Nos. 20-55106; 20-55107

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA TRUCKING ASSOCIATION, ET AL,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, ET AL.,

Defendants-Appellants,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor-Defendant-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 3:18-CV-02458-BEN-BLM
The Honorable Roger T. Benetez, Judge

BRIEF *AMICUS CURIAE* BY THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC. IN SUPPORT OF CALIFORNIA TRUCKING ASSOCIATION AND AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, proposed Amicus Curiae, Owner-Operator Independent Drivers Association, Inc., states that it has no parent corporation, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public and that no publicly held corporation owns 10% or more of its stock.

Respectfully Submitted,

Dated: May 13, 2020

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TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Likelihood of Irreparable Harm Under AB 5 Extends Beyond Large Motor Carriers and California's Borders to Owner-Operators and Small-Business Motor Carriers Based Throughout the Nation. 4

A. The Owner-Operator Business Model Is a Significant Component of the Motor Carrier Industry 5

B. California Has an Out-Sized Impact on the Motor Carrier Industry Including on Owner-Operators and Small-Business Motor Carriers Based in and outside the State. 7

C. Owner-Operators and Small-Business Motor Carriers Will Suffer Irreparable Harm if AB 5 Is Enforced Pending Resolution of This Case 11

II. This Court Should Not Expand Its Well-Established Narrow Interpretation of FAAAA Preemption. 14

A. Congress Never Intended the FAAAA to Preempt State Laws Regulating the Treatment of Workers. 15

B. The Ninth Circuit's Narrow Interpretation of FAAAAPreemption Reflects the Appropriate Balance Between State and Federal Regulatory Authority. 19

III. Plaintiffs Satisfy the Ninth Circuit's "Serious Questions" Standard for Upholding the Preliminary Injunction. 21

IV. The Preliminary Injunction Should Also Be Upheld Under the Dormant Commerce Clause. 26

CONCLUSION 30

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page(s)**

Air Transp. Ass'n of Am., Inc. v. Cuomo,
520 F.3d 218 (2d Cir. 2008) 23

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266 F.3d 1064 (9th Cir. 2001) 21

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632 F.3d 1127 (9th Cir. 2011) 3, 22

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No. CV 18-03736 SJO (E), 2018 WL 6271965 (C.D. Cal. Nov. 15, 2018).........24

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483 U.S. 266 (1987)....................27

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559 F.3d 1046 (9th Cir. 2009) .... *passim*

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903 F.3d 953 (9th Cir. 2018) 24

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598 F.3d 30 (2d Cir. 2010) 22

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944 F.3d 773 (9th Cir. 2019) 3

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769 F.3d 637 (9th Cir. 2014) 14, 15, 23, 24

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938 F.3d 985 (9th Cir. 2019) 12, 25

Kassel v. Consolidated Freightways Corp. of Delaware,
450 U.S. 662 (1981)... 27, 28, 29

Louisville & Nashville R. Co. v. Maxwell,
237 U.S. 94 (1915)...16

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397 U.S. 137 (1970)...28

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434 U.S. 429 (1978)... 28, 29

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749 F.2d 124 (2d. Cir. 1984) 12

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552 U.S. 364 (2008)...20

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No. C 08-03494 WHA, 2009 WL 109888, (N.D. Cal. Apr. 22, 2009) 23

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355 U.S. 83 (1957)...16

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813 F.3d 429 (1st Cir. 2016)..19

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139 S. Ct. 2449 (2019)...27

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219 F.3d 1069 (9th Cir. 2000) 26

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No. 15-cv-05433-EDL, 2019 WL 1975460 (N.D. Cal. Mar. 15, 2019)...............29

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555 U.S. 7 (2008).. 3, 21, 26

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Pub. L. No. 96-296, 94 Stat. 793 22

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STATEMENT OF INTEREST

The Owner-Operator Independent Drivers Association ("OOIDA") is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional truck drivers. The approximately 160,000 members of OOIDA are professional drivers and small-business men and women, located in all 50 states and Canada, who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the total active motor carriers operated in the United States. The Association actively promotes the interests and rights of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA's mission includes the promotion and protection of the interests of independent truckers, whether they are owner-operators, small-business motor carriers, or professional truck drivers, on any issue that might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways. In addition to its affirmative, strategic litigation, OOIDA routinely participates as amicus curiae before federal Circuit Courts of Appeals and the United States Supreme Court to advocate for the lawful classification of drivers, the right to pursue independent owner-operator and

small-business motor carrier opportunities, and the right to freely participate in interstate commerce.

SUMMARY OF THE ARGUMENT

OOIDA participates as an amicus in this appeal in support of the district court's grant of Plaintiffs-Appellees' ("Plaintiffs") motion for preliminary injunction.[1] AB 5 will have a significant impact on thousands of OOIDA members, including owner-operators and small-business motor carriers that are critical for moving freight to, through, and from California in interstate commerce.

This brief addresses several issues that are relevant for this Court's evaluation of whether the district court abused its discretion in granting the preliminary injunction. First, AB 5 not only threatens the business models and balance sheets of large motor carriers, it will also result in irreparable harm to owner-operators and small-business motor carriers—businesses, including OOIDA members, that are a critical component of interstate commerce. *See Am. Trucking Ass'ns, Inc. v. City of L. A.*, 559 F.3d 1046, 1057–59 (9th Cir. 2009) (hereinafter "*ATA v. City of L.A.*") (holding that a prohibition on the use of owner-operators as independent contractors is likely to result in irreparable harm to small business motor carriers). Second, holding that Plaintiffs are likely to succeed on the merits of their FAAAA

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party contributed money intended to fund its preparation or submission. All parties consented to the filing of this brief.

preemption claim does not require this Court to expand its otherwise narrow interpretation of FAAAA preemption. Third, although the district court granted Plaintiffs' motion for a preliminary injunction under the standard established in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008), the district court's injunction is equally appropriate under this Court's "serious questions" standard. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). Finally, even if this Court were to conclude that Plaintiffs' FAAAA preemption claim is insufficient to uphold the preliminary injunction, this Court can and should uphold the preliminary injunction under the dormant Commerce Clause.

Taking these issues into consideration, the district court's grant of the preliminary injunction was appropriate *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 789 (9th Cir. 2019) (explaining the purpose of preliminary injunctions is "to preserve the status quo and the rights of the parties until a final judgment issues in the case"). While worker misclassification is a serious issue within the motor carrier industry and many owner-operators do not realize the full benefits of the owner-operator model, AB 5 goes too far. While the FAAAA, properly construed, strikes a balance between state and federal regulatory authority, it does not permit the wholesale reorganization of the interstate motor carrier industry at the cost of the owner-operator model and the thousands of successful businesses built upon it.

ARGUMENT

I. The Likelihood of Irreparable Harm Under AB 5 Extends Beyond Large Motor Carriers and California's Borders to Owner-Operators and Small-Business Motor Carriers Based Throughout the Nation.

This Court should not adopt the blinders that Defendants urge. AB 5's impact is not: limited to large motor carriers, simply a matter of increasing the cost of doing business, or confined to California. *See* State Defendants' Opening Brief, Doc. No. 23, (hereinafter "State Defs.' Br.") at 18–22, 36–38; Opening Brief of Intervenor-Defendant-Appellant, Doc. No. 21 (hereinafter "Intervenor-Defs.' Br.") at 20–22. Instead, for tens of thousands of interstate owner-operators and small-business motor carriers that regularly cross the California border—small-business truckers critical to the interstate motor carrier industry—AB 5 could be fatal.

Absent the current preliminary injunction, these truckers will be left with a Hobson's choice: abandon the unique opportunities provided by the owner-operator model, cease serving the California market to the detriment of their businesses and the goodwill they have cultivated, or simply cease to exist. *See ATA*, 559 F.3d at 1057. Regardless, AB 5 will all but eliminate a common economic model for a significant component of the interstate motor carrier industry and undermine the free flow of interstate commerce upon which the FAAAA and Commerce Clause are based.

A. The Owner-Operator Business Model Is a Significant Component of the Motor Carrier Industry.

Owner-operators are critical to the interstate motor carrier industry. *See* ER270–71 (Yadon Decl. ¶¶ 6,11). The real possibility of achieving financial success on one's own terms is the reason why men and women continue to choose the owner-operator model. In turn, owner-operators significantly contribute to the interstate transportation of freight and interstate commerce.

There are approximately 350,000 to 400,000 owner-operators on the roads today[2] providing critical capacity to efficiently move freight in response to an ever-fluctuating, diverse, and largely interstate market.[3] These owner-operators are men and women who typically have experience driving a truck as an employee for a motor carrier and then decide to start their own businesses. They buy their own trucks—which could cost from tens of thousands of dollars to more than $200,000 each—and lease their trucks and driving services as independent contractors to motor carriers. A significant number of owner-operators go on to obtain their own

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[2] Bill Mongelluzzo, ARO 2020: Trucking industry seeks clarity on driver classification issues, JOC.com (Dec. 23, 2019), https://www.joc.com/trucking-logistics/labor/aro-2020-trucking-industry-seeks-clarity-driver-classification-issues_20191223.html; Industry/Owner-Operator Facts, OOIDA.com, https://www.ooida.com/MediaCenter/trucking-facts.asp (last visited on May 13, 2020).

[3] *See* ER270–71 (Yadon Decl. ¶¶ 8–9); SER146–51 (Husing Decl.) (detailing the seasonality of trucking demands across multiple industries).

federal interstate operating authority to become motor carriers.[4] These truckers move freight for a variety of transportation companies and contract with other truckers, including owner-operators, to expand their businesses. *See* ER272 (Yadon Decl. ¶ 13).

These individuals—both leased owner-operators and small-business motor carriers—are small-business truckers that aspire to enjoy the benefits of being their own bosses. Successful small-business truckers can choose when to work, what freight to accept, and the route they want to take in order to deliver freight. Likewise, owner-operators and small-business motor carriers can cultivate their own business relationships and customer goodwill.

While owner-operators do not always realize the full promise of true owner-operator status, there is no comparable opportunity to start one's own successful business in the motor carrier industry. What might start out as a one-driver, one-truck business can turn into a multi-truck enterprise. Of the approximately 531,000 interstate motor carriers operating in the United States, nearly 85% are fleets consisting of 1 to 6 power units (i.e., tractors).[5] Adding motor carrier fleets

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[4] *See* Jennifer Cheeseman and Andrew W. Hait, America Keeps on Truckin': Number of Truckers at All-Time High, United States Census Bureau (June 6, 2019), https://www.census.gov/library/stories/2019/06/america-keeps-on-trucking.html.
[5] *Supra* note 2, Industry/Owner-Operator Facts; *see also* ER270 (Yadon Decl. ¶ 7).

consisting of 7 to 19 power units, the percentage increases to nearly 95%.[6] These small businesses are vital for moving freight throughout the United States and many of these small-business motor carriers only exists because of the owner-operator business model.

B. California Has an Out-Sized Impact on the Motor Carrier Industry Including on Owner-Operators and Small-Business Motor Carriers Based in and outside the State.

It is difficult to overstate the significance of the California market for interstate owner-operators and small-business motor carriers. That is because California is one of the primary economic engines of the United States economy. California is unique among states in that it is a major agriculture producer, a major manufacturer, and a major gateway for United States imports and exports.[7] It is also a major consumer of the nation's agricultural production and manufacturing.[8] California's economic significance is predicated on the ability to efficiently move

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[6] *Id.*; Economics and Industry Data, ATA, https://www.trucking.org/economics-and-industry-data (last visited on May 13, 2020) (asserting that as of May 2019 97.4% of for-hire carriers on file with the Federal Motor Carrier Safety Administration operate with fewer than 20 trucks); *see also* ER270 (Yadon Decl. ¶ 7).

[7] Draft California Freight Mobility Plan 2020, California Department of Transportation, at 4.B.-5–12, *available at* https://dot.ca.gov/-/media/dot-media/programs/transportation-planning/documents/freight-cfmp-2019-draft/00-cfmpdraftchapter17final.pdf.

[8] *Id.* at B.-9–11.

goods to, through, and from the state. When it comes to the transportation of most of this freight, there is no substitute for trucking.

California's gross domestic product represents approximately 15% of the United States economy.[9] California accounts for 23% of the United States' agriculture production and 15% of its manufacturing.[10] California is also home to 12 deep water port complexes whose share of U.S. import container trade has ranged from 40%-50% from 2000 through 2017, rivaling the Atlantic, Gulf, and Pacific-Northwest ports combined.[11] The neighboring ports of Los Angeles and Long Beach are the busiest ports not only in the United States, but also in all of North America with a combined market share (by volume) of 29%.[12] California's highways serve as vital corridors for reaching markets throughout western United States and beyond. In short, California is at the center of the region's and nation's economy.

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[9] Regional Data: Gross Domestic Product (GDP) By State, SAGDP2N Gross Domestic Product by State (Percent of U.S.), Bureau of Economic Analysis, *available at* https://apps.bea.gov/itable/iTable.cfm?ReqID=70&step=1#panel-1.

[10] *Id.*; *see also* SER143–44 (Husing Decl.).

[11] Draft California Freight Mobility Plan 2020, *supra* note 7, at 2.-4–5.

[12] U.S. Container Port Congestion & Related International Supply Chain Issues: Causes, Consequences & Challenges at 1, Federal Maritime Commission Bureau of Trade Analysis (July 2015), *available at* https://www.fmc.gov/wp-content/uploads/2019/04/PortForumReport_FINALwebAll.pdf; Hugh R. Morley, North American port rankings: Mexican ports grow fastest, JOC.com (May 6, 2019), https://www.joc.com/port-news/north-america-port-rankings-mexican-ports-grow-fastest_20190506.html; *see also* SER144–45 (Husing Decl.) (explaining that the ports of Los Angeles and Long Beach handled 35.9% of all U.S. imported containerized cargo in 2017).

It is no surprise then that California is both a major destination for and exporter of goods. In 2015, California imported $382 billion worth of goods (178 million tons) from other states and exported $506 billion (90 million tons).[13] Arizona, Nevada, and Oregon are major exporters to and importers of freight from California, but significant exports and imports can also be attributed to Washington, Texas, Nebraska, Illinois, and even Florida.[14] This interstate trade occurs alongside international imports passing through California on their way to other states. In 2015, 37 million tons of goods valued at $179 billion made the journey from international markets, through California, to the other 49 states.[15]

Much of this freight traveling to, through, and from California moves by truck.[16] In 2018, 49% of all California-produced goods destined for other states, representing 67 million tons, made the journey exclusively by truck while 27% of inbound goods, representing 61 million tons, did the same.[17] In 2015, 12 million tons

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[13] Draft California Freight Mobility Plan 2020, *supra* note 7, at 4.B.-8–10.
[14] *Id.* at 4.B.-19–23.
[15] *Id.* at 4.B.-33.
[16] *Id.* at 4.B.-14–16, -34–36; *see also* SER143–45 (Husing Decl.) (explaining the significance of trucking to the California economy).
[17] 2018 Weight/Value for shipments within, from, and to state by mode, Freight Analysis Framework Version 4, Center for Transportation Analysis, *available at* https://faf.ornl.gov/fafweb/FUT.aspx; California, Bureau of Transportation Statistics, United States Department of Transportation, *available at* https://www.bts.gov/archive/publications/commodity_flow_survey/2012/state_summaries/state_tables/ca (last visit on May 13, 2020); *see also* SER143 (Husing Decl.) (explaining that California leads the nation in total value of all commodities exported by truck).

of goods passed through California on trucks headed for the international market. Meanwhile, despite being home to the busiest ports in North America, California moved 8 million tons of goods via truck destined for international markets through other states.[18] These statistics do not reflect the significance of trucking in California's intrastate transportation of goods, which totaled a staggering 788 million tons in 2015.[19]

Owner-operators, in particular, play a significant role in all of this transportation. As many as 70,000 owner-operators work in California.[20] OOIDA, for its part, counts among its members 6,103 owner-operators based in the state. An additional 7,050 members reside in the nearby states of Arizona, Nevada, Oregon, and Washington—many of which also regularly operate in California. An even larger number of OOIDA's 160,000 members, based throughout the United States, count on access to California to occasionally, if not regularly, transport freight to, through, and from the state.

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[18] Draft California Freight Mobility Plan 2020, *supra* note 7, at 4.B.-15–16.
[19] *Id.* at 4.B.-14.
[20] *Supra* note 2, Mongelluzzo, ARO 2020.

C. Owner-Operators and Small-Business Motor Carriers Will Suffer Irreparable Harm if AB 5 Is Enforced Pending Resolution of This Case.

AB 5 will prevent owner-operators and small-business motor carriers throughout the nation from continuing to fulfill California's extensive trucking transportation needs. The fatal flaw of AB 5 is prong B of the ABC test it codified. Prong B requires a worker to provide his or her service "outside the usual course of the hiring entity's business" to qualify as an independent contractor—a difficult, if not impossible, task for owner-operators and small-business motor carriers that contract with trucking companies to haul freight. Its impact will not be, however, simply a matter of owner-operator truck drivers finding alternative employment as employee drivers. Instead, AB 5's enforcement, even during the pendency of this litigation, will upend the business models of thousands of small-business truckers, many of which are OOIDA members, both within and outside of California.

This Court previously concluded that a law imposing a similar burden as AB 5—requiring motor carriers to use employee drivers rather than owner-operators, as independent contractors—was likely to result in irreparable harm sufficient to support granting a preliminary injunction. *See ATA v. City of L.A.*, 559 F.3d at 1057–59. In *ATA v. City of L.A.*, this Court examined a requirement imposed by the Port of Los Angeles, as part of a concession agreement, that motor carriers "transition over the course of five years from independent-contractor drivers to employees." *Id.*

at 1049. Specifically noting the burden that the concession agreement would impose on small companies, this Court stated that "the vast increase in . . . personnel expenditures needed to turn independent contractors into employees [ ] would likely be fatal." *Id.* at 1058. Thus motor carriers were presented with a choice: do not sign the concession agreement and be prohibited from operating at the expense of "customer goodwill—or, indeed, of the carrier's whole drayage business" or incur "large costs which, if it manages to survive those, will disrupt and change the whole nature of its business in ways that most likely cannot be compensated with damages alone." *Id.*; *see also hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 993 (9th Cir. 2019) ("As the Second Circuit explained, '[t]he loss of [ ] an ongoing business representing many years of effort and the livelihood of its [ ] owners, constitutes irreparable harm.'" (quoting *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of New York, Inc.*, 749 F.2d 124, 125–26 (2d. Cir. 1984))).

Owner-operators and small-business motor carriers are presented with a similar choice here, but the likelihood of irreparable harm under AB 5 is significantly greater for two reasons. First, unlike the concession agreement in *ATA v. City of L.A.*, 559 F.3d at 1058, AB 5's impact would be immediate and, in many circumstances, its harm could not be cured by transitioning owner-operators to employee drivers. Making that switch may be possible for large motor carriers, but existing leased owner-operators' contracts with motor carriers would be unlawful—their businesses

as independent contractors would no longer exist.[21] Small-business motor carriers that primarily transport freight into and out of California also may not survive—the availability of independent contractors, including owner-operators, and access to the state is what keeps many of them in business. The costs of simply converting to an employee-driver model would be crippling, if not spell the end of the business. *See* Appellees' Br. at 22–24 (detailing the costs of adopting the employee-driver model); *see also ATA v. City of L.A.*, 559 F.3d at 1058 (same). Even small-business motor carriers that transport freight across the California border less frequently would feel the economic impact of losing access to the California market. For those small-business motor carriers that survive, they would have to dramatically change their business model. Regardless, established relationships with motor carriers, brokers, and shippers would be put in jeopardy if not entirely undone for owner-operators and small-business motor carriers under AB 5.

Second, unlike the regulation in *ATA v. City of L.A.*, which focused on the port drayage business, 559 F.3d at 1049, AB 5's impact would clearly extend beyond California's borders. On its face, AB 5 applies to all owner-operators and

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[21] Although it is not clear that AB 5's business-to-business exception would apply to any owner-operator, *see* ER019 (noting that State Defendants have not conceded the business-to-business exception would apply to motor carriers), for the reasons set for by Plaintiffs the business-to-business exception is certainly not applicable to leased owner-operators. *See* Appellees' Answering Brief, Doc. No. 39, (hereinafter "Appellees' Br.") at 63–66; *supra* Part I.A.

small-business motor carriers without any consideration for the interstate nature of the motor carrier industry or California's integration into the regional and national economy. In other words, while motor carriers servicing the Port of Los Angeles would have been prohibited from using owner-operators as independent contractors when on port property, the remainder of the trucking industry was free to adopt the business model best suited to meet the needs of the market. *See id.* at 1050–51. Not so under AB 5, which concerns the entire trucking industry. Thus, while intrastate California owner-operators and small-business motor carriers will be threatened with the loss of their businesses, as were Port of Los Angeles motor carriers, so too will those interstate truckers that move freight into and out of California.

What Defendants contend is merely an amendment to California's labor code could, on its face, be imposed on small-business truckers, wherever they are based, hauling freight into, out of, or through California. Nothing so extreme was before this Court in *ATA v. City of L.A.* when it reversed the district court's denial of a preliminary injunction.

II. This Court Should Not Expand Its Well-Established Narrow Interpretation of FAAAA Preemption.

Even in upholding the preliminary injunction, this Court should strictly adhere to its well-established narrow interpretation of FAAAA preemption. The limiting principles that this Court adopted in *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), and *Dilts v. Penske*

Logistics, LLC, 769 F.3d 637 (9th Cir. 2014), reflect the original purpose of the FAAAA and the appropriate balance between federal and state regulatory authority of the motor carrier industry.[22] That properly construed balance enables states, as demonstrated in *Mendonca* and *Dilts*, to enact reasonable regulations. AB 5, however, is likely preempted under an even narrow interpretation of the FAAAA.

A. Congress Never Intended the FAAAA to Preempt State Laws Regulating the Treatment of Workers.

The legislative history of the FAAAA demonstrates that it was designed to address a specific, narrow issue affecting the national motor carrier industry. Congress' inclusion of a motor carrier preemption provision in the FAAAA, *see* 49 U.S.C. § 14501(c)(1), came after more than a decade of legislative efforts to end economic regulation of the motor carrier industry. FAAAA, Pub. L. No. 103-305, 108 Stat. 1569. One year later, Congress abolished the Interstate Commerce Commission ("ICC"). ICC Termination Act of 1995, Pub. L. No. 104–88, 109 Stat. 803. The FAAAA was enacted to address the specific problem presented by state attempts to re-impose ICC-like economic regulation on the motor carrier industry.

Before Congress began to incrementally dismantle the ICC from 1980 to 1995, the federal government closely regulated the economics of the motor carrier industry. The ICC treated motor carriers like a public utility, with a level of

[22] To minimize repetition, OOIDA relies on Plaintiffs' application of Ninth Circuit FAAAA preemption jurisprudence to AB 5. *See* Appellees' Br. at 35–47.

government control that would seem unfathomable today. Motor carriers were required to seek approval of their specific services (the transportation of a specific commodity) over specific routes (the origin and destination of that service). Seeking this approval, the motor carrier had to demonstrate that the proposed service would serve the public necessity. *See, e.g.*, *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 85, (1957) (reviewing the ICC's decision, under Section 207(a) of the Motor Carrier Act of 1935, as amended by the Transportation Act of 1940, upon a motor carrier's application to expand its existing authority to haul "granite from Grant County, South Dakota, to points in 15 States").

Motor carriers were also required to file a tariff with the ICC setting the rate (price) it would charge the public for providing that service. The ICC was responsible for ensuring that a carrier's rates were both reasonable and nondiscriminatory. *See, e.g.*, *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 119, (1990). Deviation "from the filed rate [could] result in the imposition of civil or criminal sanctions on the carrier or shipper." *Id.* at 120. Rates (the prices carriers charged the public) had the force and effect of law under the Filed Rate Doctrine. *Id*. at 127 (citing *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, (1915)).

Congress began to pull back the scope of the ICC's economic regulation by passing a series of laws beginning with the Motor Carrier Act of 1980. Pub. L. 96-

296, 94 Stat. 793. Fifteen years later in 1995, a year before Congress terminated the ICC, it observed that some 26 states were still requiring motor carriers to file and seek a state agency's approval of its rates, routes, and services under various different regulatory structures. Congress saw this state regulation as an obstacle to its goal of eliminating the economic regulation of the motor carrier industry nationwide and believed preemption legislation was both in the public interest as well as necessary to facilitate interstate commerce. H.R. Conf. Rep. 103-677 at 86, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. In response, Congress tacked-on a section to the FAAAA preempting state regulation of motor carrier prices, routes, and services. FAAAA, Pub. L. No. 103–305, § 601 108 Stat. 1569. The statute provided, "[A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier … with respect to the transportation of property." *Id.*; 49 U.S.C. § 14501(c)(1).

In passing this preemption provision, Congress did not choose the terms "price, route, or service" in a vacuum. These terms were established by federal statute and ICC regulations, and interpreted by decades of ICC administrative decisions and federal court decisions. The only change Congress made to those terms was to substitute "price" for "rate" without any intended change in meaning. H.R. Conf. Rep. 103-677 at 83, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755 (explaining

that the use of "price" rather than "rate" was not intended to legislate a new or different meaning or to depart from the prevailing judicial interpretation).

The FAAAA conference committee report also stated that "the conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." *Id*. It was not, however, Congress' intent to prevent states from exercising any regulatory authority. State authority "to regulate safety, financial responsibility relating to insurance, transportation of household goods, vehicle size and weight and hazardous materials," among other areas, were all considered outside the scope of preempted motor carrier regulation. *See id.* ("This list is not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted.").

This explanation is particularly useful to courts seeking to determine whether a state law or regulation is preempted by the FAAAA. The court should begin with reference to the long-established interpretations of prices (rates), routes, and services. With the FAAAA's legislative history in mind, whether the FAAAA preempts a particular state law is a straightforward inquiry. Courts may also review whether the state's law or regulation uses "the guise of some form of unaffected regulatory authority" to effectuate the regulation of a motor carrier's prices, routes, or services. A useful benchmark in evaluating this question are the (non-exclusive)

areas of state regulation permitted by the FAAAAA: How does the effect of the state law at issue on motor carrier prices, routes, and services compare to state regulations Congress intended to permit?

The FAAAA's legislative history demonstrates that while Congress intended to constrain the ability of states to regulate prices, routes, and services, the FAAAA was never intended to serve as a sword against all exercises of state regulatory authority. The legislative history supports a narrow interpretation of FAAAA preemption leaving ample room for reasonable regulations to address working conditions within the motor carrier industry. Accordingly, California could have taken a different approach to address worker misclassification without running afoul of FAAAA preemption. But unlike similar efforts to improve trucker working conditions, such as the laws at issue in *Mendonca* and *Dilts*, *see infra* Part II.B., AB 5 goes too far by threatening the wholesale delegitimization of otherwise legitimate, successful motor carrier/owner-operator relationships.

B. The Ninth Circuit's Narrow Interpretation of FAAAA Preemption Reflects the Appropriate Balance Between State and Federal Regulatory Authority.

Since this Court first started evaluating the scope of FAAAA preemption, four years after the FAAAA was enacted, it has staked out a narrow interpretation. This interpretation appropriately enables states to adopt reasonable labor regulations to protect the rights of workers, such as minimum wage and rest-break laws. To

whatever extent the First Circuit's analysis in *Schwann v. FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016), is instructive, this Court should not also adopt the First Circuit's broad interpretation of FAAAA preemption.

In *Mendonca*, this Court evaluated whether California's prevailing wage laws were preempted by the FAAAA. *Mendonca*, 152 F.3d at 1185. As in the present case, the Court's analysis turned on the meaning of the FAAAA's "related to" statutory language. In addition to finding support against preemption from the FAAAA's legislative history, this Court discerned three principles from prior Supreme Court decisions evaluating similar statutory language. First, state actions are preempted to the extent that they impose substantive standards on prices, routes, or services. *Id.* at 1188 (citing *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995)). Second, areas of traditional state regulation are insulated from the FAAAA's preemptive scope. *Id.* (citing *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997)). Finally, the mere imposition of increased costs is not grounds for preemption. *Id.* (citing *Dillingham*). Accordingly, California's prevailing wage laws were not preempted. *Id.* at 1189.

This Court further clarified its narrow interpretation of FAAAA preemption and its "related to" statutory language in *Dilts*. Relying on the Supreme Court's decision in *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008), this Court held that FAAAA preemption applies when "the provision, directly or

indirectly, *binds* the carrier to a particular price, route or service." *Dilts*, 769 F.3d at 646 (emphasis added) (citing *Air Transp. Ass'n of Am. v. City & Cty of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001)). Moreover, laws are more "likely to be preempted when they operate at the point where carriers provide services to customers at specific prices." *Id.* at 646 (citing *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 284 (2014)). Thus, generally applicable background regulations that "operate one or more steps away" from customers are not preempted. *Id.* Similarly, regulations that merely increase costs and thus only shift incentives are not sufficiently "related to" prices, routes, or services to trigger FAAAA preemption.

Under the standard established by *Mendonca* and *Dilts*, it is clear how California's prevailing wage and rest-break laws would escape preemption, but not AB 5. AB 5 binds motor carriers to a particular business model while the laws at issue in *Mendonca* and *Dilts* merely increased motor carrier costs. In doing so, AB 5 destroys an existing business model, upon which thousands of successful businesses are built. The Ninth Circuit's interpretation "preserve[s] the proper and legitimate balance between federal and state authority." *Mendonca*, 152 F.3d at 1189.

III. Plaintiffs Satisfy the Ninth Circuit's "Serious Questions" Standard for Upholding the Preliminary Injunction.

The district court granted Plaintiffs' motion for preliminary injunction under the standard set forth in *Winter*. ER010–ER021 (analyzing the *Winter* preliminary

injunction factors). But even if Plaintiffs' likelihood of success on their FAAAA preemption claim is in doubt, Plaintiffs also prevail under this Court's "serious questions" standard. *See* ER009 (citing *Alliance for the Wild Rockies*, 632 F.3d at 1135); Appellees' Br. at 35. Plaintiffs' challenge to AB 5 turns on the scope of FAAAA preemption, an issue that continues to divide the Circuit Courts of Appeals. Additionally, serious questions about the scope of AB 5 remain outstanding. Together these issues support upholding the preliminary injunction under the Ninth Circuit's sliding scale analysis.

This Court has adopted a sliding scale for determining whether a preliminary injunction is warranted. Instead of precisely satisfying the four factors reaffirmed by the Supreme Court in *Winter*, plaintiffs can balance a diminished likelihood of success if they raise "serious questions going to the merits" and satisfy the other *Winter* factors. *See Alliance for the Wild Rockies*, 632 F.3d at 1135. The Second Circuit, which has joined this Court in reaffirming the sliding scale approach post-*Winter*, explained the "serious questions" standard as permitting "a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claim, but where the costs outweigh the benefits of not granting the injunction." *Id.* at 1133 (quoting *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010)). The purpose of the

sliding scale approach, even after *Winter*, is to maintain the "longstanding discretion of a district judge to preserve the status quo with provisional relief until the merits [can] be sorted out in cases where clear irreparable injury would otherwise result." *Id.* at 1134 (quoting *Save Strawberry Canyon v. Dep't of Energy*, No. C 08-03494 WHA, 2009 WL 109888, at *1-3 (N.D. Cal. Apr. 22, 2009)).

The scope of FAAAA preemption has been contested for the past twenty years. The disagreement is based on, among other issues of statutory interpretation, the meaning of two words: "related to." *Compare Mendonca*, 152 F.3d at 1188–89 (construing "related to" more narrowly consistent with the Supreme Court's ERISA decision in *Dillingham and Dilts*, 769 F.3d at 645–46 (refuting that *Rowe* calls into question Mendonca), *with Mass. Delivery Ass'n v. Healey*, 821 F.3d 187, 192 (1st Cir. 2016) (asserting that *Dilts* is inconsistent with *Schwann*); *see also Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 233 (2d Cir. 2008) (asserting that the Ninth Circuit's jurisprudence is inconsistent with *Rowe*). This disagreement has not gone unnoticed.

Defendants appeal the district court's preliminary injunction precisely because the district court relied on the First Circuit's decision in *Schwann*. According to Defendants, the district court's reliance on *Schwann* was inappropriate because the First Circuit and this Circuit have adopted divergent interpretations of FAAAA preemption. *See* State Defendants Br. at 29–30; *see also* Intervenor-Def.'s

Br. at 33–34. Even if Defendants are making too much of the district court's citation to *Schwann*, *see* ER011–12 (relying principally on this Court's analysis in *ATA v. City of L.A.* and *California Trucking Association v. Su*, 903 F.3d 953 (9th Cir. 2018)), uncertainty about the scope of FAAAA preemption is also reflected in several recent district court opinions. *Compare Valadez v. CSX Intermodal Terminals, Inc.*, No. 15-cv-05433-EDL, 2019 WL 1975460 (N.D. Cal. Mar. 15, 2019) (holding prong B of the ABC test preempted by the FAAAA), *and Alvarez v. XPO Logistics Cartage LLC*, No. CV 18-03736 SJO (E), 2018 WL 6271965 (C.D. Cal. Nov. 15, 2018) (holding the *Dynamex* ABC test preempted), *with Western States Trucking Ass'n v. Schoorl*, 377 F. Supp. 3d 1056 (E.D. Cal. 2019) (applying *Mendonca* and *Dilts* to hold that the ABC test is not preempted).

Defendants, however, draw the wrong conclusion from the purported circuit split at this stage of litigation. Even if Defendants are correct regarding the circuit split, under this Court's sliding scale analysis the disagreement between the federal circuit courts and California federal district courts supports upholding the preliminary injunction. *See* Br. Amicus Curiae by CELA, Doc. No. 36-2, at 12–13 (highlighting that the Third and Seventh Circuit have also recently issued decisions regarding the scope of FAAAA preemption). Plaintiffs' challenge has clearly raised "serious questions" regarding the scope of FAAAA preemption and its applicability to some state labor laws. Combined with the likelihood of irreparable harm in "the

loss of [ ] an ongoing business representing many years of effort and the livelihood of its [ ] owners," as demonstrated above would likely occur, the district court's grant of the preliminary injunction was not an abuse of discretion. *See hiQ Labs, Inc.*, 938 F.3d at 993 (internal quotation marks omitted) (upholding a preliminary injunction under the "serious questions" standard because circuit courts were divided regarding the scope of federal preemption).

In addition to serious questions regarding the scope of FAAAA preemption, there are outstanding questions pertaining to the scope of AB 5. For example, AB 5 facially applies to all workers within California. But ongoing litigation before this Court suggests that there may be some de minimis level at which California labor laws do not apply.

In *Oman v. Delta Airlines, Inc.*, 889 F.3d 1075 (9th Cir. 2018), and *Ward v. United Airlines, Inc.*, 889 F.3d 1068 (9th Cir. 2018), this Court confronted the applicability of California labor laws to individuals that do not principally work in California. *See Oman*, 889 F.3d at 1077 (noting that plaintiffs worked between 3% and 14% of their time in California); *Ward*, 889 F.3d at 1071 (noting that the plaintiff class members spend between 12% and 17% of their flight time in California airspace). Because California precedent has left open the question of whether California's labor code applies to employees that work principally outside of the state, this Court certified questions to the California Supreme Court. *See Oman*, 889

F.3d at 1079–80 (certifying questions because “[t]here is no controlling California precedent on the question whether California labor law applies to an employee who works for an out-of-state employer and does not work principally, or even for days at a time, in California”); *Ward*, 889 F.3d at 1073 (same). Those certified questions are still pending. AB 5 raises similar questions for owner-operators and small-business motor carriers, based within and outside California, that spend most of their time crisscrossing the nation on interstate highways.

The enforceability of AB 5 under both state and federal law against interstate owner-operators and small-business motor carriers, a significant component of the California and national motor carrier industries, is (at best) uncertain. In light of these serious questions, the district court did not abuse its discretion in granting Plaintiffs’ motion for preliminary injunction.[23]

IV. The Preliminary Injunction Should Also Be Upheld Under the Dormant Commerce Clause.

This Court is not bound by the district court’s reliance on FAAAA preemption to uphold the preliminary injunction. *See Union Pacific R. Co. v. Mower*, 219 F.3d 1069, 1076 (9th Cir. 2000) (stating that this Court may affirm the grant of a preliminary injunction “on any legitimate basis supported by the record”). Although the district court declined to address Plaintiffs’ dormant Commerce Clause claim in

[23] The other *Winter* factors are also satisfied. *See supra* Part I.A–C; Appellees’ Br. at 71–78.

granting the preliminary injunction, it was fully briefed and offers an alternative ground to enjoin the enforcement of AB 5. *See* ER010, ER150–53 ER 263–64.

The dormant Commerce Clause shares the FAAAA's purpose of securing a national interstate market. *Compare Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019) (explaining that "removing state trade barriers was a principal reason for the adoption of the Constitution), *with Rowe*, 552 U.S. at 996 (explaining that Congress passed the FAAAA to prevent states from undermining a national competitive market thorough a "patchwork of state service-determining laws, rules, and regulations"). Accordingly, the dormant Commerce Clause, like the FAAAA, provides a check on a state's ability to impose undue burdens on interstate commerce. *See Tennessee Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2460–61.

Unsurprisingly, the Supreme Court has periodically held that state motor carrier regulations violate the dormant Commerce Clause. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987) (holding that State-imposed requirements could easily exert "an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than among the several States"). The Court's analysis in *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), and *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981), is particularly instructive. In both cases, the Court

addressed state prohibitions (in Wisconsin and Iowa, respectively) on the length of trucks operating on state highways. *Raymond Motor Transp., Inc.*, 434 U.S. at 432–33; *Kassel*, 450 U.S. at 665–66. Applying the analysis set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Court found that the state length restrictions violated the dormant Commerce Clause. *Raymond Motor Transp., Inc.*, 434 U.S. at 441, 444; *Kassel*, 450 U.S. at 670–71, 674.

What the Supreme Court found objectionable in *Raymond Motor Transportation* and *Kassel* is equally present in Plaintiffs' challenge to AB 5. There, state laws forced motor carriers to fundamentally change how they moved freight resulting in increased costs and delays. *See Raymond Motor Transp., Inc.*, 434 U.S. at 438, 445 (forcing motor carriers to change trailers when entering Wisconsin and divert trucks around the state); *Kassel*, 450 U.S. at 667, 674 (same for transportation into and through Iowa). Small-business motor carriers and owner-operators face a similar burden here. Under AB 5, upon approaching the California border, motor carriers, relying on owner-operators, will be forced to change drivers, transfer freight to trucks operated by appropriately classified employee drivers, alter the employment status of the existing driver, or divert the driver around California. Each of these efforts to comply with AB 5 will increase the cost and/or time of moving freight to or through California. *See Raymond Motor Transp., Inc.*, 434 U.S. at 445 ("The regulations substantially increase the cost of such movement, a fact which is

not . . . entirely irrelevant. In addition, the regulations slow the movement of goods in interstate commerce."); *Kassel*, 450 U.S. at 674 ("Each of these options engenders inefficiency and added expense.").

Compounding the burden on interstate commerce posed by AB 5 is the reality that California currently stands alone in adopting the rigid ABC worker classification test. *See* ER019 (noting that the district court was aware of only one other state that adopted an identical ABC test, which the First Circuit held was preempted). A similar concern was present in *Raymond Motor Transportation* and *Kassel*. *See Raymond Motor Transp., Inc.*, 434 U.S. at 445 (noting that the restriction prevents "accepting interline transfers of 65-foot doubles for movement through Wisconsin from carriers that operate only in the 33 States where the doubles are legal"); *Kassel*, 450 U.S. at 671 ("Iowa's law is now out of step with the laws of all other Midwestern and Western States."). Thus, absent the restraints imposed by the dormant Commerce Clause, California—like Wisconsin and Iowa before it—could dictate how businesses based beyond its borders operate. *Cf. Southern Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 775, 781–82 (1945) (holding an Arizona train length limitation violated the dormant Commerce Clause because "[t]he practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it" having "seriously adverse effect on transportation efficiency and economy").

The extraterritorial burdens imposed by AB 5 are inconsistent with the Supreme Court's dormant Commerce Clause jurisprudence. Upholding the preliminary injunction prevents AB 5 from unduly burdening interstate commerce pending a ruling on the merits.

CONCLUSION

AB 5 will impose crippling burdens on small-business interstate truckers and dramatically reorder the motor carrier industry by eliminating the owner-operator model, upon which thousands of successful businesses critical to the motor carrier industry are built. For the foregoing reasons, in addition to those advanced by Plaintiffs, Amicus urges this Court to affirm the preliminary injunction and remand for further proceedings.

Respectfully Submitted,

Dated: May 13, 2020

/s/ Paul D. Cullen, Sr.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), and 29(a)(4)(G), I hereby certify that this brief contains 6,976 words as established by the word count of the computer program used for preparation of this brief. This brief complies with the length requirements set forth in Rule 29(a)(5).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

Dated: May 13, 2020

/s/ Paul D. Cullen, Sr.
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CERTIFICATE OF SERVICE

I, Paul D. Cullen Sr., hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit and served upon all counsel of record via the Court's CM/ECF system.

Dated: May 13, 2020

/s/ Paul D. Cullen, Sr.
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