting A.B. 5 § 1(e)).

Upon the vote of a majority of nonrecused active judges, we granted rehearing en banc and vacated the three-judge panel decision. *Olson v. California*, 88 F.4th 781 (9th Cir. 2023).[4]

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[3] Plaintiffs' Second Amended Complaint included a new claim that A.B. 5 violates the Bill of Attainder Clauses of the United States and California Constitutions.

[4] The panel affirmed the district court's dismissal of Plaintiffs' Due Process claims, Contract Clause claims, and Bill of Attainder claims. We do not disturb the panel's disposition as to those

II.

We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court order granting a motion to dismiss for failure to state a claim. *See Tingley v. Ferguson*, 47 F.4th 1055, 1066 (9th Cir. 2022).

III.

As a preliminary matter, we agree with the parties that the passage of Prop. 22 does not moot this appeal. There are ongoing state enforcement actions seeking retrospective relief, including civil penalties, for Uber's and Postmates' alleged violations of A.B. 5 that transpired prior to Prop. 22's effective date. The extent of Uber's and Postmates' liability in those enforcement actions would be affected by our resolution of the constitutional challenge to A.B. 5, given that Prop. 22 does not apply retroactively. *See Lawson v. Grubhub, Inc.*, 13 F.4th 908, 914 (9th Cir. 2021). The parties therefore continue to maintain a concrete interest in the outcome of this litigation, and the appeal is not moot. *See Fritsch v. Swift Transp. Co. of Ariz.*, 899 F.3d 785, 791 (9th Cir. 2018).

IV.

Plaintiffs bring Equal Protection claims under the federal and California constitutions. We address these claims together because "[t]he equal protection analysis under the California Constitution is 'substantially similar' to analysis under the federal Equal Protection Clause." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004) (citing *Los Angeles Cnty. v. S. Cal. Tel. Co.*, 196 P.2d 773, 781 (Cal. 1948)).

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claims. Accordingly, we reinstate Parts III.B, III.C, and III.D of *Olson*, 62 F.4th at 1220–23.

The Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7 ("A person may not be . . . denied equal protection of the laws."). Plaintiffs do not allege that A.B. 5 employs suspect classifications, nor does their Equal Protection claim allege that A.B. 5 impinges on fundamental rights—we therefore apply rational basis review to their claims. *See Hodel v. Indiana*, 452 U.S. 314, 331 (1981). Under this standard, A.B. 5 "carries with it a presumption of rationality," and we must uphold it if "the legislative means are rationally related to a legitimate governmental purpose." *Id.*

A.

To establish an Equal Protection claim, Plaintiffs must demonstrate "that a class that is similarly situated has been treated disparately." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1063 (9th Cir. 2014) (quoting *Christian Gospel Church, Inc. v. City & Cnty. of San Francisco*, 896 F.2d 1221, 1225 (9th Cir. 1990)). The comparator groups "need not be similar in all respects, but they must be similar in those respects relevant to the Defendants' policy." *Id.* at 1064 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Once Plaintiffs identify a similarly situated class that is treated disparately under A.B. 5, they must also negate "every conceivable basis which might support" such disparate treatment. *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

Plaintiffs contend that other app-based companies like Wag!, which provides on-demand dog-walking, and TaskRabbit, which provides on-demand help with daily tasks like handyman work, are functionally

identical "in all relevant aspects" to Uber and Postmates. The complaint alleges that "service providers who use TaskRabbit and Wag! have the same patterns of use as the 'drivers' and 'couriers' who use Uber and Postmates." Wag!'s business model, Plaintiffs allege, is so similar to Uber's that Wag! is referred to as "Uber for dogs." And, according to Plaintiffs, these similarly situated comparators are treated differently under A.B. 5 because Uber drivers and Postmates couriers are automatically subject to the ABC test, while Wag! dogwalkers and TaskRabbit handymen are not.[5]

According to Plaintiffs, whether Uber drivers and Wag! dogwalkers are similarly situated for Equal Protection purposes is an issue of fact—one that is not amenable to resolution at the motion to dismiss stage. While a complaint's "[t]hreadbare recital" that another class is similarly situated will not suffice to survive a motion to dismiss, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), we recognize that determining whether a comparator is "similar in those respects relevant to the Defendants' policy" may be a fact-specific inquiry. *Brewer*, 757 F.3d at 1063 (citing *Nordlinger*, 505 U.S. at 10). But we need not engage in such an inquiry here. Even if we assume that Uber and Postmates are similarly situated to Wag! and TaskRabbit, and that A.B. 5 treats Uber and Postmates disparately from those similarly situated comparators, Plaintiffs' Equal Protection claim nevertheless fails.

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[5] To be clear, A.B. 5 does not automatically subject dogwalkers or handymen to the Borello test. Rather, the Borello test is applied to those service providers if, and only if, the hiring entity can establish the eleven criteria set forth in California Labor Code section 2777(a). *See supra* p. 12 n.1. If a hiring entity fails to establish any one of those criteria, the ABC test will apply to classify the worker. *See* Cal. Lab. Code § 2775.

There are rational reasons for that disparate treatment.

When conducting rational basis review of economic legislation that disparately treats similarly situated groups, we ask whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns, Inc.*, 508 U.S. at 313. We need not rely on the legislature to proffer its actual rationale motivating the legislation—or any rationale, for that matter. *See Nordlinger*, 505 U.S. at 15. We may consider any "purposes the legislature, litigants, or district court have espoused," but we are not limited to those reasons—we may consider "*any* other rational purposes *possibly* motivating enactment of the challenged statute." *Mountain Water Co. v. Mont. Dep't of Pub. Serv. Regul.*, 919 F.2d 593, 597 (9th Cir. 1990) (emphases added) (citing *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457–58, 463 (1988)). And so long as there is some conceivable legitimate purpose justifying the statute, we need not inquire into the legislature's actual purpose in enacting it. *Raidoo v. Moylan*, 75 F.4th 1115, 1121 (9th Cir. 2023) (citing *Beach Commc'ns, Inc.*, 508 U.S. at 315).

The stated purpose of A.B. 5 is to address the "misclassification of workers," which the California legislature described as a "significant factor in the erosion of the middle class and the rise in income inequality." A.B. 5 § 1(c). By codifying and expanding the reach of the California Supreme Court's decision in *Dynamex*, the legislature sought to restore important workplace protections and rights to potentially several million workers who were "exploited by being misclassified as independent contractors instead of recognized as employees." *Id.* § 1(e). Plaintiffs do not

contest that protecting workers, stemming the erosion of the middle class, and reducing income inequality are legitimate state interests. We therefore turn our focus to whether A.B. 5's distinction between transportation and delivery referral services, on the one hand, and other types of referral services on the other, is rationally related to this stated purpose. We conclude that it is.

While Plaintiffs allege that Uber and Wag! have functionally identical business models, that similarity alone does not compel us to conclude that there is no rational reason to treat those apps differently. One explanation for such a distinction is that the legislature perceived Uber, Postmates, and other transportation and delivery services as more substantial contributors to the problem of misclassification than referral agencies engaged in other services. As we recently observed in a different case challenging the rationality of A.B. 5, it is certainly "conceivable that misclassification was more rampant in certain industries and therefore deserving of special attention." *Am. Soc'y of Journalists & Authors, Inc.*, 15 F.4th at 965. To the extent that it perceived Uber, Postmates and other transportation and delivery app-based services as posing a greater risk of misclassification than Wag! or TaskRabbit, the California legislature acted rationally by "strik[ing] at the evil where it is felt and reach[ing] the class of cases where it most frequently occurs." *Silver v. Silver*, 280 U.S. 117, 124 (1929); *see also Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1086 (9th Cir. 2015) (recognizing that "[t]argeting the biggest contributors" to a perceived problem "is certainly rationally related to a legitimate policy goal"). It is not necessary that such a perception be supported by "evidence or empirical data." *Beach Commc'ns, Inc.*, 508 U.S. at 315.

According to Plaintiffs, Wag! is sometimes referred to as "Uber for dogs." While Plaintiffs allege that this underscores the similarity between Uber and Wag!, it also highlights another plausible justification for their disparate treatment. The legislature may have perceived Uber as the pioneer of the on-demand app-based business model that many other services replicated. It is certainly reasonable for the legislature to try to target the problem of misclassification at its origin. *See Angelotti Chiropractic*, 791 F.3d at 1085–86 (recognizing that a legislature may approach a problem incrementally by targeting the worst offenders).

Considering the statutory scheme in its entirety further reinforces our conclusion that the legislature acted rationally in pursuing its intended goals. Under A.B. 5, even so-called "exempted" services like Wag! and TaskRabbit must satisfy eleven statutory criteria before the relationship between those agencies and their service providers are *actually* exempted from the ABC test. In other words, to avoid application of the ABC test, Wag! must show that its dogwalkers are "free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact," along with ten other requirements, including that a dogwalker provide her own tools and supplies, set her own hours and terms of work, and that dogwalkers are free to accept or reject rates set by clients. Cal. Lab. Code § 2777(a). These statutory criteria ensure that the exemption to the ABC test is only available where service providers working through referral agencies display hallmarks of traditional independent contractor status, as articulated in *Dynamex* and *Borello*. The limited availability of the exemption in the referral agency industry reflects the

legislature's rational choice to preserve the traditional distinctions between independent contractors and employees and leave the *Borello* test in place only for those workers who faced little risk of misclassification.

B.

Nevertheless, Plaintiffs argue that A.B. 5 is an unconstitutionally irrational means of achieving California's stated interest of addressing misclassification. Relying on *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), and *Fowler Packing Co. v. Lanier*, 844 F.3d 809 (9th Cir. 2016), Plaintiffs argue that A.B. 5's numerous broad exemptions contradict that purpose and roll back the protections of *Dynamex* and the ABC test for millions of workers, including workers in industries with demonstrated histories of misclassification. As already noted, the exemptions carved out by the legislature plausibly reflect its determination that workers in certain occupations and industries bore closer resemblance to traditionally lawful independent contractors. *See Am. Soc'y of Journalists & Authors, Inc.*, 15 F.4th at 965. And as Plaintiffs acknowledge, *Dynamex* itself applied only to wage-order claims, while A.B. 5 was, in Plaintiffs' words, a "sea change" that expanded the ABC test to cover a vast array of previously unavailable employment benefits, even as it exempted certain workers. Those benefits include "a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave." A.B. 5 § 1(e).

That A.B. 5 may be underinclusive because it does not extend the ABC test to every industry and occupation that has historically contributed to California's misclassification woes does not render it

unconstitutionally irrational. *See Vance v. Bradley*, 440 U.S. 93, 108 (1979); *see also Brandwein v. Cal. Bd. of Osteopathic Exam'rs*, 708 F.2d 1466, 1471–72 (9th Cir. 1983) ("[T]he legislature may take piecemeal steps which only partially ameliorate a perceived evil and create some disparate treatment of affected parties."). Even accepting as true Plaintiffs' allegation that A.B. 5 rolled back more protection than it extended, that is insufficient to overcome rational basis review because "the law need not be in every respect logically consistent with its aims to be constitutional." *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 487–88 (1955). Whether A.B. 5, with all of its expansions and exemptions, will have a net effect of improving or worsening misclassification and income inequality remains to be seen, but that is entirely irrelevant for our purposes. To consider whether the law is actually effective in achieving its stated goals would require us to second guess a legitimate "legislative choice" and engage in "courtroom fact-finding." *Beach Commc'ns, Inc.*, 508 U.S. at 315. The Equal Protection Clause does not give us license to do so. *Id.* at 313.

Plaintiffs further argue that A.B. 5 is irrational because it arbitrarily "singles out" network companies for disfavored treatment. But the statute's referral agency provision plainly excludes not just Uber and Postmates—or any particular network company—but *all* referral-based businesses that provide "janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair." Cal. Lab. Code § 2777(b)(2)(C). Such a broad definition that sweeps in many different companies across many different industries can hardly be said to "single out" Plaintiffs for uniquely disfavored treatment. And as

the district court correctly observed, the decision to extend the exemption to some network companies while withholding it from other network companies demonstrates that the legislature did *not* arbitrarily target all app-based network companies.

Our decisions in *Fowler Packing* and *Merrifield* do not call for a contrary result. In *Fowler Packing*, the state did not offer, nor could we conceive of, any explanation for cutoff dates in a statute that specifically carved out three specific employers, including the plaintiff, from a safe harbor that was extended to all other employers. 844 F.3d at 816. *Fowler Packing* merely required us to apply the settled rule that "legislatures may not draw lines for the purpose of arbitrarily excluding individuals." *Id.* at 815. Rather than excluding individual employers from the application of the ABC test, A.B. 5 provides a complex framework that subjects certain categories of workers to the ABC test and other categories of workers to the *Borello* test, based on statutorily defined conditions and criteria.

Plaintiffs' reliance on *Merrifield* is similarly unavailing. In *Merrifield*, we considered a state law that "singl[ed] out . . . three types of vertebrate pests" from a licensure requirement for non-pesticide-using pest controllers. 547 F.3d at 991. We determined that the law did not survive rational basis review because "those exempted [from the licensure requirement] under the current scheme are more likely to be exposed to pesticides" than those who were not exempted. *Id.* Thus, when applying the state's own rationale for requiring controllers to obtain a license, we found that "rationale so weak that it undercut[] the principle of non-contradiction." *Id.* For the reasons already discussed, the same is not true of A.B. 5. The exemptions available in A.B. 5 plausibly reflect the legislature's

view that certain industries and occupations posed a diminished risk of misclassification, and the legislature added in safeguards, like those contained in California Labor Code section 2777(a), to ensure that the exemption from the ABC test would only be available to those hiring entities that could meet a threshold showing that their workers bear the hallmarks of traditional independent contractors.[6]

Finally, Plaintiffs argue that A.B. 5 was motivated by impermissible animus and political favoritism. Because we have identified plausible legitimate purposes motivating A.B. 5 and the lines it draws between workers in different industries and occupations, we need not further address these arguments. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200 (9th Cir. 2018) ("When the politically unpopular group is not a traditionally suspect class, a court may strike down the challenged statute under the Equal Protection Clause 'if the statute serves no legitimate governmental purpose *and* if impermissible animus toward an unpopular group prompted the statute's enactment.'" (quoting *Mountain Water Co.*, 919 F.2d at 598)); *Beach Comm'ns, Inc.*, 508 U.S. at 315 ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.").

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[6] Defendants argue *Merrifield* was wrongly decided and invite us to expressly overrule that decision. We decline to do so, as we have already made clear that "*Merrifield* stands for the unremarkable proposition that no rational basis exists if the law lacks *any* legitimate reason for its adoption." *S.F. Taxi Coal. v. City & Cnty. of San Francisco*, 979 F.3d 1220, 1225 (9th Cir. 2020); *id.* (recognizing that *Merrifield* "provides an outer limit to the state's authority if the state's action borders on corruption, pure spite, or naked favoritism lacking any legitimate purpose").

V.

In evaluating the constitutionality of A.B. 5 under the Equal Protection Clause, we ask whether "plausible reasons" exist for the law. We find that they do. We therefore conclude that the district court correctly dismissed Plaintiffs' Equal Protection claims. And because Plaintiffs' suit was properly dismissed, the district court properly denied preliminary injunctive relief.

AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYDIA OLSON; MIGUEL PEREZ; POSTMATES, INC., (Successor Postmates LLC); UBER TECHNOLOGIES, INC., *Plaintiffs-Appellants,* v. STATE OF CALIFORNIA; ROB BONTA,* in his capacity as Attorney General of the State of California, *Defendants-Appellees.*	No. 21-55757 D.C. No. 2:19-cv-10956-DMG-RAO OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted July 13, 2022
San Francisco, California

Filed March 17, 2023

* Rob Bonta is substituted for his predecessor Xavier Becerra, former Attorney General of the State of California. See Fed. R. App. P. 43(c)(2).

Before: Johnnie B. Rawlinson and
Danielle J. Forrest, Circuit Judges, and
Morrison C. England, Jr.,** Senior District Judge.

Opinion by Judge Rawlinson

SUMMARY***

Civil Rights

The panel affirmed in part and reversed in part district court orders dismissing Plaintiffs' Second Amended Complaint and denying Plaintiffs' motion for a preliminary injunction, and remanded, in an action seeking to enjoin the State of California and the California Attorney General from enforcing California Assembly Bill 5 ("A.B. 5"), as amended by California Assembly Bills 170 and 2257.

A.B. 5, as amended, codified the "ABC test" adopted by the Supreme Court of California in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018), to categorize workers as employees or independent contractors for the purposes of California wage orders. A.B. 5, as amended, however, incorporated numerous exemptions into its provisions.

The panel first held that, even under the fairly forgiving rational basis review, Plaintiffs plausibly

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** The Honorable Morrison C. England, Jr., Senior United States District Judge for the Eastern District of California, sitting by designation.

*** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

alleged that A.B. 5, as amended, violated the Equal Protection Clause for those engaged in app-based ride-hailing and delivery services. Thus, Plaintiffs plausibly alleged that the primary impetus for the enactment of A.B. 5 was the disfavor with which the architect of the legislation viewed Uber, Postmates, and similar gig-based business models. Additionally, Plaintiffs plausibly alleged that their exclusion from the wide-ranging exemptions, including for comparable app-based gig companies, could be attributed to animus rather than reason. The district court therefore erred by dismissing Plaintiffs' equal protection claim.

The panel held that the district court correctly dismissed Plaintiffs' due process claims because Plaintiffs failed to plausibly allege that A.B. 5, as amended, completely prohibited them from exercising their "right to engage in a calling." In addition, Plaintiffs' allegations did not plausibly allege that A.B. 5, as amended, would bar plaintiffs Olson and Perez from continuing their work as "business owners in the sharing economy" with network companies that were exempted from A.B. 5, as amended.

The panel held that A.B. 5, as amended, did not violate the Contract Clause because it neither interfered with Plaintiffs' reasonable expectations nor prevented them from safeguarding or reinstating their rights. Plaintiffs' Bill of Attainder claims likewise failed because Plaintiffs did not plausibly allege that A.B. 5, as amended, inflicted punishment on them.

Addressing the district court's denial of Plaintiffs' motion for a preliminary injunction, the panel noted that the district court's order was based on allegations contained in the Initial Complaint, which did not include Plaintiffs' allegations regarding facts—namely

the passage of A.B. 2257 and Proposition 22—that did not exist when the Initial Complaint was filed. The panel therefore remanded for the district court to reconsider Plaintiffs' motion for a preliminary injunction, considering the new allegations contained in the Second Amended Complaint.

COUNSEL

Theane Evangelis (argued), Blaine H. Evanson, Heather L. Richardson, Dhananjay S. Manthripragada, and Alexander N. Harris, Gibson Dunn & Crutcher LLP, Los Angeles, California; for Plaintiffs-Appellants.

Jose A. Zelidon-Zepeda (argued), Deputy Attorney General; Mark Beckington and Tamar Pachter, Supervising Deputy Attorneys General, Thomas S. Patterson, Senior Assistant Attorney General; Rob Bonta, Attorney General of California; Office of the Attorney General, San Francisco, California; for Defendant-Appellee.

Scott A. Kronland and Stacey M. Leyton, Altshuler Berzon LLP, San Francisco, California, for Amici Curiae International Brotherhood of Teamsters, Service Employees International Union California State Council, and United Food and Commercial Workers Union Western States Council.

OPINION

RAWLINSON, Circuit Judge:

Lydia Olson (Olson), Miguel Perez (Perez), Uber, Inc. (Uber) and Postmates, Inc. (Postmates, and collectively Plaintiffs) appeal the district court's orders denying their motion for a preliminary injunction and dismissing their Second Amended Complaint.

Plaintiffs filed this action to enjoin the State of California and the Attorney General of California (Defendants), from enforcing California Assembly Bill 5, 2019 Cal. Stats. Ch. 296 (A.B. 5), as amended by California Assembly Bill 170, 2019 Cal. Stats. Ch. 415 (A.B. 170) and California Assembly Bill 2257, 2020 Cal. Stats. Ch. 38 (A.B. 2257, and collectively A.B. 5, as amended), against them. A.B. 5, as amended, codified the "ABC test" adopted by the Supreme Court of California in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018).[1] A.B. 5, as amended, however, incorporated numerous exemptions into its provisions.

Plaintiffs' Second Amended Complaint requested an injunction on the grounds that—as applied to Plaintiffs—A.B. 5, as amended, violates: the Equal Protection Clauses, the Due Process Clauses, the Contract Clauses, and the Bill of Attainder Clauses of the United States and California Constitutions.

This case consolidates Plaintiffs' appeals of: 1) the district court's order granting Defendants' motion to dismiss Plaintiffs' Second Amended Complaint;

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[1] The effect of the "ABC test" was to include more workers in the category of "employee" as opposed to that of "independent contractor." *Dynamex*, 4 Cal. 5th at 964.

and 2) the district court's order denying Plaintiffs' motion for a preliminary injunction.

We have jurisdiction under 28 U.S.C. § 1291. Reviewing *de novo*, we REVERSE the district court's dismissal of Plaintiffs' equal protection claims, but AFFIRM the dismissal of the due process, contract clause, and bill of attainder claims. We REMAND the district court's order denying Plaintiffs' motion for a preliminary injunction for reconsideration consistent with this opinion.

I. Background

A. The *Dynamex* Decision

In 2018, the Supreme Court of California adopted the aforementioned "ABC test" to categorize workers as employees or independent contractors for the purposes of California wage orders. *Dynamex*, 4 Cal. 5th at 957. Under the ABC test, workers are presumed to be employees, and may only be classified as independent contractors if the hiring entity demonstrates:

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

Id. (citations omitted) (emphases in the original).[2]

B. Statutory Background

In 2019, the California Legislature passed A.B. 5. The expressed intent of the Legislature in enacting A.B. 5 was 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 if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave.

A.B. 5 § 1(e). To effectuate its expressed intent, A.B. 5 codified *Dynamex*, *see id.*, and its presumption that "a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor, unless the hiring entity" makes the requisite showing under the ABC test. A.B. 5 § 2(a)(1); *see also Dynamex*, 4 Cal. 5th at 967. A.B. 5 also expanded *Dynamex's* application beyond wage orders to California's Labor and Unemployment Insurance Codes. *See id.* However, A.B. 5 exempted a broad swath of workers from the *Dynamex* presumption. *See id.* § 3(b). These statutory exemptions included: California licensed insurance businesses or individuals; physicians and surgeons; dentists; podiatrists; psychologists; veterinarians; lawyers; architects; engineers; private investigators and

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[2] Prior to *Dynamex*, California courts primarily determined whether a worker was an employee or an independent contractor by applying the multi-factor balancing test adopted in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). *See Dynamex*, 4 Cal. 5th at 931-32.

accountants; registered securities broker-dealers and investment advisers; direct sales salespersons; commercial fishermen working on American vessels for a limited period; marketers; human resources administrators; travel agents; graphic designers; grant writers; fine artists; payment processing agents; certain still photographers or photo journalists; freelance writers, editors, or cartoonists; certain licensed estheticians, electrogists, manicurists, barbers or cosmetologists; real estate licensees; repossession agents; contracting parties in business-to-business relationships; contractors and subcontractors; and referral agencies and their service providers. *See* A.B. 5 § 2. A.B. 5 also left open the possibility of court-created exemptions. *See id.* § 2(a)(3).

Within a year of its enactment, A.B. 5 was amended by A.B. 170 and A.B. 2257. Both bills exempted even more workers from the *Dynamex* presumption. A.B. 170 added exemptions for "[a] newspaper distributor working under contract with a newspaper publisher . . . and a newspaper carrier working under contract either with a newspaper publisher or newspaper distributor." A.B. 170 § 1(b)(7). A.B. 2257 added exemptions for recording artists; songwriters, lyricists, composers, and proofers; managers of recording artists; record producers and directors; musical engineers and mixers; vocalists; musicians engaged in the creation of sound recordings; photographers working on recording photo shoots, album covers, and other press and publicity purposes; and independent radio promoters. *See* A.B. 2257 § 2, 2780. A.B. 2257 also reduced application of the existing exemption for referral agencies. *See id.*, § 2, 2777.

C. Factual Background

It is undisputed that the enactment of A.B. 5 was largely driven by a perceived need to curb reported abuses in the gig economy, particularly rideshare companies and analogous platforms. The sponsor of A.B. 5, California Assemblywoman Lorena Gonzalez, published a Washington Post Op-Ed in which she proclaimed that A.B. 5 would "guarantee . . . workers the normal rights and privileges—and benefits—enjoyed by most employees" that "'gig' companies such as Uber, Lyft, DoorDash, Handy and others" do not provide to "'gig' workers." *See* Lorena Gonzalez Opinion, *The Gig Economy Has Costs. We can No Longer Ignore Them*, Wash. Post (Sept. 11, 2019).[3] According to a December 2019 Los Angeles Times Article, Assemblywoman Gonzalez was "open to changes in [A.B. 5] next year, including an exemption for musicians—but not for app-based ride-hailing and delivery giants." Margot Roosevelt, *New Labor Laws Are Coming to California. What's Changing in Your Workplace?* (*New Labor Laws*), L.A. TIMES (Dec. 29, 2019).[4] California Assemblyman Anthony Rendon tweeted, "[t]he gig economy is nothing new. It's a continuation of hundreds of years of corporations trying to screw over workers. With [A.B. 5], we're in a position to do something about that." Anthony Rendon, @Rendon63rd, TWITTER (July 10, 2019, 4:40 PM).[5] Addressing A.B. 5, Assemblywoman Buffy Wicks tweeted, "I believe all workers should benefit from the hard-fought

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[3] https://www.washingtonpost.com/opinions/2019/09/11/gig-economy-has-costs-we-can-no-longer-ignore-them/

[4] https://www.latimes.com/business/story/2019-12-29/California-employment-laws-2020-ab5-minimum-wage

[5] https://twitter.com/Rendon63rd/status/1149101100928159744

protections won by unions—just because your employer uses a smartphone app, doesn't mean they should be able to misclassify you as an independent contractor." Buffy Wicks, @BuffyWicks, TWITTER (Sept. 7, 2019, 6:57 AM).[6]

D. Plaintiffs

Postmates is "a network company that operates an online marketplace and mobile platform connecting local merchants, consumers, and independent couriers to facilitate the purchase, fulfillment, and, when applicable, local delivery of anything from takeout to grocery goods from merchants to the consumers." Consumers may request delivery from local merchants (including restaurants and grocery stores) through Postmates' Mobile Application (Postmates' App). When such a request is made, a nearby courier will receive a notification and "can choose whether to accept the consumer's offer to pick up and complete the requested delivery."

To serve as a courier on Postmates' App, an individual must execute a "Fleet Agreement" to establish the individual and Postmates' relationship as independent contractor and principal (rather than employee and employer). A courier on Postmates' App may use the platform "as much or as little as he or she wants—there is no set schedule, minimum-hours requirement, or minimum-delivery requirement," and couriers are free to choose whether to "accept, reject, or ignore" delivery requests.

Perez uses Postmates' App to "run his own delivery business." He "values the flexibility of working for

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[6] https://twitter.com/BuffyWicks/status/1170335312758706177

himself," and does not want to work as "someone else's employee again."

Uber is also a network company that operates a digital marketplace through its own mobile application-based platforms (Uber Apps). Uber uses its Uber apps to "connect individuals in need of goods or services with those willing to provide them." Uber's most popular marketplace is housed on two distinct apps: the Uber Rider App, which allows riders to "connect with available transportation providers based on their location" and the Uber Driver App, which, in conjunction with the Uber Rider App, connects available app-based drivers to those requesting rides. Prior to utilizing the Uber Driver App, a driver must "execute a 'Platform Access Agreement,' which provides, in its very first section: 'The relationship between the parties is solely as independent enterprises' and '[t]his is not an employment agreement and you are not an employee.'" As with Postmates, a driver is free to use the Uber Driver App "as much or as little as he or she wants—there is no set schedule, minimum-hours requirement, or minimum-ride or minimum-delivery requirement." Drivers provide and maintain their own equipment.

Olson is a California-based driver who "uses the Uber platform to get leads for passenger requests to transport passengers in the Sacramento and San Francisco Bay areas." Olson would be unable to work for Uber if she were to be reclassified as an employee under A.B. 5 because she depends on "the flexibility that comes with being an independent service provider," as she serves as her husband's primary caretaker.

E. Procedural History

1. The Initial Complaint and Motion for a Preliminary Injunction.

Plaintiffs jointly filed a complaint on December 30, 2019 (the Initial Complaint), seeking declaratory, injunctive, and other relief based on the unconstitutionality of A.B. 5. Plaintiffs also filed a motion for a preliminary injunction in connection with their claims based on the denial of their rights under the Equal Protection, Due Process, and Contract Clauses. In support of their motion, Plaintiffs and their *amici* filed several declarations, including: declarations from Patricia Cartes Andres, Postmates' Director of Trust and Safety and Insurance Operations, and Brad Rosenthal, Uber's Director of Strategic Operational Initiatives, regarding the companies' respective business models; declarations from drivers who use the Uber Drivers App, and couriers who use the Postmates App, including Olson and Perez; and a declaration and expert report from economist Justin McCrary. Plaintiffs also provided tweets from Assemblywoman Gonzalez, the principal sponsor and proponent of A.B. 5, discussing A.B. 5 and Uber;[7] articles and reports concerning the anticipated effect A.B. 5 would have on the "gig economy"; and testimonials from Californians negatively affected by A.B. 5.

The district court denied Plaintiffs' motion for preliminary injunctive relief. *See Olson v. California*, No. CV-1910956-DMG (RAOx), 2020 WL 905572 (C.D. Cal. Feb. 10, 2020) (*Olson I*). The district court noted that for a plaintiff to succeed on a motion for a preliminary injunction, the plaintiff must show that "(1) she

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[7] One example was a tweet directed at Assemblywoman Gonzalez reminding her that A.B. 5 was "aimed at Uber/Lyft."

is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) an injunction is in the public interest." *Id*. at *4 (*citing Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008)).

Beginning with the likelihood of success, the district court determined that Plaintiffs were unlikely to succeed on the merits of their claims and failed to raise "sufficiently serious questions" on the merits. *Id.* at *5.

The district court specifically found that A.B. 5 was related to a legitimate state interest and did not target gig economy companies in violation of their equal protection rights. *See id.* at *5. The district court rejected Plaintiffs' argument that A.B. 5 does not rationally further the government's interest in the proper classification of workers, given its numerous exemptions. *See id.* at *6. Rather, the district court concluded that A.B. 5's exemptions were supported by rational explanations. *See id.* at *8. The district court also rejected Plaintiffs' argument that the exemptions contained in A.B. 5 could only be explained by improper animus against gig companies because: (1) the "expansive language of the statute" negated that argument; (2) discrimination cannot be proven by simply pointing to lobbying efforts, which are "constitutionally protected"; and (3) "reform may take one step at a time," so the refusal to give an exemption to gig companies was not, in and of itself, improper. *Id.* at *8 (citations omitted). Although the district court conceded that "the record contains some evidence that [A.B.] 5 targeted [Uber, Postmates] and other gig economy companies, and that some lawmakers' statements specifically complained about Uber," it found

that the evidence did not rise to the level of demonstrating "an Equal Protection violation where the statute addresses legitimate concerns of deleterious misclassification of workers in many industries, not just the gig economy." *Id.* at *9.

Next, the district court found that A.B. 5 did not deprive gig workers of the right to pursue a career, in violation of due process. *See id.* at *10. The district court reasoned that for a statute to infringe on a plaintiff's "vocational liberty interest," it must completely prohibit a plaintiff from engaging in a calling. *Id.* The district court concluded that A.B. 5 was not a complete prohibition on the right to pursue a calling because (1) Uber and Postmates insist that their drivers are independent contractors even under the ABC test; (2) Olson and Perez could be independent contractors if they meet the ABC test or fall under an exemption, such as the "referral agency" exemption; and (3) even if Olson and Perez are reclassified as employees, they can still drive for Uber and Postmates so long as those companies "compensate them properly and allow them to have flexible work schedules." *Id.*

Finally, the district court found that A.B. 5 did not unconstitutionally impair Plaintiffs' contracts. *See id.* at *11–13. The district court again pointed to Uber and Postmates' position that A.B. 5 did not require them to reclassify their drivers, and thus "their contractual relationships with drivers are not at all impaired, much less substantially impaired." *Id.* at *11. The district court further concluded that "Plaintiffs reasonably should have expected that the terms setting forth a driver's contractor status were not independently determinative of employment classification," and thus, should have foreseen that their contracts could have been altered by laws like A.B. 5. *Id.*

at *11–12. The district court also noted that even if A.B. 5 substantially impaired Plaintiffs' contracts, Plaintiffs are unlikely to succeed on the merits of their contract clause claims because they failed to show "that [A.B.] 5 does not serve a significant and legitimate public purpose." *Id.* at *12.

On the irreparable harm element, the district court conceded that Uber and Postmates "established some measure of irreparable harm stemming from threatened municipal enforcement actions," but ultimately found that the harm was mitigated by the possibility of "flexibility and freedom" that could be offered to drivers as employees. *Id.* at *14. The district court considered any potential harm stemming from business restructuring and unrecoverable expenditures "speculative" because Uber and Postmates maintained that the ABC test does not apply to them. *Id.* The district court determined that Olson and Perez were not subject to the same enforcement actions as Uber and Postmates, and that their alleged "unrecoverable financial losses" and loss of "customer goodwill, freedom, financial stability, and work satisfaction" were speculative in light of Uber's and Postmates's position that A.B. 5 does not apply to them. *Id.*

Addressing the remaining two preliminary injunction elements—balancing of the equities and public interest—the district court found that "the State's interest in applying [A.B.] 5 to [Uber and Postmates] and potentially hundreds of thousands of California workers outweighs Plaintiffs' fear of being made to abide by the law." *Id.* at *16. The district court acknowledged Olson's, Perez's, and *amici*'s contention "that being classified as employees would be financially devastating and upend their schedules and

expectations." *Id.* The district court nonetheless also pointed to evidence from Plaintiffs' own expert that "'a majority of workers do not value scheduling flexibility' and only a 'substantial share'—by inference, less than a majority—'are willing to give up a large share of their earnings to avoid employer discretion in setting hours.'" *Id.* Accordingly, the district court declined to "second guess the Legislature's choice to enact a law that seeks to uplift the conditions of the majority of non-exempt low-income workers rather than preserve the status quo for the smaller subset of workers who enjoy independent contractor status." *Id.*

Plaintiffs appealed this decision and we heard argument in that case on November 18, 2020. However, on November 3, 2020, shortly before argument, Proposition 22 (Prop. 22) was adopted through California's ballot initiative process. The initiative was aimed at protecting "the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies throughout the state" from "recent legislation [that] has threatened to take away the flexible work opportunities of hundreds of thousands of Californians, potentially forcing them into set shifts and mandatory hours, taking away their ability to make their own decisions about the jobs they take and the hours they work." To effectuate this protection, Prop. 22 classified app-based drivers as independent contractors "and not as [] employee[s] or agent[s] with respect to the app-based driver's relationship with a network company," "[n]otwithstanding any other provision of law."

Given the then-recent passage of Prop. 22, we requested a joint supplemental brief and status report from the parties addressing: whether Prop. 22 mooted

the appeal; the status of any enforcement actions pending against Plaintiffs that might be affected by the passage of Prop. 22; any pending legal challenges to Prop. 22; the prospect of future enforcement actions against Plaintiffs under A.B. 5; and any other relevant pending matter or information. The Joint Supplemental Brief was filed on December 10, 2020. In the brief, the parties agreed that the appeal was not mooted by the passage of Prop. 22.

2. The Second Amended Complaint and Defendant's Motion to Dismiss.

Shortly before we heard argument on Plaintiffs' appeal of the district court's order denying their motion for a preliminary injunction, Plaintiffs filed their Second Amended Complaint.[8] The Second Amended Complaint updated Plaintiffs' original claims to incorporate the amendments to A.B. 5 made by A.B. 2257. It alleged that A.B. 5, as amended, violates state and federal Equal Protection Clauses, Due Process Clauses, Contract Clauses, and Bill of Attainder Clauses.

Defendant moved to dismiss Plaintiffs' Second Amended Complaint for failure to state a claim on which relief could be granted, and the district court granted Defendant's motion in its entirety, with prejudice. *See Olson II*, 2021 WL 3474015 at *10.

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[8] Plaintiffs' First Amended Complaint was dismissed by the district court with leave to amend its Equal Protection, Due Process, and Contract Clauses claims. Although the district court incorporated this order by reference in its order dismissing the Second Amended Complaint, Plaintiffs do not independently challenge dismissal of the First Amended Complaint. *See Olson v. Bonta*, No. CV-1910956-DMG (RAOx), 2021 WL 3474015 at *1 (C.D. Cal. July 16, 2021) (*Olson II*).

a. Equal Protection Claims

The district court dismissed Plaintiffs' Equal Protection claims after concluding that A.B. 5, as amended, is "rationally related to [California's] interest in protecting workers." *Id.* at *2. The district court incorporated by reference its previous dismissal of Plaintiffs' Equal Protection claims, as pled in the First Amended Complaint. *See id.* The district court then addressed "four categories of *new* factual allegations" in the Second Amended Complaint: "(1) [A.B.] 5 bill sponsor Assemblywoman Lorena Gonzalez's comments about exempting the work relationships of newspaper workers under [A.B.] 170; (2) possible exemptions of the work relationships of gig economy companies TaskRabbit and Wag! under [A.B.] 5; (3) Assemblywoman Gonzalez's animus toward Uber; and (4) the policy pronouncements of Prop 22." *Id.* at *3 (emphasis in the original).

The district court rejected Plaintiffs' allegations that the one-year delay in the effective date of A.B. 5 for newspaper distributors lacked a reasonable explanation. *Id. The* district court reasoned that Assemblywoman Gonzalez's statement that "newspapers have lost nearly every case brought by carriers under [*Borello*]," implied that "even under the old *Borello* multifactor standard for determining employment status, newspaper workers have been able to show that they are properly classified as employees, not contractors." *Id.* (citations and internal quotation marks omitted). Thus, the district court concluded, the one-year exemption for newspaper distributors and carriers, "where newspaper workers arguably were already protected even under the old *Borello* test, does not undermine the rationality of a legislative scheme aimed at remedying misclassification in

industries *not* satisfactorily covered by *Borello*." *Id.* (emphasis in the original). The district court also noted that the newspaper industry faced idiosyncratic concerns such that the Legislature concluded it would be "desirable to give newspaper publishers more time to address misclassification concerns." *Id.*

Second, the district court rejected Plaintiffs' allegations that the exemption of TaskRabbit and Wag! from the mandates of A.B. 5, as amended (without similarly exempting Plaintiffs) demonstrates that the bill lacks a rational basis. *Id.* at *4. The district court concluded that Plaintiffs' allegations that Uber and Postmates' business models are "nearly identical" to those of TaskRabbit and Wag!, *id.*, suggested that A.B. 5, as amended, "did *not* arbitrarily target app-based network companies," rather than supported Plaintiffs' contention that this disparate treatment "undercuts the State's own rational basis" argument. *Id.* (citation and alterations omitted) (emphasis in the original). The district court found the California Legislature's decision to exempt some app-based referral agencies but not others, based on the services the referral agencies provide, to be a "deliberate choice" that was consistent with the legislative history of A.B. 5, as amended. *Id.* The district court reasoned that there are "rational differences between exempted errand-running and dog-walking and non-exempted passenger and delivery driving," such that any disparate treatment on this basis does not give rise to an equal protection violation. *Id.* at *5.

The district court was unpersuaded by Plaintiffs' allegations that statements made by Assemblywoman Gonzalez evidenced an irrational animus against them. *See id.* at *6. The district court concluded that Plaintiffs failed to demonstrate that they were a

"politically unpopular group" for the purposes of an equal protection analysis. *Id.* It further noted that "even if the [California] Legislature sought to apply and then enforce the ABC test solely against [Uber and Postmates], legislators are entitled to identify 'the phase of the problem' of misclassification 'which seems the most acute to the legislative mind.'" *Id.* (citation omitted). Accordingly, the district court concluded that "Plaintiffs cannot show that the statute serves no legitimate governmental purpose *and* that impermissible animus toward an unpopular group prompted the statute's enactment." *Id.* (citation, alteration, and internal quotation marks omitted) (emphasis in the original).

Third and finally, the district court considered Plaintiffs' allegations that the passage of Prop. 22 "further establishes the irrationality of A.B. 5." *Id.* (citation omitted). The district court opined that "it is not clear that California voters' disapproval of [A.B.] 5 by voting for Prop 22 translates to a finding that [A.B.] 5 is irrational and thus unconstitutional." *Id.*

b. Due Process claims

In dismissing the due process claims, the district court relied on its previous rational basis analysis. *See id.* at *7. The district court also reiterated that Plaintiffs failed to plausibly allege that A.B. 5 was "a complete prohibition on [Olson and Perez's] ability to pursue any profession." *Id.* (citation omitted). The district court noted that A.B. 5, as amended, and the ABC test "permit anyone to remain an independent contractor if their work relationship meets the ABC test's requirements." *Id.* The district court added that, even if Plaintiffs established that Olson and Perez's desire to remain independent contractors is its own "calling or profession" their due process claims

fail because A.B. 5 "conceivably furthers [California's] legitimate interest in preventing misclassification of workers in a wide swath of industries." *Id.*

c. Contract Clause Claims

The district court observed that Contract Clause claims "involve a three-step inquiry." *Id.* First, courts consider "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id.* Next, courts consider "whether the state has a significant and legitimate public purpose behind the law." *Id.* (alteration and internal quotation marks omitted). Finally, courts consider "whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* (citation and alteration omitted).

The district court began and ended its analysis at the first step, *see id.*, finding that Plaintiffs failed to plausibly allege that A.B. 5 substantially impaired their contracts under California law. *See id.* In the alternative, the district court concluded that even if Plaintiffs had plausibly alleged substantial impairment, their contract clause claims fail at the third step because California has the authority "to regulate employment relationship[s]," thereby satisfying "the public purpose test" applied when assessing a Contract Clause challenge. *Id.* at *8.

d. Bill of Attainder Claims[9]

Concluding that A.B. 5, as amended, is—notwithstanding its exemptions—"a law of general

[9] A bill of attainder results when legislation specifies affected persons and inflicts punishment on them without a trial. *See*

applicability to work relationships in California," the district court found that Plaintiffs failed to provide "clear proof that [A.B.] 5, as amended, singles them out." *Id.* at 9 (citation and internal quotation marks omitted).

Following this order, Plaintiffs filed a timely appeal. As we had not yet resolved Plaintiffs' appeal of the district court's denial of their motion for a preliminary injunction, we granted Plaintiffs' motion to consolidate the two appeals. Our order detailed that we would address the issue of whether the preliminary injunction was properly denied if we reversed the district court's dismissal order. *See Nationwide Biweekly Admin. Inc. v. Owen*, 873 F.3d 716, 730-31 (9th Cir. 2017) (discussing the merger of appeals).

II. Standards of Review

We review *de novo* an order granting a motion to dismiss for failure to state a claim. *See Tingley v. Ferguson*, 47 F.4th 1055, 1066 (9th Cir. 2022). "We must determine whether Plaintiffs' complaint pleads enough facts to state a claim to relief that is plausible on its face. . . ." *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 814 (9th Cir. 2016) (citation and internal quotation marks omitted). To do so, we credit "all factual allegations in the complaint as true" and construe them "in the light most favorable" to the nonmoving party. *Tingley*, 47 F.4th at 1066 (citation omitted).

We review *de novo* a district court's interpretation of state law. *See Killgore v. SpecPro Pro. Servs., LLC*, 51 F.4th 973, 982 (9th Cir. 2022). When interpreting

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SeaRiver Maritime Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 668 (9th Cir. 2002).

state law, we are bound by the decisions of the state's highest court. *See id*.

Finally, "[w]e review a district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (per curiam) (citation omitted).

III. Discussion[10]

A. Equal Protection Claims

As we recently noted in *American Society of Journalists & Authors, Inc. v. Bonta*, "[t]he Equal Protection Clause prohibits states from denying to any person within its jurisdiction the equal protection of the laws." 15 F.4th 954, 964 (9th Cir. 2021) (citation, alteration, and internal quotation marks omitted), *cert. denied* 142 S. Ct. 2870 (2022). "If the ordinance does not concern a suspect or semi-suspect class or a fundamental right, we apply rational basis review and simply ask whether the ordinance 'is rationally-related to a legitimate governmental interest.'" *Honolulu Wkly., Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002) (citation and internal quotation marks omitted). We apply rational basis review in this case. *See Am. Soc'y of Journalists & Authors*, 15 F.4th at 964 (applying rational basis review to A.B. 5); *see also Dittman v. California*, 191 F.3d 1020, 1031 n.5 (9th Cir. 1999) (noting that "the Supreme Court has never held that the 'right' to pursue a profession is a *fundamental* right, such that any state-sponsored barriers to entry would be subject to strict scrutiny").

Rational basis review is "a fairly forgiving standard," as it affords states "wide latitude . . . in

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[10] The parties agree that the analysis is the same under federal and state law.

managing their economies." *American Soc'y of Journalists & Authors*, 15 F.4th at 965. Under this standard, we "uphold economic classifications so long as there is any reasonably conceivable state of facts that could provide a rational basis for them." *Id.* (citation and internal quotation marks omitted). For a plaintiff whose equal protection claim is subject to rational basis review to prevail, they must "negate every conceivable basis which might have supported the distinctions drawn." *Id.* (citation and internal quotation marks omitted).

Even under this "fairly forgiving" standard of review, we conclude that, considering the particular facts of this case, Plaintiffs plausibly alleged that A.B. 5, as amended, violates the Equal Protection Clause for those engaged in app-based ride-hailing and delivery services.

Plaintiffs plausibly allege that the primary impetus for the enactment of A.B. 5 was the disfavor with which the architect of the legislation viewed Uber, Postmates, and similar gig-based business models. However, the publicly articulated purpose of A.B. 5 was to "ensure [that] workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve." A.B. 5 § 1(e). But, as Plaintiffs plausibly alleged, the exclusion of thousands of workers from the mandates of A.B. 5 is starkly inconsistent with the bill's stated purpose of affording workers the "basic rights and protections they deserve." A.B. 5 § 1(e). The plausibility of Plaintiffs' allegations is strengthened by the piecemeal fashion in which the exemptions were granted, and lends credence to Plaintiffs' allegations that the exemptions were the result of "lobbying" and "backroom

dealing" as opposed to adherence to the stated purpose of the legislation. As one reporter noted, "[a] lobbying frenzy led to exemptions for some professions in which workers have more negotiating power or autonomy than in low-wage jobs. Among them: lawyers, accountants, architects, dentists, insurance brokers and engineers." Roosevelt, *New Labor Laws*. And along with the many categories of workers carved out, A.B. 5, as amended, also exempts those who work with certain app-based gig companies that perform errand services, such as Task Rabbit and Wag!, which have business models that are nearly identical to Uber and Postmates. There is no indication that many of the workers in exempted categories, including those working for the app-based gig companies that are exempted, are less susceptible to being "exploited by being misclassified as independent contractors." A.B. 5 § 1(e).[11] And as Plaintiffs plausibly alleged, the referral agency exemption was expressly amended to *exclude* Plaintiffs "after this court had previously indicated" that the referral exemption "might apply to Plaintiffs."

Additionally, Plaintiffs plausibly allege that their exclusion from wide-ranging exemptions, including for comparable app-based gig companies, can be attributed to animus rather than reason. In the Second Amended Complaint, Plaintiffs cited reporting by the *Los Angeles Times* that after the passage of A.B. 5 (but before the passage of A.B. 2257), Assemblywoman Gonzalez stated that she is "open to changes in the bill next year, including an exemption for musicians–*but not for app-based ride-hailing and delivery giants*."

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[11] It is notable that during oral argument, counsel for Defendants was unable to articulate a conceivable rationale for A.B. 5 that explains the exemptions made by A.B. 5, as amended.

Roosevelt, *New Labor Laws* (emphasis added). As further noted in the Second Amended Complaint, this statement by Assemblywoman Gonzalez followed numerous other comments "repeatedly disparag[ing]" Plaintiffs. We are persuaded that these allegations plausibly state a claim that the "singling out" of Plaintiffs effectuated by A.B. 5, as amended, "fails to meet the relatively easy standard of rational basis review." *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008), *as amended*. We recognize that we recently rejected an equal protection challenge to A.B. 5 in *American Society of Journalists and Authors*. However, Plaintiffs' plausible allegations of Assemblywoman Gonzalez's animus against them distinguish the two cases. *See* 15 F.4th at 966 ("Unlike the situation in *Merrifield*, however, nothing about section 2778 suggests that its classifications border on corruption, pure spite, or naked favoritism . . .") (citation, alteration, and internal quotation marks omitted).

We therefore hold that the district court erred by dismissing Plaintiffs' equal protection claim. *See United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973) (commenting that a legislative "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

B. Due Process Claims

We reject Plaintiffs' contention that the district court erred by dismissing their due process claims.

"A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Dittman*, 191 F.3d at 1029 (citation omitted). And we have recognized that "[a]lthough the precise contours of that liberty interest remain largely

undefined, the Supreme Court observed recently that the line of authorities establishing the liberty interest all dealt with a complete prohibition of the right to engage in a calling." *Id.* (citation, alteration, and internal quotation marks omitted).

The district court correctly dismissed Plaintiffs' due process claims because Plaintiffs failed to plausibly allege that A.B. 5, as amended, completely prohibits them from exercising their "right to engage in a calling." *Id.* In addition, Plaintiffs' allegations do not plausibly allege that A.B. 5, as amended, would bar Olson and Perez from continuing their work as "business owners in the sharing economy" with network companies that are exempted from A.B. 5, as amended. These allegations are insufficient to plausibly allege a due process violation because, as we have previously held, "people do not have liberty interests in a specific employer." *Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 925 (9th Cir. 2013) (citation and alteration omitted).

Reclassifying on-demand drivers as employees does not completely prohibit these drivers from engaging in a calling. Olson and Perez are still free to "use apps to facilitate the transportation of passengers or deliveries"; they are merely barred under A.B. 5, as amended, from doing so as independent contractors. These allegations simply do not establish a complete prohibition of Olson and Perez's chosen "field of employment." *Franceschi v. Yee*, 887 F.3d 927, 937–38 (9th Cir. 2018). Rather, the infringement is on the means of engaging in their chosen work. As a result, Plaintiffs failed to plausibly allege that a protected liberty or property interest was infringed. *See Sierra Med. Servs. All. v. Kent*, 883 F.3d 1216, 1226 (9th Cir. 2018) (concluding that the plaintiff's due process

claims were without merit because they were not rooted in a constitutionally protected interest).

C. Contract Clause Claims

A state law violates the Contract Clause if it "(1) operates as a substantial impairment of a contractual relationship, and (2) is not drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1279 (9th Cir. 2021) (citation, alteration, and internal quotation marks omitted).

Determining whether a state law substantially impairs a contractual relationship involves three inquiries: 1) "whether there is a contractual relationship," 2) "whether a change in law impairs that contractual relationship," and 3) "whether the impairment is substantial." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004) (citation omitted).

Plaintiffs satisfied the first component of this inquiry through their allegation that Uber and Postmates are "parties to valid contracts with the app-based drivers who use their apps, including [Olson and Perez]."

Plaintiffs satisfied the second component by alleging that "[e]nforcement of [A.B. 5, as amended] would substantially impair existing contracts . . . between [Uber and Postmates] and the app-based drivers who use their apps, including [Uber and Postmates'] contracts with [Olson and Perez]." More specifically, Plaintiffs alleged that A.B. 5, as amended, "would severely modify key contractual rights in those contracts (such as various rights to flexibility), and would impose new obligations to which the parties did not voluntarily agree to undertake, such as a duty of

loyalty, unemployment coverage, and other employment benefits."

Nevertheless, the district court properly dismissed Plaintiffs' Contract Clause claims because Plaintiffs failed to plausibly allege the third component of the inquiry. Plaintiffs asserted that A.B. 5, as amended, would "eliminate the very essence of the contractual bargain in these existing contracts, interfere with the reasonable expectations under these existing contracts, and eliminate the primary value of those contracts," because "[t]he classification of app-based drivers as independent contractors under the existing contracts . . . is a critical feature" of these contractual relationships. Even after taking this allegation as true—as we must at this juncture, *see Tingley*, 47 F.4th at 1066—we conclude that A.B. 5, as amended, does not violate the Contract Clause because it neither interferes with Plaintiffs' reasonable expectations nor prevents them from safeguarding or reinstating their rights. Notably—as Plaintiffs conceded at oral argument—nothing in A.B. 5, as amended, prevents Plaintiffs from amending their contracts in response to the statute's requirements.

Although Plaintiffs' Second Amended Complaint alleged that A.B. 5, as amended, infringed upon their "reasonable expectation in the enforcement of their contracts," we are not persuaded that these allegations plausibly allege that Plaintiffs had a "reasonable expectation" that their contractual terms were immune from regulation. We have consistently held that states have "clear" authority to regulate employment conditions. *See e.g.*, *RUI One Corp.*, 371 F.3d at 1150 ("The power to regulate wages and employment conditions lies clearly within a state's . . . police power "). And, "California law is clear that the label placed by

the parties on their relationship is not dispositive." *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989 (9th Cir. 2014) (citation, alteration, and internal quotation marks omitted). We remain unconvinced that Plaintiffs' allegations required the district court to conclude that Plaintiffs' Contract Clause claims were plausible. *See generally Hotop v. City of San Jose*, 982 F.3d 710, 717 (9th Cir. 2020) (concluding that plaintiffs failed to plausibly allege a Contract Clause claim when the plaintiffs did "not specify *how*" the ordinance affected the contracts) (footnote reference omitted) (emphasis added).

D. Bill of Attainder Claims

"A bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *SeaRiver Maritime Fin. Holdings*, 309 F.3d at 668 (citation and internal quotation marks omitted). A statute is a Bill of Attainder if it "(1) specifies the affected persons, and (2) inflicts punishment (3) without a judicial trial." *Id.* (citation omitted).

Plaintiffs' Bill of Attainder claims fail because Plaintiffs did not plausibly allege that A.B. 5, as amended, inflicts punishment on them. In assessing whether a statute inflicts punishment we assess the following factors: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, reviewed in terms of the type and severity of burdens imposed reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a [legislative] intent to punish." *Id.* at 673 (citations and internal quotation marks omitted).

Plaintiffs' allegations fail the plausibility test on the first factor. In *SeaRiver*, we described the historical means of punishment that characterize an unconstitutional Bill of Attainder as legislation that "sentenced the named individual to death, imprisonment, banishment, the punitive confiscation of property by the sovereign, or erected a bar to designated individuals or groups participating in specified employments or vocations." *Id.* (citation omitted). Nothing in Plaintiffs' allegations plausibly allege punishment that conforms to this historical description. The closest allegations assert interference with Plaintiffs' business model. But even that allegation does not plausibly allege punishment. *See id.* at 673–74 (concluding that there was no bar to employment as long as the Plaintiffs continued to operate their business).

Nor do Plaintiffs' allegations plausibly describe a legislative intent to punish. To be sure, as previously discussed, Plaintiffs alleged that Defendants have animus against them. But animus does not necessarily translate into *punitive* intent. The purpose of A.B. 5 § 1(e), as amended, is remedial—to prevent worker misclassification. *See* A.B. 5 § 1(e). While the allegations of inconsistent exemptions and animus state a claim that A.B. 5, as amended, lacks a rational basis, "[a]bsent more compelling support in the record, we cannot conclude that there is 'unmistakable evidence of punitive intent.'" *SeaRiver*, 309 F.3d at 677 (citation omitted); *see also Fowler Packing Co. v. Lanier*, 844 F.3d 809, 819 (9th Cir. 2016) ("While such intent [for political expediency] does not align with a legitimate justification for a law, it is distinct from an intent to *punish*."). Given the absence of plausible allegations of both an alignment with historical notions of punishment and punitive intent, Plaintiffs fail to

state a claim that A.B. 5, as amended, represents a Bill of Attainder. *See SeaRiver*, 309 F.3d at 674.

E. Preliminary Injunction.

Pursuant to our previous Order on Motion to Consolidate and Motion to Dismiss, we "address the issue of whether the preliminary injunction was properly denied" because "the district court's dismissal order is reversed." *See Nationwide Biweekly Admin.*, 873 F.3d at 730–31 (discussing the merger of appeals). Because we reverse in part the district court's dismissal order, we now address the district court order denying Plaintiffs' motion for a preliminary injunction.

The district court denied Plaintiffs' motion for a preliminary injunction based on the allegations contained in the Initial Complaint. The district court's dismissal order dismissed Plaintiffs' Second Amended Complaint, which contained allegations regarding facts—namely the passage of A.B. 2257 and Prop. 22—that did not exist when the Initial Complaint was filed. Although we could review the district court's order to determine whether it abused its discretion by denying Plaintiffs' motion, *see Roman*, 977 F.3d at 941, the more prudent course of action is a remand for the district court to reconsider Plaintiffs' motion for a preliminary injunction, considering the new allegations contained in the Second Amended Complaint. *See Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (per curiam) (remanding to the district court where it was "better able to decide the question in the first instance") (citation omitted).

We therefore remand Plaintiffs' motion for a preliminary injunction for reconsideration, consistent with this Opinion.

IV. Conclusion

We conclude that the district court erred by dismissing Plaintiffs' Equal Protection claims. However, the district court correctly dismissed Plaintiffs' Due Process claims, Contract Clause claims, and Bill of Attainder claims.

We remand the district court's order denying Plaintiffs' motion for a preliminary injunction for reconsideration.

REVERSED IN PART, AFFIRMED IN PART, and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 19-10956-DMG (RAOx)

July 16, 2021

Present: The Honorable	DOLLY M. GEE, UNITED STATES DISTRICT JUDGE
KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present For Plaintiff(s) None Present	Attorneys Present For Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANT'S MOTION TO DISMISS [84]

I.
INTRODUCTION

On December 18, 2020, Defendant California Attorney General Xavier Becerra filed a Motion to Dismiss ("MTD") the Second Amended Complaint ("SAC") filed by Plaintiffs Lydia Olson, Miguel Perez, Postmates Inc. ("Postmates"), and Uber Technologies, Inc. ("Uber").[1] Since the MTD was filed, Rob Bonta replaced Xavier Becerra as California Attorney General and is hereby automatically substituted for

[1] The Court refers to Olson and Perez collectively as the "Individual Plaintiffs" and Uber and Postmates collectively as the "Company Plaintiffs."

Becerra as a party in accordance with Federal Rule of Civil Procedure 25(d).

Many of the allegations in the SAC are identical or similar to the allegations in the First Amended Complaint ("FAC"). The Court therefore incorporates by reference the factual and procedural background set forth in its prior Order granting Defendant's motion to dismiss the FAC. September 18, 2020 Order at 1–4 [Doc. # 76]; *see also Olson v. California*, No. CV 19-10956-DMG (RAOx), 2020 WL 6439166, at *1–3 (C.D. Cal. Sept. 18, 2020). The new allegations focus on (1) Assembly Bills ("AB") 170 and 2257, which provide additional exemptions and clarifications to AB 5; (2) efforts to enforce AB 5 against Plaintiff Uber and another similar company, Lyft; and (3) Proposition 22 ("Prop 22"), a California ballot initiative approved by California voters on November 3, 2020 which provides, in short, that AB 5, AB 170, and AB 2257 (collectively, "AB 5, as amended"), do not apply to individuals who use rideshare and delivery applications to provide services, and such individuals are classified as independent contractors who will receive a range of new protections and benefits from rideshare and delivery platform companies such as Company Plaintiffs. *See* SAC at ¶¶ 14-16. According to Plaintiffs, even after the passage of Prop 22, Defendant, other California officials, and private actors are still trying to use AB 5, as amended, to force reclassification of Company Plaintiffs' drivers from independent contractors to employees under the "ABC" test for worker classification set forth in *Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903 (2018) and codified by AB 5. *Id.* at ¶ 18. The Court will detail any additional factual allegations in its analysis below.

In addition to claims for violating the Equal Protection, Due Process, and Contract Clauses of the United States and California Constitutions, the SAC also brings a new claim for violation of the Bill of Attainder Clauses of both Constitutions. *Id.* at ¶¶ 17, 177–245. Defendant now moves to dismiss the SAC in its entirety. [Doc. # 84.] The MTD is fully briefed. [Doc. ## 88, 89.]

For the reasons stated below, the Court **GRANTS** Defendant's MTD.

II.
LEGAL STANDARD

The Court stated the legal standard governing motions to dismiss in its prior MTD Order and therefore need not repeat it here. September 18, 2020 MTD Order at 5 [Doc. # 76].

III.
DISCUSSION

As a preliminary matter, no party argues that Prop 22 moots this case. Although Prop 22 created a new classification scheme for gig economy workers, it did not include a retroactive application provision. *See* SAC at ¶ 132 ("Prop 22 classifies independent service providers who use app-based rideshare and delivery apps as independent contractors *going forward*[.]") (emphasis in original). The law remains unsettled as to whether Prop 22 in fact applies retroactively and whether its passage abated any existing claims for reclassification under AB 5. *See James v. Uber Techs. Inc.*, No. 19-CV-06462-EMC, 2021 WL 2476809, at *2 (N.D. Cal. June 17, 2021) (clarifying that the court would decide the retroactivity and abatement issues on the merits). In the meantime, Plaintiffs cite to public statements that the State of

California will "continue to seek penalties for the time between January and the certification of the election results" for Prop 22. SAC at ¶ 132 (quoting Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. Times (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html (last visited July 16, 2021)). Moreover, Plaintiffs challenge the constitutionality of the entire AB 5 scheme, which applies to a wide array of work relationships in different industries, not just to the specific rideshare and delivery app relationships affected by Prop 22.

Because Prop 22 does not moot this constitutional challenge, the Court concludes that Plaintiffs have presented a live case or controversy for decision.[2]

A. Equal Protection Claims

The SAC re-alleges violations of the United States and California Constitutions' Equal Protection Clauses, focusing primarily on (1) the arbitrariness and irrationality of the exemptions to AB 5 codified in AB 170 and AB 2257, and (2) the State's "animus toward the on-demand economy." SAC at ¶¶ 177–201. As set forth in its prior Orders, the Court need only determine whether, under the Equal Protection Clause, the statute rationally furthers "a legitimate

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[2] Although the Ninth Circuit has not yet decided whether Plaintiffs' appeal of the Court's denial of their motion for preliminary junction is moot, in light of Prop 22, the Court may still proceed with the merits of the case. *See G & M, Inc. v. Newbern*, 488 F.2d 742, 746 (9th Cir. 1973) ("[A]n appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits.").

state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

In its September 18, 2020 MTD Order, the Court concluded that the Legislature asserted a legitimate interest in protecting California workers from misclassification and that AB 5's statutory scheme, including its exemptions of certain types of workers and industries, was rationally related to that interest in protecting workers. September 18, 2020 Order, 2020 WL 6439166, at *4–9. Specifically, the Court rejected Plaintiffs' arguments that Company Plaintiffs' drivers are so similarly situated to exempted workers that the Legislature's failure to exempt Plaintiffs' work relationships is irrational or arbitrary. *Id.* at *6–7. Furthermore, even if AB 5's list of exemptions had to pick some groups to exempt and some not to exempt, the Court's rational basis review "reflect[s] the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Id.* at *7 (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)). Plaintiffs also did not sufficiently allege that AB 5 was motivated purely by irrational animus or favoritism to lobbying groups. *Id.* at *9.

Additionally, in its February 10, 2020 Order denying Plaintiffs' Motion for Preliminary Injunction ("MPI"), the Court discussed AB 170's exemption of newspaper carriers and noted that rational reasons exist to exempt a local newspaper delivery person from the ABC test. February 10, 2020 Order at 11, n.9 [Doc. # 52]; *see also Olson v. California*, No. CV 19-10956-DMG (RAOx), 2020 WL 905572, at *8, n.9 (C.D. Cal. Feb. 10, 2020).

Thus, the SAC and instant MTD rehash many of the arguments raised in the FAC and prior MTD, and

the Court need not reiterate the reasons why "'a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked[.]'" September 18, 2020 Order, 2020 WL 6439166, at *8 (quoting *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969)). AB 5, as amended by AB 170 and 2257, does not fail rational basis review simply because Plaintiffs can identify, in theory, other groups possibly worthy of exemption, such as musicians who perform in a live, single-engagement ballet. *See* SAC at ¶ 107. Under Supreme Court and Ninth Circuit precedent, classifications that are "to some extent both underinclusive and overinclusive" may survive rational-basis review, since "perfection is by no means required" of legislatures. *Gallinger v. Becerra*, 898 F.3d 1012, 1018 (9th Cir. 2018) (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)).

To determine whether the SAC has cured the deficiencies of the FAC, the Court addresses only the following four categories of *new* factual allegations: (1) AB 5 bill sponsor Assemblymember Lorena Gonzalez's comments about exempting the work relationships of newspaper workers under AB 170; (2) possible exemptions of the work relationships of gig economy companies TaskRabbit and Wag! under AB 5; (3) Assemblymember Gonzalez's animus toward Uber; and (4) the policy pronouncements of Prop 22.

1. AB 170's one-year grace period for contract newspaper distributors

According to Plaintiffs, AB 170 created an irrational one-year exemption for newspaper distributors, as evidenced by Assemblymember Gonzalez's statements excoriating misclassification in the newspaper

industry. SAC at ¶¶ 80–82. In full, AB 170 does not require the ABC test to be applied to "a newspaper distributor working under contract with a newspaper publisher and a newspaper carrier working under contract, either with a newspaper publisher or newspaper distributor" until January 1, 2021, a year after AB 5's effective date. AB 170, Ch. 415, 2019–2020 Reg. Sess. (Cal. 2019). Assemblymember Gonzalez said that AB 170's exemption was "shameful" and would cause "continue[d] . . . misclassif[ication]" of "historically misclassified" workers, such as "women of color," but that it was a "condition of AB 5's passage." SAC at ¶ 81 (quoting Katy Grimes, *How Assemblywoman Lorena Gonzalez was Forced to Author AB 170 and Voted NO on Her Own Bill*, Cal. Globe (Sept. 16, 2019), https://californiaglobe.com/section-2/how-assemblywoman-lorena-gonzalez-was-forced-to-author-ab-170-and-voted-no-on-her-own-bill/ (last visited July 3, 2021)).

Undercutting the thrust of Plaintiffs' argument, however, Assemblymember Gonzalez also asserted that "'newspapers have lost nearly every case brought by carriers under [*S. G. Borello & Sons, Inc. v. Department of Industrial Relations.*, 48 Cal. 3d 341 (1989)],'" implying that even under the old *Borello* multifactor standard for determining employment status, newspaper workers have been able to show that they are properly classified as employees, not contractors. Opp. at 13 (quoting SAC at ¶ 81); *see, e.g.*, *Espejo v. The Copley Press, Inc.*, 13 Cal. App. 5th 329, 342–352 (2017). Thus, the legislature's decision to provide a one-year exemption for newspaper distributors and carriers under AB 170, where newspaper workers arguably were already protected even under the old *Borello* test, does not undermine the rationality of a legislative scheme aimed at remedying misclassification

in industries *not* satisfactorily covered by *Borello*. Indeed, by contrast to the newspaper workers described in AB 170, delivery drivers for an app-based food delivery service similar to Postmates have been found to be independent contractors under the *Borello* test. *See* SAC at ¶ 61 (citing *Lawson v. Grubhub Inc.*, 302 F. Supp.3d 1071 (N.D. Cal. 2018)). The Legislature could thus rationally surmise that delivery drivers had greater need for a swift change to the ABC test to adequately capture cases of misclassification.

Furthermore, AB 170 gave the newspaper industry an additional year to come into compliance with the ABC test due to a "uniquely complex regulatory and legal history when it comes to independent contractor law." Sen. Comm. Rep., AB 170, 2019–2020 Reg. Sess., at 2 (Cal. Sept. 11, 2019). As explained by the California Senate Committee on Labor, Public Employment, and Retirement, the newspaper industry had relied on an Employment Development Department regulation created in 1987 that addressed when a newspaper carrier or distributor's workers are considered employees for the purposes of the Unemployment Insurance Code, but which newspaper publishers had stretched to utilize in wage and hour litigation. *Id.* at 2–4. In light of the shift from the existing regime, and in consideration of the undeniable financial stress affecting the newspaper industry as a whole, the Legislature concluded that it would be desirable to give newspaper publishers more time to address misclassification concerns. *Id.*; *see also* Assemb. Comm. Rep., AB 170, 2019–2020 Reg. Sess., at 2 (Cal. Sept. 14, 2019).

Because reasonable explanations for AB 170's amendment to AB 5 exist, Plaintiffs' argument fails to establish an Equal Protection violation.

2. Comparison to gig economy companies TaskRabbit and Wag!

The SAC also includes new allegations about two other gig economy companies: TaskRabbit, an "errands-based app[]" that provides "on-demand help with everyday tasks, such as handyman work," and Wag!, an app that provides "on-demand dog walking," both of which rely on nearly identical business models as the Company Plaintiffs. SAC at ¶ 10. Plaintiffs argue that because AB 5 specifically exempts referral agencies that refer "errands" and "dog walking" services, TaskRabbit's and Wag!'s relationships with their app-based workers are exempted from the ABC test. *Id.* According to Plaintiffs, exempting TaskRabbit and Wag!'s work relationships, which are nearly identical to Uber's and Postmates' relationships with their workers, "undercut[s] [the State's] own rational basis" for AB 5 and its amendments. Opp. at 10 (quoting *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008)).

This argument in fact supports the opposite conclusion. The decision to exempt some gig economy companies and not others demonstrates that the Legislature did *not* arbitrarily target app-based network companies. It is true that the Legislature highlighted the gig economy as a growth industry with high rates of misclassification. In an official bill analysis published months before most of the exemptions were added, the California Assembly Committee on Labor and Employment claimed that "some of the highest misclassification rates [occur] in the economy's growth industries, including homecare, janitorial, trucking, construction, hospitality, security, *and the app-based 'on demand' sector*." Assemb. Comm. Rep., AB 5, 2019–2020 Reg. Sess., at 2 (Cal. July 5, 2019)

(emphasis added); *see* SAC at ¶ 59. Thus, in crafting AB 5's exemptions for certain referral agencies, the Legislature specifically stated that AB 5 does *not* exempt referrals for "services provided in an industry designated . . . as a high hazard industry . . . or referrals for businesses that provide janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair. Cal. Lab. Code § 2777(b)(2)(C).

Conspicuously missing from this list, however, is the app-based on demand sector. The deliberate choice not to "carve in" the entire app-based on demand sector is consistent with a report by the California Senate Committee on Labor, Public Employment, and Retirement, in which the committee highlighted "technological neutrality" as one of the four factors considered to determine whether an occupation is comprised "unquestionably" of independent contractors. *See* SAC at ¶ 69 (citing Sen. Comm. on Labor, Pub. Emp't, and Ret., AB 5, 2019–2020 Reg. Sess., at 8 (Cal. July 8, 2019)). In other words, the Legislature made no distinction between a mobile app or the Yellow Pages as the intermediary connecting contractor and client, and asked instead "if the intermediary is . . . deriving disproportionate benefits from the relationship." Sen. Comm. Rep., AB 5, 2019–2020 Reg. Sess., at 8–12 (Cal. July 8, 2019). According to the Legislature's framework, similarities in the app-based business model of TaskRabbit, Wag!, Uber, and Postmates are not dispositive of an employer or an independent contractor relationship. Instead, the Legislature's framework focuses on the *services* each company provides to determine if those services tend to be performed by traditional independent contractors and should be exempt from the ABC test under AB 5.

Thus, the very fact that TaskRabbit and Wag! may be exempted from the ABC test under AB 5 indicates that the Legislature is *not* "singling out network companies and subjecting them to different rules," as Plaintiffs allege. SAC at ¶ 30.

Thus, the more salient question is whether there are rational differences between exempted errand-running and dog-walking, and non-exempted passenger and delivery driving. Several easily come to mind. *See Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (noting that courts "imagine any conceivable basis supporting a law, even if not advanced by the government"). Dog-walking and errand-running are traditionally activities performed by a household member, and a client's relationships with those service providers is necessarily a more intimate one. Because those tasks likely involve entering a client's home, the client and individual service provider likely exert more control over the service than the depersonalized referral agency, and the service providers may have their supplies provided by the client. By contrast, the transportation industry has historically experienced misclassification of drivers. *Dynamex* itself involved a class of drivers for an "on-demand" courier company. *See* 4 Cal. 5th at 917. And the sheer number of pre-AB 5 lawsuits against Uber alone indicates drivers' and competitors' perception that Uber's drivers are misclassified as independent contractors. *See, e.g.*, *Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074 (N.D. Cal. 2019); *Colopy v. Uber Techs. Inc.*, No. 19-CV-06462-EMC, 2019 WL 6841218 (N.D. Cal. Dec. 16, 2019); *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110 (N.D. Cal. 2016); *Yucesoy v. Uber Techs., Inc.*, No. 15-CV-00262-EMC, 2016 WL 493189 (N.D. Cal. Feb. 9, 2016). The employment of

dog-walkers and errand-runners has not engendered any comparable misclassification lawsuits.

Furthermore, notwithstanding the exemptions relating to referral agencies, AB 5 still applies the ABC test to typical cases of misclassification. AB 5, as amended, requires that in order for the relationship between a referral agency and a service provider to be exempt from the ABC test, the service provider must be "free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact"—in addition to *ten* other requirements such as the service provider providing her own tools and supplies and setting her own hours and terms of work. *See* Cal. Lab. Code § 2777(1)-(11). So TaskRabbit, Wag!, and other app-based referral agencies could still be swept under AB 5, as amended, should they exert control and direction over the service provider's services for the client. AB 5 thus still provides that any service providers referred to clients by a referral agency may be considered employees if they display hallmarks of traditional employee, versus independent contractor, status, even if they provide services in industries that were not of particular concern to the Legislature. *See Dynamex*, 4 Cal. 5th at 955; *Borello*, 48 Cal. 3d at 351.

Accordingly, Plaintiffs have yet again failed to carry their burden "to negative every conceivable basis which might support" AB 5, as amended. *Beach Commc'ns, Inc.*, 508 U.S. at 315. As the Ninth Circuit recently stated, "For better or for worse, governmental regulations today typically benefit some groups and burden others. So long as there are other legitimate reasons for the economic distinction, we must uphold the state action." *San Francisco Taxi Coal. v. City &*

Cnty. of San Francisco, 979 F.3d 1220, 1225 (9th Cir. 2020). Equal protection is implicated only "if the state's action borders on corruption, pure spite, or naked favoritism lacking any legitimate purpose." *San Francisco Taxi Coal.*, 979 F.3d at 1225. Based on the factual allegations of the SAC, the Legislature's reports incorporated by reference in the SAC or judicially noticed by this Court, and the Court's own rational perceptions of the basis for the law, AB 5 and its exemptions may benefit some groups and burden others, but the scheme survives Equal Protection challenge because it is motivated by a legitimate legislative interest in addressing erosion of the middle class through misclassification.[3]

3. Animus against Uber

Although the SAC contains new allegations about Assemblymember Gonzalez's undeniable disdain for Uber and her specific desire that AB 5 cover Uber in particular, those allegations do not show that AB 5 was motivated solely by impermissible animus. *See, e.g.*, SAC at ¶ 92 (noting that Assemblymember Gonzalez explained during legislative debate that the

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[3] The Court rejects Plaintiffs' argument that the rationality inquiry is too fact-intensive to be decided as a matter of law. See Opp. at 12. Plaintiffs do not cite any binding, analogous authority for that proposition, and courts frequently grant motions to dismiss constitutional claims requiring rational basis review, where rationality may be determined as a matter of law. See, e.g., *San Francisco Taxi Coal.,* 979 F.3d at 1222 (affirming dismissal of Equal Protection challenge to a municipal agency rule giving priority to certain taxi drivers over others); *Gallinger,* 898 F.3d at 1022 (9th Cir. 2018) (affirming dismissal of Equal Protection challenge to California's Gun-Free Schools Act); *Am. Soc'y of Journalists & Authors, Inc. v. Becerra,* No. CV 19-10645-PSG (KSx), 2020 WL 1434933, at *2 (C.D. Cal. Mar. 20, 2020) (dismissing journalists' Equal Protection challenge to AB 5).

exemptions were purposefully designed so there was no way "Uber w[ould] [be able to] just say" it might fall within one); ¶¶ 93, 135 (describing Assemblymember Gonzalez's Twitter activity). First, Plaintiffs still have not shown that they are a "politically unpopular group" in the Equal Protection context. *See* February 10, 2020 Order, 2020 WL 905572, at *9, n.13 (noting politically unpopular groups in the past have included members of the LGBT community, mentally disabled individuals, and hippies). AB 5 has also been implicated in misclassification litigation in the trucking industry, including in one enforcement action brought by a city attorney, undermining Company Plaintiffs' insistence that they alone are targets of AB 5. *See California Trucking Ass'n v. Bonta*, 996 F.3d 644, 649 (9th Cir. 2021); *People v. Superior Ct. of Los Angeles Cnty.*, 57 Cal. App. 5th 619, 625 (2020), *review denied* (Feb. 24, 2021). Regardless, even if the Legislature sought to apply and then enforce the ABC test solely against Company Plaintiffs, legislators are entitled to identify "the phase of the problem" of misclassification "which seems the most acute to the legislative mind." September 18, 2020 Order, 2020 WL 6439166, at *7 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)).

Because AB 5 sweeps far more broadly than simply Uber or any other gig economy company, Plaintiffs cannot show that "'the statute serves no legitimate governmental purpose *and* [that] impermissible animus toward an unpopular group prompted the statute's enactment.'" *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200–01 (9th Cir. 2018) (quoting *Mountain Water Co. v. Mont. Dep't of Pub. Serv. Regulation*, 919 F.2d 593, 598 (9th Cir. 1990)) (emphasis added).

4. Effect of Prop 22

Similarly, Plaintiffs fail to support their assertion that Prop 22's passage "further establishes the irrationality of AB 5." Opp. at 9. Prop 22 certainly contains harsh language about AB 5. It sets forth that AB 5 "threatened to take away the flexible work opportunities of hundreds of thousands of Californians . . . [including] their ability to make their own decisions about the jobs they take." Cal. Bus. & Prof. Code § 7449(d). Prop 22's stated purpose is "[t]o protect the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies throughout the state," and it effectuated that purpose by providing that, "[n]otwithstanding" AB 5, "an app-based driver is an independent contractor." *Id.* §§ 7450(a), 7451.

But it is not clear that California voters' disapproval of AB 5 by voting for Prop 22 translates to a finding that AB 5 is irrational and thus unconstitutional. As the Supreme Court noted, "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Beach Commc'ns*, 508 U.S. at 314 (citing *Vance v. Bradley,* 440 U.S. 93, 97 (1979) (footnote omitted)). From Plaintiffs' perspective, any excesses of AB 5 have in fact been "rectified by the democratic process." *Id.* And the Court notes that Prop 22 may also abate any existing claims under AB 5—that question is not yet settled and is not before this Court. *See James v. Uber Techs. Inc.*, No. 19-CV-06462-EMC, 2021 WL 2476809, at *2 (N.D. Cal. June 17, 2021). As discussed above, Plaintiffs also fail to adequately allege that

animus or antipathy alone motivated the statute, which extends to far more work relationships than those of rideshare and delivery companies redefined by Prop 22. The Court therefore sees no reason to alter its conclusions about the constitutionality of AB 5, as amended, based on the passage of Prop 22.

* * *

In conclusion, the SAC does not cure the deficiencies with Plaintiffs' Equal Protection claims under the United States and California Constitutions. Because further amendment would be futile, the Court **DISMISSES** those claims without leave to amend.

B. Due Process Claims

The SAC re-alleges violations of the United States and California Constitutions' Due Process Clauses, arguing once again that "[b]eing one's own boss" is a fundamentally different occupation than "driving as an employee on an inflexible shift," and that AB 5 is not rationally related to a legitimate government interest. SAC at ¶¶ 202–14.

Having found a rational basis for AB 5 sufficient to survive an Equal Protection challenge, the Court applies that same rational basis to the Due Process challenge. The Court has already found that "AB 5 is not a 'complete prohibition' on Individual Plaintiffs' ability to pursue any profession." September 10, 2020 Order, 2020 WL 6439166, at *9 (quoting *Franceschi v. Yee*, 887 F.3d 927, 938 (9th Cir. 2018)). AB 5 and the ABC test permit anyone to remain an independent contractor if their work relationship meets the ABC test's requirements. But *even if* Plaintiffs' allegations in the SAC establish that driving as an independent contractor for Company Plaintiffs is its own "calling" or profession, to which AB 5 acts as a complete

prohibition, the Court need only determine "whether the legislation has a 'conceivable basis' on which it might survive constitutional scrutiny." *Dittman v. California*, 191 F.3d 1020, 1031 & n.5 (9th Cir. 1999) ("The [Supreme] Court has never held that the 'right' to pursue a profession is a *fundamental* right, such that any state-sponsored barriers to entry would be subject to strict scrutiny."); *see* SAC at ¶ 204.

For the reasons stated above, AB 5 conceivably furthers the State's legitimate interest in preventing misclassification of workers in a wide swath of industries, including the transportation, delivery, and courier industries. Accordingly, the Court **DISMISSES** Plaintiffs' due process claims, without leave to amend.

C. Contract Clause Claims

The SAC also re-alleges violations of the United States and California Constitutions' Contract Clauses, focusing primarily on the degree to which AB 5 was unforeseeable to Plaintiffs and impaired their reasonable contract expectations. SAC at ¶¶ 215–33. Contracts Clause claims involve a three-step inquiry: (1) "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship"; (2) whether the state has "a significant and legitimate public purpose behind the [law], such as the remedying of a broad and general social or economic problem"; and (3) "whether the adjustment of the 'rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.'" *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004) (quoting *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–13 (1983)).

The Court previously held that Plaintiffs' Contracts Clause claims failed at the first step of the inquiry for lack of substantial impairment, because "it was foreseeable that Uber's and Postmates' independent contractor relationship with their drivers could be reclassified via state regulation or court order." September 10, 2020 Order, 2020 WL 6439166, at *11. AB 5 falls under the regulatory purview of the State's "'broad authority under [its] police powers to regulate the employment relationship to protect workers within the State' through 'minimum and other wage laws [and] laws affecting occupational health and safety[.]'" *Id.* (quoting *RUI One Corp.*, 371 F.3d at 1150). The SAC re-alleges that enforcement of AB 5 substantially impairs the contracts between Company Plaintiffs and their drivers, including Individual Plaintiffs, because "[i]t would severely modify key contractual rights in those contracts (such as various rights to flexibility), and would impose new obligations to which the parties did not voluntarily agree to undertake, such as a duty of loyalty, unemployment coverage, and other employment benefits." SAC at ¶ 218.

But "California law is clear that '[t]he label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.'" *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989 (9th Cir. 2014) (quoting *Borello*, 48 Cal. 3d at 349)). There was thus always the risk that Plaintiffs' work relationships could be subject to reclassification, particularly after the *Dynamex* decision in 2018 and the cases addressing Uber's classification of workers. *See* September 18, 2020 Order, 2020 WL 6439166, at *11. In addition, because AB 5 only applies the ABC test prospectively, there is no retroactive impairment of past obligations in reliance on Plaintiffs' contracts.

Id. For example, one case cited by Plaintiffs involved a statute with an "extremely narrow focus," such that the law targeted very few employers, and imposed a retroactive requirement on those employers to pay "completely unexpected liability in potentially disabling amounts" of pension contributions for the past ten years. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247–48 (1978). Despite Company Plaintiffs' view of themselves as uniquely or solely targeted by AB 5, the statute's plain text shows that it is a law of general application that seeks to address *prospectively* a broad societal and economic problem in many industries. AB 5 thus did not create unexpected changes to Plaintiffs' past relationships and resulted only in some impairment to their existing and future contracts. After AB 5's passage, Plaintiffs were free to address anew their work relationships going forward.

The Court also previously noted that even if Plaintiffs had alleged substantial impairment, at the third step, the Court defers to the State's assessment of the reasonableness and necessity of enacting AB 5 to remedy a perceived economic and social problem. September 18, 2020 Order, 2020 WL 6439166, at *11 (citing *RUI One Corp.*, 371 F.3d at 1150 (upholding a municipal living wage ordinance that altered contractual expectations because "[t]he power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power.")). Plaintiffs' SAC and Opposition fail to persuade the Court that the State lacks the authority to regulate the work relationships between private parties. The cases Plaintiffs cite are inapposite. Most of them involve government actors impairing their own contracts, necessitating a higher level of scrutiny. *See Matsuda v. City & Cnty. of Honolulu*, 512 F.3d 1148, 1155 (9th Cir. 2008); *Univ. of*

Hawai'i Pro. Assembly v. Cayetano, 183 F.3d 1096, 1106 (9th Cir. 1999); *Ross v. City of Berkeley*, 655 F. Supp. 820, 829 (N.D. Cal. 1987); *Sonoma Cnty. Org. of Pub. Emps. v. Cnty. of Sonoma*, 23 Cal. 3d 296, 308–09 (1979); *Ass'n of Los Angeles City Att'ys v. City of Los Angeles*, No. CV 12-4235-MMM (JCX), 2012 WL 12887541, at *8 (C.D. Cal. Nov. 20, 2012); *Aaron v. Aguirre*, No. 06-CV-1451-H (POR), 2006 WL 8455871, at *9 (S.D. Cal. Dec. 13, 2006).

Here, because the impairment to the private-party contracts at issue is not severe, the Court "may properly defer to legislative judgment as to the necessity and reasonableness of a particular measure" of social and economic regulation. *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 22–23 (1977). Plaintiffs allege that they proposed other policies addressing the social welfare of gig economy drivers to the Legislature, including policies that California voters approved via Prop 22. SAC at ¶¶ 194–95. They argue that the Legislature's failure to adopt those "direct and less-restrictive measures" to address misclassification in the gig economy indicates that AB 5 is an unnecessary legislative overreach. *Id.* at ¶ 194. The Supreme Court has been clear that even when public welfare is invoked as a justification, the security of a contract cannot be cut down without "moderation or reason or in a spirit of oppression." *Allied Structural Steel*, 438 U.S. at 243 (quoting *W.B. Worthen Co. ex rel. Bd. of Comm'rs of St. Imp. Dist. No. 513 of Little Rock v. Kavanaugh*, 295 U.S. 56, 60 (1935)). But Plaintiffs' myopia with respect to the larger goals of AB 5 once again hinders their argument. As alleged, Plaintiffs' alternative policy proposals would have done nothing to address misclassification in, *inter alia*, the trucking, janitorial, agricultural labor, retail, logging, in-home care, or construction service

industries. Thus, the Court defers to the Legislature's judgment that the proposals Plaintiffs put forward to regulate the gig economy were not reasonable solutions in light of the larger problem of misclassification. And, as already discussed in prior Orders, AB 5 fits within the State's authority to regulate employment relationships and thus satisfies the public purpose test imposed in a Contracts Clause challenge. *See* September 18, 2020 Order, 2020 WL 6439166, at *11; February 10, 2020 Order, 2020 WL 905572, at *12.

The Court therefore **DISMISSES** Plaintiffs' state and federal Contracts Clause claims, without leave to amend.

D. Bill of Attainder Claims

The SAC advances for the first time claims that AB 5 is a bill of attainder. SAC at ¶¶ 234–45. The United States and California Constitutions provide that no legislature shall pass a bill of attainder. *See* U.S. Const. art. I, § 9, cl. 3; *id.* art. I, § 10; Cal. Const., art. I, § 9; *see Law Sch. Admission Council, Inc. v. State of Cal.*, 222 Cal. App. 4th 1265, 1298-99 (2014). A similar analysis applies under both constitutional provisions. *See, e.g.*, *Armijo v. Miles*, 127 Cal. App. 4th 1405, 1419 (2005).

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 468 (1977). A bill of attainder has the following three components: it "(1) specifies the affected persons, and (2) inflicts punishment (3) without a judicial trial." *SeaRiver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002). Courts

presume that statutes are constitutional, and "[o]nly the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder." *Id.* at 669. In examining a statute, courts "'may only look to its terms, to the intent expressed by [the legislators] who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect.'" *Id.* (quoting *Nixon*, 433 U.S. at 484). Courts also use various "guideposts" to determine whether a law singles out an individual or group. First, courts look at whether "the statute or provision explicitly names the individual or class, or instead describes the affected population in terms of general applicability." *Id.* Relatedly, courts also assess whether the identity of the individual or class was "easily ascertainable" when the legislation was passed. Third, courts ask "whether the legislation defines the individual or class by 'past conduct [that] operates only as a designation of particular persons," and, fourth, "whether the past conduct defining the affected individual or group consists of 'irrevocable acts committed by them.'" *Id.* (citations omitted).

Plaintiffs have not provided the requisite "clear proof" that AB 5, as amended, singles them out. *Id.* AB 5, as amended, has numerous exemptions, but is still a law of general applicability to work relationships in California. *See Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961) (concluding that the challenged law was not a bill of attainder because it "attaches not to specified organizations but to described activities in which an organization may or may not engage"). While some legislators pointed fingers at Uber in their public comments, many other companies and industries are explicitly covered by the statute. AB 5 also does not define its applicability by an individual's or entity's past

conduct, but rather by existing work relationships. AB 5, as amended, therefore does not single out Uber, Postmates, or anyone based on past conduct in the same way that the challenged legislation in *SeaRiver* singled out the oil tanker Exxon Valdez and its owners and operators by increasing penalties on oil pollution starting on the day before the 1989 Exxon Valdez oil spill. *SeaRiver*, 309 F.3d at 670. Unlike in *SeaRiver*, the "prospective and generalized effect [of the statute] tempers the concerns of 'tyranny' by the 'multitude' that motivated the inclusion of the Bill of Attainder Clause." *SeaRiver*, 309 F.3d at 670–71 (quoting *United States v. Brown*, 381 U.S. 437, 443 (1965)).

Moreover, as discussed above, the State had a rational basis for addressing misclassification concerns and did not pass AB 5 solely to punish Plaintiffs. *See Communist Party*, 367 U.S. at 86 ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."). "An otherwise valid law is not transformed into a bill of attainder merely because it regulates conduct on the part of designated individuals or classes of individuals." *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 727 (9th Cir. 1992) (holding that an assault weapons ban was not a bill of attainder against assault weapon manufacturers). Plaintiffs obviously continue to disagree with the Legislature's policy determination that misclassification is a social and economic problem that needs to be addressed, particularly in certain industries. But Plaintiffs' disagreement with the policy motivating AB 5, as amended, does not mean that this law of general applicability is an irrational piece of legislation designating only Plaintiffs for punishment. As the Supreme Court has emphatically warned, an individual

or group affected by legislation cannot claim a bill of attainder merely due to dislike of the law, for to do so "would cripple the very process of legislating." *Nixon*, 433 U.S. at 470.

In light of the foregoing, Plaintiffs cannot show that AB 5 is a bill of attainder justifying this Court's interference with the Legislature's policy choices. The Court therefore **DISMISSES** the claims under the federal and state Bill of Attainder Clauses. Moreover, in light of the Court's repeated conclusions regarding the rationality of AB 5, as amended, and its determination that AB 5 is a law of general applicability that does not single out Plaintiffs, any amendment would be futile. In addition, because the SAC fails to state any ground for injunctive relief, the Court **DISMISSES** Plaintiffs' standalone claim for injunctive relief.

IV.
CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendant's MTD in its entirety. Because Plaintiffs have already had an opportunity to amend their Equal Protection, Due Process, and Contract Clause Claims, without success, and because further amendment would be futile, the Court **DISMISSES** those claims with prejudice. In addition, because the Bill of Attainder claims fail as a matter of law, and further amendment would be futile, the Court **DISMISSES** those claims with prejudice. The parties' Joint Request for Ruling [Doc. # 91] is **DENIED** as moot.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 19-10956-DMG (RAOx)

February 10, 2020

Present: The Honorable	DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [14]

On January 8, 2020, Plaintiffs Lydia Olson, Miguel Perez, Postmates Inc. ("Postmates"), and Uber Technologies, Inc. ("Uber")[1] filed a Motion for Preliminary Injunction requesting that the Court enjoin the enforcement against Plaintiffs, pending final judgment, of any provision of California Assembly Bill 5 2019 ("AB 5"), a recently enacted law pertaining to the classification of employees and independent contractors. [Doc. # 14.] The Motion has been fully briefed,

[1] The Court refers to Olson and Perez collectively as the "Individual Plaintiffs" and Uber and Postmates collectively as the "Company Plaintiffs."

and the Court held a hearing on February 7, 2020. [Doc. ## 21, 23.][2] For the reasons stated below, the Court **DENIES** Plaintiffs' Motion.

I.
FACTUAL AND PROCEDURAL BACKGROUND[3]

California courts have long grappled with the challenges of defining the line between an employee and an independent contractor. Two years ago, in its unanimous decision in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (2018), the California Supreme Court described the distinction between an independent contractor and employee—and the importance of that distinction—in this way:

> Under both California and federal law, the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has

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[2] On February 4, 2019, individuals described as "California On-Demand Contractors" Keisha Broussard, Daniel Rutka, Raymond Frazier, and Lamar Wilder filed a brief as *amici curiae* in support of Plaintiff's Motion for Preliminary Injunction. [Doc. # 27.] The next day, the Chamber of Commerce of the United States of America, Engine Advocacy, and TechNet also filed a brief as *amici curiae* in support of Plaintiff's Motion. [Doc. # 44.]

[3] The following facts are based on judicially noticeable documents and the sworn declarations Plaintiffs submitted in support of their Motion, not on the unverified allegations in Plaintiffs' Complaint. *See, e.g.*, *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088 (9th Cir. 1972) ("A verified complaint or supporting affidavits may afford the basis for a preliminary injunction[.]"); 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2949 (3d ed. 2019) ("Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for a preliminary injunction.").

> considerable significance for workers, businesses, and the public generally. On the one hand, if a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families.

Id. at 912–13 (footnote omitted). The California Supreme Court noted that "[t]he basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare." *Id.* at 952. It therefore adopted a "very broad definition of the

workers who fall within the reach of the wage orders."[4] *Id*.

That broad definition is known as the "ABC" test, a standard used in numerous jurisdictions in different contexts to determine a worker's classification. *Id.* at 916. Under the ABC test, a worker is considered an employee unless the hiring entity establishes that the worker (a) 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) "performs work that is outside the usual course of the hiring entity's business"; and (c) 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. *Dynamex* applied the ABC test to all employers and workers covered by California Industrial Wage Commission ("IWC") wage orders. *Id.* at 964.

On September 18, 2019, Defendant the State of California enacted AB 5, which codifies *Dynamex*'s holding and adopts the ABC test for all provisions of the California Labor Code, the Unemployment Insurance Code, and IWC wage orders, with numerous exemptions. *See* A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019); Cal. Lab. Code § 2750.3. For such statutory exemptions, AB 5 provides that the multifactor test of independent contractor status established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), remains in effect. *See* Cal. Lab. Code § 2750.3(b)–(h). The listed occupations, industries, or types of work relationships are

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[4] "In California, wage orders are constitutionally-authorized, quasi-legislative regulations that have the force of law." *Id.* at 914.

subject to additional criteria in order to be exempted from application of the ABC test and include, among others: licensed professionals such as doctors and lawyers, commercial fishermen, contractors and subcontractors in the construction industry, business-to-business service providers, travel agents, graphic designers, freelance writers, aestheticians, and business entities providing referred services as home cleaners, dog walkers, or tutors. *See id.* Under AB 5, certain city attorneys may bring injunctive actions, and reclassified employers may be subject to pre-existing Labor and Unemployment Insurance Code provisions penalizing some violations as misdemeanors. *See id.* § 2750.3(j); A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019).

On December 30, 2019, Plaintiffs filed the instant lawsuit alleging that AB 5 violates the U.S. and California Constitutions and seeking declaratory, injunctive, and other relief from the State and Defendant Xavier Becerra, in his capacity as Attorney General of California. [Doc. # 1.] Postmates and Uber are both headquartered in San Francisco, California, and are commonly referred to as "on-demand economy," "network economy," "platform," or "gig economy" companies that use technology to respond to a customer's immediate or specific need. *See* Compl. at ¶ 3; Andres Decl. at ¶ 3 [Doc. # 17]; Rosenthal Decl. at ¶ 5 [Doc. # 18]; McCrary Decl. at ¶ 14 n.1 [Doc. # 19].

Postmates provides and maintains an online marketplace and mobile platform (the "Postmates App") that connects local merchants, consumers, and drivers[5] to facilitate the purchase, fulfillment, and—when

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[5] Postmates' Director of Trust and Safety and Insurance Operations describes drivers as "independent contractor couriers."

applicable—delivery of goods from merchants (oftentimes restaurants) to consumers. Andres Decl. at ¶ 4. When consumers place orders of goods for delivery through the Postmates App, nearby drivers receive a notification and can choose whether to pick up and complete the requested delivery. *Id.* at ¶¶ 4–5. According to Postmates, more than 300,000 drivers in California currently make deliveries through the Postmates App, and "the vast majority" of those drivers "provide delivery services only intermittently and for short periods of time." *Id.* at ¶ 6. For drivers, there are no set schedules or requirements for minimum hours or deliveries. *Id.* at ¶ 7. Drivers use their own vehicles and determine their own appearance and routes, and they may do other work for other employers. *Id.* at ¶¶ 9–11. Drivers who wish to make deliveries through the Postmates App must sign the "Fleet Agreement," which currently explains, *inter alia*, that the driver is "an independent provider of delivery services" and that Postmates and the driver do not have an employer-employee relationship. *Id.* at ¶¶ 12–15.

Uber provides at least two "digital marketplaces" to connect individual consumers with those willing to service them—the UberEats mobile platform (the "UberEats App") and the Uber rideshare mobile platform (the "Uber Rides App"). Rosenthal Decl. at ¶¶ 6–8. The UberEats App, like Postmates, connects local merchants, consumers, and drivers to facilitate customers' food orders for delivery. *Id.* at ¶ 8. The Uber Rides App has different interfaces for customers seeking a ride ("riders") and for drivers seeking riders. *Id.*

See, e.g., Andres Decl. at ¶ 2. The Court has not been asked to decide whether Postmates' couriers are independent contractors or employees under AB 5, *Dynamex*, *Borello*, or any other law, and opts to describe the couriers as "drivers."

at ¶¶ 7, 12–15. According to Uber, more than 395,000 drivers in California have used Uber platforms to provide services in the year beginning October 1, 2018. *Id.* at ¶ 9. Drivers can choose when and where they drive and accept or reject requests as they see fit. *Id.* at ¶¶ 14–15, 18–19. To use the driver version of the Uber Rides app, drivers must agree to Uber's Technology Services Agreement (the "Rasier Services Agreement"), which provides, *inter alia*, that Uber is "a technology services provider that does not provide transportation services" and that the drivers operate as independent contractors, not employees. *Id.* at ¶¶ 20–29. UberEats drivers must also agree to a Technology Services Agreement (the "Portier Services Agreement") with similar provisions. *Id.* at ¶¶ 30–39.

Plaintiff Lydia Olson is a driver for Uber, and Plaintiff Miguel Perez is a driver for Postmates and, occasionally, Uber Rides and UberEats. Olson Decl. at ¶ 5 [Doc. # 15]; Perez Decl. at ¶¶ 2, 4–5 [Doc. # 16]. Olson owns a consulting business and at times takes care of her husband, who suffers from multiple sclerosis. Olson Decl. at ¶¶ 2–3. She attests that she intentionally chooses to work as an independent contractor for the flexibility and autonomy, as well as to help stabilize her fluctuating income. *Id.* at ¶¶ 4–5, 8–12. Similarly, Perez attests that he chose on-demand work to avoid driving a truck during the graveyard shift, to take on more family responsibilities, and to increase his income. Perez Decl. ¶¶ 3–8, 18. Neither Individual Plaintiff wants to be an employee of Uber or Postmates, and both express concerns about the grave impact of AB 5 on their lives. *Id.* at ¶¶ 19–20; Olson Decl. at ¶¶ 10, 12.

AB 5 went into effect on January 1, 2020. On January 8, 2020, Plaintiffs filed the instant Motion

requesting that this Court enjoin Defendants from enforcing AB 5 against Company Plaintiffs.

II.
JUDICIAL NOTICE

Both sides seek judicial notice of various documents. Federal Rule of Evidence 201 permits a court to take judicial notice of facts not subject to reasonable dispute and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Campbell v. Pricewaterhouse-Coopers, LLP*, 642 F.3d 820, 824 n.3 (9th Cir. 2011) (citing Fed. R. Evid. 201(b)). Defendants seek judicial notice of:

(1) The Order Denying Temporary Restraining Order in *American Society of Journalists and Authors, Inc. v. Becerra*, No. CV 19-10645-PSG (C.D. Cal. Jan. 3, 2020);

(2) The October 29, 2019 initiative submitted to the California Attorney General's Office entitled "the Protect App-Based Drivers and Services Act." [Doc. # 21.]

Plaintiffs seek judicial notice of:

(1) Plaintiffs' Motion for Provisional Relief in *Regents of University of California v. U.S. Department Homeland Security*, No. CV 17-05211-WHA (N.D. Cal. Jan. 9, 2018);

(2) Brief of State Amicus Curiae in *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017);

(3) Order Granting Temporary Restraining Order, *California Trucking Association v. Becerra*, No. CV 18-02458-BEN (BLMx) (S.D. Cal. Dec. 31, 2019);

(4) Order Granting Preliminary Injunction, *California Trucking Association v. Becerra*, No. CV 18-02458-BEN (BLMx) (S.D. Cal. Jan. 16, 2020);

(5) Docket Report, *First Franklin Financial Corp. v. Franklin First Financial, Ltd.*, 356 F. Supp. 2d 1048, CV No. 04-02842-WHA (N.D. Cal. 2005);

(6) Tweet by @LorenaSGonzalez, Twitter (Jan. 20, 2020, 11:55 p.m.), https://twitter.com/LorenaSGonzalez/status/1219528872351322114;

(7) Tweet by @LorenaSGonzalez, Twitter (Jan. 20, 2020, 11:35 p.m.), https://twitter.com/LorenaSGonzalez/status/1219523961517527040. [Doc. # 24.]

Courts "may take judicial notice of 'matters of public record.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted). Documents on file in federal or state courts are considered undisputed matters of public record. *Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). Courts take notice of the existence of such filings, not the truth of the facts recited therein. *Lee*, 250 F.3d at 689–90.

The Court hereby **GRANTS** both requests for judicial notice regarding Assemblymember Gonzalez's Tweets and the fact that the court documents were filed, but not of the facts asserted in the court documents. The Court also *sua sponte* takes notice of the Tweets and media reports referred to in the Complaint and the moving papers, as those documents' existence cannot reasonably be disputed. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) ("Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the

contents of those articles were in fact true.'" (citations omitted)). The Court also *sua sponte* takes notice of legislative history cited by Defendants at oral argument. *See* Assemb. Comm. Rep., AB 5, 2019–2020 Reg. Sess. (Cal. July 10, 2019). Because the Court does not rely on the "Protect App-Based Drivers and Services Act" in its analysis below, the Court **DENIES as moot** Defendants' request for judicial notice of that document.

III.
DISCUSSION

A plaintiff seeking a preliminary injunction must show that (1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction is also appropriate under the Ninth Circuit's "sliding scale" approach when a plaintiff raises "serious questions going to the merits" and demonstrates that "the balance of hardships tips sharply in the plaintiff's favor," in addition to showing the final two *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)). The Supreme Court has cautioned that "[a]n injunction is an exercise of a court's equitable authority," which should not be invoked as a matter of course, and "a court should be particularly cautious when contemplating relief that implicates public interests." *Salazar v. Buono*, 559 U.S. 700, 714 (2010).

In the Ninth Circuit, the four "elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker

showing of another." *Cottrell*, 632 F.3d at 1131. The Court assesses each factor *seriatim*.

A. Likelihood of Success on the Merits

Plaintiffs' Complaint contains 10 claims against Defendants for violations of the U.S. Constitution's Ninth Amendment and Equal Protection, Due Process, and Contract Clauses and the California Constitution's "Baby Ninth Amendment" and Inalienable Rights, Equal Protection, Due Process, and Contract Clauses. [Doc. # 1.] Plaintiffs' Motion for Preliminary Injunction focuses on AB 5's alleged discrimination against Plaintiffs in violation of Equal Protection, deprivation of Individual Plaintiffs' substantive due process right to pursue their chosen professions, and impairment of contracts between Individual and Company Plaintiffs. *See, e.g.*, Mot. at 9–10 [Doc. # 14].[6] The Court therefore addresses only these claims.

Under the sliding scale approach, Plaintiffs must demonstrate at a minimum "that serious questions going to the merits were raised." *Cottrell*, 632 F.3d at 1134–35. For the reasons stated below, the Court does not find likelihood of success on the merits or that sufficiently serious questions have been raised as to the merits of these claims.

1. AB 5 is rationally related to a legitimate state interest and did not target gig economy companies in violation of Equal Protection

The Fourteenth Amendment's Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of

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[6] All page references herein are to page numbers inserted in the header of the document by the CM/ECF filing system.

the laws[.]'" *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

Plaintiffs argue that AB 5 targets gig economy companies and workers and treats them differently from similarly situated groups. Mot. at 16–17. The parties appear to agree that AB 5 does not warrant "some form of heightened review" because it implicates no fundamental right or suspect classification. *Nordlinger v. Hahn*, 505 U.S 1, 10 (1992); *see* Mot. at 16; Opp. at 14–15. Accordingly, the Court need only determine whether, under the Equal Protection Clause, the statute rationally furthers "a legitimate state interest." *Nordlinger*, 505 U.S. at 10. Under the rational review test, a statute bears "a strong presumption of validity," and "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 314–15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The Equal Protection inquiry does not license the Court to "'judge the wisdom, fairness, or logic of legislative choices,'" and it ends if the Court finds a "'plausible reason[] for [California's] action.'" *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (quoting *Beach Commc'ns*, 508 U.S. at 313–14)). Plaintiffs therefore bear the heavy burden of demonstrating that AB 5 irrationally targets gig economy companies and workers.

Section 1 of AB 5 sets forth a statement of purpose that describes "[t]he misclassification of workers as independent contractors [as] a significant factor in the erosion of the middle class and the rise in income inequality." A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal.

2019). The Legislature's stated intent in enacting AB 5 is:

> 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 if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave.

Id.

The statement of purpose also explicitly provides that "[b]y codifying the California Supreme Court's landmark, unanimous *Dynamex* decision, this act 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." *Id.* The State's asserted interest in protecting exploited workers to address the erosion of the middle class and income inequality thus appears to be based on a "reasonably conceivable state of facts that could provide a rational basis" for any ostensible targeting of gig economy employers and workers.[7] *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154 (9th Cir. 2004) (quoting *Beach Commc'ns*, 508 U.S. at 313); *see Nordlinger*, 505 U.S. at 11 (finding the state interest legitimate "so long as there is a plausible policy reason for the classification" and "the legislative facts on which the classification is apparently based

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[7] The Legislature's choice is entitled to such deference on rational basis judicial review that it "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315.

rationally may have been considered to be true by the governmental decisionmaker"). Given this plausible reason for enacting AB 5, the Court's inquiry could end here. *See Fowler Packing*, 844 F.3d at 815.

But Plaintiffs argue that AB 5 does not rationally further that asserted governmental interest because its numerous exemptions "roll[] back *Dynamex* for the wage order claims of" workers who would otherwise be covered by *Dynamex*. Reply at 7 [Doc. # 23]. Asserting that many of the employers and workers in the exempted industries are "similarly situated to Plaintiffs," Plaintiffs proffer the example that "an individual who chooses to earn income by direct selling Tupperware is exempt, and yet, if that same person earns extra income by offering driving services, there is no exemption." *Id.* This example overlooks AB 5's requirement that a direct salesperson must meet additional conditions described in Section 650 of the Unemployment Insurance Code, and ignores the practical differences between direct selling and gig economy driving. Cal. Lab. Code § 2750.3(b)(5); *see* Cal. Unemp. Ins. Code § 650 (defining direct salespersons in part as individuals who attempt to sell products in a buyer's home and not in a retail or wholesale establishment). It is rational to infer that direct salespersons exert independence and control in choosing their sales targets and locations and how they interact with customers in closing their sales. Moreover, outside salespersons have been exempt from wage orders under California law long before AB 5. Cal. Lab. Code § 1171 ("The provisions of this chapter . . . shall not include any individual employed as an outside salesman[.]"); IWC Wage Order No. 7-2001(1)(C), *codified at* Cal. Code Regs. Tit. 8, § 11070(1)(C) ("The provisions of this order shall not apply to outside salespersons.").

In addition, referring to AB 5's "service provider" exemption, Plaintiffs argue that "there is no material difference between providing local 'moving' of items from one's home [to which AB 5 does not apply] and local delivery of items to one's home [to which AB 5 does apply]." Reply at 11; *see* Cal. Lab. Code § 2750.3(g)(2)(C). But that exemption covers only "a business entity, who performs services for a client through a referral agency," not "individual workers." Cal. Lab. Code § 2750.3(g)(3). Thus, one material difference between a local moving company which may be exempted from AB 5 and a Postmates delivery driver who may be covered by AB 5 is the moving company's entity status. Plaintiffs also ignore the numerous additional criteria to be met by any business entity providing services, such as tutoring (if the person develops and teaches their own curriculum) and pet boarding (a regulated industry under the California Health and Safety Code section 122386), including "set[ting] its own rates for services performed, without deduction by the referral agency" and "deliver[ing] services to the client under service provider's name, rather than under the name of the referral agency." *Id.* at § 2750.3(g)(1).[8]

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[8] In their Complaint and Reply, Plaintiffs also argue that AB 5 is irrational because "some types of workers are excluded (e.g., a delivery truck driver delivering milk) while others performing substantively identical work are not excluded (e.g., a delivery truck driver delivering juice)." Reply at 9–10 (quoting Compl. ¶ 24). Plaintiffs appear to be referring to the longstanding provision of the California Unemployment Insurance Code—also found in a regulation of the Internal Revenue Service—that "an agent-driver or commissioner-driver engaged in distributing . . . beverages (other than milk)" is considered an employee. *See* Cal. Unemployment Ins. Code § 621(c)(1)(A); 26 CFR § 31.3121(d)-1(d)(1)(i). No milkman exemption is contained in AB 5, which

These examples are thus dissimilar from the classification rejected in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), in which the government "undercut its own rational basis for the licensing scheme by excluding [plaintiff] from the exemption." *Id.* at 992. In that case, the Ninth Circuit found no rational explanation to require certain pest controllers dealing with mice or pigeons to obtain a license relating to pesticide use, while similar pest controllers dealing with bats or squirrels were exempted from the licensing requirement, despite being *more* likely than the former group to encounter pesticides. *Id.* at 988, 992. Plaintiffs have not shown that their work arrangements are so similar to exempted work arrangements that exempting Uber and Postmates from AB 5's application would further the State's interest in preventing misclassification of independent contractors. Thus, they have not borne their heavy burden of showing that AB 5's exemption of other categories of industries and workers "contradicts the purposes of the prevailing wage law." *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1066 (9th Cir. 2018).

Plaintiffs' reliance on *Fowler Packing* is also unavailing. There, the Ninth Circuit held that the only conceivable explanation for "carve-outs" making three or four specific employers ineligible for a "safe harbor" affirmative defense against a piece-rate wage law was to procure the support of a labor union. 844 F.3d at 816 ("[W]e cannot conceive of a legitimate interest that would explain this decision."); *see also Allied Concrete*, 904 F.3d at 1066 (describing the exemption in *Fowler Packing* as "clearly suggest[ing] improper favoritism"). It is true that Defendants' Opposition does

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modified Unemployment Insurance Code section 621 solely to describe the ABC test and utilize gender-neutral nouns.

not provide specific justifications for every exemption in AB 5, besides the broad exemption for licensed professionals such as architects and dentists. *See* Opp. at 20. But "the burden is on plaintiffs to negate 'every conceivable basis' which might have supported the distinction between exempt and non-exempt entities." *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1086 (9th Cir. 2015) (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012)).

To explain the exemptions, Defendants point to the traditional distinctions between independent contractors and employees. AB 5 maintains exemptions of workers who were previously exempted under *Dynamex*—workers in the "administrative, executive, or professional category" and "outside salespersons." 4 Cal. 5th at 925 n.8. In addition, the Assembly Committee on Labor & Employment noted that AB 5 needed to account for other types of typical independent contractors. *See* Assemb. Comm. Rep., AB 5, 2019–2020 Reg. Sess., at 8 (Cal. July 10, 2019). The Committee focused on "occupation-by-occupation rules" based on a framework consisting of: market strength (*i.e.*, if there are finite numbers of skilled practitioners), rate setting, relationship between contractor and client, and "technological neutrality" (*i.e.*, making no distinction between the Yellow Pages and an internet-based intermediary connecting contractor and client and asking instead "if the intermediary is . . . deriving disproportionate benefits from the relationship"). *Id.* at 8–12.

There are rational explanations for AB 5's exemptions under this framework, because the work relationships described therein require business organization, skill, self-direction, self-pricing, shorter or less frequent work terms, a distinct location, specific type

of work, and other hallmarks of independent status. *See Dynamex*, 4 Cal. at 932–35 (discussing *Borello*, 48 Cal. 3d at 355–56). Plaintiffs have not negated Defendants' argument that "the Legislature had ample basis to determine that in certain occupations, independent contractor status was lawful and did not cause the systemic harm . . . associated with misclassification."[9] Opp. at 19 n.9. Nor have Plaintiffs offered evidence showing that legislators could not have reasonably conceived AB 5's stated purpose to be true—*i.e.*, that the legislation aimed to alleviate "the erosion of the middle class and the rise in income inequality" and that the ABC test is rationally related to reducing misclassification.[10] A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019). Without "'judg[ing] the wisdom, fairness, or logic of legislative choices,'" the

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[9] At the hearing, Plaintiffs cited an online article to argue that an ABC test exemption for newspaper carriers codified in a different bill, AB 170, was motivated solely by political favoritism and is thus illegitimate. Plaintiffs have not explained why a separately-passed bill undercuts the validity of AB 5 or why there is no other conceivable reason, other than political favoritism, why a local newspaper delivery person should not be exempt from the ABC test. The Legislature's framework for determining exemptions appears to apply with equal vigor to the delivery of newspapers, which is not a growing industry.

[10] Plaintiffs say that it is "incorrect" that "*Dynamex*'s ABC test is a benefit to the middle class and an engine of income equality," but offer no data to support that position. Reply at 10. The declaration of economist Justin McCrary discusses the benefits of the gig economy and costs associated with implementing AB 5, but does not address the broader and more pervasive problem of misclassification across the California economy. *See generally* McCrary Decl. Accordingly, "Plaintiffs have not met their high burden of convincing us that these legislative facts 'could not reasonably be conceived to be true by the governmental decisionmaker.'" *Allied Concrete*, 904 F.3d at 1061 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

Court finds that AB 5 furthers the State's legitimate interest in addressing misclassification. *Fowler Packing*, 844 F.3d at 815 (quoting *Beach Commc'ns*, 508 U.S. at 313–14)).

Instead of negating every conceivable basis for AB 5's exemptions, Plaintiffs argue that the statute is "inexplicable by anything but animus toward the class it affects," Mot. at 20 (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)), based in part on the bill's sponsor's alleged refusal to consider an exemption for gig economy companies. Reply at 10. Plaintiffs assert that AB 5's supporters "did their best to limit the scope of the law *only* to the network companies" and that AB 5 "leave[s] nearly all non-app-based independent workers out in the cold." Mot. at 13, 19. But that argument is plainly belied by the expansive language of the statute, which applies to "a person providing labor or services for remuneration," unless that person meets the ABC test or satisfies an exemption.[11] Cal. Lab. Code § 2750.3(a)(1), (b). In addition,

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[11] In a declaration submitted by Plaintiffs, McCrary noted that "well over one million independent contractors in California" could be reclassified under AB 5, a number far greater than the number of drivers claimed by Uber and Postmates. McCrary Decl. at ¶ 37. Plaintiffs also submitted a series of Tweets by Assemblymember Gonzalez stating, "A majority of folks affected by the bill are construction workers, janitors, child care providers, home healthcare workers, nail salon technicians, delivery drivers & other lower wage service workers." Stoker Decl., Ex. C (Tweet by @LorenaSGonzalez, Twitter (Jan. 5, 2020)).

In addition, one University of California, Berkeley study cited by Defendants in their Opposition notes that although "[t]he lion's share of media attention surrounding AB 5 has gone to the law's effects on on-demand labor platforms like Uber and Lyft . . . , these workers represent just a fraction of independent contractors, most of whom work across a diverse range of

the Ninth Circuit has held that a plaintiff cannot prove invidious discrimination simply by alleging that legislators responded to lobbying efforts, because "[a]ccommodating one interest group is not equivalent to intentionally harming another." *Gallinger v. Becerra*, 898 F.3d 1012, 1020–21 (9th Cir. 2018) (finding no impermissible animus in statute's exemption for retired police officers after "political pressure" resulting from "potent lobbying efforts by the law enforcement community."). The right to lobby is "constitutionally protected." *Id*. at 1021. Furthermore, even if legislators refused to make any exemptions for gig economy companies, Plaintiffs have not shown that their choice is illegitimate. The Supreme Court has observed that "'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.'" *RUI One Corp.*, 371

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occupations such as janitors, hair stylists, and accountants." Sarah Thomason, Ken Jacobs, and Sharon Jan, *Estimating the Coverage of California's New AB 5 Law*, UC Berkeley Labor Center (Nov. 12, 2019), http://laborcenter.berkeley.edu/estimating-the-coverage-of-californias-new-ab-5-law/. Using data from the 2017 American Community Survey by the U.S. Census Bureau, the study's authors concluded that (1) of all California workers who are independent contractors as their primary job, AB 5 applies the ABC test to the 64 percent of potentially misclassified independent contractors who work as janitors, truck drivers, retail workers, and childcare providers, among other occupations; (2) the ABC test applies, except when strict criteria are met, to the 27 percent of independent contractors who are construction workers, barbers, designers, writers, and sales representatives, among others; and (3) the ABC test does not apply to the 9 percent of independent contractors who are real estate agents, lawyers, accountants, and doctors, among others. *Id.*

F.3d at 1155 (quoting *Beach Commc'ns*, 508 U.S. at 316).

Plaintiffs correctly point out, however, that the record contains some evidence that AB 5 targeted Company Plaintiffs and other gig economy companies, and that some lawmakers' statements specifically complained about Uber.[12] But such targeting, even if it rises to the level of animus toward gig economy companies, does not establish an Equal Protection violation where the statute addresses legitimate concerns of deleterious misclassification of workers in many industries, not just the gig economy. Under rational basis review, where a statute classifies a "politically

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[12] California Assemblymembers, including AB 5's sponsor Assemblymember Lorena Gonzalez, have publicly criticized rampant misclassification at gig economy companies and explained that AB 5 would address the gig economy's perceived exploitation of workers. *See* Compl. at ¶¶ 15–18, 63–68 (collecting Tweets and news articles). For example, Assemblymember Gonzalez published an op-ed in the *Washington Post* on September 11, 2019 entitled "The gig economy has costs. We can no longer ignore them." that specifically named Uber among other companies that "skirt labor laws, exploit working people and leave taxpayers holding the bag." *See id.* at ¶ 16 (citing Lorena Gonzalez, *The Gig Economy Has Costs. We Can No Longer Ignore Them*., Wash. Post (Sept. 11, 2019), https://www.washingtonpost.com/opinions/2019/09/11/gig-economy-has-costs-we-can-no-longer-ignore-them/). Assembly Speaker Anthony Rendon, the principal coauthor of the bill, Tweeted in July 2019: "The gig economy is nothing new. It's a continuation of hundreds of years of corporations trying to screw over workers. With #AB5, we're in a position to do something about that." *See id.* at ¶ 65a (citing @Rendon63rd, Twitter (July 10, 2019, 4:40 p.m.), https://twitter.com/Rendon63rd/status/1149101100928159744). The Court notes that many of the legislators' statements selected by Plaintiffs appear to refer to Uber, Postmates, and other gig economy companies as examples of a larger problem of misclassification by corporations, not as the sole targets of AB 5.

unpopular group [that] is not a traditionally suspect class, a court may strike down the challenged statute under the Equal Protection Clause 'if the statute serves no legitimate governmental purpose *and* if impermissible animus toward an unpopular group prompted the statute's enactment.'" *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200–01 (9th Cir. 2018) (quoting *Mountain Water Co. v. Mont. Dep't of Pub. Serv. Regulation*, 919 F.2d 593, 598 (9th Cir. 1990)) (emphasis added). Because Plaintiffs have failed to meet their burden to show that they are a "politically unpopular group" as construed in the case law and that AB 5 serves no legitimate governmental purpose, *see Beach Commc'ns*, 508 U.S. at 314, the statute survives rational basis review.[13]

The Court concludes that no serious questions exist as to Plaintiffs' likelihood of success on the merits

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[13] Examples of politically unpopular groups cited by Plaintiffs include lesbian, gay, and bisexual individuals targeted by a Colorado constitutional amendment, *see Romer v. Evans*, 517 U.S. 620, 634 (1996), and mentally disabled individuals, where building a group home for such individuals required a unique special use permit, *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 444 (1985). In *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), the Supreme Court concluded, based on legislative history, that an exclusion from the Food Stamp Act was solely motivated by animus toward politically unpopular "hippies." *Id.* at 534. Far from being politically unpopular, the burgeoning demand for gig companies' services stems from their widespread acceptance by consumers. More importantly, AB 5 is distinguishable from the invalidated state actions in *Romer*, *Cleburne*, and *Moreno* not only because a legitimate state interest in addressing misclassification exists, but because AB 5's text and legislative history make clear that it was not enacted to target solely gig economy companies.

on their Equal Protection claims, and this factor therefore weighs against granting Plaintiffs' Motion.

2. AB 5 does not deprive gig economy workers of the right to pursue their chosen occupation

The California and U.S. Constitutions also prohibit California from depriving any person of "life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7(a). Courts have recognized a liberty interest based on some "generalized due process right to choose one's field of private employment," but that right is "subject to reasonable government regulation." *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999). The line of cases establishing a liberty interest in pursuing a chosen profession "'all deal[] with a complete prohibition of the right to engage in a calling[.]'" *Franceschi v. Yee*, 887 F.3d 927, 938 (9th Cir. 2018) (quoting *Conn*, 526 U.S. at 292).

Because this vocational liberty interest is not a fundamental right, the Court needs only to determine "whether the legislation has a 'conceivable basis' on which it might survive constitutional scrutiny." *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999); *see also id.* at 1031 n.5 ("The [Supreme] Court has never held that the 'right' to pursue a profession is a *fundamental* right, such that any state-sponsored barriers to entry would be subject to strict scrutiny."). For the reasons stated above, AB 5 survives rational basis review because it conceivably furthers the State's legitimate interest in preventing misclassification of millions of workers.

In any event, AB 5 is not a "complete prohibition" on Individual Plaintiffs' ability to pursue any

profession. *Conn*, 526 U.S. at 292. Indeed, Uber and Postmates insist that their drivers qualify as independent contractors even under the ABC test. *See* Compl. at ¶ 19; Rosenthal Decl. at ¶ 56. And Olson and Perez can still work as independently contracted drivers if they satisfy the ABC test or fall under an exemption, such as the one discussed *supra* which exempts business entities providing services through referral agencies. *See* Cal. Lab. Code § 2750.3(g)(2). *Cf. Franceschi*, 887 F.3d at 938 (holding that an attorney's due process claim failed "for the obvious reason that the [contested government action] does not operate as a complete prohibition on his ability to practice law, which it must to violate substantive due process"). Even if Individual Plaintiffs' employment status would change under AB 5, they potentially could still pursue their line of work, provided that their employers compensate them properly and allow them to have flexible work schedules. Plaintiffs' due process claim is thus unlikely to succeed.[14]

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[14] Similarly, Plaintiffs' claim of "violation of the California Constitution's Inalienable Rights Clause," which appears to be rooted in similar arguments about AB 5's effect on Individual Plaintiffs' right to pursue their chosen profession, is also unlikely to succeed on its merits. *See* Mot. at 20; Compl. at 38. California and federal courts have found that Article I, Section 1 of the California Constitution, which provides that "[a]ll people are by nature free and independent and have inalienable rights," indicates mere principles and does not create a private right of action. *See Bates v. Arata*, No. C 05-3383 SI, 2008 WL 820578, at *4 (N.D. Cal. Mar. 26, 2008), *order clarified sub nom. Bates v. San Francisco Sheriff's Dep't*, No. C 05-3383 SI, 2008 WL 961153 (N.D. Cal. Apr. 7, 2008); *Clausing v. San Francisco Unified Sch. Dist.*, 221 Cal. App. 3d 1224, 1237 (1990).

The Court's analysis of the likelihood of success on the merits of the federal due process claim also applies with equal force to

3. Enforcement of AB 5 does not unconstitutionally impair Plaintiffs' contracts

The Contract Clause bars states from passing any "Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. Similarly, the California Constitution prohibits the Legislature from enacting a "law impairing the obligation of contracts." Cal. Const. art. I, § 9. "Although the text of the Contract Clause is 'facially absolute,' the Supreme Court has long held that 'its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people.'" *RUI One Corp.*, 371 F.3d at 1147 (quoting *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (internal quotation marks omitted)). Unless a challenged statute impairs a state's own contractual obligations, determining whether a statute violates the Contract Clause involves a three-step inquiry: (1) "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship"; (2) whether the state has "a significant and legitimate public purpose behind the [law], such as the remedying of a broad and general social or economic problem"; and (3) "whether the adjustment of the 'rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.'" *Id.* (quoting *Energy Reserves Grp.*, 459 U.S. at 411–13).

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the due process claim under the California Constitution. *See Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1116 (E.D. Cal. 2012) ("California's Due Process Clause is 'identical in scope with the federal due process clause.'" (quoting *Owens v. City of Signal Hill*, 154 Cal. App. 3d 123, 127 n.2 (Cal. Ct. App. 1984)).

The threshold inquiry—whether the state law substantially impairs a contractual relationship—has three components: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992). Plaintiffs assert that each component is easily met because Olson and Perez signed agreements with Uber and Postmates stating that they were independent contractors, and AB 5 substantially alters those agreements to "*eliminate* the very *essence* of Plaintiffs' contractual bargain" and reclassify Olson and Perez as employees. Mot. at 22.

The existence of contractual relationships between Company Plaintiffs and their drivers is clear. But Uber and Postmates have explicitly stated that AB 5 does not require them to reclassify their drivers as employees. Plaintiffs' Complaint and Motion refer to "forced classification" as if Uber's and Postmates' drivers necessarily transform into employees under AB 5. Yet in their Complaint, Uber and Postmates also assert that, even under the ABC test, their drivers are independent contractors. *See* Compl. at ¶ 19 ("Company Plaintiffs maintain that (among other things) they are not hiring entities under AB 5 and can establish that app-based independent service providers are not employees under the ABC test."). According to Uber's Director of Strategic Operational Initiatives, "AB 5 does not require Uber to treat the independent drivers and delivery persons as employees because, *inter alia*, Uber does not 'hire' these independent service providers and these independent service providers are not employees under the 'ABC test' adopted by AB 5." Rosenthal Decl. at ¶ 56. Postmates' Director of Trust and Safety and Insurance Operations attests that "Postmates would not need to

make . . . changes to its business model . . . absent the threat of AB 5 being enforced against Postmates." Andres Decl. at ¶ 46. Over one year since *Dynamex* issued and over one month since AB 5's effective date, Uber and Postmates still assert that the ABC test does not affect the status of their drivers. Accordingly, their contractual relationships with drivers are not at all impaired, much less substantially impaired.

Moreover, when entering the Postmates Agreement, Rasier Services Agreement (for Uber Rides drivers), and/or Portier Services Agreement (for Uber Eats drivers), Plaintiffs reasonably should have expected that the terms setting forth a driver's contractor status were not independently determinative of employment classification. According to the Ninth Circuit, "California law is clear that '[t]he label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.'" *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989 (9th Cir. 2014) (quoting *Borello*, 48 Cal. 3d at 349)). Under the prior *Borello* standard for determining employment status, "[w]hat matters is what the contract, in actual effect, allows or requires." *Id.* Nothing in *Dynamex* or AB 5 alters this approach. Olson and Perez thus cannot expect to be considered independent contractors solely because their contracts with Uber and Postmates say so.

In addition, a court is less likely to find substantial impairment when a state law "was foreseeable as the type of law that would alter contract obligations." *Energy Reserves Grp.*, 459 U.S. at 416. Each of the contracts at issue here was entered into in the wake of foreseeable potential enforcement of the ABC test to Company Plaintiffs' drivers. Uber last updated its Rasier Services Agreement on November 25, 2019.

See Rosenthal Decl., Ex. A at 17; Ex. B at 45. The Postmates Agreement is effective as of May 11, 2019. *See* Andres Decl., Ex A at 17. Both contracts were updated after April 2018, when the California Supreme Court issued *Dynamex*. In fact, the Rasier Services Agreement was updated after AB 5 was passed, when Company Plaintiffs were certainly aware that the ABC test could apply to their drivers' contracts. And, though Uber's Portier Services Agreement was last updated on August 26, 2016, *see* Rosenthal Decl., Ex. B at 45, several courts had already opined by August 2016 that Uber drivers could plausibly be considered employees despite contractual language. *See Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 783 (N.D. Cal. 2016) (holding at motion to dismiss stage that plaintiff drivers "alleged sufficient facts that an employment relationship may plausibly exist"); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (finding a triable issue of fact on whether Uber drivers are employees—the case ultimately settled). Plaintiffs thus should have foreseen that the independent contractor status of drivers set forth in their contracts could be challenged, regardless of whether AB 5 was enacted.

In response, Plaintiffs cite to inapposite cases that find substantial impairment of existing contracts based on statutes that applied *retroactively*. *See, e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250–51 (1978) (finding that a pension law substantially impaired contracts where it would have retroactively modified compensation that an employer had agreed to pay for the past 11 years); *In re Workers' Comp. Refund*, 46 F.3d 813, 818 (8th Cir. 1995) (finding that a retroactively applied statute changing who received payment of any excess insurance premiums "destroy[ed] the insurance companies' reasonable

expectations"); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1006 (4th Cir. 1980) (finding that a retroactively applied statute severely limiting an insurer's ability to terminate an agency relationship substantially impaired existing insurer-agent contracts that permitted easy termination). AB 5 does not apply retroactively such that Uber and Postmates would be required to pay back wages, payroll taxes, unemployment insurance premiums, and other sums based on prior misclassification of workers under the ABC test. Instead, AB 5 applies to work performed after January 1, 2020. The Court therefore finds that if any impairment of contractual relationships exists at all, it is minimal, not substantial.

Even if Plaintiffs could establish a substantial impairment, the Court finds, for similar reasons set forth *supra*, Part III.A.1, that Plaintiffs cannot successfully answer the second question of whether the State had "a significant and legitimate public purpose . . . of remedying a broad and general social or economic problem." *Energy Reserves Grp.*, 459 U.S. at 411–12. The Court notes that "[t]he more severe the impairment, the more searching the examination of the legislation must be." *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1098 (9th Cir. 2003). But even under this heightened review, Plaintiffs have not shown that AB 5 does not serve a significant and legitimate public purpose. The Ninth Circuit has stated, in an unrelated Contract Clause challenge to a living wage ordinance, that "[t]he power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power." *RUI One Corp.*, 371 F.3d at 1150. In that case, the Ninth Circuit upheld an ordinance that required employers to provide employees higher wages and improved benefits immediately, rather than after signing new contracts incorporating

the ordinance's terms. *Id.* The court noted that "'[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," such as through "minimum and other wage laws [and] laws affecting occupational health and safety." *Id.* (quoting *Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). Similarly, AB 5 is an exercise of the State's police power to protect workers aimed at remedying what it perceives to be a broad economic and social problem. The text of AB 5, echoing the California Supreme Court in *Dynamex*, targets misclassification as "a significant factor in the erosion of the middle class and the rise in income inequality." A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019). Thus, even if Plaintiffs can show substantial impairment of contracts, AB 5 satisfies the public purpose test imposed in a Contract Clause challenge. No serious questions exist as to the merits of Plaintiffs' Contract Clause claims.

In sum, Plaintiffs have not shown either a likelihood of success on the merits or that serious questions exist as to any of their claims highlighted in this motion.[15] Accordingly, *Winter*'s first factor weighs heavily against granting the preliminary injunction.

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[15] This conclusion is not at odds with another district court's finding of likelihood of success on the merits of a trucking association's challenge to AB 5. *See Cal. Trucking Ass'n v. Becerra*, No. CV 18-02458-BEN, 2020 WL 248993 at *10 (BLMx) (S.D. Cal. Jan. 16, 2020). In that case, plaintiff raised serious questions regarding whether the Federal Aviation Authorization Administration Act of 1994 preempted *any* state legislation relating to aspects of the trucking industry. *Id.* No similar argument is available to Plaintiffs, whose claims rest on alleged constitutional violations, rather than preemption.

B. Irreparable Harm

Plaintiffs "'[must] demonstrate that irreparable injury is likely in the absence of an injunction,' not merely that it is possible." *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (quoting *Winter*, 555 U.S. at 22).[16]

As discussed *supra* Part III.A.3, statements by Uber and Postmates directors and in Plaintiffs' Complaint indicate that, without the threat of enforcement, Uber and Postmates would not take any action under AB 5 and would not suffer any irreparable injury from "forced reclassification." *See* Compl. at ¶ 19; Rosenthal Decl. at ¶ 56; Andres Decl. at ¶ 46.

Regardless of how the ABC test in fact applies to their drivers, Uber and Postmates have asserted a fear of enforcement and litigation based on the statute and lawmakers' statements. *See* Compl. at ¶ 18. AB 5 specifically provides city attorneys with the authority to bring injunctive actions against companies and exposes them to potential criminal penalties under the California Labor Code and Unemployment Insurance Code for violators. *See* Cal. Lab. Code § 2750.3(j); A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019). And in November 2019, after AB 5's passage but

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[16] Plaintiffs are correct that "'an alleged constitutional infringement will often alone constitute irreparable harm.'" *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (quoting *Assoc. Gen. Contractors v. Coal. For Econ. Equity*, 950 F.2d, 1401, 1412 (9th Cir. 1991)). But where the "constitutional claim is too tenuous," courts need not give plaintiffs "such a presumption of harm." *Assoc. Gen. Contractors*, 950 F.2d at 1412 (citation and internal quotation marks omitted). Based on the foregoing analysis of Plaintiffs' slim likelihood of success on the merits, the Court does not accord Plaintiffs the presumption of irreparable harm.

before its effective date, Assemblymember Gonzalez issued a Tweet saying:

> [Use of arbitration] has been a huge problem. Attorneys have sued, settled, walked away & never demanded proper classification of the workers. It's what Uber told me they'd continue to do under #AB5. That's why we ask the 4 big city City Attorneys offices to file for injunctive relief on 1/1/20.

Stoker Decl., Ex. A (Tweet by @LorenaSGonzalez, Twitter (Nov. 21, 2019, 8:05 a.m.)). Company Plaintiffs point to this Tweet and others to indicate Defendants' intent to enforce AB 5 against them. *See* Mot. at 27–28.

When plaintiffs are faced with "Hobson's choice" of "continually violat[ing]" a law and exposing themselves to "potentially huge liability" or "suffer[ing] the injury of obeying the law during the pendency of the proceedings and any further review," the Ninth Circuit has found imminent harm. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057–58 (9th Cir. 2009) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)). If Uber and Postmates do not reclassify workers as employees, they could be subject to more litigation and the threat of criminal penalties. If the ABC test is found to require the reclassification of their drivers, Uber and Postmates would also suffer significant harms associated with restructuring their businesses. *See* Andres Decl. at ¶¶ 36–38; Rosenthal Decl. at ¶ 64; *see also Cal. Trucking*, 2020 WL 248993, at *11 (finding that irreparable harm exists where plaintiffs may violate AB 5 unless they "restructure their business model, including by obtaining [equipment], hiring and training employee drivers, and establishing administrative

infrastructure"). In addition, although mere financial harms are normally not considered irreparable, the payroll taxes and other sums Uber and Postmates would pay to the State and federal government for reclassified or newly hired employees would not be recoverable due to sovereign immunity. *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) ("If expenditures cannot be recouped, the resulting loss may be irreparable."); *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (finding purely economic harms constituted irreparable harm because plaintiff would be barred from recovering monetary damages from the defendant tribe due to tribal sovereign immunity).

Because Company Plaintiffs insist that the ABC test would not affect their drivers' employment statuses, any irreparable injury based on a costly business restructuring process and unrecoverable expenditures is speculative. *See In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm.").[17] Moreover, even in the absence of AB 5,

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[17] Defendants argue that Plaintiffs' delay in seeking a preliminary injunction against AB 5's enforcement, when AB 5 was enacted in September 2019 and *Dynamex* has governed worker classification in all wage ordercovered industries since April 2018, "indicate[s] an absence of the kind of irreparable harm required to support a preliminary injunction." *Kiva Health Brands LLC v. Kiva Brands Inc.*, 402 F. Supp. 3d 877, 897 (N.D. Cal. 2019) (citation omitted). But in the Ninth Circuit, "delay is but a single factor to consider in evaluating irreparable injury," and "courts are 'loath to withhold relief solely on that ground.'" *Id.* (quoting *Arc of Cal.*, 757 F.3d at 990). Accordingly, Plaintiffs' four-month delay in seeking an injunction against AB 5's enforcement does not undermine the irreparable harm analysis described above.

Company Plaintiffs remain subject to potential liability and enforcement of wage and hour laws pursuant to the *Dynamex* decision. But because Company Plaintiffs point to evidence of the imminent threat of enforcement by state actors and exposure to criminal liability, the Court finds that they have established some measure of irreparable harm stemming from threatened municipal enforcement actions.

Olson and Perez do not, however, face a similar Hobson's choice. Though they assert that they would suffer unrecoverable financial losses and lose customer goodwill, freedom, financial stability, and work satisfaction if Uber and Postmates reclassify them as employees, those harms are speculative so long as the Company Plaintiffs maintain that AB 5 does not apply to them. *See* Olson Decl. at ¶¶ 10, 12; Perez Decl. at ¶¶ 19–20; Rosenthal Decl. at ¶ 56. AB 5 does not subject individual workers to any threat of enforcement or litigation. And, as Defendants note, "AB 5 does not compel a 'forced reclassification,' but instead provides the applicable standard to ascertain whether an individual is an employee or an independent contractor." Opp. at 26. The declarations by Uber and Postmates directors indicate that Company Plaintiffs may not enact drastic "forced reclassification" measures that irreparably harm Olson and Perez. For instance, Postmates' Director of Trust and Safety and Insurance Operations states that "*[i]f* AB 5 were enforced against Postmates in a manner consistent with the sponsors' stated intent to require reclassification of workers in the on-demand economy as employees, Postmates *could be* required to significantly alter its current business model." Andres Decl. at ¶ 38 (emphasis added). Displaying only slightly more urgency, Uber's Director of Strategic Operational Initiatives attests that though AB 5 does not change Uber's

independent contractors' classification, "*if* AB 5 were enforced against Plaintiffs in a manner consistent with the sponsors' stated intent . . . , [Uber] would have to make radical changes to its business model." Rosenthal Decl. at ¶¶ 56–57 (emphasis added). The alleged harm to Olson and Perez—as well as to the individual *amici* Uber and Postmates drivers—would therefore stem from Company Plaintiffs' response to AB 5 only if the statute is interpreted and enforced in a specific manner, not from automatic application of AB 5 to their employment statuses or threatened or actual enforcement actions.[18] And, in fact, *Dynamex* contemplates that "if a business concludes that it improves the morale and/or productivity of a category of workers to afford them the freedom to set their own hours or to accept or decline a particular assignment, the business may do so while still treating the workers as employees." 4 Cal. 5th at 961. Thus, even if AB 5 enforcement actions require reclassification of gig economy drivers, Company Plaintiffs could still offer Olson and Perez flexibility and freedom while treating them as employees. The harm that Olson, Perez, and

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[18] At the hearing, Plaintiffs' counsel cited to *Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469 (C.D. Cal. 2012), and *Nelson v. National Aeronautics & Space Admin.*, 530 F.3d 865 (9th Cir. 2008), *rev'd and remanded*, 562 U.S. 134 (2011), to support a finding of irreparable harm to Individual Plaintiffs based on stress and uncertainty. *Yue* appears highly fact-bound to insurance benefits, whose very purchase is intended to engender peace of mind. *Nelson* notes that "the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress"—as described above, however, the loss of Individual Plaintiffs' jobs is speculative at this point. 530 F.3d at 882. Regardless, a finding of Individual Plaintiffs' irreparable harm based on current or prospective emotional distress and instability would not alter the outcome of this Order, given the unlikelihood of success on the merits.

individual *amici* assert therefore seems merely possible, not probable. *See Arc of Cal. v. Douglas*, 757 F.3d at 990.[19]

Arguing that an injunction would irreparably harm the State, Defendants assert that "[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." Opp. at 27–28 (quoting *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citation omitted); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (order) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined."). But the Ninth Circuit has distanced itself from this understanding of a state's irreparable injury. *See Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014) ("Individual justices, in orders issued from chambers, have expressed the view that a state suffers irreparable injury when one of its laws is enjoined. No opinion for the Court adopts this view." (internal citations omitted)). In light of this

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[19] In their declarations, *amici curiae* Keisha Broussard, Raymond Frazier, Daniel Rutka, and LaMar Wilder assert that they will be harmed only *if* Uber or Postmates classifies them as employees under AB 5. *See, e.g.*, Broussard Decl. at ¶ 7 ("If I am forced to work as a regular employee, I might have to choose between my acting career and spending time with my daughter on one hand, and holding a regular job on the other."); Frazier Decl. at ¶ 5 ("Being involuntarily converted to an employee would likely cost me thousands of dollars in lost Social Security benefits and force me to come back out of retirement."); Rutka Decl. at ¶ 6 ("If I can no longer work as an independent contractor, I may have to choose between taking a regular job or taking care of my sick family member."); Wilder Decl. at ¶ 5 ("If I am required to become an employee, I will lose the freedom to decide when and where I can drive.").

ambiguous direction, the Court notes that any irreparable injury to Defendants would be mitigated by the fact that even if a preliminary injunction were granted, *Dynamex* still applies the ABC test to all workers covered by IWC wage orders. And, given that the State's interests are collapsed with those of the public when balancing the equities, *see infra* Part IV.C, the Court will examine the harms to Defendants when analyzing the third and fourth *Winter* factors.

The irreparable harm factor must weigh sharply in Plaintiffs' favor to prevail, since "'the required degree of irreparable harm increases as the probability of success decreases.'" *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (quoting *Nat. Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007)). Here, Uber and Postmates have demonstrated a likelihood of irreparable harm based on the threats of enforcement against them by city attorneys and the availability of criminal penalties. But this showing is offset somewhat by the fact that the Company Plaintiffs may still face private enforcement actions under *Dynamex*, even in the absence of AB 5. As no enforcement or non-speculative reclassification measures apply to individual drivers, Olson and Perez have not demonstrated the likelihood, rather than the mere possibility, of irreparable harm. Accordingly, this factor weighs slightly in Plaintiffs' favor.

C. Balance of Equities and Public Interest

When 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). Plaintiffs must still "establish that 'the balance of equities tips in [their] favor.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (quoting *Winter*,

555 U.S. at 20). But "[i]n exercising their sound discretion, courts of equity should pay particular regard [to] the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

California enacted AB 5 to address misclassification and its public consequences through the ABC test. *See* A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019); Opp. at 29. *Dynamex* noted the following public benefits to applying the ABC test: "ensuring low income workers' wages and conditions despite their weak bargaining power"; "ensuring that . . . responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices"; and ensuring that the public is not "left to assume responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions." 4 Cal. 5th at 952–53. Because "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," showing the public's favor for the legislation," Defendants argue that the public's interest in enforcing the legislation outweighs private parties' interests in enjoining it. Opp. at 29–30. The Court agrees that "[t]he public interest may be declared in the form of a statute" and is not served by the preliminary injunction Plaintiffs seek. *Golden Gate Rest. Ass'n*, 512 F.3d at 1127 (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.4, at 207 (2d ed. 1995)); *see also id.* ("[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." (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (internal quotation marks omitted))).

Plaintiffs assert public benefits to enjoining enforcement that weigh slightly in their favor. In one concrete example, a 2019 study found that Uber's rideshare service decreased the use of per capita ambulance services by at least 6.7 percent, likely reducing public spending on medical transportation costs. McCrary Decl. at ¶ 34. In another example, a 2015 study found that Uber's entry into California reduced alcohol-related motor vehicle homicides. *See* Br. of *Amici Curiae* U.S. Chamber of Commerce, Engine Advocacy, and TechNet at 15 (citing Brad Greenwood & Sunil Wattal, *Show Me the Way to Go Home: An Empirical Investigation of Ride Sharing and Alcohol Related Motor Vehicle Homicide*, Temple University Fox School of Business Research Paper No. 15-054 (Jan. 29, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557612) [Doc. # 44]. According to Plaintiffs, AB 5's enforcement will decrease the number and availability of drivers, which presumably could reduce Uber's impact on medical transportation costs and drunk driving. McCrary Decl. at ¶ 42. Plaintiffs also argue that prices for gig economy services will increase, harming consumers as well as gig economy workers. *Id.* at ¶¶ 42–47. More generally, Plaintiffs argue that the equities balance in their favor, since AB 5 attempts to roll back technology, "[f]orcing companies to make major changes to their operations—leaving California an aberration in their global businesses—only to see them potentially reversed once the Court adjudicates the merits of Plaintiffs' challenges would greatly disserve all Californians who use their apps." Reply at 30 (citing Andres Decl. at ¶¶ 41–47; Rosenthal Decl. at ¶¶ 57–66). But because this

argument is premised on their claims' success on the merits—an outcome that the Court has already determined to be unlikely—it does not militate in favor of Plaintiffs on the final two preliminary injunction factors.

Furthermore, evidence submitted by Plaintiffs indicates that according to academic studies, "a majority of workers do not value scheduling flexibility" and only a "substantial share"—by inference, less than a majority—"are willing to give up a large share of their earnings to avoid employer discretion in setting hours." McCrary Decl. at ¶ 26. This statement by Plaintiffs' expert indicates that of the 395,000 or more drivers for Uber and/or Postmates, a majority may favor—or at least be neutral to—the application of AB 5 to their worker classification. To be sure, Olson, Perez, and individual *amici* attest that being classified as employees would be financially devastating and upend their schedules and expectations. *See, e.g.*, Perez Decl. ¶¶ 8, 18–20; Olson Decl. at ¶¶ 10, 12; *see also* Br. of *Amici Curiae* U.S. Chamber of Commerce, Engine Advocacy, and TechNet at 10 (citing U.S. Dep't of Labor, *Contingent and Alternative Employment Relationships*, Bureau of Labor Statistics (May 2017) (79 percent of independent contractors prefer their work arrangement). The Court does not doubt the sincerity of these individuals' views, but it cannot second guess the Legislature's choice to enact a law that seeks to uplift the conditions of the majority of non-exempt low-income workers rather than preserve the status quo for the smaller subset of workers who enjoy independent contractor status.

When "an injunction is requested which will adversely affect a public interest . . . the court may in the public interest withhold relief until a final

determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Stormans*, 586 F.3d at 1139 (quoting *Weinberger*, 456 U.S. at 312–13). Considering the potential impact to the State's ability to ensure proper calculation of low income workers' wages and benefits, protect compliant businesses from unfair competition, and collect tax revenue from employers to administer public benefits programs, the State's interest in applying AB 5 to Company Plaintiffs and potentially hundreds of thousands of California workers outweighs Plaintiffs' fear of being made to abide by the law.

In light of the foregoing, the Court concludes that the balance of equities and the public interest weigh against the issuance of injunctive relief.

IV.
CONCLUSION

Plaintiffs have not shown serious questions going to the merits—the critical factor in determining whether to issue a preliminary injunction—and, though Company Plaintiffs have shown some measure of likelihood of irreparable harm, the balance of equities and the public interest weigh in favor of permitting the State to enforce this legislation. Accordingly, the *Winter* factors weigh against enjoining enforcement of AB 5 against Uber and Postmates, and the Court therefore **DENIES** Plaintiffs' Motion.

IT IS SO ORDERED.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

A.B. 5, ch. 296, § 1, 2019 Cal. Stats. 2890

The Legislature finds and declares all the following:

(a) On April 30, 2018, the California Supreme Court issued a unanimous decision in Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903 (Dynamex).

(b) In its decision, the Court cited the harm to misclassified workers who lose significant workplace protections, the unfairness to employers who must compete with companies that misclassify, and the loss to the state of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for workers' compensation, Social Security, unemployment, and disability insurance.

(c) The misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality.

(d) It is the intent of the Legislature in enacting this act to include provisions that would codify the decision of the California Supreme Court in Dynamex and would clarify the decision's application in state law.

(e) It is also the intent of the Legislature in enacting this act 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 if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous Dynamex decision, this act 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.

(f) The Dynamex decision interpreted one of the three alternative definitions of "employ," the "suffer or permit" definition, from the wage orders of the Industrial Welfare Commission (IWC). Nothing in this act is intended to affect the application of alternative definitions from the IWC wage orders of the term "employ," which were not addressed by the holding of Dynamex.

(g) Nothing in this act is intended to diminish the flexibility of employees to work part-time or intermittent schedules or to work for multiple employers.

Cal. Lab. Code § 2775

(a) As used in this article:

(1) "Dynamex" means Dynamex Operations W. Inc. v. Superior Court (2018) 4 Cal.5th 903.

(2) "Borello" means the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341.

(b) (1) For purposes of this code and the Unemployment Insurance Code, and for the purposes of

wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration 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 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.

(2) Notwithstanding paragraph (1), any exceptions to the terms "employee," "employer," "employ," or "independent contractor," and any extensions of employer status or liability, that are expressly made by a provision of this code, the Unemployment Insurance Code, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of "employee" in subdivision 2(E) of Wage Order No. 2, shall remain in effect for the purposes set forth therein.

(3) If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of

employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (Borello).

Cal. Lab. Code § 2777

Section 2775 and the holding in Dynamex do not apply to the relationship between a referral agency and a service provider, as defined below, under the following conditions:

(a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ("service provider") provides services to clients through a referral agency, the determination of whether the service provider is an employee or independent contractor of the referral agency shall be governed by Borello, if the referral agency demonstrates that all of the following criteria are satisfied:

(1) The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.

(2) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration in order to provide the services under the contract, the service provider shall certify to the referral agency that they have the required business license or business tax registration. The referral agency shall keep the certifications for a period of at least three years. As used in this paragraph:

(A) "Business license" includes a license, tax certificate, fee, or equivalent payment that is required or collected by a local jurisdiction annually, or on some other fixed cycle, as a condition of providing services in the local jurisdiction.

(B) "Local jurisdiction" means a city, county, or city and county, including charter cities.

(3) If the work for the client requires the service provider to hold a state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor's license.

(4) If there is an applicable professional licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, the service provider shall certify to the referral agency that they have the appropriate professional licensure, permit, certification, or registration. The referral agency shall keep the certifications for a period of at least three years.

(5) The service provider delivers services to the client under the service provider's name, without being required to deliver the services under the name of the referral agency.

(6) The service provider provides its own tools and supplies to perform the services.

(7) The service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed for the client.

(8) The referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.

(9) The service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client.

(10) Without deduction by the referral agency, the service provider sets their own rates, negotiates their rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client.

(11) The service provider is free to accept or reject clients and contracts, without being penalized in any form by the referral agency. This paragraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

(b) For purposes of this section, the following definitions apply:

(1) "Client" means:

(A) A person who utilizes a referral agency to contract for services from a service provider, or

(B) A business that utilizes a referral agency to contract for services from a service provider that are otherwise not provided on a regular basis by employees at the client's business location, or to contract for services that are outside of the client's usual course of business. Notwithstanding subdivision (a), it is the responsibility of a business that utilizes

a referral agency to contract for services, to meet the conditions outlined in this subparagraph.

(2) (A) "Referral agency" is a business that provides clients with referrals for service providers to provide services under a contract, with the exception of services in subparagraph (C).

(B) Under this paragraph, referrals for services shall include, but are not limited to, graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and interpreting services.

(C) Under this paragraph, referrals for services do not include services provided in an industry designated by the Division of Occupational Safety and Health or the Department of Industrial Relations as a high hazard industry pursuant to subparagraph (A) of paragraph (3) of subdivision (e) of Section 6401.7 of the Labor Code or referrals for businesses that provide janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.

(3) (A) "Referral agency contract" is the agency's contract with clients and service providers governing the use of its intermediary services described in paragraph (2). The

intermediary services provided to the service provider by the referral agency are limited to client referrals and other administrative services ancillary to the service provider's business operation.

(B) A referral agency's contract may include a fee or fees to be paid by the client for utilizing the referral agency. This fee shall not be deducted from the rate set or negotiated by the service provider as set forth in paragraph (10) of subdivision (a).

(4) "Service provider" means an individual acting as a sole proprietor or business entity that agrees to the referral agency's contract and uses the referral agency to connect with clients.

(5) "Tutor" means a person who develops and teaches their own curriculum, teaches curriculum that is proprietarily and privately developed, or provides private instruction or supplemental academic enrichment services by using their own teaching methodology or techniques. A "tutor" does not include an individual who contracts with a local education agency or private school through a referral agency for purposes of teaching students of a public or private school in a classroom setting.

(6) (A) "Youth sports coaching" means services provided by a youth sports coach who develops and implements their own curriculum, which may be subject to requirements of a youth sports league, for an athletic program in which youth who are 18 years of age or younger predominantly participate and that is organized for the purposes of training for

and engaging in athletic activity and competition. "Youth sports coaching" does not mean services provided by an individual who contracts with a local education agency or private school through a referral agency for purposes of teaching students of a public or private school.

(7) "Interpreting services" means:

(A) Services provided by a certified or registered interpreter in a language with an available certification or registration through the Judicial Council of California, State Personnel Board, or any other agency or department in the State of California, or through a testing organization, agency, or educational institution approved or recognized by the state, or through the Registry of Interpreters for the Deaf, Certification Commission for Healthcare Interpreters, National Board of Certification for Medical Interpreters, International Association of Conference Interpreters, United States Department of State, or the Administrative Office of the United States Courts.

(B) Services provided by an interpreter in a language without an available certification through the entities listed in subparagraph (A).

(8) "Consulting" means providing substantive insight, information, advice, opinions, or analysis that requires the exercise of discretion and independent judgment and is based on an individual's knowledge or expertise of a particular subject matter or field of study.

(9) "Animal services" means services related to daytime and nighttime pet care including pet boarding under Section 122380 of the Health and Safety Code.

(c) The determination of whether an individual worker is an employee of a service provider or whether an individual worker is an employee of a client is governed by Section 2775.