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Olson v. California

Let the Statute Speak for Itself

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Olson v. California[1]—a case pending before the Ninth Circuit *en banc* in which plaintiffs Uber and Postmates have alleged that "AB 5,"[2] California's worker classification statute, violates their equal protection rights—should be an easy case under settled equal protection doctrine. The companies contend that AB 5 is irrational because it does not exempt them from the ABC test when other businesses are exempted. As we discussed in our amicus brief,[3] the plaintiffs in *Olson* do not have a valid equal protection claim. The district court articulated multiple rational bases for AB 5's statutory distinctions; accordingly, the court dismissed plaintiffs' claim without leave to amend.[4] But in an astounding decision departing from equal protection jurisprudence, a panel of the Ninth Circuit reversed the district court's dismissal.[5] After the State of California successfully petitioned for rehearing *en banc*, a series of supplemental briefs followed, with oral argument slated for this month.

Plaintiffs' equal protection claim essentially centers on one provision of AB 5, codified at California Labor Code § 2777, known as the referral agency exemption. This section states that the determination of whether a "service provider" is an employee or independent contractor of a "referral agency" is governed by the *Borello* test,[6] and exempted from the ABC test, if numerous statutory requirements are first satisfied.[7] Under this section, a "service provider" is "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,"[8] and a "referral agency," in turn, is "a business that

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1 62 F.4th 1206 (9th Cir. 2023).

2 We refer to AB 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019), and AB 2257, Ch. 38, 2019–2020 Reg. Sess. (Cal. 2020), the bill that amended and added to AB 5's provisions, collectively as "AB 5." AB 5 codified the ABC test to determine whether a worker is an employee or an independent contractor, for purposes of California wage and hour laws, workers' compensation, and unemployment insurance. *See* Cal. Lab. Code § 2775(b)(1).

3 *See* Brief of *Amici Curiae* Center for Law and Work and Labor and Constitutional Law Scholars in Support of Defendants-Appellees' Petition for Panel Rehearing or Rehearing *En Banc*.

4 *See Olson v. Bonta*, No. CV 19-10956-DMG (RAOx), 2021 WL 3474015, at *3-6 (C.D. Cal. July 16, 2021).

5 *See Olson*, 62 F.4th at 1218-20.

6 *See S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal.3d 341, 350-59 (1989) (discussing multiple factors relevant to the determination of employee or independent contractor status). The ABC test is generally viewed as more protective of workers than the test under *Borello. See Dynamex Operations W. v. Superior Ct.*, 4 Cal.5th 903, 954-57 (2018).

7 *See* Cal. Lab. Code § 2777(a).

8 Cal. Lab. Code § 2777(b)(4).

provides clients with referrals for service providers to provide services under a contract."[9] Such "services" are enumerated under the statute to include "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."[10] The referral agency exemption contains a carve-out for services provided in certain industries, including the industries in which plaintiffs operate, that prevents plaintiffs from seeking the exemption from the ABC test.[11]

Plaintiffs object to the referral agency exemption because they are excluded from it. They primarily argue that they are similarly situated with other app-based gig companies like Wag! and TaskRabbit that can seek the referral agency exemption, and that "the State never answers" why Section 2777 exempts "valid referral agency arrangements when a company refers someone to walk a dog" but not when they drive a car.[12] Plaintiffs assert that carving them out of the referral agency exemption has no rational basis and was driven instead by animus and political favoritism.[13] The State counters that the exemption's carve-out rationally excludes industries like plaintiffs' with high rates of misclassification, and that plaintiffs in any event are not similar to Wag! or TaskRabbit.[14] In response, plaintiffs maintain the carve-out is irrational because "numerous courts and regulators had found" that gig companies like plaintiffs "properly classified drivers as independent contractors" pre-AB 5, and because plaintiffs are not "more prone to misclassify" than other app-based companies like Wag! and TaskRabbit.[15] The Ninth Circuit panel that first decided this case was apparently persuaded by this argument.[16]

While dismissal of their equal protection claim should be affirmed, the plaintiffs may have muddied things enough to cause some unwarranted confusion, particularly as to whether plaintiffs are similarly situated with other entities that can seek the referral agency exemption. In **Part 1** of this Note, we point out a key rationale for the distinctions drawn in the referral agency exemption that is clear on the face of the statute but has not received attention: the exemption's carve-out, which excludes services provided in certain high hazard industries, is rationally related to one of AB 5's stated purposes, namely, to protect workers when they are injured on the job from the harm of misclassification. This rationale presents a straightforward resolution of the equal protection claim,

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9 Cal. Lab. Code § 2777(b)(2)(A).

10 Cal. Lab. Code § 2777(b)(2)(B).

11 *See* Cal. Lab. Code § 2777(b)(2)(C).

12 Plaintiffs-Appellants' Supplemental *En Banc* Reply Brief, 7. Plaintiffs misunderstand Section 2777, which does not actually identify "valid referral agency arrangements"—it simply allows certain entities that satisfy a detailed set of eleven statutory requirements to use the *Borello* test as the basis for determining a worker's classification instead of the ABC test. Even if *Borello* applies, this does not necessarily mean the referral agency arrangement will be found "valid," as the analysis under *Borello* could still result in a determination that a worker has been misclassified as an independent contractor.

13 *See, e.g.*, Plaintiffs-Appellants' Supplemental *En Banc* Brief, 23-24.

14 *See, e.g.*, State of California Supplemental Opening Brief, 17-26; State of California Supplemental Reply Brief, 6-7.

15 Plaintiffs-Appellants' Supplemental *En Banc* Reply Brief, 7-8.

16 The panel found that "[t]here is *no indication that many of the workers* in [AB 5's] exempted categories, including those working for the app-based gig companies [like Wag! and TaskRabbit] that are exempted, are *less susceptible*" to misclassification than plaintiffs' workers. *Olson*, 62 F.4th at 1219 (emphasis added).

without any need for the Court to address the question of whether plaintiffs are similarly situated. While this rationale has not been briefed by the State, the Ninth Circuit is not bound by the parties' arguments[17] and should look beyond them to the plain language of the statute.[18] In **Part 2**, we discuss plaintiffs' equally misguided contention that AB 5 undermines itself and is irrational because its exemptions "reinstitute" the *Borello* test. We explain why plaintiffs' reductionist view of AB 5's purpose is incorrect and how the law's exemptions actually operate.

PART 1	The Carve-Out in the Referral Agency Exemption is Rationally Related to the Legitimate State Purpose of Ensuring Workers are Not Misclassified So They Can Access Workers' Compensation if They Are Injured on the Job

Rational basis review is extremely deferential to legislative policymaking.[19] Under this standard, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[20] Contrary to what plaintiffs assert, the Ninth Circuit need only look to the plain language of the carve-out in the referral agency exemption in order to discern its rational relationship to AB 5's purposes. This should end the analysis, regardless of whether plaintiffs are similarly situated with companies like Wag! or TaskRabbit.

We first highlight one of AB 5's legitimate purposes as it relates to the referral agency exemption—to protect workers when they are injured on the job from the harm of misclassification, which prevents them from accessing workers' compensation—that has not been discussed in the parties' briefs. Next, we explain what the carve-out in the referral agency exemption says, which shows its rational relationship to AB 5's stated purpose and belies plaintiffs' argument that they were irrationally "targeted."

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17 Under rational basis review, courts are "not bound by explanations of the statute's rationality that may be offered by litigants or other courts." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1988). Indeed, courts must identify "*any* hypothetical rational basis" for a statutory classification. *See Gallinger v. Becerra,* 898 F.3d 1012, 1017 (2018) (citations omitted) (emphasis in original); *see also Starlight Sugar, Inc. v. Soto,* 253 F.3d 137, 146 (1st Cir. 2001) (courts are not bound by the parties' arguments and must seek out other conceivable reasons for validating a statute).

18 *Amicus* briefs filed by labor groups have more generally mentioned this rationale, without pointing to the specific language of the carve-out. *See* Brief of *Amici Curiae* California Labor Federation, International Brotherhood of Teamsters, Service Employees International Union California State Council, United Food and Commercial Workers Union Western States Council, and State Building and Construction Trades Council of California in Support of Panel Rehearing and Rehearing *En Banc*, 7 (noting the Legislature could have rationally concluded that drivers for rideshare and delivery companies like plaintiffs are in greater need of employee protections because, *inter alia*, they are at greater risk of on-the-job injuries from vehicle accidents); *Amicus Curiae* Brief of International Brotherhood of Teamsters, Service Employees International Union California State Council, and United Food and Commercial Workers Union Western States Council in Support of Appellees and Affirmance, 21-22 (noting that delivery drivers face heightened physical risk when making food deliveries on a bike or electric bike, and referencing a study in which 49% of delivery workers reported having been in an accident or crash).

19 The rational basis standard is a "paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-314 (1993).

20 *Gallinger*, 898 F.3d at 1017 (citation omitted).

1. **One legitimate purpose of AB 5 is to address the harm to workers and the state when workers are misclassified and injured on the job.**

In passing AB 5, the Legislature declared its intent "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."[21] Such rights and protections, the Legislature announced, include "workers' compensation if they are injured on the job."[22] When workers are misclassified as independent contractors, they do not receive the statutory protections of workers' compensation that are afforded to employees.[23] AB 5 also notes that misclassification results in "the loss to the state of needed revenue from companies that use misclassification to avoid obligations such as…payment of premiums for workers' compensation."[24]

Addressing the problem of misclassification including the harm to workers and the state when workers are injured on the job and misclassified—while also preserving true independent contractor relationships—is indisputably a legitimate state interest. The only question with respect to the referral agency exemption, which is easily answered by looking at the language of the carve-out itself, is whether AB 5's line-drawing in the carve-out is rationally related to this legitimate purpose. The answer is clearly yes.

2. **The carve-out excluding dangerous industries from the referral agency exemption is rationally related to AB 5's purpose of ensuring that workers are not misclassified so they can access workers' compensation if they are injured on the job.**

AB 5's referral agency exemption from the ABC test does not allow a business to seek the exemption with respect to services that are provided in certain industries. The statute states:

> Under this paragraph, referrals for services do not include services provided in an industry designated by the Division of Occupational Safety and Health [DOSH] 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.[25]

There are thus two parts to this carve-out: the DOSH[26] designation of "high hazard industries" pursuant to California Labor Code § 6401.7(e)(3)(A), followed by an enumerated list of services in ten industries.

California Labor Code § 6401.7(e)(3)(A) states that DOSH "shall establish a list of high hazard industries using the methods prescribed in Section 6314.1 for identifying and targeting employers in

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21 AB 5, Ch. 296, 2019–2020 Reg. Sess. § 1(e) (Cal. 2019).
22 *Id.*
23 *See Borello*, 48 Cal.3d at 349 (Workers' Compensation Act extends only to injuries suffered by employees which arise out of or in the course of their employment, and does not include independent contractors).
24 AB 5, Ch. 296, 2019–2020 Reg. Sess. § 1(b) (Cal. 2019).
25 Cal. Lab. Code § 2777(b)(2)(C).
26 DOSH is also commonly known and referred to as "Cal/OSHA."

high hazard industries." This list must be periodically reviewed and revised as deemed necessary.[27] Section 6314.1, in turn, requires DOSH to "establish a program for targeting employers in high hazardous industries with the highest incidence of preventable occupational injuries and illnesses and workers' compensation losses."[28] To this end, Section 6314.1 further dictates that DOSH utilize "any or all of the following data sources: the California Work Injury and Illness program, the Occupational Injuries and Illness Survey, the federal hazardous employers' list, experience modification and other relevant data maintained and furnished by all rating organizations as defined in Section 11750.1 of the Insurance Code, histories of violations of Occupational Safety and Health Act standards, and any other source deemed to be appropriate that identifies injury and illness rates."[29]

Pursuant to this statutory mandate, DOSH publishes a list of "high hazard" industries, which may vary year to year, based on information such as workers' compensation loss data and the history of DOSH citations.[30] The DOSH list identifies certain NAICS industry "groups" or "sectors" such as agriculture, construction, transportation and warehousing, retail trade, and accommodation and food services, and then within those groups or sectors, *targets industry subsectors* that DOSH has determined are "high hazard" industries.[31] For example, within the "transportation and warehousing" sector, the subsector of "couriers and messengers" has been designated by DOSH as a high hazard industry.[32]

After referencing the DOSH high hazard industry list, the carve-out in AB 5's referral agency exemption proceeds to enumerate ten categories of services (janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair)[33] that overlap with the NAICS industry sectors and subsectors that have appeared on the DOSH list. But the carve-out's enumerated list is also clearly broader than the DOSH list; the enumerated list includes, for example, "transportation" and "retail" as *entire sectors* (not targeted by subsector), while it also names subsectors like "delivery" and "in-home care." Thus, one common sense reading of this enumerated list is that for purposes of the carve-out, the Legislature meant to *draw from and expand upon* DOSH's list of high hazard industries; codifying this enumerated list ensures that certain industry sectors as a whole, as well as identified subsectors, will always be included as a baseline in the carve-out, since the DOSH list focuses on subsectors and is subject to change.

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27 Cal. Lab. Code § 6401.7(e)(3)(B).

28 Cal. Lab. Code § 6314.1(a).

29 *Id.*

30 *See* https://www.dir.ca.gov/dosh/high-hazard-unit.html.

31 The North American Industry Classification System (NAICS) is the standard used by federal agencies to classify business establishments in order to collect, analyze, and publish statistical data related to the U.S. business economy. *See Economic Census: NAICS Codes & Understanding Industry Classification Systems*, at https://www.census.gov/programs-surveys/economic-census/year/2022/guidance/understanding-naics.html.

32 *See, e.g.*, DOSH High Hazard Industry List, fiscal years 2019-2020, 2020-2021, 2021-2022, 2022-2023, and 2023-2024, at https://www.dir.ca.gov/dosh/high-hazard-unit.html.

33 *See* Cal. Lab. Code § 2777(b)(2)(C).

Accordingly, the common thread that runs throughout the carve-out is the Legislature's particular concern about referral arrangements that misclassify workers in *dangerous* industries.[34] Contrary to plaintiffs' assertion, this concern constitutes a rational basis for the Legislature to set up different worker classification tests (the ABC test or *Borello*) in the referral agency exemption. Businesses that operate in hazardous industries, in which workers may be likely to experience job-related injuries, cannot seek the exemption and are held to the ABC test in order to better protect workers against misclassification that would deprive them of workers' compensation if they are injured.

Once the carve-out is seen in this light, it does not matter if, as plaintiffs tell it, they are similarly situated to businesses like Wag! or TaskRabbit. The *en banc* Court need not decide this point, since the rational basis for the statutory distinction is apparent.[35] It does not matter if plaintiffs' business models are similar to that of Wag! or TaskRabbit, nor whether plaintiffs, just like Wag! and TaskRabbit, can meet the statutory requirements exempting referral agencies from the ABC test, as plaintiffs argue.[36] It also does not matter whether plaintiffs can satisfy the various policy considerations that may inform AB 5's exemptions from the ABC test. For example, it is irrelevant, despite what plaintiffs assert, whether "yard workers, picture hangers, and furniture assemblers…boast no higher 'barriers to entry' [in order to provide their services] than do plaintiffs."[37] Nor does it matter if plaintiffs' workers are "positioned identically [to other workers whose employment status under AB 5 may be determined by *Borello* and not the ABC test] as to the amount of control in their position, their bargaining power, their ability to control their own rate of pay, and the nature of the relationship between themselves and their customers."[38] All of this is factually and legally beside the point.

Transportation, courier, and delivery services, the Legislature could have rationally believed, involve more serious and potential hazards to workers than walking a dog, working in a yard, or hanging pictures—such that referral arrangements for those services should be governed by the more worker-protective ABC test. The Legislature could have also rationally assumed that injury rates are different enough to justify the lines that the statute draws. Under rational basis review, the Legislature's assumptions need not be supported by evidence or empirically proven as correct, and

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34 Basic canons of statutory interpretation also lend support to reading the carve-out as animated by the Legislature's overarching concern about misclassification in dangerous industries. *See generally Grafton Partners v. Superior Ct.,* 36 Cal. 4th 944, 960 (2005) (courts "[o]rdinarily… interpret related statutory provisions on the assumption that they each operate in the same manner, and courts may conclude that the Legislature would not intend one subsection of a subdivision of a statute to operate in a manner markedly dissimilar from other provisions in the same list or subdivision" (citation and internal quotations omitted)); *People v. Rogers*, 5 Cal. 3d 129, 142 (1971) (Mosk, J., concurring and dissenting) (each term of a section of the law should not be viewed in a vacuum, "as if it stood alone in the text" but rather, "it is settled that the intent of the Legislature must be gathered from the statute taken as a whole… and that all parts of the statute must if possible be construed together and harmonized so as to effectuate that intent").

35 *See Gallinger*, 898 F.3d at 1016-1020 (declining to address whether two groups were similarly situated because the classification was rationally related to legitimate state interests). Even assuming *arguendo* that plaintiffs are similarly situated, there is a rational basis for treating plaintiffs differently, as we have explained above. In the alternative, the Court could determine that plaintiffs are not similarly situated because they operate in high hazard industries.

36 *See* note 12, *supra.*

37 Plaintiffs-Appellants' Supplemental *En Banc* Reply Brief, 6.

38 Plaintiffs' Second Amended Complaint ¶ 9.

may even be erroneous.[39] Neither would it matter if the Legislature's line-drawing is underinclusive (*e.g.*, if more industries could be deemed hazardous to workers and could have been listed) or overinclusive (*e.g.*, if it is disputed that all of the industries in the carve-out are hazardous).[40] The basis need only be plausible, arguable, or conceivable.[41] And Plaintiffs' complaint does nothing to negate this plausible basis, which appears on the face of the statute itself, as plaintiffs are required to do in order to proceed with their equal protection claim.[42]

Moreover, this rationale for the carve-out also makes irrelevant plaintiffs' contention that they were illegitimately targeted because their businesses were not "more prone to misclassify" than Wag! or TaskRabbit and the Legislature therefore did not draw lines based on the actual risk of misclassification.[43] While the State stresses that the carve-out was reasonably based on which industries had "high pre-AB 5 misclassification rates" and that the carve-out was unnecessary "where the Legislature identified no comparable evidence of misclassification,"[44] the plaintiffs

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39 Here, the carve-out is grounded in and expands upon the DOSH high hazard industry list, which is based on various data sources, as discussed *supra.* But even so, "a legislative choice 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 (citations omitted). Moreover, "assumptions underlying [legislative] rationales may be erroneous, but the very fact that they are arguable is sufficient, on rational-basis review," to survive an equal protection challenge. *Id*. at 320 (citation and internal quotations omitted). Indeed, "States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464 (1981) (citations and internal quotations omitted).

40 *See Gallinger*, 898 F.3d at 1018; *see also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind…[and] neglecting…others" (citations omitted)). "[R]ough accommodations" between means and ends are constitutionally permissible. *Heller v. Doe,* 509 U.S. 312, 321 (1993); *see also Mountain Water Co. v. Mont. Dep't of Pub. Serv. Regul*., 919 F.2d 593, 597 (9th Cir. 1990) (no precise nexus is required between the challenged statute's classification and the statute's overall purpose).

41 *S.F. Taxi Coal. v. City & Cnty. of S.F.*, 979 F.3d 1220, 1224 (9th Cir. 2020).

42 Plaintiffs merely allege as part of one sentence in their 255-paragraph complaint that their workers do not perform jobs that are "more dangerous" than workers providing services like home repair or moving furniture. *See* Plaintiffs' Second Amended Complaint ¶ 189. This conclusory allegation does not satisfy plaintiffs' burden to negate every conceivable basis which might have supported the statutory classification. *See Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 965 (9th Cir. 2021) (citation omitted). And even if home repair or furniture-moving were somehow considered dangerous to a similar extent as driving a motor vehicle, this does not make the Legislature's line-drawing in the referral agency exemption irrational. *See Beach Commc'ns*, 508 U.S. at 315–16 (defining the class of persons subject to a regulatory requirement "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration").

43 *See* Plaintiffs-Appellants' Supplemental *En Banc* Reply Brief, 6-8.

44 State of California Supplemental Opening Brief, 21; *see also* State of California Supplemental Reply Brief, 6-7. The State has the better argument. The Legislature could have properly determined, as the State points out, that companies providing transportation, courier, and delivery services like Uber and Postmates presented higher pre-AB 5 misclassification rates as compared to other companies like Wag! and TaskRabbit, based on the disproportionate numbers of misclassification cases brought against ridehailing and delivery companies like plaintiffs' and the fact that "numerous policy experts, courts, and others have recognized" that app-based drivers "look very much like" employees. *See* State of California Supplemental Opening Brief, 14-15, 21-22 & n.14. Regardless, neither a *greater* risk of misclassification nor any evidentiary showing as to the relative risks

attempt to sow doubt about this point. Ultimately, any focus on the relative risk of misclassification is not necessary to understand the carve-out's rational relationship to AB 5's purposes. The carve-out has a separate justification that does not depend on high pre-AB 5 misclassification rates. As we have explained, the carve-out is rationally based on the Legislature's determination of which industries present "high hazards" to workers (drawn from and expanding upon DOSH's designation of those industries), such that the Legislature could have viewed *any* risk or incidence of worker misclassification in those industries as exacerbating the harm to workers who are injured on the job.

Finally, with this rational basis in mind, it becomes even more clear why *Merrifield v. Lockyer,* a case on which plaintiffs heavily rely, is inapposite.[45] In *Merrifield*, the Ninth Circuit found an equal protection violation where a state law required all persons engaged in structural pest control to obtain licenses, but exempted certain pest controllers who the Court stated were more likely to be exposed to pesticides than individuals who were not exempted. The Court found the exemption undermined the rationale for the law, which was to regulate pest controllers who might interact with pesticides, and therefore had no rational basis.[46] The plaintiffs in this case cite *Merrifield* to assert that the Court "cannot simultaneously uphold the [ABC test] based on one rationale and then uphold [app-based drivers'] exclusion from the exemption based on a completely contradictory rationale."[47] But there is no real contradiction. The Legislature's express rationale for AB 5 (to address the harms of misclassification and make sure that workers have basic protections as employees including workers' compensation when they are injured on the job) aligns with the rationale for carving out plaintiffs' industries (among many others) from the referral agency exemption. This carve-out ensures the more worker-protective ABC test applies to determine employee status when referral arrangements are used in high hazard industries in which workers may be likely to experience job-related injuries.

3. The carve-out in the referral agency exemption is not "laser-focused" on plaintiffs' businesses but includes multiple industries deemed to be dangerous to workers.

Plaintiffs repeatedly state that the Legislature's carve-out in the referral agency exemption is irrational and reflects animus directed at plaintiffs because of its "laser" focus on carving plaintiffs out of the exemption in order to "target" them.[48] But there is no such laser focus on plaintiffs. As noted above, the carve-out encompasses all the industries on the DOSH high hazard industry list (the list for 2019-2020, for example, includes over 40 high hazard industries),[49] as well as ten separately enumerated categories of services in industries that both overlap with and expand on the DOSH list. The carve-out does not single out Uber and Postmates, app-based transportation, courier and delivery businesses, or gig economy companies. Rather, the carve-out, which includes

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of misclassification is legally required for the State to prevail. *See Beach Commc'ns*, 508 U.S. at 315–16 (constitutionally permissible legislative line-drawing need not be supported by evidence and can result in excluding some persons with an almost equally strong claim to favored treatment).

45 547 F.3d 978 (9th Cir. 2008).

46 *Id.* at 990-92.

47 Plaintiffs-Appellants' Supplemental *En Banc* Reply Brief, 20.

48 *See, e.g.*, Plaintiffs-Appellants' Supplemental *En Banc* Brief, 34.

49 *See* DOSH High Hazard Industry List, fiscal year 2019-2020, at https://www.dir.ca.gov/dosh/high-hazard-unit.html.

the transportation, courier and delivery industries as a whole in addition to many other industries, indicates that the Legislature was focused on the goal of protecting workers from misclassification in a wide array of industries where they may likely experience job-related injuries.[50] Because there is a rational basis for the distinctions made in the referral agency exemption, whether or not there was legislative animus is also legally irrelevant.[51]

PART 2	AB 5's Exemptions, Like the Referral Agency Exemption Which Incorporates a "*Borello*-Plus" Filter, Support the Statute's Principal Purpose of Addressing Misclassification While Preserving True Independent Contractor Relationships

Plaintiffs also attempt to disregard the clear rational basis that exists for the referral agency exemption and its carve-out by arguing more broadly that AB 5's exemptions contradict the statute's purpose. Plaintiffs frame AB 5's purpose as "mak[ing] it more difficult for employers to evade labor requirements" by replacing the "complex and manipulable" *Borello* standard with the "simpler, more structured" ABC test.[52] Plaintiffs contend this purpose is inconsistent with the statute's exemptions that "reinstitute" the *Borello* test which the Legislature deemed insufficient to protect workers.[53] Plaintiffs are wrong. They too narrowly constrict AB 5's purpose and fail to acknowledge how exemptions like the referral agency exemption actually operate.

The Ninth Circuit has recognized that AB 5 applies the ABC test to "employers generally," and to "hundreds of different industries."[54] At the same time, the purpose of AB 5 was not to codify the ABC test as an end in itself. This is an overly simplistic view of AB 5 that is fatal to plaintiffs' argument. Rather, AB 5's overall statutory scheme reflects the Legislature's goal of addressing the problem of misclassification, while also preserving bona fide independent contractor relationships. To this end, as the Ninth Circuit has previously found with respect to AB 5, "It is certainly conceivable that differences between occupations warrant *differently contoured rules for determining which employment test better accounts for a worker's status*."[55] These differently contoured rules are reflected in AB 5's exemptions from the ABC test.

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50 This is in stark contrast to *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809 (9th Cir. 2016), on which plaintiffs also rely. In *Fowler*, unlike here, the law that otherwise created a "safe harbor" for employers from certain wage obligations included a carve-out that was alleged to have benefited only *three specific employers from one industry*. *Id.* at 815.

51 *See Boardman v. Inslee*, 978 F.3d 1092, 1119 (9th Cir. 2020) (where plaintiffs are not members of a suspect class, an equal protection violation on the basis of animus may be found only 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, 1201 (9th Cir. 2018) (no equal protection violation where statute had legitimate governmental purpose and thus did not "rest exclusively" on irrational prejudice, even though animus was a motivating factor).

52 Plaintiffs-Appellants' Supplemental *En Banc* Reply Brief, 1, 4. Plaintiffs quote the State's brief but take a myopic view of what the State is saying.

53 *Id*. The Ninth Circuit panel was convinced by this argument. *See Olson*, 62 F.4th at 1219 (stating "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" (citation and internal quotations omitted)).

54 *Cal. Trucking Ass'n. v. Bonta*, 996 F.3d 644, 658-59 (9th Cir. 2021) (citation omitted).

55 *Am. Soc'y of Journalists*, 15 F.4th at 965 (emphasis added).

Moreover, the statute's exemptions do not just simply "reinstitute" *Borello*; the referral agency exemption, for example, like many of AB 5's other exemptions, spells out multiple detailed criteria that overlap with factors from the *Borello* test itself,[56] and that must be met in order for *Borello* to be used as the basis for determining a worker's classification instead of the ABC test.[57] Failure to meet *any one* of these statutory criteria is dispositive because it disqualifies the entity from the exemption. This ensures that each criterion will be applied and consistently accorded weight in every situation where an exemption is sought—unlike under the *Borello* test where no one factor is determinative and individual factors may be subject to inconsistent interpretation, application, and manipulation.[58]

In this way, the Legislature erected statutory guardrails for AB 5's exemptions. For exemptions like the referral agency exemption, the specific threshold criteria that must be satisfied to obtain an exemption act as a sort of "*Borello*-plus" filter that provides more protection against misclassification than *Borello* alone would. The Legislature embedded this filter where it believed the *Borello* test could better account for a worker's status but only if there is some added assurance—*i.e.*, by passing entities through the filter—that the exemption from the ABC test would not be exploited.[59] At the same time, the Legislature also determined that businesses operating in industries "deserving of special attention"[60] (*e.g.*, due to high misclassification rates or high hazards) should be held to the ABC test without exception, in order to better protect workers in those industries that present heightened concerns. Such line-drawing is rationally related to AB 5's legitimate purposes and is therefore constitutionally permissible. Second-guessing whether the Legislature could have approached the problem of misclassification differently or more precisely is not the proper role of the judiciary.

PART 3 Conclusion

Olson v. California, which is pending before the Ninth Circuit *en banc*, should be a straightforward case, resolved in favor of the State to dismiss plaintiffs' equal protection claim. Under rational basis review, the Court should readily conclude that plaintiffs have failed to negate every conceivable basis for AB 5's statutory classifications, which are rationally related to its legitimate purposes. The State has already posited cogent arguments to this end. However, plaintiffs have manufactured a thicket of distraction that previously proved successful before the Ninth Circuit panel that reversed the district court's dismissal of plaintiffs' claim. The Court *en banc* need not wade into this thicket

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56 Compare the criteria in Cal. Lab. Code § 2777(a) with the factors considered in *Borello*, 48 Cal.3d at 350-59 (discussing factors distinguishing employees from independent contractors).

57 *See* Cal. Lab. Code § 2777(a); *supra* note 12. We focus on the referral agency exemption because plaintiffs' argument centers on that exemption.

58 *See Dynamex*, 4 Cal.5th at 954-55 (discussing criticisms of the *Borello* test and how it can be exploited by entities that misclassify workers).

59 Even though the Legislature codified extra safeguards to protect workers through the "*Borello*-plus" filter in many exemptions, we do not mean to suggest that such a filter is required for any given exemption to be rationally related to AB 5's purposes.

60 *See Am. Soc'y of Journalists*, 15 F.4th at 965 (stating that "[i]t is…conceivable that misclassification was more rampant in certain industries and therefore deserving of special attention" under AB 5).

but could decide this matter without having to address whether plaintiffs are similarly situated with other gig companies like Wag! and TaskRabbit.

The Court should look to the statute itself to find that the referral agency exemption, and its carve-out which precludes businesses operating in dangerous industries from seeking an exemption from the ABC test, are rationally related to AB 5's legitimate purpose of addressing the problem of misclassification, including the harm to workers and the state when workers are misclassified and injured on the job, while preserving bona fide independent contractor relationships. Plaintiffs' complaint, even when accepting all of their factual allegations as true, does nothing to negate this rational basis. The Court should also discern from the statute itself that AB 5's exemptions, far from contradicting the law's legitimate purposes, serve to further those purposes because they reflect the legislative assessment of which test of employee status should be utilized, and under what circumstances, in order to best protect workers. For many exemptions, this includes statutorily incorporating a "*Borello*-plus" filter in order to qualify for the exemption instead of simply "reinstituting" *Borello* with no safeguards—while also prohibiting entities from seeking an exemption when they operate in industries, such as high hazard industries, in which the Legislature was particularly concerned about the harms of misclassification.