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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

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

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

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REPLY MEMORANDUM

I. The IBT Is Entitled to Intervene as of Right

In opposing intervention by the International Brotherhood of Teamsters ("IBT"), Plaintiff and Defendants both make clear their disagreement with the approach and the holding of *Californians For Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998). But *Mendonca* remains authoritative precedent in this circuit, and controls the result in this case, which involves the same union seeking to intervene to defend a labor protective law alongside the existing state official defendants.

The parties concede the timeliness of IBT's intervention motion, and their arguments that IBT fails to satisfy the other three prongs of the intervention test lack any merit. In arguing that the IBT lacks a "significantly protectable" interest, Plaintiff focuses on an interest that the IBT never even relied on, and completely fails to address the concrete interests the IBT *did* demonstrate in its opening papers. In further contending that the IBT has not shown impairment of any such interest, Plaintiff is forced to take a position that is contrary to its own complaint, by denying that the test established by *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018), will make it easier to prove misclassification of truck drivers. Plaintiff cannot have it both ways. And finally, Plaintiff's and Defendants' assertions that IBT's interests are adequately represented because the government officials in this case are already defending the challenged wage order and test for employee status rely on inapposite precedent. The relevant precedent here is *Mendonca* and similar cases that involve unions asserting concrete *economic* interests that are concededly *narrower* than the government, and that precedent requires a grant of intervention as of right.

A. The IBT Has a "Significantly Protectable" Interest that May Be Impaired by this Lawsuit

Defendants do not dispute that IBT has a "significant" interest that may be impaired by the outcome of this case. Dkt. 13 at 3. Plaintiff, however, argues that the IBT's interest is merely "speculative" because it is uncertain whether *Dynamex* will lead to increased IBT

membership. Dkt. 12 at 3. But Plaintiff attacks a straw man: IBT did not rely on any such interest in increased membership in its opening papers or evidence.

Rather, IBT relied on the concrete interests of its members—the very workers who are protected by the minimum wage, overtime, and other worker protections of Wage Order No. 9—whose interests IBT may rely on through associational standing. *See* Dkt. 8 at 7. Plaintiff does not even mention, much less refute, IBT's showing regarding these interests.

As explained in IBT's opening papers, the *Dynamex* rule directly benefits IBT's *current* members by making it more difficult to misclassify workers as independent contractors. Dkt. 8 at 7. This helps create additional job opportunities that comply with the Wage Order, *and* levels the playing field between businesses that employ IBT's members and those that classify their workers as independent contractors. *Id.*; *see also* Dkt. 8-1 (Raymond Decl. ISO Mot. to Intervene) ¶¶6-7. Plaintiff completely ignores these direct interests in the outcome of the litigation, as well as the prior cases where courts have determined that labor organizations have a "significantly protectable" interest in laws designed to protect the workers they represent. *See* Dkt. 8 at 7 (citing *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008); *Assoc. Builders & Contractors of S. Cal., Inc. v. Nunn*, 356 F.3d 979, 983-84 (9th Cir. 2004); *Mendonca*, 152 F.3d at 1189-90)).

Plaintiff fares no better in arguing that these concrete interests will not be affected by an adverse outcome in this litigation. Plaintiff contends that "IBT was successful in reclassification litigation in California long before *Dynamex*, and there is no reason to suggest that IBT's success will not continue even if the decision in *Dynamex* is invalidated." Dkt. 12 at 4. But the facts that many trucking companies were proven to have misclassified workers even under California's common law test, and IBT has in the past been successful in proving this, in no way shows that IBT's interests would not be "impair[ed]" or "impede[d]" as a practical matter if Plaintiff were successful in its challenge to the *Dynamex* standard. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc). And Plaintiff cannot have it both ways: *Plaintiff's own complaint* asserts that the

California Supreme Court's adoption of the ABC Test will make it easier to prove misclassification of truck drivers. *See, e.g.*, Dkt. 1 (Complaint) ¶¶ 30-31; *see also* Dkt. 12 at 4 ("this case may eliminate a test favorable to IBT and revert to prior law"). Having chosen to proceed on that theory, Plaintiff cannot now contend that the invalidation of *Dynamex* will not impede IBT's interests as a practical matter because *Dynamex* does not matter.

B. The Existing Parties May Not Adequately Represent the IBT's Interests

The parties' arguments that existing representation is adequate in this case erroneously rely on their positions that *Mendonca* does not control the result here because it was inadequately reasoned or wrongly decided, and that a "compelling showing" of inadequacy rather than the standard set forth *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)—that a putative intervenor need make only a "minimal" showing that "representation of [its] interest 'may be' inadequate"—applies when a government defendant and proposed intervenor seek the same ultimate outcome. Dkt. 13 at 3 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). The parties are wrong, for several reasons.

In *Mendonca*, the Ninth Circuit held that IBT had the right to intervene to defend a statute alongside state officials in a case in which both the state officials and IBT sought the same ultimate outcome. 152 F.3d at 1189-90. *Mendonca* reasoned that "the employment interests of IBT's members were potentially more narrow and parochial than the interests of the public at large," so "IBT demonstrated that the representation of its interests by the named defendants-appellees may have been inadequate." *Id*. at 1190.

Mendonca is on all fours with this case—it involved the same union and same adequacy of representation issue (government defendant who was defending the challenged law)—and the Ninth Circuit held that the union's narrow economic interest sufficed to establish that the government's defense of the law may have been inadequate. In other similar cases, moreover, courts have held that labor unions whose members have a concrete, narrow, economic interest in the outcome of the litigation have a right to intervene because representation by the government may be inadequate. *See, e.g., Air Conditioning Trade*

Ass'n v. Baker, 2012 WL 3205422, at *5 (E.D. Cal., Jul. 31, 2012) (granting labor organization right to intervene in contractors' challenge to standards for expansion of state-approved apprenticeship programs based on finding that representation by existing parties was inadequate because "the state defendants have a broader interest than [union] as the proposed intervenor"); *Golden Gate Rest. Ass'n v. City and County of San Francisco*, 2007 WL 1052820, at *4 (N.D. Cal. Apr. 5, 2007) ("[T]he Unions' members here have a personal interest in the enforcement of the Ordinance" because "the Defendant City and County of San Francisco represents the public generally, including businesses and employers who may claim to be harmed by the passage of the Ordinance."). The same result is required here.

By contrast, in most of the cases that Defendants cite, the proposed intervenors lacked any *concrete economic* interests like those threatened by the Plaintiff's legal challenges here; rather, they had a mere ideological affinity for the challenged statute. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 949 (9th Cir. 2009) ("public interest organization" sought to intervene to defend "state ballot initiative restricting the definition of marriage"); *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) ("public interest group" sought intervention because it "has supported a [ballot] measure"); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1300-01 (9th Cir. 1997) (interest group "had participated in the drafting and sponsorship of" challenged ballot initiative).[1] In the remaining case, the proposed intervenor's economic interests were already adequately represented for two reasons that do not apply here: First, the state there had a "specific statutory and constitutional obligations to protect native Hawaiians' interests"—the very interests the proposed intervenor sought to represent. *Arakaki*, 324 F.3d. at 1087. Second, a group representing the same economic interests as the proposed intervenor had already intervened and was willing to represent his interests as well. *Id*. Here, Defendants have no

[1] The order denying intervention in *United States of America v. State of California*, No. 18-cv-00490-JAM-KJN (E.D. Cal. June 5, 2018), which Defendants attached to their opposition brief, also involved proposed intervenors lacking any concrete economic interest in the case. *See* Dkt. 13 Ex. 1 at 3 ("Both organizations supported [the challenged legislation's] passage and believe the laws enacted are important to their members' interests.").

comparable "specific statutory [or] constitutional obligation" to represent workers' interests; nor are those interests already represented by another intervenor.

Accordingly, even if the cases Defendants cited may have required a "compelling showing" of inadequacy, Defendants cite *no* authority for the proposition that a "compelling showing" is required where the proposed intervenor has a concrete economic interest in the outcome of the litigation that is necessarily narrower than that held by an existing governmental party.[2]

Defendants urge this Court to rely on the cases they cite, rather than *Mendonca*, because *Mendonca* did not address the "compelling showing" requirement. Dkt. 13 at 5. Similarly, Plaintiff complains that *Mendonca* "devoted a mere paragraph to all four elements of the intervention as of right test." *See* Dkt. 12 at 6. But these arguments do not negate *Mendonca*'s controlling weight, nor do they undermine its core holding, which squarely applies here: that inadequacy of representation supporting intervention as of right is shown—and *there is no* heightened "compelling showing" requirement—when a union seeks to intervene to represent its members' economic interests, even where state government officials are already defending the challenged law. That the parties take issue with *Mendonca*'s analysis is irrelevant because *Mendonca* squarely controls where, as here, a union seeks to intervene to represent its members' economic interests, even where the state government is already defending the challenged law.[3]

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[2] Plaintiff wrongly asserts that inadequacy of representation requires a showing of "collusion" between Plaintiff and the state, that the state is "adverse" to IBT, or that the state will fail to defend *Dynamex*. *See* Dkt. 12 at 5 (citing *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969); *Peterson v. U.S.*, 41 F.R.D. 131 (D. Minn. 1966); *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962)). None of these decades-old cases are from the Ninth Circuit and, in any case, they have been roundly criticized for misinterpreting the standard for intervention as of right. *See* 7C Charles Alan Wright et al., *Federal Practice & Procedure, Civ.* (3d ed.) § 1909 at n. 11 (criticizing these cases for misinterpreting mere list of "circumstances" sufficient "to establish inadequacy of representation" as instead holding that "representation is adequate unless one of those three circumstances is present").

[3] Intervention by unions to defend the interests of their members alongside state officials who are defending state laws is commonplace. In fact, attorneys from the undersigned law firm have represented unions that successfully intervened to represent their members' concrete economic interests in numerous cases in which, as here, the Attorney General represented state officials who were defending a challenged state law, and the state officials and intervening union shared the same ultimate goal of upholding a challenged law. *See, e.g.*, *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1079 (9th Cir. 2006); *Unico*

In addition, even if the parties *were* correct that adequacy of representation is presumed when the government defends a state law, that presumption would not apply to the defense of a judicial decision. It may be true that Defendants have a state constitutional obligation to defend California laws that are enacted by the Legislature and signed by the Governor. *See* Dkt. 13 at 3-4 (citing Cal. Const., art. V, § 13). But that obligation does not necessarily extend to a legal rule, like the ABC Test, imposed as a matter of judicial interpretation. *See Dynamex*, 4 Cal.5th at 956-57 (interpreting "suffer or permit to work standard" of Wage Order No. 9 to require that employer satisfy ABC Test to classify worker as exempt from Wage Order protections). The Attorney General and Department of Industrial Relations are frequent *litigants* before the California Supreme Court, and no doubt often disagree with its decisions. Because Plaintiff purports to challenge the "California Supreme Court's interpretation" of Wage Order No. 9 (i.e. the ABC Test) and *not* the Wage Order's underlying obligations (*see* Dkt. 1 at ¶¶Prayer for Relief), Defendants' constitutional obligations will not necessarily ensure an adequate defense against Plaintiff's claims.

Finally, Plaintiff and Defendants are wrong to deny that IBT's intimate and detailed knowledge of the trucking industry will help develop the record in these proceedings. Dkt. 12 at 5; Dkt. 13 at 5. The parties argue that this case will turn on "purely legal" questions that IBT can adequately address as an amicus, but that is not necessarily the case. *Id.* If this Court does not grant Defendants' motion to dismiss, for example, the resolution of Plaintiff's Federal Aviation Administration Authorization Act ("FAAAA") preemption and dormant Commerce Clause claims may depend on evidence regarding *Dynamex*'s impact on motor carriers specifically and interstate commerce in general.[4] IBT should be permitted to intervene in order to present evidence bearing on these claims.

Mechanical Corp. v. Harris, 2016 WL 2848592 (E.D. Cal. 2016); *Baker*, 2012 WL 3205422, at *1; *cf. also City of El Centro v. Lanier*, 245 Cal.App.4th 1494 (2016); *Vergara v. California*, 246 Cal.App.4th 619 (2016).

[4] The FAAAA preempts state laws that 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))

The IBT has a long history of representing truck drivers, and considerable knowledge and experience with the industry in general and with worker misclassification issues specifically. *See, e.g.*, *Mendonca*, 152 F.3d at 1189-90; Dkt. 8-1 (Raymond Decl.) ¶5. Given that expertise, the IBT is well positioned to develop evidence bearing on the effect of *Dynamex* on motor carriers' operations and interstate commerce as a whole. Neither party explains why it would be fair to permit potential employers in the transportation industry, who are represented by Plaintiff, to introduce evidence on these issues while denying affected employees the same opportunity. *See* Dkt. 8 at 11. Basic fairness dictates that IBT be permitted to intervene to challenge the trucking companies' factual assertions.

II. Alternatively, Permissive Intervention Should be Granted

Neither party disputes that IBT satisfies the threshold requirement for permissive intervention, which requires that the proposed intervenor have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Instead, the parties wrongly contend that IBT's intervention will delay or prejudice the adjudication of this case. To the contrary, IBT's intervention will assist in the fair and just resolution of this litigation.

Plaintiff argues that permitting IBT to intervene would require it to respond to additional "questions, briefs, arguments, motions and the like." Dkt. 12 at 7 (quoting *Mumford Cove Ass'n v. Town of Groton, Connecticut*, 786 F.2d 530, 535 (2nd Cir. 1986)). But the potential need to address additional argument or evidence is not the type of prejudice that Rule 24(b) contemplates as a basis for denying permissive intervention, at least in the Ninth Circuit. *See Empl. Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994) (upholding grant of permissive intervention where "the Union added no claims or issues to those already in the case, and did not complicate or delay resolution beyond the

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(emphasis in original). And the dormant Commerce Clause invalidates laws that do not discriminate against out-of-state entities only if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Both tests contemplate the introduction of evidence bearing on the real-world effects of a challenged law.

need of plaintiffs to respond to additional briefing"). If anything, Plaintiff's concern regarding IBT's potential presentation of additional arguments or evidence weighs in favor of a grant of intervention because it indicates that Defendants' representation of the IBT's interests may be inadequate. *See Arakaki*, 324 F.3d at 1086 (adequacy of representation depends in part on whether the existing parties "will *undoubtedly* make *all* of a proposed intervenor's arguments") (emphasis added).

For their part, Defendants suggest that permissive intervention would lead to duplicative discovery. Dkt. 13 at 6 (citing *Perry*, 587 F.3d at 955). But if permitted to intervene, IBT will work with Defendants to ensure that IBT's efforts in this case are not unnecessarily duplicative. And in any case, this Court can address any concerns about discovery through its case management authority. Similarly, the answer to Defendants' concern about other groups trying to intervene in the future, *id*., is to deny those groups permissive intervention if their intervention would delay or prejudice this litigation, not to prevent IBT from intervening. *Cf. Arakaki*, 324 F.3d at 1087 (holding that presence of "a similarly situated intervenor" in the case justifies denying intervention to subsequent proposed intervenor).

Defendants also recycle their erroneous assertion that, because the issues in this care are "purely legal," IBT's participation is not necessary for a full and fair adjudication of this case. Dkt. 13 at 6-7. As previously explained, however, if this Court does not grant Defendants' motion to dismiss, the parties will be required to present evidence regarding Plaintiff's factual assertions, and IBT should be permitted to participate in that effort as the representative of workers in the trucking industry who may be affected by this case. *See supra* at 6-7.

CONCLUSION

For the reasons stated, the Court should grant IBT's motion for leave to intervene as a defendant.

Dated: September 13, 2018

Respectfully submitted,

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