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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WESTERN STATES TRUCKING ASSOCIATION

Plaintiff,

v.

ANDRE SCHOORL, Acting Director of the California Department of Industrial Relations; XAVIER BECERRA, Attorney General for the State of California, and DOES 1-50,

Defendants.

Case No. 2:18-cv-01989-MCE-KJN

[PROPOSED] MEMORANDUM OF POINTS AND AUTHORITIES OR, IN THE ALTERNATIVE, AMICUS BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Hearing Date: Off calendar
Judge: Honorable Morrison C. England, Jr.
Action Filed: July 19, 2018

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I. INTRODUCTION[1]

Misclassification of "workers as independent contractors rather than employees is a very serious problem," and the trucking industry is no exception. *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 913 (2018). Western States Trucking Association's ("WSTA") challenge to *Dynamex* is nothing more than a recycled attack on California's employment law protections, asserting claims that the Ninth Circuit has repeatedly rejected.

In *Dynamex*, the California Supreme Court approved the "'ABC' test" as one way to determine whether a worker qualifies as an "employee" for purposes of California Industrial Welfare Commission Wage Order 9-2001, Cal. Code Regs., tit. 8, §11090 ("Wage Order No. 9" or "§11090"). 4 Cal.5th at 955. If a worker is an "employee," the worker is entitled to certain employment law protections set forth in the Wage Order, including minimum wage rules and meal and rest break requirements.

WSTA alleges that federal law exempts its member trucking companies from the application of the ABC Test. Even before *Dynamex*, however, trucking companies were frequently found to have unlawfully misclassified their workers and were mandated to comply with applicable employment protections. The trucking industry unsuccessfully protested that federal law freed transportation companies from complying with California's generally applicable employment laws. Having lost that battle in state courts and the Ninth Circuit, the industry now seeks to resurrect its losing claims in the form of WSTA's challenge to the ABC Test. But the ABC Test itself does not impose any substantive requirements. Instead, it merely determines *whether* a worker is covered by the same substantive requirements of Wage Order No. 9 that the Ninth Circuit has already held *can* be enforced against transportation companies. Because binding appellate precedent holds that federal law does *not* exempt

[1] On August 23, 2018, proposed intervenor International Brotherhood of Teamsters ("IBT") moved for leave to intervene to defend Wage Order No. 9 alongside the existing Defendants. Dkt. 8. That same day, Defendants filed a motion to dismiss WSTA's complaint. Dkt. 6 ("MTD"). WSTA's opposition to Defendants' motion to dismiss is currently due on September 20, 2018. Because IBT's motion for leave to intervene is still pending, proposed intervenor IBT hereby files this Proposed Memorandum of Points and Authorities, or, in the Alternative, Amicus Brief, in Support of Defendants' Motion to Dismiss.

trucking companies from complying with the minimal requirements of the Wage Order, WSTA's challenge to the ABC Test necessarily fails.

As a threshold matter, this Court lacks jurisdiction to consider WSTA's claims. In addition to the jurisdictional flaws pointed out by Defendants, WSTA also lacks associational standing to challenge *Dynamex*'s interpretation of Wage Order No. 9 because its allegations do not identify a single WSTA member that has been, or will imminently be, affected by *Dynamex*. Even if WSTA did have associational standing, moreover, its pre-enforcement challenge to the requirements of Wage Order No. 9 does not establish a live case or controversy. WSTA does not allege that Wage Order No. 9 will imminently be enforced against any of its members (much less in a situation in which *Dynamex* would make a difference), so any decision that this Court would render on the enforceability of the Wage Order would be a mere advisory opinion.

If this Court does reach the merits, Defendants are correct that none of WSTA's three causes of action states a cognizable legal claim. WSTA's claim that *Dynamex* is preempted by the Federal Aviation Administration Authorization Act ("FAAAA") rests on a fundamental misunderstanding of the Wage Order No. 9 as interpreted in *Dynamex*. The Wage Order does not "eliminate[]" independent contractors or prevent trucking companies from hiring a driver on an "intermittent" basis. Dkt. 1 ("Complaint") ¶¶45-46. A trucking company can still hire a driver for an individual job. The Wage Order simply requires that, if a covered business does so, it must comply with generally applicable employment laws, for example by paying that driver a minimum wage and giving the driver meal and rest breaks. Because the Ninth Circuit has already held that the FAAAA does not preempt these requirements, WSTA's FAAAA claim fails as a matter of law.

The Federal Motor Carrier Safety Regulations ("FMCSR") also do not preempt Wage Order No. 9. To the extent those regulations have any preemptive effect, that effect is limited only to conflicting vehicle safety regulations. Wage Order No. 9 is not a vehicle safety regulation and, in any case, does not conflict with the FMCSR.

Finally, Wage Order No. 9 does not violate the dormant Commerce Clause. Wage Order No. 9 neither discriminates against out-of-state entities nor regulates out-of-state conduct, and the important public policies it serves easily satisfy the deferential balancing test that therefore applies.

II. ARGUMENT

A. This Court Lacks Jurisdiction to Adjudicate WSTA's Claims

1. WSTA's Allegations Do Not Establish Associational Standing

WSTA purports to bring this challenge on behalf of its "member companies and . . . affiliated member motor carriers." Complaint ¶1. But WSTA's failure to identify a single affected member is fatal to its claim to associational standing.

An association has standing to represents its members' interests only when the association's complaint "make[s] specific allegations establishing that at least one *identified* member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added); *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990) (holding affidavit proffered to establish standing was insufficient because it did not name the individuals who would be harmed by challenged ordinance). Mere "speculation" or "statistical probabilities" that an organization's members are affected does not suffice. *Summers*, 555 U.S. at 498-99. Instead, an organization must "identify members who have suffered the requisite harm" to establish standing. *Id*. at 499.

This requirement is no mere technicality. If an association does not identify an affected member, a court cannot "satisfy [itself] that 'the plaintiff has alleged such a personal stake in the outcome of the controversy' as to warrant" Article III jurisdiction. *Summers*, 555 U.S. at 493 (quoting *Warth v. Seldin*, 422 U.S. 490, 489-99 (1975) (internal quotation marks omitted)).

The circumstances of this case illustrate why an association must identify members that will be affected by the outcome of the litigation. WSTA seeks to invalidate *Dynamex*'s construction of Wage Order No. 9, and alleges that its members will be injured if the ABC Test rather than the common law standard set forth in *S.G. Borello & Sons, Inc. v. Dep't of*

Industrial Relations, 48 Cal.3d 341 (1989), is used to determine whether WSTA members must comply with Wage Order No. 9. *See* Complaint ¶¶32, Prayer for Relief. But WSTA lacks standing to seek such relief unless, at a minimum, it identifies a member that will be injured if the *Dynamex* rather than the *Borello* test determines whether a business must comply with the Wage Order. *See Stevens v. Harper*, 213 F.R.D. 358, 369 (E.D. Cal. 2002) ("[B]ecause plaintiffs 'must demonstrate standing separately for each form of relief sought,' the named plaintiffs must establish imminent injury traceable to [the] practice that they seek to enjoin.") (quoting *Friends of the Earth, Inc. v. Laidlaw Environ. Servs. Inc.*, 528 U.S. 167, 185 (2000)). Accordingly, WSTA must identify a member whose workers are alleged to be (1) *subject to* Wage Order No. 9 under the ABC Test; but (2) *exempt from* Wage Order No. 9 under the *Borello* standard. Because WSTA has not done so, its complaint must be dismissed.[2]

WSTA's failure to identify such a member dooms its claim to associational standing under any circumstances. But there is additional reason for this Court to require concrete assurance that WSTA has associational standing: it is far from certain that any WSTA member would be affected by invalidation of the *Dynamex* standard. Since 2010, the California Department of Labor Standards Enforcement ("DLSE") has adjudicated over 1,150 misclassification complaints involving drayage drivers. *See* Analysis of SB 1402, *California Senate Committee on Appropriations* (May 7, 2018).[3] Even before the *Dynamex* decision, the DLSE found in 97% of those 1,150 cases that the hiring entity had misclassified the driver as an independent contractor. *Id.* In fact, the transportation industry's lack of success under the *Borello* standard led another association of transportation companies to challenge the DLSE's

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[2] WSTA cannot excuse its failure to identify an affected member on the basis that "*all* the members of the organization are affected by the challenged activity." *Summers*, 555 U.S. at 499 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958)) (emphasis in original). For this exception to apply, WSTA would have to allege that *none* of its members are subject to the Wage Orders under *Borello* and that *all* are under *Dynamex*. If any WSTA member already classifies its workers as "employees," or if any WSTA member's workers are misclassified under the *Borello* standard, WSTA cannot allege that *Dynamex* affects every single one of its members.

[3] *Available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1402

application of *Borello* as preempted under the FAAAA, a challenge that the Ninth Circuit rejected in a published opinion just three days ago. *See California Trucking Ass'n v. Su*, 2018 WL 4288953 (9th Cir. Sept. 10, 2018) (affirming dismissal of complaint) ("*Cal. Trucking Ass'n II*"). Because so many transportation companies have been found to have misclassified their workers even under *Borello*, this Court cannot simply assume that *Dynamex* will affect WSTA's membership. The workers employed by many WSTA members would qualify for Wage Order protections even under the *Borello* standard, making it especially important that WSTA identify at least one member whose workers are allegedly subject to Wage Order No. 9 under the ABC Test but exempt from Wage Order No. 9 under the *Borello* standard, and therefore purportedly injured by the *Dynamex* decision.[4]

2. WSTA's Pre-Enforcement Challenge to the California Supreme Court's Interpretation of Wage Order No. 9 Does Not Present a Live Case or Controversy

Even if WSTA had associational standing to represent its members' interests, its complaint would still be subject to dismissal for failure to present a live case or controversy. The role of a federal court "is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). As Defendants rightly point out, WSTA's complaint seeks an advisory opinion about the legality of *Dynamex*'s construction of Wage Order No. 9. *See* MTD at 6-8.

"[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution" establishes standing to bring a pre-enforcement challenge to a legal requirement like Wage Order No. 9. *Thomas*, 220 F.3d at 1139. Instead, a plaintiff must allege and establish "a 'genuine threat of imminent prosecution.'" *Id.* Whether such a threat is genuine

[4] WSTA cannot excuse its failure to identify an affected member on the ground that defendants "need not know the identity of a particular member to understand and respond to an organization's claim of injury." *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). Defendants must know the identity of the affected member to respond to WSTA's theory of standing. If that member's workers would already be protected by the Wage Order under *Borello*, then *Dynamex* makes no difference and WSTA cannot rely on that member to support its challenge to *Dynamex*.

depends on "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Id*. (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996)).

Thus, to have standing to bring this pre-enforcement challenge, WSTA must identify at least one member whose workers are not already subject to Wage Order No. 9 under *Borello* that has a "concrete plan" not to comply with the requirements of the Wage Order as construed in *Dynamex*, and allege sufficient facts (such as a "specific warning or threat to initiate proceedings") to demonstrate that the Wage Order will be imminently enforced against that member. *See Thomas*, 220 F.3d at 1139. Because WSTA's complaint is bereft of such allegations, it must be dismissed.

B. WSTA's Complaint Fails to State A Claim for Relief

Defendants are correct that, if this Court reaches the merits of WSTA's claims, WSTA's complaint should be dismissed because it fails to state a cognizable legal claim.

1. The FAAAA Does Not Preempt the Requirements of Wage Order No. 9

The FAAAA provides that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. §14501(c)(1). This provision preempts state laws that "aim directly at the carriage of goods" or have a "'*significant* impact' on carrier rates, routes, or services," but does not disturb laws with only a "tenuous, remote, or peripheral" connection to rates, routes, or services. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 375 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)) (emphasis in original). Under binding Ninth Circuit precedent, Wage Order No. 9's substantive requirements have only a "tenuous, remote, [and] peripheral" relationship to motor carriers' rates, routes, or services, and so are not preempted.

WSTA alleges that the FAAAA precludes California from using the ABC Test to distinguish between workers subject to and exempt from the Wage Order's protections.

Complaint ¶45. But the ABC Test itself imposes no legal obligations. Rather, it merely "determine[s] whether and how California's labor laws (*which are not pre-empted by the FAAAA*) apply to a worker." *California Trucking Ass'n v. Su*, 2017 WL 6049242, at *3 (S.D. Cal. Jan. 6, 2017) (emphasis added) (discussing *Borello* standard; "In other words, the determination of whether a worker is an employee is merely an element of (or prerequisite for) a claim for violation of the labor laws, not a . . . claim itself.") ("*Cal. Trucking Ass'n I*"), *aff'd* 2018 WL 4288953 (9th Cir. Sept. 10, 2018). Accordingly, the question for purposes of WSTA's FAAAA preemption claim is whether the *substantive requirements of Wage Order No. 9* that attach through the ABC Test are preempted. They are not. Therefore, even if the ABC Test were to subject every WSTA member to Wage Order No. 9's requirements, WSTA's FAAAA preemption challenge would still fail to state a claim for relief because the Wage Order's *substantive* requirements are generally applicable labor laws that the Ninth Circuit has already determined are not preempted. *See* MTD at 10-12.

That the FAAAA does not preempt "generally applicable labor laws" was reaffirmed by the Ninth Circuit most recently this week. *Cal. Trucking Ass'n II*, 2018 WL 4288953, at *6. The court rejected the argument that the FAAAA preempts the DLSE's use of the *Borello* standard to determine whether a worker enjoys the protections of California's labor laws, reasoning that, unlike regulations that define a motor carrier's relationship with its *customers*, laws that define "the relationship between a motor carrier and its workforce . . . 'are several steps removed from prices, routes, or services.'" *Id.* (quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014)). Because they are but one among many variables that determine prices, routes, or services, generally applicable labor laws do not "'compel[] or bind[] [motor carriers] to a particular price, route, or service.'" *Id.* (quoting *Air Transp. Ass'n of Am. v. City and Cnty. of San Francisco*, 266 F.3d 1064, 1074 (9th Cir. 2001)). Thus, under binding Ninth Circuit precedent, the substantive requirements of Wage Order No. 9 are workforce-related obligations that are "several steps removed from prices, routes, or services," *id.*, and are not preempted.

Not only is this general rule sufficient to foreclose WSTA's FAAAA preemption claim, but the Ninth Circuit has also held that all of the specific requirements of Wage Order No. 9 are not preempted. Wage Order No. 9 imposes a discrete set of obligations on businesses subject to its requirements, the most important of which are minimum wage rules (§11090, Parts 4-5), mandated meal and rest breaks (§11090, Parts 11-12), and the requirement that a covered business provide and maintain the tools and equipment that are necessary for the worker's performance of the job (§11090, Part 9(B)).[5] The FAAAA does not preempt any of these requirements (nor Wage Order No. 9's other, less demanding requirements, discussed below).

Initially, the Ninth Circuit has made it clear that the FAAAA does not preempt Wage Order No. 9's minimum wage rules. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), rejected a similar challenge to California's Prevailing Wage Law, which, like Wage Order No. 9's minimum wage rules, prescribed minimum rates of compensation for workers in the transportation industry. As in this case, the businesses in *Mendonca* asserted that complying with the Prevailing Wage Law would increase their labor costs (in fact, the businesses argued that the Prevailing Wage Law would increase their *overall prices by 25%*). *Id*. at 1189; *cf.* Complaint ¶46 (alleging that "[p]rices will be impacted" as a result of *Dynamex*). But the Ninth Circuit nonetheless held that this kind of effect upon prices, routes, and services is "indirect, remote, and tenuous" and did not "frustrate[] the purpose of deregulation by *acutely* interfering with the forces of competition," so the law was not preempted by the FAAAA. *Mendonca*, 152 F.3d at 1189

[5] Wage Order No. 9 also includes work scheduling and overtime pay requirements but expressly excludes from that subsection of the Wage Order any employee whose "hours of service" are regulated by the Federal Motor Carrier Safety Regulations. §11090, Part (3)(L); *see also Collins v. Overnite Transp. Co.*, 105 Cal.App.4th 171, 180 (2003) (holding that Part (3)(L) of Wage Order No. 9 remained valid notwithstanding subsequent legislation). Because WSTA alleges that its members are subject to the FMCSR (*see* Complaint ¶¶ 68-75), WSTA cannot challenge Wage Order No. 9's work scheduling and overtime pay requirements.

(emphasis in original). The same analysis applies here, and thus *Mendonca* precludes any challenge to Wage Order No. 9's minimum wage requirements.[6]

Similarly, the Ninth Circuit has squarely held that California's meal and rest break laws, including those set forth in Wage Order No. 9, are not preempted by the FAAAA. *Dilts* held that meal and rest break requirements "plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended [the FAAAA] to preempt." 769 F.3d at 641-42, 647. *Dilts* recognized that such requirements are "generally applicable background regulations that are several steps removed from prices, routes, or services . . . [and] 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. Accordingly, *Dilts* forecloses any challenge to Wage Order No. 9's meal and rest break provisions.

The Ninth Circuit has also previously rejected a preemption challenge to the mandate that transportation companies reimburse workers for the operating costs of worker-owned vehicles, which is all that a business needs to do to comply with Wage Order No. 9's requirement that the business provide and maintain any tools and equipment that are necessary for the worker's performance of the job.[7] *Cal. Trucking Ass'n II*, 2018 WL 4288953, at *8 (holding FAAAA does not preempt law requiring "reallocation of truck maintenance costs," which is "indistinguishable from those [laws] recognized as permissible in *Dilts* and *Mendonca*"). The court reasoned that even if the reimbursement requirement were to result in "increases in business costs" for motor carriers, it still would not "bind[] motor carriers to specific services, [thereby] making the continued provision of particular services essential to

[6] The Ninth Circuit recently affirmed that recent U.S. Supreme Court jurisprudence does not "call [*Mendonca*] into question." *Dilts*, 769 F.3d at 645; *see also Cal. Trucking Ass'n II*, 2018 WL 4288953, at *5 n.7 (same).

[7] Businesses subject to Wage Order No. 9 are not required to reimburse workers for the acquisition costs of their vehicles. *See Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 24-25 (2007) ("it is perfectly lawful for an employer to require its employees to provide their own vehicles as a condition of employment" so long as "'the employer agree[s] to reimburse the employee for all the costs incurred by the employee in the operation of the equipment.'") (quoting DLSE Opinion Letter No. 1991.08.30). *Estrada* addressed reimbursement in the context of California Labor Code §2802 but noted that its conclusion that §2802 does not require reimbursement of vehicle acquisition costs was "entirely consistent" with the requirements of Wage Order No. 9 (referred to as "IWC Order No. 9-2001"). 154 Cal.App.4th at 24.

compliance with the law, or interfer[e] at the point that a carrier provides services to its customers." *Id*. (quoting *Dilts*, 769 F.3d at 649). It therefore is not preempted.

Finally, Wage Order No. 9 imposes other, less demanding obligations, including keeping accurate employment records (§11090, Part 7), reimbursing workers for uniforms that businesses require the workers to wear (§11090, Part 9(A)), limiting companies' ability to credit meals and lodging toward the Wage Order's minimum wage requirement (§11090, Part 10), and various regulations regarding companies' physical locations (i.e. regulations relating to seating, temperature, etc.) (§11090, Parts 13-16). These requirements have an even more "indirect, remote, and tenuous" relationship to covered businesses' prices, routes, and services than the background employment law obligations that the Ninth Circuit has already held are not preempted. *Mendonca*, 152 F.3d at 1189; *see also People ex rel Harris v. Pac Anchor Transp., Inc.*, 59 Cal.4th 772, 785 (2014) (holding that the recordkeeping requirements of Wage Order No. 9 are not preempted by the FAAAA).

In sum, Ninth Circuit precedent establishes that the FAAAA does not preempt any of the substantive requirements of Wage Order No. 9 that apply to a business whose workers qualify as "employees" under the ABC Test. Necessarily, then, the ABC Test itself cannot be preempted, because the ABC Test affects transportation companies only to the extent that it requires those companies to comply with Wage Order No. 9's substantive requirements.[8]

WSTA ignores these actual requirements of Wage Order No. 9 and instead asserts that *Dynamex* will preclude covered businesses from using independent contractors, and require them to hire and train additional full-time drivers and keep those drivers "on staff" even when "there is insufficient work to justify their positions." Complaint ¶¶45-46. This is mistaken.

[8] Even if this Court were to determine that the FAAAA precludes applying any of Wage Order No. 9's provisions to transportation companies, the proper remedy would be invalidation not of the ABC Test but rather of the specific substantive requirement at issue. *See Cal. Trucking Ass'n I*, 2017 WL 6049242, at *3 (definition of employee merely "determine[s] whether and how California's labor laws . . . apply to a worker."); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 394, 403-09 (9th Cir. 2011) (discussing separately each requirement of challenged Port "concession agreement" and deciding separately for each "whether . . . each challenged provision is subject to preemption by the FAAA Act"), *rev'd on other grounds* 569 U.S. 641 (2013); §11090, Part 21 (Wage Order No. 9's severability provision).

Wage Order No. 9 sets "no such requirements." *See Cal. Trucking Ass'n I*, 2017 WL 6049242, at *4. WSTA's "members are free to use independent contractors or employees." *Id*. Whatever model they choose, however, WSTA's members, just as any other California employer, are required to abide by California's "generally applicable background regulations" regarding working conditions. *Dilts*, 769 F.3d at 646.

WSTA's contrary allegations are based on the mistaken assumption that the only two alternatives are (1) independent contractor status with compensation and conditions that violate Wage Order No. 9; and (2) full-time employment with Wage Order No. 9 compliance. *See* Complaint ¶34 (alleging that *Dynamex* precludes transportation companies from contracting with "independent owner-operators . . . on short-term basis"). But nothing in *Dynamex* or Wage Order No. 9 precludes a motor carrier from hiring an independent owner-operator for individual jobs or assignments.[9] Rather, *Dynamex* requires only that, if the ABC Test affords an owner-operator on an individual job the protections of Wage Order No. 9, the hiring entity pay the owner-operator in accordance with the Wage Order's minimum wage rules, provide the owner-operator with meal and rest breaks as required under the Wage Order, and reimburse the owner-operator for costs incurred in operating his or her truck during the job assignment (as well as abide by the other requirements of the Wage Order that are even more remotely connected to prices, routes, and services). Accordingly, WSTA's allegations reflect a fundamental misunderstanding of the Wage Order, as construed in *Dynamex*.[10]

To be sure, these requirements might make it more expensive for a hiring entity to engage an owner-operator than if Wage Order No. 9 did not exist. Binding Ninth Circuit

[9] In asserting that compliance with Wage Order No. 9 will be costly, Plaintiff also appears to presume that all employment relationships are long-term and full-time, as if there is no such thing as temporary or part-time employment. *See, e.g.*, Complaint ¶62 (assuming that companies will need to "hire as employees a whole cadre of drivers" to wait on-call at California border).

[10] For purposes of Defendants' motion to dismiss, this Court should not accept as true WSTA's erroneous assertions about Wage Order No. 9's legal requirements, e.g. that *Dynamex* requires businesses to "keep [workers] on staff when there is insufficient work to justify their positions" and prevents them from hiring workers for one-off jobs. Complaint ¶¶46, 48; *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'") (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

precedent, however, clearly establishes that any such increased costs do not trigger FAAAA preemption. *Cal. Trucking Ass'n II*, 2018 WL 2488953, at *8; *Mendonca*, 152 F.3d at 1189; *Dilts*, 769 F.3d at 643.

Schwann v. FedEx Ground Package System, Inc., 813 F.3d 429 (1st Cir. 2016) does not require a different result. *See* Complaint ¶49. In *Schwann*, the First Circuit held that the FAAAA precluded the plaintiff from using the B prong of the ABC Test to prove that the defendant company was subject to Massachusetts' laws regulating working conditions. 813 F.3d at 433, 440. But *Schwann* is contrary to the governing FAAAA preemption case law in this Circuit.

In direct contrast to the Ninth Circuit, the First Circuit has held that generally applicable employment laws *are* preempted in this context. *Schwann* relied on *DiFiore v. American Airlines, Inc.*, 646 F.3d 81 (1st Cir. 2011), which held that the Airline Deregulation Act ("ADA") preempted Massachusetts' generally applicable tipping statute as applied to airline employees. *Id*. at 84, 90; *see also Schwann*, 813 F.3d at 439-40 (citing *DiFiore*, 646 F.3d at 88-89).[11] In so holding, *DiFiore* observed that, if the statute were applied to the defendant airline, it might force the airline to cease charging $2 per customer for curbside check-in, which would impermissibly "affect price" by "rais[ing] American's ticket fare." 646 F.3d at 89. This approach cannot be squared with that of the Ninth Circuit, which has repeatedly held that the FAAAA does not preempt generally applicable employment laws and, moreover, that a price increase does not trigger preemption.

Other aspects of *Schwann* are similarly incompatible with Ninth Circuit jurisprudence. *Schwann* relied heavily on the reasoning that the ABC Test differed from the test used for employee status under "federal law and the law of many states," so that the "relatively novel" nature of the ABC Test meant that it would impermissibly contribute to the "patchwork of state service-determining laws, rules, and regulations" that the FAAAA is designed to prevent. 813 F.3d. at 438 (quoting *Rowe*, 552 U.S. at 373). The Ninth Circuit, however, has held

[11] Because the FAAAA preemption provision is "nearly identical to the" ADA's, "the analysis from . . . Airline Deregulation Act cases is instructive for . . . FAAAA analysis." *Dilts*, 769 F.3d at 644; *see also Schwann*, 813 F.3d at 435-36 (same).

otherwise: The "fact that laws may differ from state to state is not, on its own, cause for FAAAA preemption." *Dilts*, 769 F.3d at 647. Rather, differences between multiple states' laws are relevant only if those laws themselves "are significantly 'related to' prices, routes, or services." *Id*. For this reason, the Ninth Circuit holds that generally applicable employment laws are *not* preempted, even if they differ from the employment laws "adopted in neighboring states." *Id*. at 647-48. Because such laws are *not* significantly related to prices, routes, or services, any differences among the generally applicable employment laws of different states do "not contribute to 'a patchwork of state *service-determining* laws, rules, and regulations.'" *Id*. (quoting *Rowe*, 552 U.S. at 373 (emphasis in *Dilts*)).

In sum, *Schwann* is of limited persuasive weight in the Eastern District of California, which must follow the Ninth Circuit's approach to FAAAA preemption. *See Phillips v. Roadrunner Intermodal Servs*., 2016 WL 9185401, at *8 (C.D. Cal. 2016) (distinguishing *Schwann* in part on basis that, unlike in Ninth Circuit, "First Circuit jurisprudence" establishes that a "relatively low level of interference [is] required to find preemption" under FAAAA).[12]

Furthermore, *Schwann*'s reasoning makes little sense even on its own terms. *Schwann* expressly refused to decide which "state law requirements [were] triggered by a finding that a person is an employee" under the ABC Test, even though, as with Wage Order No. 9's ABC Test, the Massachusetts ABC Test does not itself impose any substantive requirements. 813 F.3d at 433 n.2. *Schwann* thus skipped the crucial first step of determining *how* the ABC Test affects transportation companies, which is essential to understanding whether it has a "*significant*" or merely "tenuous, remote, or peripheral" effect on their rates, routes, or services. *Rowe*, 552 U.S. at 375 (emphasis in original). And the Ninth Circuit has rightly rejected the argument that distinctions between different states' generally applicable employment laws trigger FAAAA preemption. *See Dilts*, 769 F.3d at 647-48. Differences

[12] The Ninth Circuit's decision in *California Trucking Association* is not to the contrary. There, the court merely explained why *Schwann*'s analysis of the Massachusetts version of ABC Test would not apply to California's use of the *Borello* test. The Ninth Circuit expressly declined to reach the question whether the FAAAA would preempt use of the ABC Test to enforce California's employment laws, because the issue was not presented in that case. *Cal. Trucking Ass'n II*, 2018 WL 4288953, at *7 & n.9.

between state laws that do not themselves *significantly* relate to prices, routes, or services are irrelevant for FAAAA preemption purposes. A wholly unique state law might bear only the most tenuous connection to motor carriers' operations, while a ubiquitous state law could easily have a significant impact on rates, routes, or services. Thus, even setting aside *Schwann*'s incompatibility with Ninth Circuit jurisprudence, it is of limited persuasive value.

2. The Federal Motor Carrier Safety Regulations Do Not Preempt the Requirements of Wage Order No. 9

WSTA also alleges that Wage Order No. 9 as construed in *Dynamex* "is in direct conflict" with the FMCSR, Complaint ¶71, and therefore preempted. The FMCSR are safety regulations promulgated pursuant to the Federal Motor Carrier Safety Act that regulate safety in the motor carrier industry, including on such issues as drug and alcohol use by motor carrier drives, vehicle inspections, and driver's license standards. *See generally* 49 C.F.R. §§300-399. As Defendants rightly argue, the FMCSR is not so comprehensive as to preempt all state laws that have some relationship to motor carrier operations. MTD at 14 (citing *Specialized Carrier & Rigging Ass'n v. Com. of Va.*, 795 F.2d 1152, 1155 (4th Cir. 1986)). And to the extent that the FMCSR does have any preemptive effect, that effect would be limited to conflicting regulations on "commercial vehicle safety." *Id.* (citing 73 FR 79204-01) (emphasis omitted). Wage Order No. 9 is not a vehicle safety regulation and, in any case, does not conflict with the FMCSR, so it is not preempted.

3. Wage Order No. 9 Does Not Violate the Dormant Commerce Clause.

Finally, Defendants are correct that WSTA's allegations that trucking companies that operate entirely in-state will have an easier time complying with California's employment laws than those that also operate out-of-state, Complaint ¶64, even if true, do not come close to establishing the type of discrimination against out-of-state conduct that offends the dormant Commerce Clause. *See* MTD at 16-18; *see also Pharm. Research & Mrfs. of Am. v. Alameda County*, 768 F.3d 1037, 1042 (9th Cir. 2014) ("[A]n ordinance that applies across-the-board provides no geographic advantages. This holds true even where the ordinance only affects interstate commerce due to an absence of intrastate businesses."). Nor does WSTA even

contend that California is applying Wage Order No. 9 to regulate conduct that occurs entirely out of state such that it constitutes direct regulation of inter-state commerce. Thus, the requisite test is that established by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Under these circumstances, the reasoning and holding of *Sullivan v. Oracle Corp.*, 662 F.3d 1265 (9th Cir. 2011), control:

> If a 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). California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or by out-of-state residents. *There is no plausible Dormant Commerce Clause argument* when California has chosen to treat out-of-state residents equally with its own.

Id. at 1271 (emphasis added). Here, just as in *Sullivan*, Wage Order No. 9 treats in-state and out-of-state residents equally, and imposes its minimum standards only with respect to work performed in California. Under such circumstances, "[t]here is no plausible Dormant Commerce Clause argument . . . ." *Id.* For that reason alone, WSTA's claim should be dismissed.

Even if this Court were deciding the issue de novo, without the assistance of controlling precedent, dismissal of WSTA's dormant Commerce Clause claim would be appropriate. The *Pike* standard is very difficult to meet: "For a facially neutral statute to violate the commerce clause, the burdens of the statute must so outweigh the putative benefits as to make the statute *unreasonable or irrational*." *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir.1991) (emphasis added). That is because the point of the *Pike* test is to uncover laws that have illusory benefits or seek to favor in-state over out-of-state industry. *Id.* The substantial burden that must be shown under *Pike* is a burden on interstate commerce itself—not simply that applying Wage Order No. 9 will impose significant costs on particular trucking companies. *See S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 471 (9th Cir. 2001). WSTA's allegations that complying with Wage Order No. 9 will cause its members' labor costs to increase substantially thus do not suffice.

Further, even if WSTA's allegations *did* establish a substantial burden upon interstate commerce, the benefits of Wage Order No. 9 as interpreted by *Dynamex* would not be "so outweigh[ed] as to make the statute unreasonable or irrational." *Alaska Airlines*, 951 F.2d at 983. WSTA identifies the only relevant benefit as "ease of administration." Complaint ¶65. In doing so, WSTA completely ignores the significant benefit to California's workers that protections like Wage Order No. 9 afford. As the California Supreme Court explained in *Dynamex* itself:

> Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions. *The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare.* These critically important objectives support a very broad definition of the workers who fall within the reach of the wage orders. These fundamental obligations of the IWC's wage orders are, of course, primarily for the benefit of the workers themselves, intended to enable them to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect. At the same time, California's industry-wide wage orders are also clearly intended for the benefit of those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices. Finally, the minimum employment standards imposed by wage orders are also for the benefit of the public at large, because if the wage orders' obligations are not fulfilled the public will often be left to assume responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions.

4 Cal.5th at 952-53 (emphasis added and omitted, and citations omitted, including to United States and California Supreme Court precedent); *see also, e.g.*, Labor Code 90.5(a) ("It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards."); *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal.2d 287, 302 (1943) ("The Constitution authorizes the Legislature to provide a minimum wage for women and minors and for the comfort, health, safety and general welfare of employees, and to confer upon a commission the authority it deems necessary to carry out those purposes."); *compare Mendis v. Schneider Nat'l Carriers*

Inc., 2016 WL 6650992, *4-5 (W.D. Wash. Nov. 10, 2016) (application of Washington rest break provision to truck drivers does not violate dormant Commerce Clause, because it furthers legitimate public interest and applies only to in-state conduct).[13] Thus, Wage Order No. 9 as interpreted in *Dynamex* easily survives *Pike*'s deferential review.

CONCLUSION

For the reasons stated, the Court should grant Defendants' motion to dismiss.

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Respectfully submitted,

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[13] The Ninth Circuit has made clear that courts may not look behind the "putative" benefits of a state or local measure in order to decide whether the challenged state action *actually* accomplishes its purported purposes. *See National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1155-56 (9th Cir. 2012). Thus, any argument that Wage No. 9 does not actually further these goals would be irrelevant.