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9
10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 WESTERN STATES TRUCKING
13 ASSOCIATION

Case No.

14 Plaintiff,

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

15 vs.

16 XAVIER BECERRA, Attorney General for the
17 State of California, and DOES 1-50

18 Defendants.
19

20
21 **INTRODUCTION**

22 1. Plaintiff seeks declaratory and injunctive relief to prohibit defendants from
23 enforcing a discrete portion of California’s new law regarding whether persons providing
24 construction trucking services can be deemed independent contractors as opposed to employees.
25 Unlike the ABC test announced by the California Supreme Court in *Dynamex Operations West,*
26 *Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) (“*Dynamex*”), the newly enacted statute does not
27 contain a test for determining employment status; rather, it is a mandate.
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1 trucks to serve the needs of a particular project, the trucking company will subcontract with other
2 construction trucking companies to meet the needs of the job.

3 8. The independent contractor model has been a significant component of the
4 construction trucking industry for decades. Many construction trucking jobs are uncertain in
5 both duration and volume. For example, the volume of trucking services required for a particular
6 project depends on the size of the project. General contractors hire construction trucking
7 companies to haul material (like sand, gravel, dirt, or aggregate) to and from the construction
8 site. For a small project, like grading a plot of land for a housing development, the job may only
9 last a few days or weeks, and may only require a few types of trucks. For a larger project, like
10 building a stretch of freeway, the job may last weeks or months and may require different types
11 of trucks for different stages of the project.

12 9. In the construction trucking industry, demand for equipment fluctuates daily. For
13 example, even though a job may require 500 loads of dirt to be removed, it is extremely rare for
14 that job to be performed with a single truck at a rate of 10 loads a day for 50 straight workdays.
15 It would be more typical for that job to be performed in a few days with dozens of trucks hauling
16 multiple loads per day. This is because the sequencing of other phases of the construction
17 project requires that the material be moved as soon as possible. In this example, the project
18 would require a lot of trucks for a short time, but after that 500 loads were completed, this
19 project may not need any trucks for a long time. To account for this, construction trucking
20 companies need to be able to rapidly increase and decrease the effective size of their fleet to
21 meet the demands of the general contractor clients.

22 10. Sequencing is extremely important in construction projects. Some portions of a
23 project cannot begin until other necessary preliminary work is done. Weather often plays a role
24 in delaying the sequencing of certain parts of construction projects. Thus, as just one basic
25 example, a construction trucking company might have a contract with a general contractor to
26 deliver 10 tons of gravel to a work site on Tuesday. However, a big rainstorm on Monday may
27 have delayed the ability of the workers at the worksite to prepare the locations where the gravel
28 needs to be placed. As a result, the contractor will tell the construction trucking company not to

1 deliver the gravel until Wednesday or Thursday. However, the construction trucking company
2 may have his entire fleet of trucks booked for another project on those dates. As a result, he
3 would need to subcontract with other trucking companies in order to perform the required
4 services.

5 11. The business of construction trucking necessarily involves jobs that vary
6 significantly in frequency, location, duration, and type of cargo. A driver may haul gravel to a
7 construction site on one day for one prime construction contractor, and may haul debris to a
8 dump on the next day for a different contractor. These different jobs typically require the use of
9 different trailers depending on the type of cargo being hauled.

10 12. In order to meet this fluctuating demand for services, construction trucking
11 companies contract with other trucking companies on a temporary basis. Some large
12 construction trucking companies have fleets of hundreds of trucks with hundreds of employee-
13 drivers who are classified as employees. There are also many smaller construction trucking
14 companies that hire their services to contractors and other trucking companies as independent
15 contractors. Among the smaller companies are thousands of non-employee independent owner-
16 operators. The owner-operators are small businesses in which the owner of the business (and the
17 truck) is also the sole driver for the company.

18 13. It is common for construction trucking companies to bid on jobs that exceed the
19 capacity of their fleet and employee drivers. When those bids are successful, they need to
20 engage the services of other trucking companies temporarily to complete that job, but they do not
21 have sufficient ongoing business to permanently keep them as employees. In these situations, it
22 is typical for the construction trucking company to act as both an independent contractor with
23 respect to the general contractor by providing hauling and trucking services to the construction
24 site, and as a broker to subcontract with other trucking companies and independent owner-
25 operators to perform trucking and hauling work on the same construction project.

26 14. Many small construction trucking companies have invested in specialized
27 equipment and have obtained the skills to operate that equipment efficiently. Some of these
28 trucking companies have very unique and expensive equipment not available in the fleet of other

1 trucking companies. This can make them more attractive to other trucking companies that need
2 to temporarily increase their hauling capacity, because they can obtain the services of additional
3 drivers and equipment without having to make large capital investments in either skilled
4 operators or expensive equipment. For example, the construction trucking industry includes
5 water trucks, concrete pumping trucks, and dump trucks, to name a few. Even within category of
6 dump trucks, there are end dumps, bottom dumps, super dumps, and many other categories that
7 are each used for specific projects. Most of these trucks can cost between \$150,000 and
8 \$300,000 depending on the type of equipment.

9 15. Given the variety of construction trucking equipment that may be needed for
10 discrete portions of a project, it often makes little sense for a construction trucking company to
11 invest in a piece of equipment that is only used occasionally. For a trucking company, because
12 of the large capital investment in equipment, if the wheels are not moving, the company is losing
13 money. Thus, rather than purchasing fleets of all the various types of construction trucks,
14 trucking companies will often subcontract with smaller companies who already have the
15 equipment and the skilled personnel to use it. In this way, the trucking company is able to bid on
16 any job and perform the required services, even if it does not own the precise equipment required
17 for the job. Likewise, for smaller construction trucking companies and individual owner-
18 operators, it makes sense to invest in an expensive piece of equipment and network with other
19 companies and brokers, because there are almost always a wide variety of construction jobs in
20 progress such that the small company will be able to hire out its specialized services every day.

21 16. Virtually all construction trucking companies, from small one-truck owner-
22 operators, to large companies with fleets of hundreds of trucks, are motor carriers. In California,
23 the Department of Motor Vehicles issues a Motor Carrier of Property permit that specifically
24 includes a category for owner-operators. A motor carrier is a person engaged in the
25 transportation of goods or passengers for compensation. 49 C.F.R. 390.5. Construction trucking
26 companies are not required to be licensed by the Contractors State License Board, although some
27 trucking companies do also coincidentally have contractors' licenses.

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1 17. There are also businesses that act exclusively as brokers for trucking services.
2 These businesses are defined as “any person, excluding a licensed contractor, that, as a principal
3 or agent, arranges for transportation services to be provided by an independent contractor motor
4 carrier of property in dump truck equipment and who is responsible for paying the transportation
5 charges of the motor carrier.” Cal. Civil Code sec. 3322. The federal regulations contain a
6 similar definition: “*Broker* means a person who, for compensation, arranges, or offers to
7 arrange, the transportation of property by an authorized motor carrier.” 49 C.F.R. 371.2(a).

8 18. Some brokers are also motor carriers, while other brokers do not own any power
9 units and simply contract with general contractors to arrange trucking services. Brokers may be
10 any type of business entity, including but not limited to a sole proprietorship, a partnership, or a
11 corporate entity. Construction trucking companies, both large and small, are referred work by
12 brokers and generally pay a negotiated fee (typically 5% to 8%) to the broker for referring them
13 the work.

14 19. Some construction trucking companies also act as brokers. For example, if a
15 trucking company secures the trucking work for a particular project, but lacks the necessary
16 drivers and/or equipment in house to perform the work, that trucking company may subcontract
17 with other trucking companies, or may simply broker the excess work to other trucking
18 companies in exchange for a fee or commission.

19 20. In California, brokers are required to obtain a surety bond of at least \$15,000 from
20 an admitted surety insurer. Cal. Veh. Code. sec. 34510.5. In addition, brokers are required to
21 pay motor carriers for all transportation charges no later than the 25th day of the month following
22 the month in which the transportation services were performed. These requirements ensure that
23 trucking companies that use brokers to obtain work are paid in a timely fashion, and ensures that
24 brokers are solvent enough to ensure the trucking companies get paid.

25 21. Smaller construction trucking companies often contract with brokers or other
26 trucking companies on a day-to-day basis to haul materials to, from, and within construction
27 sites. Brokers refer hauling jobs to the smaller trucking companies, and otherwise do not
28 exercise any supervision over the trucking companies. While on the job site, only the building

1 contractor's personnel direct the truck operators where to pick up or deliver a load. The trucking
2 companies may accept referrals from more than one broker and are free to negotiate any job rate
3 and terms of payment acceptable to both parties. The independent owner-operators generally
4 own their trucks, and are responsible for their own licensing, insurance, repairs and maintenance.
5 They are responsible for operating expenses like fuel, oil, and tires. They are personally liable
6 for spillage, must pay Social Security taxes as self-employed persons, and often receive payment
7 based on tonnage, mileage, or per load as opposed to hourly wages. They are also able to
8 subcontract job referrals to other owner-operators.

9 22. Studies have demonstrated that self-employed independent owner-operators
10 running their own businesses do quite well financially. In fact, the vast majority of independent
11 owner-operators make more money than their counterparts employed as company drivers, even
12 accounting for union wages. Median income for independent owner-operators is, on average,
13 approximately 40% higher than the median income for employee drivers. See, e.g., John Husing,
14 Ph.D., *Owner Operator Driver Compensation* (2015). It is also well known that many workers
15 wish to be independent contractors for specific non-employment benefits. Research shows that
16 less than one in ten independent contractors would prefer a more "regular" nine-to-five type of
17 work arrangement. See, e.g., Peter Tran, *The Misclassification of Employees and California's*
18 *Latest Confusion Regarding Who Is an Employee or an Independent Contractor*, 56 Santa Clara
19 L. Rev. 677, 701 (2016).

20 23. As independent contractors, owner-operators get to decide when they want to
21 work, when they want to stay home with their sick child, and when they want to work extra
22 hours to earn more money.

23 24. Almost all construction trucking companies contract with other trucking
24 companies to engage the services of additional drivers, trucks and trailers, as their business needs
25 fluctuate. Because of the fluctuation, it would be impossible for trucking companies to hire
26 enough employees, so they could be staffed at the level necessary to serve the maximum capacity
27 of their business. Rather, because their business ebbs and flows unexpectedly throughout the
28

1 year, they need to be able to expand and contract their labor force and fleet equipment as
2 necessary.

3 25. A common business model in California is for an independent owner-operator to
4 work for himself or herself for a period of time to build up his or her experience and reputation
5 in the industry. Then, as he or she is looking to expand his or her business, that owner-operator
6 will bid on jobs that require more than just the single truck that he or she owns. At that time, the
7 owner-operator will subcontract with one or more other owner-operators to complete the job that
8 he or she could not have completed alone.

9 26. Eventually, the owner-operator may have enough business to warrant hiring one
10 or more employee-drivers. In this way, small businesses are able to grow from one truck/one
11 driver operations to larger fleets with multiple trucks and multiple employee drivers. This model
12 has brought prosperity to thousands of independent owner-operators throughout the state, many
13 of whom are minorities and people of color.

14 27. AB 5 (Gonzalez) enacts new Labor Code section 2750.3, which purports to
15 establish new rules for determining whether a worker is an employee or an independent
16 contractor. Section 2750.3, subdivision (a) codifies the ABC test of *Dynamex* and applies it not
17 just to the wage orders, but also to the Unemployment Insurance Code.

18 28. After establishing the general rule in subdivision (a) of Section 2750.3,
19 subdivisions (b) through (h) establish exceptions for various industries. For example,
20 subdivision (b) provides that the older *Borello* test applies to workers in the insurance industry,
21 physicians, dentists, veterinarians, lawyers, direct sales salespersons, and commercial fishermen,
22 among others. Similarly, subdivision (c) provides that *Borello* applies to certain contracts for
23 “professional services” so long as a number of factors are satisfied. Other subdivisions generally
24 provide that the ABC test of *Dynamex* does not apply to various industries, often so long as
25 certain other factors or criteria are met.

26 29. Section 2750, subdivision (f), like other subdivisions, provides that the holding in
27 *Dynamex* does not apply, and instead the *Borello* test applies, to the relationship between a
28 contractor and an individual performing work pursuant to a subcontract in the construction

1 industry, provided all of the listed criteria are satisfied. There are eight separate paragraphs
2 within subdivision (f). The first seven paragraphs are all criteria that apply to subcontractors
3 licensed by the Contractors State License Board. The eighth paragraph is not so much an
4 additional criterion that must be met, as it is a separate exception applicable to a very specific
5 industry: subcontractors providing construction trucking services for which a contractor's
6 license is *not* required. Paragraph 8 then has a series of subparagraphs that define the specific
7 requirements for this "construction trucking" exception. Labor Code section 2750.3, subd.
8 (f)(8).

9 30. Paragraph 8 purports to allow a non-*Dynamex* pathway for a person performing
10 construction trucking services, as defined, to be classified as either an employee or an
11 independent contractor based on the *Borello* test, provided certain criteria are met (See Labor
12 Code section 2750.3, subd. (f)(8)(A)(i) through (iv).)

13 31. The criteria that subcontractors must meet in order for their worker status to be
14 governed by *Borello* instead of *Dynamex* are:

15 (i) The subcontractor is a business entity formed as a sole proprietorship,
16 partnership, limited liability company, limited liability partnership, or corporation.

17 (ii) For work performed after January 1, 2020, the subcontractor is
18 registered with the Department of Industrial Relations as a public works
19 contractor pursuant to Section 1725.5, regardless of whether the subcontract
20 involves public work.

21 (iii) The subcontractor utilizes its own employees to perform the
22 construction trucking services, unless the subcontractor is a sole proprietor who
23 operates their own truck to perform the entire subcontract and holds a valid motor
24 carrier permit issued by the Department of Motor Vehicles.

25 (iv) The subcontractor negotiates and contracts with, and is compensated
26 directly by, the licensed contractor.

27 The foregoing criteria mandate that the subcontractor uses its own employees unless the
28 subcontractor is a sole proprietor, in which case he is the sole driver on the job. Thus, a
construction trucking subcontractor of any size is not allowed to contract with other independent
trucking companies or owner-operators to meet the criteria for the *Borello* test.

1 32. Even worse, Labor Code section 2750.3, subd. (f)(8)(B) eliminates any pretense
2 of a “test” and instead makes employment an explicit mandate, as it provides as follows:

3 (B) For work performed after January 1, 2020, any business entity that provides
4 construction trucking services to a licensed contractor utilizing more than one
5 truck shall be deemed the employer for all drivers of those trucks.

6 The “shall be deemed” language of this provision overrides both the *Borello* and *Dynamex* tests
7 and instead mandates employee status rather than independent contractor status anytime a
8 subcontractor utilizes more than one truck on a construction project. Thus, any construction
9 trucking company, large or small, could never supplement its workforce with independent
10 contractor owner-operators or other trucking companies in order to perform a job. Instead, any
11 supplemental workforce would be deemed employees.

12 33. Labor Code section 2750.3, subd. (f)(8)(A)(iv) also mandates that subcontractors
13 performing construction trucking services must negotiate with, contract with, and get
14 compensated directly by the licensed contractor. Here again, this provision completely
15 eliminates the ability of a trucking company – that has lawfully won a bid to provide
16 construction trucking services to a licensed contractor – to subcontract with one or more other
17 trucking companies to complete the job if the trucking company needs more trucks and drivers.
18 Instead, each of the putative sub-subcontractor trucking companies would be required to
19 negotiate and contract with the licensed contractor and would be required to be paid directly by
20 the licensed contractor.

21 34. As a result of these various mandates, the type and level of service that
22 construction trucking companies can provide to their customers is extremely limited. They are
23 required to use only their own employees, and even if they attempt to use independent
24 contractors, they will be deemed employers. Moreover, trucking companies that desire to be
25 independent subcontractors – and are gracious for the opportunity to perform work – are unable
26 to work as independent contractors under the trucking company subcontractor, and instead must
27 negotiate with, contract with, and get paid directly by the licensed contractor, or else be deemed
28 employees of the trucking subcontractor.

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The Cost of Employment

35. Classification of workers as employees instead of independent contractors has enormous consequences. In California, employers are required to obtain and pay premiums for workers' compensation insurance for their employees. They are subject to minimum wage and hour laws, overtime laws, and are exposed to class-action liability for violations of those laws. They are required to give employees meal and rest breaks, and are required to keep documents recording the meal periods. Employers in California are required to provide paid family leave, paid sick leave, pregnancy leave, lactation breaks, leave to parents to attend school functions, voting leave, jury duty leave, domestic violence leave, and numerous other benefits. They are required to provide itemized wage statements and paychecks, and have strict deadlines within which to provide an employee's final paycheck. They are required to post various notices to employees at the worksite regarding rates of pay, overtime rules, sick leave policies, and various other topics. Regardless of whether these policies are good or bad, they are undeniably expensive to employers.

36. As the foregoing requirements demonstrate, the cost of employment in California is a huge burden. Independent contractors are free to negotiate with service vendors for benefits that are most desirable and necessary to them and their business. Alternatively, independent contractors can forego any or all of these social benefits and services (excluding taxes) in favor of higher compensation for their services, which in most cases is utilized to build and grow their own businesses. As just one example, independent owner-operators are exempt from the requirement to obtain workers' compensation insurance, since the business has no employees other than the owner, who serves as the sole driver.

37. Giving independent construction trucking companies the freedom to forego some of the mandatory benefits of employment makes them more competitive, allows them to offer their services and equipment at a more competitive rate, and enables the consumer to enjoy the benefit of a functioning marketplace.

1 productivity of their employees. It would become impractical and cost-prohibitive to service
2 routes that only required occasional shipments.

3 41. Mandating that construction trucking companies hire employees rather than
4 contracting with other trucking companies will mean that they will either have to dramatically
5 increase their prices to account for all of the additional costs associated with hiring employees, or
6 they will have to dramatically reduce the quantity and quality of services they provide and the
7 number of routes they use. For example, mandating an employer-employee relationship will
8 require trucking companies to purchase or lease trucks and equipment that would otherwise be
9 supplied by the independent contractor. In addition, trucking companies would be required to
10 pay for additional workers' compensation insurance and liability insurance. In addition, they
11 would incur numerous other costs associated with employment, and would lose the staffing
12 flexibility that is vital for operating a trucking business in an efficient manner.

13 42. California recognizes the value of small businesses and gives them bid
14 preferences and prompt payment preferences on public works projects. Cal. Govt. Code secs.
15 14837, subd. (d), 14838. Similarly, the federal government recognizes small, minority owned
16 and disadvantaged businesses and gives them bid preferences as well. See 13 C.F.R. 124.101 et
17 seq. According to the Department of General Services, California awarded \$2.5 billion to small
18 and minority businesses in FY 2015-16, and another \$349 million to disabled veteran businesses.

19 43. Because local, state, and federal governments recognize that many small,
20 minority-owned, women-owned, and disadvantaged businesses are unlikely to be prime
21 contractors for major public works projects, they have instituted a variety of programs to certify
22 these businesses as recognized subcontractors that prime contractors can use on projects in order
23 to qualify for the various incentive programs. The subcontractor model thus works to help those
24 businesses that most deserve assistance in ensuring equity in the award of public works projects.

25 44. The vast majority of small businesses impacted by the new law qualify as small,
26 women-owned, minority owned, veteran owned, or disadvantaged businesses under one or more
27 state or federal grant or funding programs. The new law will effectively eliminate the
28 subcontractor model in the construction trucking industry, and will mandate that all of these

1 small businesses be treated as employees of larger, more established businesses, thereby
2 depriving these business owners of the opportunity to pursue the American dream and grow their
3 own company. The elimination of the subcontractor model will also make it difficult or
4 impossible for general contractors to comply with the various requirements for using these
5 businesses under existing governmental contracts.

6
7 **FIRST CAUSE OF ACTION**
8 **(Violation of Supremacy Clause)**
9

10 45. All preceding paragraphs of this complaint are expressly incorporated herein.

11 46. The Federal Aviation Administration Authorization Act of 1994 (“FAAAA”) is
12 codified at 49 U.S.C. § 14501 et seq.

13 47. The FAAAA prohibits any state or any political subdivision thereof from enacting
14 or enforcing any law or regulation related to the price, route, or service of a motor carrier.

15 48. The new law enacted by AB 5 is a state law that directly impacts the price, route,
16 and service of the motor carrier members of WSTA that provide construction trucking services,
17 and is therefore preempted by federal law pursuant to the supremacy clause of Article VI of the
18 United States Constitution. The new law mandates an employer/employee relationship between
19 parties engaged in the business of trucking, and eliminates the independent contractor model that
20 has flourished for years. This fundamental change will inevitably result in increased prices
21 charged by motor carriers, and will severely limit the types of services they can provide and the
22 routes they can utilize.

23 49. Prices will be impacted because it is significantly more expensive to utilize an all-
24 employee model in the trucking industry, as compared to the efficient use of independent
25 contractors when needed on an intermittent basis. It will cost companies significantly more
26 money to train additional drivers, keep them on staff when there is insufficient work to justify
27 their positions, and pay them all of the benefits mandated by California for employees. It will
28 also require companies to make significant capital investment in trucks and trailers so that their

1 fleets are large enough and diverse enough to accommodate the needs of any particular job, even
2 if certain equipment will only be used occasionally.

3 50. Routes will be impacted because it will no longer be economically feasible to
4 service certain routes and locations that are currently serviced only on an occasional basis.
5 Without the ability to utilize independent contractors, companies will simply cease traveling
6 certain routes, and instead will utilize and service only those routes that provide the most
7 frequent business, in order to maximize the efficiency of their workforce and equipment.

8 51. Services will be impacted because currently, construction trucking companies can
9 provide virtually any type and number of trucks, trailers and drivers and equipment needed for a
10 particular job on very short notice. They are able to do this by using an extensive network of
11 independent contractors. Without the ability to use this model, companies will simply have to
12 cease operating the services of certain trucks, trailers, drivers, and equipment because they will
13 not have that available in their own fleet or workforce. It will be cost-prohibitive to acquire
14 every possible type of truck, trailer, and equipment that might possibly be needed, especially
15 those trucks, trailers and equipment that are only utilized occasionally. Moreover, it will be cost-
16 prohibitive and economically infeasible to train employees on how to safely and efficiently
17 operate equipment that is only rarely used. Thus, companies will scale back their service
18 offerings to only those trucks, trailers, drivers, and equipment for which there is regular demand.

19 52. The offending provisions of Labor Code section 2750.3, subdivision (f)(8) are
20 preempted by the FAAAA.

21 53. An actual controversy has arisen and now exists between Plaintiff and Defendants
22 regarding the interpretation and legality of the wage order. Plaintiff desires a declaration of its
23 members' rights under the Constitution and laws of the United States.

24 54. Unless restrained and enjoined, defendants will implement and enforce the new
25 interpretation of the wage order, resulting in irreparable harm to WSTA members.

26 55. Plaintiff and its members will suffer irreparable harm and injury if the illegal
27 interpretation of the wage order is permitted to be enforced, including the loss of their businesses
28

1 and livelihoods, which in turn will proximately cause some members to be at risk of losing their
2 trucks, homes, cars, and the ability to purchase the basic necessities of life.

3 56. Plaintiff has no plain, speedy, and adequate remedy in the ordinary course of law,
4 other than the relief sought in this complaint, in that there is no other legal remedy to prevent or
5 enjoin the implementation of the illegal interpretation of the wage order.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff WSTA respectfully prays that:

1. This Court issue a declaration that Labor Code section 2750.3, subdivision (f)(8)(A)(iii) is preempted by federal law;

2. This Court issue a declaration that Labor Code section 2750.3, subdivision (f)(8)(A)(iv) is preempted by federal law;

3. This Court issue a declaration that Labor Code section 2750.3, subdivision (f)(8)(B) is preempted by federal law;

4. This Court issue a preliminary and permanent injunction prohibiting Defendants from enforcing the wage order as it has now been interpreted by the California Supreme Court.

4. Plaintiff be awarded attorneys fees and costs of suit incurred in this action.

5. Such other relief as this Court deems just and proper.

ELLISON, WHALEN & BLACKBURN

Dated: December 19, 2019

/s/ Patrick J. Whalen

PATRICK J. WHALEN

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