UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**2:16-CV-04830-RGK (FFM)**	Date	October 18, 2016
Title	***ALLIED CONCRETE & SUPPLY CO., et al. v. EDMUND GERALD BROWN Jr., et al.***		

Present: The Honorable	R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order re: Plaintiff's Motion for Preliminary Injunction (DE 25)**

I. INTRODUCTION

On June 30, 2016, Allied Concrete and Supply Co.; CalPortland Company; Gary Bale Redi-Mix Concrete, Inc.; Holliday Rock Co., Inc.; National Ready Mixed Concrete Co.; Robertson's Ready Mix, Ltd.; Sprague's' Rock and Sand Company; and Superior Ready Mix Concrete L.P. (collectively, "Plaintiffs") filed the present action seeking to prohibit the enforcement of recently enacted California Labor Code § 1720.9. Plaintiffs bring this action against Christine Baker (Director of California's Department of Industrial Relations) and Julie Su (California's Labor Commissioner) (collectively, "Defendants")[1], who are state officials allegedly vested with the responsibility of enforcing § 1720.9. Plaintiffs allege that § 1720.9 violates the Equal Protection Clause of the Fourteenth Amendment, or alternatively, is preempted by the Federal Aviation Administration Authorization Act ("FAAAA").

Presently before the Court is Plaintiffs' Motion for Preliminary Injunction ("Motion"). For the following reasons, Plaintiff's Motion is **GRANTED**.

II. FACTUAL BACKGROUND

[1]Defendant Edmund Gerald Brown, Jr. (Governor of California) was dismissed from the case by stipulation on August 19, 2016. (Stipulation to Dismiss Def. Edmund Gerald Brown Jr., ECF No. 23.)

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In 2015, the California Legislature passed Assembly Bill 219, which went into effective on July 1, 2016. Assembly Bill 219, codified as California Labor Code § 1720.9, expanded the definition of "public works" under California's prevailing wage law. "Public works" are projects "paid for in whole or in part out of public funds." Cal. Lab. Code § 1720(a)(1). Section § 1720.9 adds to the definition of public works, "the hauling and delivery of ready-mixed concrete to carry out a public works contract." Cal. Lab. Code § 1720.9(a). The prevailing wage law previously did not extend to ready-mixed concrete drivers employed by ready-mixed concrete manufacturing companies that deliver concrete directly to public works job sites.

The legislative history reveals that Assembly Bill 219 was introduced to close a purported loophole in California's Prevailing Wage Law. The Bill's proponents concluded it provides "uniformity and a fair application of the prevailing wage law to deliveries of ready-mix [concrete] and [asphalt] and not about expanding prevailing wage to all material drivers." (Pls.' Req. for Judicial Notice in Supp. of Mot. for Prelim. Inj. Ex. B at 13, ECF No. 26.) Before Assembly Bill 219 was passed, ready-mixed concrete and asphalt drivers were only covered under the prevailing wage law if they were hired as contractors on a public works project, or if the ready-mixed concrete or asphalt they hauled was manufactured at a plant established solely for a public works project. Before § 1720.9 was enacted, however, the Legislature amended Assembly Bill 219 to drop asphalt drivers. Thus, § 1720.9 only broadened the prevailing wage law to encompass ready-mixed concrete drivers who are directly employed by ready-mixed concrete suppliers.

Plaintiffs are companies that manufacture and deliver ready-mixed concrete directly to construction sites using their own drivers. Plaintiffs allege that § 1720.9 is unconstitutional because it violates the Equal Protection Clause of the United States Constitution, arbitrarily subjecting ready-mixed concrete suppliers, but not other similarly situated building material suppliers, to the prevailing wage law. Plaintiffs also contend that § 1720.9 is preempted by the FAAAA, which prohibits the enactment of state laws that are "related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Plaintiffs seek declaratory and injunctive relief against Defendants in their official capacities, prohibiting Defendants from enforcing § 1720.9.

III. JUDICIAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014) (quoting *Munaf v. Geren*, 553 U.S. 674, 689 (2008)). Preliminary injunctive relief is "never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), but it is within the discretion of the district court, *All. for the Wild Rockies v. Cottrell* (*Cottrell*), 632 F.3d 1127, 1131 (9th Cir. 2011).

The Ninth Circuit employs two separate but related tests for determining whether a party is entitled to a preliminary injunction: (1) the *Winter* factor test; and (2) the "sliding scale" test, also referred to as the "serious questions" test. *See Cottrell*, 632 F.3d at 1135.

Under the *Winter* factor test, a plaintiff must demonstrate that: (1) it is "likely to succeed on the merits;" (2) the "balance of equities tips in [its] favor;" (3) it is "likely to suffer irreparable harm in the absence of preliminary relief;" and (4) "an injunction is in the public interest." *Winter*, 555 U.S. at 20.

Under the sliding scale test, a plaintiff must demonstrate that: (1) there are "serious questions going to the merits;" (2) the "balance of hardships . . . tips sharply towards the plaintiff;" (3) there is "a likelihood of irreparable injury;" and (4) an "injunction is in the public interest." *Cottrell*, 632 F.3d at 1135.

IV. DISCUSSION

In deciding whether Plaintiff is entitled to a preliminary injunction in the present case, the Court applies the sliding scale test. All four prongs of the test are required, but "a stronger showing of one element may offset a weaker showing of another." *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 739 (9th Cir. 2011). The Court discusses each factor in turn.

A. Factor One: Serious Questions on the Merits

The first factor of the sliding scale test requires that Plaintiffs raise serious questions on the merits of their claim that § 1720.9 violates the Equal Protection Clause of the Fourteenth Amendment.[2] Ready-mixed concrete manufacturers are not a suspect class, accordingly, the Court applies rational basis review. *See F.C.C. v. Beach Commc'n, Inc.*, 508 U.S. 307, 313 (1993) (stating that "[i]n areas of social and economic policy, a statutory classification . . . must be upheld" if there is a rational basis for the classification).

Under rational basis review, a state statute will be upheld if it is "rationally related to a legitimate governmental purpose." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1137 (9th Cir. 2009). Statutes are presumed to be constitutional, and "[t]he burden is on the one attacking the legislative arrangement to [negate] every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (internal quotation marks omitted). Moreover, "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." *Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008) (quoting *Vance v. Bradley*, 400 U.S. 93, 111 (1979)).

[2]Plaintiffs also allege that § 1720.9 is preempted by the Federal Aviation Administration Authorization Act. Plaintiffs, however, rely solely on their equal protection claim for purposes of this Motion. (Pls.' Mem. P. & A. in Supp. of Mot. for Prelim. Inj. 21 n.5, ECF No. 25-1.)

Plaintiffs do *not* allege that there is no rational basis for including ready-mixed concrete haulers under the prevailing wage law. Rather, they allege that there was no rational basis to single out ready-mixed concrete suppliers for inclusion under the prevailing wage law while leaving out all other construction materials suppliers. Plaintiffs claim that distinguishing between ready-mixed concrete and all other building materials for purposes of inclusion under the prevailing wage law is arbitrary and irrational.

In *Merrifield*, the Ninth Circuit invalidated a law that exempted from state licensing requirements exterminators of "bats, racoons, skunks, and squirrels," but did not exempt exterminators of "mice, rats, or pigeons." *Merrifield*, 547 F.3d at 988, 992. The *Merrifield* Court held that this classification was not logically related to the government's alleged interest, and that "this type of singling out, in connection with a rationale so weak that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review." *Id*. at 991 (stating in a footnote that "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review").

Similar to *Merrifield*, the Court concludes that Plaintiffs in the instant case raise serious questions as to whether including ready-mixed concrete but excluding other building materials under the prevailing wage law is rationally related to a legitimate government interest. To illustrate this, the Court identifies several of the most persuasive possible rationale's for the challenged classification, and considers the serious questions Plaintiffs raise for each.

1. *Technical Differences Between Ready-Mixed Concrete and Other Building Materials*

Defendants point to numerous technical differences between the uses and delivery methods of ready-mixed concrete and other materials. In particular, while other materials can be stockpiled at a construction site, ready-mixed concrete and asphalt must be laid immediately upon arrival. Ready-mixed concrete is also different than asphalt because ready-mixed concrete has various uses whereas asphalt is only used for pavement. In addition, ready-mixed concrete is delivered in specialized trucks while other materials, including asphalt, are delivered by dump trucks.

Plaintiffs point out, however, that these differences are irrelevant to a building material's inclusion or exclusion under California's prevailing wage law. *See Munoz v. Sullivan*, 930 F.2d 1400, 1406 (9th Cir. 1991) (quoting *Johnson v. Robison*, 415 U.S. 361, 374 (1974)) ("[T]he guarantee of equal protection does not allow 'different treatment [to] be accorded to persons placed by a statute into different classes *on the basis of criteria wholly unrelated to the objective of that statute*.'").

2. *Prevailing Wage Rate Disparity in Materials Immediately Incorporated at the Project Site*

Defendants argue that ready-mix concrete could have been singled-out to address a disparity in wage rates paid to truck drivers of materials immediately incorporated into the construction site. Plaintiffs note, however, that to the extent such a disparity existed for ready-mixed concrete, it also existed for other materials—like asphalt—that are immediately incorporated at the site.

3. Fiscal and Administrative Impact on State Government

Defendants argue that lessening the fiscal impact on Caltrans of including both ready-mixed concrete and asphalt could have been a rationale behind the challenged classification. Plaintiffs respond, however, that allowing this argument would gut the Equal Protection Clause because it would mean that legislatures can make any arbitrary or irrational classification they want so long as the result is a net cost savings to the government.

Defendant's also argue that extending the prevailing wage laws to include both ready-mixed concrete and asphalt drivers would have resulted in a tremendous administrative burden. This rationale, however, presumably would also have been true for the unconstitutional licensing scheme in *Merrifield*—exempting a group of exterminators from licensing requirements surely would have eased the administrative burden of the licensing scheme. The Ninth Circuit nonetheless deemed the *Merrifield* classification unconstitutional. *Merrifield*, 547 F.3d at 992.

4. The Legislature's Ability to Address Problems Incrementally

Defendants contend that the classification here may have stemmed from the Legislature's decision to expand the prevailing wage law incrementally. Indeed, "[l]egislatures may implement their programs step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Here, however, the Legislative history belies such a rationale. Plaintiffs point out that asphalt drivers were specifically dropped from Assembly Bill 219 "to remove concern about expansion [of the prevailing wage law] to other materials" (Pls.' Req. for Judicial Notice in Supp. of Mot. for Prelim. Inj. Ex. F at 31. ECF No. 26.) The Legislature appears to have specifically dropped asphalt from the Bill to assure lawmakers and observers that the law would not expand to reach other building materials in the future—thus, it can hardly be said that the Legislature plans to act incrementally. As the Ninth Circuit noted in *Merrifield*, a rationale that undercuts the principle of non-contradiction does not satisfy rational basis review. *Merrifield*, 547 F.3d at 988, 991.

For the foregoing reasons, the Court finds that Plaintiffs have, at a minimum, raised serious questions on the merits of their equal protection claim.

B. Factor Two: Balance of Hardships

Under the second factor of the sliding scale test, Plaintiffs must demonstrate that the balance of hardships tips sharply in their favor. *Cottrell*, 632 F.3d at 1135. The relevant interests in such an inquiry are those of the parties to the action—ready-mixed concrete companies on the one hand and state officials on the other. *See Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 412 (9th Cir. 2015) (finding that the inquiry under the balance of hardship factor only concerns the parties to an action).

"[T]he balance of the equities favor[s] preventing the violation of a party's constitutional rights." *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Moreover, the Court concludes that Plaintiffs have produced sufficient evidence to establish that § 1720.9 has already affected their businesses—by increasing costs associated with sales, ordering, dispatching and routing drivers, monitoring deliveries, payroll, accounting, and human resources. (*See* Holliday Decl. ¶¶ 8–11, ECF No. 25-2; O'Regan Decl. ¶¶ 13–21, ECF No. 25-3; Dragna Decl. ¶¶ 5–13, ECF No. 25-4.) Defendants, by contrast, do not present any evidence that a preliminary injunction would cause them hardship.

As such, the Court finds that the balance of hardships tips sharply in Plaintiffs favor.

C. Factor Three: Likelihood of Irreparable Harm

All plaintiffs seeking a preliminary injunction must establish that they will likely suffer irreparable harm without an injunction. *See Cottrell*, 632 F.3d at 1135. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Since the Court concludes above that Plaintiffs have at least raised serious questions as to the constitutionality of § 1720.9, the Court finds that Plaintiffs have established a likelihood of irreparable harm. *See Goldie's Bookstore, Inc. v. Superior Court of California*, 739 F.2d 466, 472 (9th Cir. 1984) ("An alleged constitutional infringement will often alone constitute irreparable harm.").

D. Factor Four: Injunction is in the Public Interest

Finally, Plaintiffs must establish that an injunction is in the public interest. *See Cottrell*, 632 F.3d at 1135. Two competing interests are at play here. On one side, the public has an interest in California workers receiving fair compensation. The Ninth Circuit has held that when a preliminary injunction would result in "many workers receiving reduced wages," the public interest factor weighs against granting the injunction. *See Int'l Franchise Ass'n*, 803 F.3d at 412. If the Court grants this preliminary injunction, ready-mixed concrete drivers employed directly by concrete manufactures will undoubtedly have their wages reduced until this action is ultimately resolved.

On the other hand, it is certainly not in the public interest for a potentially unconstitutional state law to remain in effect. The Ninth Circuit has repeatedly stated that "it is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law,

especially when there are no adequate remedies available." *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). As stated above, Plaintiffs have at least raised serious questions as to the constitutionality of § 1720.9. The public also has an interest in keeping costs down for public works projects while the constitutionality of this classification is adjudicated.

The Court finds that, on balance, the public interest favors injunction.

V. EVIDENTIARY OBJECTIONS

To the extent the Court relied on any evidence to which the parties object, those objections are overruled.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiffs' Motion for Preliminary Injunction.

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