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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

WESTERN STATES TRUCKING ASSOCIATION, Plaintiff, **v.** **ANDRE SCHOORL; et al,** Defendants.	2:18-cv-01989 MCE KJN **DEFENDANT ATTORNEY GENERAL XAVIER BECERRA'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING SAME** Date: October 4, 2018 Time: 2:00 p.m. Dept: Courtroom 7, 14th Floor Judge: The Honorable Morrison C. England, Jr. Trial Date: Not set Action Filed: 7/19/2018

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TO PLAINTIFF WESTERN STATES TRUCKING ASSOCIATION AND ITS COUNSEL OF RECORD:

TAKE NOTICE THAT on October 4, 2018, at 2:00 p.m., or as soon thereafter as this motion may be heard, in courtroom 7, 14th floor, in the United States District Court for the Eastern District of California, Sacramento Division, 501 I Street, Sacramento, California, Defendant Xavier Becerra, Attorney General of California, will move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) and (6) on the grounds Plaintiff has not established jurisdiction for its declaratory and injunctive relief claims, and because the allegations of the Complaint fail to state a claim for which relief can be granted. This motion is based on the complaint, the attached memorandum of points and authorities, and such argument as the Court may allow on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this action, Plaintiff Western States Trucking Association challenges a California Supreme Court decision to which it was not a party and that has never been applied against its members. Plaintiff seeks a declaration that the legal decision at issue, *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (Cal. 2018), is preempted by the Federal Aviation Administration Authorization Act and federal safety regulations, and violates the dormant Commerce Clause, and asks this Court to permanently enjoin its application.

Initially, Western States cannot establish the requisite standing for its claims, whether for declaratory or injunctive relief. And Western States's claims fail as a matter of law. Western States's specific preemption claims are foreclosed by Circuit caselaw, which holds that general state labor regulations like California's are not preempted by the FAAAA. Similarly, as laws of general applicability, the challenged labor laws are not preempted by federal motor vehicle safety regulations. And the claim that *Dynamex* violates the dormant Commerce Clause fails because the rule it interprets applies equally to in-state, multistate, and out-of-state businesses, and Western States does not allege that it imposes a substantial burden on interstate commerce.

For these reasons, this Court should dismiss the complaint.

BACKGROUND

I. ALLEGATIONS OF THE COMPLAINT.

Western States describes itself as a nonprofit trade association with over 1,000 member companies and 5,000 affiliated member motor carriers. (ECF No. 1 at 2 ¶ 1.) Its member carriers operate in interstate, intrastate, and foreign commerce, and range in size from single truck owner-operators, to fleets with over 350 trucks. (*Id.*) Western States alleges that many of its members are sole proprietors, and the vast majority are motor carriers, with approximately 30% of them having federal operating authority to operate as interstate carriers. (*Id.*)

Western States alleges that the "independent contractor model has been a significant component of the trucking industry for decades." (ECF No. 1 at 3 ¶ 4.) Given fluctuating demand for services, trucking companies contract with other trucking companies on a temporary basis to handle large jobs. (*Id.* ¶ 5.) While some large trucking companies operate fleets with hundreds of trucks and hundreds of employee-drivers classified as employees, other smaller trucking companies hire their services out to contractors and other trucking companies as independent contractors. (*Id.*) These include thousands of non-employee independent owner-operators, in which the owner of the business and the truck is also the sole driver for the company. (*Id.*)

The trucking industry also includes businesses that broker trucking services, by arranging for independent contractors to provide transportation services. (ECF No. 1 at 4 ¶ 8.) Although some brokers are also motor carriers, others do not own any trucks. (*Id.* ¶ 9.) Brokers allegedly refer hauling jobs to trucking companies, but do not supervise them. (ECF No. 1 at 5 ¶ 15.) The truck operators usually own their own trucks, and obtain licensing, insurance, repairs, and maintenance. (*Id.*) Trucking companies often bid on jobs that exceed the capacity of their fleet and employee drivers, and, if successful on the bid, retain the services of other trucking companies temporarily to complete that job. (*Id.* ¶ 15.) Western States claims that "almost all trucking companies contract with other trucking companies to engage the services of additional drivers, trucks, and trailers," depending on fluctuating business needs. (ECF No. 1 at 7 ¶ 22.)

Western States claims that *Dynamex* "announced a new rule of interpretation for Order No. 9 with respect to classifying workers as either employees . . . or independent contractors." (ECF No. at 8 ¶ 23.) This classification has "enormous consequences," impacting, for example, who obtains and pays premiums for workers' compensation insurance, applicability of minimum wage, hour and overtime laws, and the like. (*Id.* ¶ 25.) "[T]he cost of employment in California is a huge burden," Western States contends. (*Id.* ¶ 26.) As more fully explained below, *Dynamex* puts the burden on the hiring entity to establish that an individual is an independent contractor rather than an employee. In order to do so, the hiring entity must meet the ABC test. Of greatest concern to Western States, the B prong of this test requires that the "worker" perform work that is outside the usual course of the hiring entity's business. Western States contends that this requirement "means that virtually every independent contractor relationship in the trucking industry will be converted into an employer-employee relationship," because "in all the various models that predominate in the trucking industry . . . both the 'hiring entity' and the 'worker' are both engaged in the same business—trucking." (ECF No. 1 at 10 ¶ 31.) Thus, according to the Complaint, implementation of the ABC test means that "trucking companies will have to immediately convert all of the independent contractor drivers with whom they do business into employees against their will or face severe financial liabilities" under Order No. 9. (*Id.*)

Western States argues that *Dynamex* "discarded decades of settled California law" by abandoning the standard under *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (Cal. 1989), for assessing whether an individual is an employee or an independent contractor. (ECF No. 1 at 10 ¶ 32.) The trucking industry allegedly was familiar with the *Borello* standard, and "trucking business models were developed in light of it." (ECF No. 1 at 11 ¶ 33.) The alleged change under *Dynamex* purportedly "throws into question the legality of the entire trucking industry in California." (*Id.*) Specifically, the Complaint alleges that classifying all of the owner-operators that the trucking industry currently deems independent contractors as employees "would be cost-prohibitive, inefficient, and would cause them to have to significantly increase their prices to pay for additional staff." (*Id.* ¶ 34.) Trucking companies would also allegedly be obligated to change the services they can provide, and would be limited in their

ability to easily obtain drivers on a short-term basis. (*Id.*) "As a result, some companies would be forced to stop providing certain services and would be effectively prohibited from bidding on certain types of jobs, because they would not have the equipment, personnel, and experience necessary to perform certain jobs, and because the prices they would have to charge would prevent them from being competitive." (*Id.*) Lastly, trucking companies would allegedly be forced to limit the number of routes they could service, and force them to either raise their prices or reduce the services they provide. (*Id.* ¶¶ 35-36.) The Complaint does not allege that the *Dynamex* decision has been enforced against any of its members, cite any threatened enforcement, or claim that any specific member has been impacted by the decision. (*See generally* ECF No. 1.)

Western States raises three legal claims. First, it contends that the ABC test adopted by the California Supreme Court in *Dynamex* directly impacts the price, route, and service of its motor carrier members, and is thus preempted by the FAAAA. (ECF No. 1 at 13-14 ¶ 45.) Second, Western States claims that the ABC test "on its face discriminates against out-of-state and interstate trucking companies," violating the dormant Commerce Clause. (*Id.* at 18 ¶¶ 64-66.) Third, the Complaint alleges that the ABC test is preempted by the Federal Motor Carrier Safety Regulations, 49 C.F.R. parts 300-399. (*Id.* at 19 ¶¶ 68-69.) Western States seeks declaratory and injunctive relief, "prohibiting Defendants from enforcing the wage order as it has now been interpreted by the California Supreme Court." (*Id.* at 22 ¶¶ 1-3.)

II. CALIFORNIA'S WAGE LABOR REGULATIONS AND THE *DYNAMEX* DECISION.

Under the California Constitution, the Legislature has the authority to "provide for minimum wages and for the general welfare of employees, and for those purposes may confer on a commission legislative, executive, and judicial powers." Cal. Const. art. XIV, § 1. In California, wages and other workplace matters are regulated by the California Industrial Welfare Commission. Cal. Lab. Code § 517; *Indus. Welfare Comm'n v. Superior Court*, 27 Cal. 3d 690, 701 (Cal. 1980). The Commission's orders are "constitutionally-authorized, quasi-legislative regulations that have the force of law." *Dynamex*, 4 Cal.5th at 914 n.3. The California Legislature defunded the Commission on July 1, 2004, but its wage orders remain in effect.

Huntington Mem'l Hosp. v. Superior Court, 131 Cal.App.4th 893, 902 n.2 (Cal. Ct. App. 2005). The California Department of Industrial Relations, Division of Labor Standards Enforcement enforces the state's labor laws, including the Commission's orders. *Id.* at 902.

Wage Order Number 9-2001 (Order No. 9), a regulation issued by the Commission, regulates the wages, hours, and working conditions of employees in the transportation industry. *See generally*, Cal. Code Regs., tit. 8, § 11090 (2001). For example, it limits daily overtime, requires meal periods, and sets minimum hourly wages. *Id.* § 11090(3)(A); (3)(E)-(F); §11090(4). The applicability of Order No. 9 hinges on whether a particular hiring arrangement meets the statutory test for an employee. Order No. 9 defines "employ," "employee," and "employer." Cal. Code Regs., tit. 8, §11090(2)(D)-(F). As relevant here, the Order defines "employ" as "engage, suffer, or permit to work." *Id.* § 11090(2)(D).

In *Dynamex*, the California Supreme Court held that to determine whether a worker is classified as an employee for purposes of the "suffer or permit to work" definition of the Order, California courts should apply the so-called ABC test. 4 Cal. 5th at 916. Under this test, a worker is considered an independent contractor, rather than an employee, and is exempt from the requirements of Order No. 9, only if the hiring entity establishes: (A) that the worker is "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;" (B) that the worker "performs work that is outside the usual course of the hiring entity's business;" and (C) that the worker is "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *Id.* at 916-17. If the hiring entity cannot satisfy all three elements, the worker is presumptively "an included employee, rather than an excluded independent contractor, for purposes of the wage order" *id.* at 964, and is entitled to all the protections that California law affords employees.

Dynamex was a class action lawsuit by delivery drivers against a shipping company. 4 Cal. 5th at 914. It did not raise any federal claims, and there was no argument made regarding any preemptive effect by federal law. *See generally, id.* The ABC test is used in multiple jurisdictions, including Massachusetts, whose iteration the California Supreme Court applied. *Id.*

at 956 n.23. No further review by either party was sought in *Dynamex* to the U.S. Supreme Court.

LEGAL STANDARD

A motion under Federal Rule of Civil Procedure 12(b)(1) challenges a federal court's subject matter jurisdiction. "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). A party invoking federal court jurisdiction bears the burden to establish that such jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Under Federal Rule of Civil Procedure 12(b)(6), a complaint should be dismissed if it fails to state a claim upon which relief can be granted. A court should dismiss a complaint "if it fails to plead enough facts to state a claim to relief that is plausible in its face." *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1107 (9th Cir. 2010) (citation omitted). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

In ruling on a motion to dismiss, a court does not have to accept as true a complaint's legal conclusions. *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A claim has facial plausibility, thus surviving a motion to dismiss, "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Dismissal for failure to state a claim can rely on the fact that "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Los Angeles Lakers, Inc. v. Federal Insurance Co.*, 869 F.3d 795, 800 (9th Cir. 2017) (citation omitted).

ARGUMENT

I. PLAINTIFF'S SPECULATIVE CLAIMS CHALLENGING A DECISION OF THE CALIFORNIA SUPREME COURT THAT HAS NOT BEEN APPLIED TO ITS MEMBERS DO NOT ESTABLISH JURISDICTION.

The Declaratory Judgment Act allows federal courts to declare the parties' rights in a case of "actual controversy." 28 U.S.C. § 2201(a). This "actual controversy" requirement "mirrors the 'case or controversy' requirement in Article III of the Constitution and embraces the

prudential standing considerations crafted by the Supreme Court." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007). To meet this requirement, Western States must show that its dispute is "definite and concrete, touching the legal relations of parties having adverse legal interests, and that it be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* at 127 (internal citation and punctuation omitted); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (setting out similar requirements for constitutional standing).

Under this test, Plaintiff lacks standing for declaratory or injunctive relief because it does not cite a concrete legal dispute; it instead seeks an advisory opinion as to whether the potential application of the ABC test adopted in *Dynamex* might violate its members' rights under federal law. In short, Plaintiff cannot show the requisite immediacy of threatened action. As the Court pointed out in *Lujan*, "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.'" 504 U.S. at 564 n.2 (citation omitted).

Although the Supreme Court has held that cases involving threatened action by the government can meet the case-or-controversy requirement, here there is no threatened government action. *MedImmune, Inc.*,549 U.S. at 128-29. Western States' challenge is twice removed—it seeks review of a state supreme court decision that has not been applied to its members, on the basis that it *might* be applied to one of its members at some point in the future and *might* cause harm to certain types of business models. (*See, e.g.*, ECF No. 1 at 11 ¶¶ 31, 34-36.) By contrast, courts have found the requisite case-or-controversy, for example, in patent cases "if defendant, the patentee, has charged plaintiff with infringement, or has threatened plaintiff with an infringement suit, either directly or indirectly." *Societe de Conditionnement en Aluminium v. Hunter Engineering Co, Inc.*, 655 F.2d 938, 944 (9th Cir. 1981) (citing *Muller v. Olin Mathieson Chemical Corp.*, 404 F.2d 501 (2d. Cir. 1968)). Under this "real and reasonable apprehension test" a case-or-controversy problem in the patent area arises when the plaintiff has

not yet begun to manufacture, or make preparations to manufacture, the patented product. *Id.*; *see also Fieger v. Michigan Supreme Court*, 553 F.3d 955, 967 (6th Cir. 2009) (plaintiff lacked standing to challenge court rule because threat of future sanction was "highly conjectural, resting on a string of actions the occurrence of which is merely speculative"). Ultimately, Western States "must be able to show, not only that the statute is invalid, but that [it] has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." *Nat'l Rifle Ass'n of Amer. v. Magaw*, 132 F.3d 272, 294 (6th Cir. 1997).

Even if Plaintiff could show that jurisdiction is proper, the Declaratory Judgment Act confers on district courts discretion whether to hear a claim. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). The Act has both constitutional and prudential aspects. *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1222 (9th Cir. 1998). Thus, such a claim must present a case or controversy under Article III, and fulfill statutory jurisdictional prerequisites. *Id.* at 1222-23. After meeting these requirements, Western States must also show that it is appropriate for this Court to entertain this action. *Id.* at 1223. "The Declaratory Judgment Act was an authorization, not a command," and "gave the federal courts competence to make a declaration of rights [but] did not impose a duty to do so." *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962). Here, Western States seeks this Court's interpretation of the *Dynamex* decision, and an advisory opinion of how it might be applied to some of its members. There is no allegation that *Dynamex* has led to threatened enforcement action at all. "Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *U.S. v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985).

II. THE FAAAA DOES NOT PREEMPT CALIFORNIA'S GENERALLY APPLICABLE LABOR LAWS.

Western States alleges that the California Supreme Court's interpretation of Order No. 9, specifically element B of that test, is expressly preempted by the FAAAA. These allegations fail as a matter of law to state a viable federal preemption claim.[1]

In assessing whether the FAAAA preempts state law, the key question is congressional intent. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). If the federal statute contains an express preemption clause, federal courts must ascertain the substance and scope of the clause. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). As relevant here, the FAAAA prohibits a state or its political subdivisions from "enact[ing] or enforc[ing] 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." 49 U.S.C. § 14501(c)(1). While modeled on the Airline Deregulation Act, this preemption provision added the significant qualifier "*with respect to the transportation of property*." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 255-56 (2013).[2]

In assessing the FAAAA's pre-emptive scope, courts look to the purpose of the statute. "Concerned that state regulation impeded the free flow of trade, traffic, and transportation of interstate commerce, Congress resolved to displace *certain* aspects of the State regulatory process." *Dan's City Used Cars, Inc.*, 569 U.S. at 263. Congress specifically targeted "a State's direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." *Id.* (internal citation omitted). As the California Supreme Court has noted, "the FAAAA was intended to prevent state regulatory practices including 'entry controls, tariff filing and price regulation, and

[1] Western States does not argue that the challenged state law is impliedly preempted, and thus Defendant does not address implied preemption.

[2] The FAAAA explicitly exempts certain activities from its preemptive scope, such as state laws regarding motor vehicle safety, motor carrier insurance, and the intrastate transportation of household goods. *Dan's City Used Cars, Inc.*, 569 U.S. at 256. These express exemptions do not define the Act's preemptive scope, however. *Id.* at 264 ("The exceptions to § 14501(c)(1)'s general rule of preemption identify matters a State may regulate when it would otherwise be precluded from doing so, but they do not control more than that.").

[regulation of] types of commodities carried." *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal.4th 772, 779-80 (Cal. 2014) (citing legislative history).

Although the statutory phrase "related to" encompasses state laws "having a connection with or reference to carrier rates, routes, or services, whether directly or indirectly," this statutory language should not be read "with an uncritical literalism." *Dan's City Used Cars, Inc.*, 569 U.S. at 260 (internal citation and quotation marks omitted). Thus, the Supreme Court has held that "§ 14501(c)(1) does not preempt state laws affecting carrier prices, routes, and services 'in only a tenuous, remote, or peripheral . . . manner.'" *Id.* at 261 (citing *Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. 364, 371 (2008)).

Caselaw in the specific context of labor regulations, like the challenge at issue here, generally holds that such regulations are not preempted by the FAAAA. In *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), the court held that the FAAAA does not preempt California's Prevailing Wage Law, which requires that companies awarded public works contracts pay their workers at least the prevailing rate in the given locality. Plaintiffs argued that the wage law "affected" and therefore was "related to" its prices, routes, and services. *Id.* at 1189. Rejecting the plaintiffs' argument, the court noted that to the extent that the prevailing wage law could potentially impact their costs of labor, performance factors, and working conditions, these effects were "no more than indirect, remote and tenuous," and did not establish preemption. *Id.*

More recently, in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), the court held that the FAAAA does not preempt California's meal and rest break laws. "The sorts of laws that Congress considered when enacting the FAAAA included barriers to entry, tariffs, price regulations, and laws governing the types of commodities that a carrier could transport." *Id.* at 644. "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services." *Id.* Thus, "generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, *even if employers must factor those provisions into their decisions about the prices that they set, the*

routes that they use, or the services that they provide." *Id.* at 646 (emphasis added). Ultimately, "California's meal and rest break laws plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt." *Id.* at 647; *see also Phillips v. Roadrunner Intermodal Serv.*, No. 16-cv-01072-SVW, 2016 WL 9185401, at *7 (C.D. Cal. Aug. 16, 2016) (pre-*Dynamex*, holding that California's common-law test to classify employees does not implicate FAAAA concerns, and is thus not pre-empted). Similarly here, the preemption claim is foreclosed.

The California Supreme Court has likewise rejected the argument that the FAAAA preempts state regulation of employment conditions.[3] In *People ex rel Harris v. Pac Anchor Transportation, Inc.*, 59 Cal.4th 772 (Cal. 2014), California sued a trucking company for unfair business practices, based in part on alleged violations of state employment laws, including Order No. 9. *Id.* at 776. The defendants argued that the state law claims were preempted by the FAAAA, and the California Supreme Court rejected that argument. *Id.* at 784. "[T]he FAAAA embodies Congress's concerns about regulation of motor carriers with respect to the transportation of property; a UCL [unfair competition law] action that is based on an alleged general violation of labor and employment laws does not implicate those concerns." *Id.* at 783. In this regard, the challenged state laws "make no reference to motor carriers, or the transportation of property," but instead "are laws that regulate employer practices *in all fields* and simply require motor carriers to comply with labor laws that apply to the classification of their employers." *Id.* at 785. Specifically addressing the challenge to Order No. 9 (which, as noted, applies to working conditions "in the transportation industry"), the Court noted that the Order did not "refer to prices, routes, or services." *Id.* "If sections 4 and 7 [of Wage Order Number 9] have an effect on defendants' prices, routes, or services, that effect is indirect," and thus is not preempted. *Id.* The U.S. Supreme Court denied certiorari. *Pac Anchor Transportation, Inc. v. Calif., ex rel. Harris*, 135 S. Ct. 1400 (2015).

[3] State courts have jurisdiction to decide federal preemption issues when these are raised as a defense. *See, e.g., Mack v. Kuckenmeister*, 619 F.3d 1010, 1021 (9th Cir. 2010) (preemption under ERISA).

Under this line of cases, Western States's preemption claim fails. The California Supreme Court rejected the argument that the FAAAA preempts Order No. 9. 59 Cal.4th at 783. And the Ninth Circuit has made clear that general state labor laws, like Order No. 9, are not preempted. *Mendonca*, 152 F.3d at 1189. Order No. 9 (either as written or as interpreted by the California Supreme Court in *Dynamex*) does not refer to motor carrier prices, routes, or services of such carriers. It is instead a quintessential state regulation of labor conditions, generally applicable to all employers in the state. *See also Dilts*, 769 F.3d at 646 ("The statutory text tells us . . . that in deregulating motor carriers and promoting maximum reliance on market forces, Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability."); *Air Transport Ass'n of Am. v. City and Cty. of San Francisco*, 266 F.3d 1064, 1072 (9th Cir. 2001) (in preemption case under Airline Deregulation Act, noting that "a local law will have a prohibited connection with a price, route or service if the law binds the air carrier to a particular price, route or service and thereby interferes with competitive market forces within the air carrier industry.").

Western States speculates that the practical effect of the ABC test will be to increase carriers' cost of doing business and cause them to change routes. (ECF No. 1 at 11 ¶¶ 34-35.) For example, Plaintiff contends that the ABC test will force trucking companies to hire employees instead of contracting with other trucking companies, which will force them to "dramatically increase their prices," or "dramatically reduce the quantity and quality of services they provide and the number of routes they use." (*Id.* at 12 ¶ 36.) But such speculative effects are too attenuated and indirect, and thus do not establish preemption. *Pac Anchor Transp.*, 59 Cal. 4th at 785; *Mendonca*, 152 F.3d at 1189 ("indirect, remote, and tenuous" effects on prices, routes, or services not enough to establish preemption). And the Ninth Circuit has rejected the argument that the fact that compliance with a state law will add to the cost of doing business somehow states a preemption claim. *Dilts*, 769 F.3d at 647 ("Nor does a state law meet the 'related to' test for FAAAA preemption because it shifts incentives and makes it more costly for motor carriers to choose some routes or services *relative* to others, leading carriers to reallocate resources or make different business decisions."). Ultimately, "even if state laws increase or

change a motor carrier's operating costs, 'broad law[s] applying to hundreds of different industries' with no other 'forbidden connection with prices [, routes,] and services' . . . are not preempted by the FAAAA." *Id.* (internal citation omitted).[4]

III. THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS DO NOT PREEMPT CALIFORNIA LABOR LAWS.

Western States also claims that the California Supreme Court's interpretation of Order No. 9 is preempted by regulations promulgated by the Federal Motor Carrier Safety Administration, known as the Federal Motor Carrier Safety Regulations and appearing at 49 C.F.R. parts 300-399. (ECF No. 1 at 19 ¶ 68.) Western States contends that these "are so thorough, complete, and detailed regarding every aspect of the trucking industry that they preempt state laws in the area of trucking and the transportation of goods, especially state laws which mandate an employer/employee relationship between parties that the federal regulations contemplate be independent contractors." (*Id.* ¶ 69.) This claim also fails as a matter of law.

"[A]n agency regulation with the force of law can pre-empt conflicting state requirements" under certain conditions. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). Assuming that the regulations are authorized by statute, this type of pre-emption can occur when a "state or local law [] conflicts with such regulations or frustrates the purposes thereof." *City of New York v.* FCC, 486 U.S. 57, 64 (1988); *R.J. Reynolds Tobacco Co. v. Durham Cty., N.C.*, 479 U.S. 130, 149 (1986) (Where "Congress has entrusted an agency with the task of promulgating regulations to carry out the purposes of a statute . . . as part of the pre-emption analysis we must consider whether the regulations evidence a desire to occupy a field completely"). Further, "in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area." *City of New York*, 486 U.S. at 64. Nevertheless, pre-

[4] Likewise, the Seventh Circuit noted: "[T]here is a relevant distinction for purposes of FAAAA preemption between generally applicable state laws that affect the carrier's relationship with its customers and those that affect the carrier's relationship with its workforce." *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1054 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2289 (2017). Thus, while laws "that affect the way a carrier interacts with its customers fall squarely within the scope of FAAAA preemption," those laws "that merely govern a carrier's relationship with its workforce . . . are often too tenuously connected to the carrier's relationship *with its consumers* to warrant preemption." *Id.* The employment regulations challenged here do not speak to a carrier's relationship with its consumers.

emption is not inferred merely because an agency's regulations are comprehensive. *R.J. Reynolds Tobacco Co.*, 479 U.S. at 149.

As is apparent from their title, the Federal Motor Carrier Safety Regulations set forth various requirements regarding the safety of motor carrier operations. These include subject areas ranging from vehicle inspections, to insurance requirements, and leasing of vehicles. (ECF No. 1 at 19 ¶¶ 69 [citing regulations].) Part 355 of Title 49 addresses the compatibility of such state regulations. These provisions "apply to any State that adopts or enforces laws or regulations *pertaining to commercial motor vehicle safety in interstate commerce*." 49 C.F.R. § 355.3 (emphasis added). The regulations specifically provide that "No State shall have in effect or enforce any State law or regulation pertaining to *commercial vehicle safety* in interstate commerce which the Administrator finds to be incompatible with the provisions of the Federal Motor Carrier Safety Regulations." 49 C.F.R. § 355.25 (emphasis added). At the same time, the regulations indicate that commercial motor vehicles "must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated." 49 C.F.R. § 392.2.

Despite their breadth, the motor vehicle safety regulations are not a comprehensive federal scheme for motor carriers that leaves no room for supplementary state regulation. In rejecting such a construction, the Fourth Circuit pointed out that "Congress made clear in various sections of the Motor Safety Act that no such comprehensive preemption was contemplated or intended." *Specialized Carriers & Rigging Ass'n v. Com. of Va.*, 795 F.2d 1152, 1155 (4th Cir. 1986). For example, in authorizing the promulgation of federal safety regulations for motor vehicles, "the Secretary was directed, before issuing any regulations, to 'consider . . . (B) State laws and regulations pertaining to commercial motor vehicle safety in order to minimize unnecessary preemption of such State laws and regulations under this Act.'" *Id.* at 1155-56 (citing statute).

This fact is bolstered by the conclusions of the Federal Motor Carrier Safety Administration. In 2008, several motor carriers petitioned the Administration to preempt California statutes and rules governing employee meal and rest breaks during the day, as applied to drivers of commercial vehicles subject to the carrier regulations governing hours of service.

Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers, 73 F.R. 79204-01 (FMCSA Dec. 18, 2008). The motor carriers claimed that the California regulations improperly interfered with their operations, and impacted safety. *Id.* at 79205. The Administration rejected the petition, concluding that the California laws "are in no sense regulations on 'commercial vehicle safety,'" and thus not subject to preemption. *Id.* at 79206. The Administration likewise rejected the broader argument that the motor vehicle safety regulations can preempt any state law or regulation "that regulates or affects" motor vehicle safety. *Id.* While this agency interpretation is not binding on courts, multiple courts have found it persuasive. *Yoder v. Western Express, Inc.*, 181 F. Supp. 3d 704, 716-17 (C.D. Cal. 2015); *Cole v. CRST Van Expedited, Inc.*, No. EDCV 08-1750-VAP, 2010 WL 11463494, at **7-8 (E.D. Cal. Aug. 5, 2010); *Mendez v. R+L Carriers, Inc.*, No. C 11-2478 CW, 2012 WL 5868973, at **7-8 (N.D. Cal. Nov. 19, 2012). This Court should reject Western States's argument that the motor carrier safety regulations are so complete that they preempt state laws.

Western States also claims that the motor carrier safety regulations contain specific provisions that trump "state laws which mandate an employer/employee relationship between parties that the federal regulations contemplate to be independent contractors." (ECF No. 1 at 19 ¶ 69.) It cites three specific provisions, namely 49 C.F.R. § 376.12(c)(4), 49 C.F.R. § 376.12(j), and 49 C.F.R. § 376.12(k). (*Id.* at 19-20.) Any purported conflict with these provisions is illusory.[5] Section 376.12(c)(4) governs the written lease requirement for authorized transportation, and states that nothing in "this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee," then provides that "[a]n independent contractor relationship *may* exist" under certain circumstances. *Id.* (emphasis added). Section 376.12(j) specifies who is responsible for obtaining insurance, and section 376.12(k) sets forth provisions regarding any escrow funds required by a lease. None of these provisions conflict with the challenged California labor

[5] The Complaint alleges that "numerous" other unspecified provisions of the federal regulations impose obligations inconsistent with California law. (ECF No. 1 at 21 ¶ 75.) Because Western States does not specify these, Defendant does not address them.

regulations, which set forth circumstances when an employee-employer relationship exists for purposes of the state's labor laws. Western States seems to allege that California law, as interpreted in *Dynamex*, would impose an employee-employer relationship in some of the situations covered by these regulations, which in turn would govern who is responsible for covering escrow funds and insurance. (ECF No. 1 at 19-20 ¶¶ 70-73.) But the federal regulations do not govern when an employer-employee relationship exists, nor do they dictate who must pay for these expenses. *Yoder*, 181 F. Supp. 3d at 716 (finding no direct conflict between California meal and rest break laws and federal hours of service regulations where it is possible to comply with both). In any event, neither Order No. 9 nor *Dynamex* purport to define the employer-employee relationship for purposes other than California labor law. It is also undisputed that the challenged California laws and regulations do not relate to motor carrier safety. Simply put, there is no conflict. *See Hillsborough Cty., Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 717 (1985) ("[M]erely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field.").

IV. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE DORMANT COMMERCE CLAUSE.

Western States alleges that the ABC test "on its face discriminates against out-of-state and interstate trucking companies," and thus violates the dormant Commerce Clause. (*Id.* at 18 ¶¶ 64-66.) This claim lacks merit and the Court should reject it.

The Commerce Clause empowers Congress to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has found "a negative implication in the provision since the early days." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* at 337-38 (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)). The key question for this purpose is whether a challenged law discriminates against interstate commerce. *Id.* at 338. In this regard, economic

protectionism, or discrimination, means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994).

"Absent discrimination for the forbidden purpose, however, the law will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Davis*, 553 U.S. at 339 (citation omitted). "[A] state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). A necessary requirement is that there be a *substantial* burden on interstate commerce. *Id.* "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Plaintiff's dormant commerce clause claim fails. Contrary to its allegations, Order No. 9 does not facially discriminate against interstate commerce, but instead sets out generally applicable requirements that apply equally to in-state, multi-state, and out-of-state employers within the state. *See Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009) (finding no discriminatory effect where state law treats in-state and out-of-state entities the same); *see also Yoder*, 181 F. Supp. 3d at 720 ("California's wage and hour laws regulate 'even-handedly' as they apply to almost all employers within the state, not just those engaged in interstate commerce."). In fact, the Complaint cites no provision of Order No. 9, or the *Dynamex* decision, that differentiates between in state and out of state commerce. (*See generally* ECF No. 1.)

Western States argues that the *Dynamex* decision "mandates that [out-of-state] companies undertake expensive and inefficient measures in order to operate in California," which in-state companies do not need to worry about. (*Id.* at 18 ¶ 64.) But the *Dynamex* decision does not impose any such requirement. *See Am. Trucking Ass'n, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 434 (2005) (rejecting Commerce Clause claim to state statute imposing fee on intrastate

transactions). In fact, the court in *Yoder* rejected a similar challenge to California's wage and hour laws. There, the plaintiff argued that compliance with multiple states' laws on a daily basis would impact its operations and impose administrative burdens, positing for example supposedly anomalous results for drivers whose routes take them through states with different wage laws. 181 F. Supp. 3d at 721. The district court concluded that the claim failed because there was no evidence "that California's wage and hour laws operate 'in practice as anything other than an unobjectionable exercise of the State's police power.'" *Id.* at 723.

CONCLUSION

For these reasons, the Court should dismiss the Complaint.

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