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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 **DEFENDANTS' REPLY SUPPORTING MOTION TO DISMISS** Date: n/a Time: n/a Dept: n/a Judge: The Honorable Morrison C. England, Jr. Trial Date: Action Filed: 7/19/2018

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INTRODUCTION

The opposition to the motion to dismiss fails to demonstrate that Plaintiff Western States Trucking Association has alleged a viable claim. Initially, Western States cannot establish standing for the declaratory relief that it seeks, since it essentially requests an advisory opinion about the legality of the California Supreme Court's decision in *Dynamex*, a decision that has not been applied or enforced in any way against Western States or any of its members.

Plaintiff's arguments against dismissal of its substantive claims likewise fail. Plaintiff opposes dismissal of its FAAAA preemption claim by relying on nonbinding out-of-circuit authority, but on-point Ninth Circuit caselaw has rejected preemption challenges to California labor regulations, and Western States does not meaningfully address this caselaw.

Similarly, Western States' regulations-based preemption claim fails because the federal motor carrier safety regulations do not preempt general background state regulations, like the *Dynamex* test at issue. The opposition argues that Wage Order No. 9 is not like these general state labor regulations because it pertains solely to the transportation industry, but this contention fails to account for the fact that equivalent wage orders govern the major industries in the state. Although Western States challenges Order No. 9 as interpreted in *Dynamex*, the California Supreme Court's decision will apply to other wage orders in the same way.

Lastly, neither *Dynamex* nor Order No. 9 discriminate against or impose a substantial burden on interstate commerce, and thus the dormant Commerce Clause claim fails.[1]

ARGUMENT

I. WESTERN STATES FAILS TO ESTABLISH THAT ITS DECLARATORY RELIEF CLAIM IS PROPER.

Plaintiff does not debate that the Declaratory Judgment Act requires an "actual controversy," and that to meet this requirement it must show that its dispute is "definite and

[1] On September 13, 2018, the International Brotherhood of Teamsters filed a Motion for Leave to File Points and Authorities, or, in the Alternative, Amicus Brief Supporting Defendants' Motion to Dismiss. (ECF No. 16.) Defendants have no objection to the Brotherhood's submission of an amicus curiae brief. For the reasons set forth in Defendants' Opposition to the Brotherhood's Motion to Intervene, Defendants oppose the request to intervene as a party. (ECF No. 13.)

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." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (internal citation and punctuation omitted); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (setting out similar requirements for constitutional standing). (ECF No. 20 at 4-8.)

Instead of trying to meet this requirement, Plaintiff notes that its member companies allegedly have thousands of drivers and support personnel, and surmises that "[a]ny of these workers *could* initiate a wage/misclassification claim against a [Western States] member at any time." (ECF No. 20 at 4 [emphasis added].) Western States also points out that seven class actions have been filed in California based on the *Dynamex* decision, yet does not explain why the parties in these cases cannot raise the claims Western States seeks to raise here. (*Id.* at 4-5.) These arguments underscore the fact that here there is no threatened government action against Western States or its members. *MedImmune, Inc.*, 549 U.S. at 128-29. Instead, Plaintiff 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.) This is speculation.

None of the cases cited in the opposition demonstrate that Plaintiff has shown standing to establish jurisdiction here. (ECF No. 20 at 7.) *Conference of Federal Savings and Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), presented an actual controversy because there were conflicting positions taken by state and federal agencies on the authority of a state board. In *First Federal Savings and Loan Association of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979), the federal plaintiff had actually been sued in state court by a state agency. And most of the factors cited by the court in *Government Employees Insurance Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998), weigh against exercise of jurisdiction here, including the need to avoid needless determination of state law issues, the policy against encouraging the filing of declaratory actions as a means of forum shopping, and the need to avoid duplicative litigation. *Id.* at 1225. Ultimately, Plaintiff here lacks standing to challenge the *Dynamex* decision because its claims of

injury are "highly conjectural, resting on a string of actions the occurrence of which is merely speculative." *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 967 (6th Cir. 2009); *Nat'l Rifle Ass'n of Amer. v. Magaw*, 132 F.3d 272, 294 (6th Cir. 1997).

And even if Plaintiff could establish the requisite case or controversy, this Court has the discretion as a prudential matter to decline to entertain this action. "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). Because 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, this will present practical difficulties in narrowing the legal issues and adjudicating the dispute. For example, Plaintiff cannot name any specific entity that has been threatened with state enforcement, (*see generally* ECF 1; ECF 20), and thus the allegations of how *Dynamex* will be interpreted, how it may be applied, and what effect this may have on a particular motor carrier's business model is theoretical at best. These concerns are heightened by the fact that Western States seeks a declaration that *Dynamex* is preempted in its entirety, relief that is questionable given the lack of factual allegations about how that decision has impacted Plaintiff or its members.

II. PLAINTIFF'S FAAAA PREEMPTION CLAIM FAILS.

A. The FAAAA Does Not Preempt Generally Applicable Background Laws.

As Defendants discussed in their motion to dismiss, governing Ninth Circuit law holds that the Act does not preempt general labor regulations. For example, the court rejected a claim that the Act preempted California's Prevailing Wage Law in *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998). And in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), the court concluded that the Act does not preempt California's meal and rest break laws, holding that "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.* at 644. Such "generally applicable background regulations" do not improperly interfere with the deregulatory purposes of the Act. *Id.* at 646. Recently, the

Ninth Circuit held that California's use of the common law *Borello* standard to assess whether an individual is an employee or an independent contractor is not preempted by the FAAAA. *California Trucking Association v. Su*, No. 17-55133, 2018 WL 4288953 (9th Cir. Sept. 10, 2018). Like this case, *CTA* was a challenge by a trucking association, which argued (among other things) that "the *Borello* standard could replace efficiency-driven terms in its members' contracts with external ones found in California's labor laws." *Id.* at *4. In line with *Dilts* and *Mendonca*, the Ninth Circuit rejected this challenge, noting that "Congress did not intend to preempt these generally applicable labor laws." *Id.* at *6.

Plaintiff attempts to distinguish the long line of cases in this Circuit holding that FAAAA does not exempt carriers from background state laws, and rejecting preemption challenges to California's generally applicable labor laws, like *Dilts* and *Mendonca*. (ECF No. 20 at 11-12.) Plaintiff argues that Wage Order No. 9 is not a "generally applicable" law like those at issue in those cases because it is allegedly specifically aimed at the transportation industry. (ECF No. 20 at 11.) But Plaintiff does not challenge Order No. 9 as such, but instead how it is interpreted under *Dynamex*. (ECF No. 1 at 13 ¶ 45; *id.* at 28 ¶ 64; ECF No. 20 at 18 ["Here, WSTA challenges only Wage Order No. 9, as recently interpreted by *Dynamex*."].) And as the California Supreme Court explained, the definition of the term "employ" it interpreted appears in every wage order. 4 Cal.5th 903, 926 n.9 (Cal. 2018).

Moreover, *Dilts* involved a challenge to Order No. 9, and concluded that it falls into the category of "generally applicable" state laws that are not preempted by the FAAAA. 769 F.3d at 641, 647 ("California's meal and rest break laws . . . are normal background rules for almost *all* employers doing business in the state of California"). And the California Supreme Court also rejected a preemption challenge to Order No. 9 in *People ex rel. Harris v. Pac Anchor Transportation, Inc.*, 59 Cal.4th 772 (Cal. 2014), *cert. denied*, 135 S. Ct. 1400 (2015). There, 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 court noted that 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 (emphasis added).[2]

B. The First Circuit's *Schwann* Decision Is Inapposite and Nonbinding.

Plaintiff disregards the established law in this Circuit discussed above, and instead relies on *Schwann v. FedEx Ground Package System*, 813 F.3d 429 (1st Cir. 2016). (ECF No. 20 at 9-10.) There, the court held that a Massachusetts statute that is substantially the same as the ABC test adopted in *Dynamex* was preempted by the FAAAA as applied to FedEx, a motor carrier that used independent contractors for the actual pick-up and delivery services for customers—generally called "first-and-last mile" services. The court reasoned that applying the B prong of the ABC test to the motor carrier's business activities requires "a judicial determination of the extent and types of motor carrier services that [the defendant] provides," and thus the test "expressly references" the carrier's services. *Id.* at 437-38. The decision largely hinged on First Circuit precedent regarding how much interference state laws could impose on motor carrier activities, precedent that is inapplicable in this Circuit. *Id.* at 439-440. As discussed above, this Circuit's caselaw predating *Dynamex* holds that California's general background laws are not preempted, and courts in this circuit have rejected the *Schwann* approach. *Phillips v. Roadrunner Intermodal Serv.*, No. 16-cv-01072-SVW, 2016 WL 9185401, at *7 (C.D. Cal. Aug. 16, 2016) ("[T]he unique facts in the First Circuit cases combined with current Ninth Circuit jurisprudence sufficiently distinguish this case from the First Circuit's"); *Valadez v. CSX Intermodal Terminals, Inc.*, No. 15-cv-05433, 2017 WL 1416883, at *6 (N.D. Cal. Apr. 10, 2017) ("The First Circuit cases that Defendant cites are nonbinding and inapposite").

To be sure, the court in *CTA*, in addressing the plaintiff's arguments regarding the effect of the ABC test and the First Circuit's *Schwann* decision, distinguished the ABC test's impact. *Id.*, 2018 WL 4288953, at *7. While it theorized how the ABC test might play out under certain situations, the court nevertheless noted that the question whether this test is preempted by the FAAAA was not presented in *CTA*, and disavowed any ruling on that point. *Id.* at *7 n.9 ("[W]e

[2] Notably, the Ninth Circuit recently endorsed the California Supreme Court's preemption analysis in *Pac Anchor*. *Cal. Trucking Ass'n*, 2018 WL 4288953, at **9-10.

need not and do not decide whether the FAAAA would preempt using the 'ABC' test to enforce labor protections under California law."); *In re Larry's Apartment, LLC*, 249 F.3d 832, 839 (9th Cir. 2001) ("As the Supreme Court has said, "'[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having so decided as to constitute precedents.'") (citation omitted). Contrary to Plaintiff's argument, *CTA* did not undermine *Dilts* and *Mendonca*. (ECF No. 20 at 12.)

III. CALIFORNIA'S LABOR LAWS DO NOT CONFLICT WITH THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS.

Western States opposes dismissal of its claim that federal carrier safety regulations preempt application of the ABC test, but does not dispute that the *Dynamex* decision does not relate in any way to safety, instead arguing that this fact is "irrelevant." (ECF No. 20 at 15.) This is plainly wrong.

The Federal Motor Carrier Safety Regulations set forth various requirements regarding the safety of motor carrier operations, including subjects ranging from vehicle inspections, to insurance requirements, and leasing of vehicles. (ECF No. 1 at 19 ¶¶ 69 [citing regulations].) The regulations explicitly state that they "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); *see also* 49 C.F.R. § 355.25 ("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.") (emphasis added). Western States' argument that these safety regulations can preempt state regulations merely because they allegedly conflict with or frustrate federal law, (ECF No. 20 at 15), is incorrect. Although "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 v. FCC*, 486 U.S. 57, 64 (1988), pre-emption is not inferred merely because an agency's regulations are comprehensive. *R.J. Reynolds Tobacco Co. v. Durham Cty., N.C.*, 479 U.S. 130, 149 (1986).

Here, the federal regulations in fact contemplate state regulation, and explicitly state 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; *Specialized Carriers & Rigging Ass'n v. Com. of Va.*, 795 F.2d 1152, 1155 (4th Cir. 1986) ("Congress made clear in various sections of the Motor Safety Act that no such comprehensive preemption was contemplated or intended."). Western States' argument is further undermined by the fact that the Federal Motor Carrier Safety Administration has rejected attempts by motor carriers to preempt California provisions governing labor matters. 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 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, which Western States urges here, that the motor vehicle safety regulations can preempt any state law or regulation "that regulates or affects" motor vehicle safety. *Id.* Multiple courts have found the Administration's reasoning persuasive. *See, e.g., 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).

Instead of addressing this authority, Western States focuses on a handful of instances presenting a potential conflict between how the ABC test *might* operate and what the motor carrier safety regulations *might* allow. (ECF No. 20 at 15.) None of the cited federal provisions conflict with the challenged California labor regulations, which set forth circumstances when an employee-employer relationship exists for purposes of the state's labor laws. Western States seems to argue 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. Western States' reliance on section 376.12(c)(4) ignores the broader context of that regulation. Section 376.12 states what is required under valid lease agreements, and subsection (c)(4) clarifies that the federal leasing requirements are *not* intended to interfere with the question whether drivers are employees or contractors; it does not provide a substantive right to operate as a contractor. 49 C.F.R. § 376.12(c)(4) (specifying that the federal provisions regarding leasing arrangements are not "intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee"). The determination of who is an employee for state law purposes has always been a matter of state law, which is what *Dynamex* does. *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. Western States ultimately provides no support for the proposition that these putative conflicts somehow warrant invalidation of the ABC test on a facial basis, rather than as-applied. *Cf. U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (Under a facial challenge, the fact that the challenged statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.").

IV. PLAINTIFF HAS NOT ESTABLISHED THAT CALIFORNIA LAW DISCRIMINATES AGAINST INTERSTATE COMMERCE FOR PURPOSES OF ITS DORMANT COMMERCE CLAUSE CLAIM.

Western States' arguments opposing dismissal of the dormant Commerce Clause claim fare no better. Indeed, Plaintiff concedes that Wage Order No. 9 does not discriminate against out-of-state entities, and applies even handedly "to in-state, multi-state, and out-of-state employers within the state." (ECF No. 20 at 16.) Plaintiff nevertheless argues that Order No. 9, as interpreted in *Dynamex*, makes it practically impossible for interstate trucking companies to operate in California "because state law invalidates the use of independent contractor drivers." (ECF No. 20 at 16.) But neither *Dynamex* nor Order No. 9 prohibit the use of independent contractor drivers; instead, they merely provide a standard to ascertain whether an individual is an employee or an independent contractor. *Cf. Cal. Trucking Ass'n*, __ F.3d __, 2018 WL 4288953,

at **6-7 (rejecting FAAAA preemption challenge to California use of the *Borello* standard, noting that it "does not compel the use of employees or independent contractors").

Because Plaintiff does not allege that *Dynamex* discriminates against interstate commerce, the dormant Commerce Claim fails. In *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009), the plaintiff challenged a facially neutral state law that did not evince a discriminatory purpose. *Id.* at 525. To assess whether the law had a discriminatory effect on interstate commerce, the Ninth Circuit compared how the challenged law treated the plaintiff and compared its effect on similarly situated in-state entities. *Id.* Because the law did not discriminate between similarly situated in-state and out-of-state entities, and the challenged statutes and regulations applied to both, there was no dormant Commerce Clause issue. *Id.* at 528. Likewise, *Sullivan v. Oracle Corporation*, 662 F.3d 1265 (9th Cir. 2011) rejected a dormant Commerce Clause challenge to California labor laws. The court noted that California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or out-of-state residents, and thus "[t]here is no plausible Dormant Commerce Clause argument when California has chosen to treat out-of-state residents equally with its own." *Id.* at 1271.[3] *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1145 (9th Cir. 2015). Plaintiff's allegations do not state a viable claim under the dormant Commerce Clause given this caselaw.[4]

CONCLUSION

For these reasons, the Court should dismiss the complaint.

[3] Plaintiff attempts to distinguish *Yoder v. Western Express, Inc.*, 181 F. Supp. 3d 704 (C.D. Cal. 2105) on the grounds that that case involved challenged to meal and rest break laws applicable to all employees, whereas this case involves a challenge to Order No. 9, which allegedly applies only to the transportation industry. (ECF No. 20 at 18.) But Plaintiff's challenge is to the *Dynamex* decision, which is not limited to the transportation industry. (ECF No. 20 at 18.) And as the California Supreme Court explained, the definition of the term "employ" it interpreted in *Dynamex* appears in every wage order. 4 Cal.5th at 926 n.9.

[4] Because Plaintiff has not alleged any burden on interstate commerce, much less a burden that is "clearly excessive" under the caselaw, the Court's inquiry need not delve further. Nevertheless, the *Dynamex* standard implicates paramount state interests. *Dynamex*, 4 Cal. 5th at 952.

Dated: September 27, 2018

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