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UNITED STATED DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WESTERN STATES TRUCKING ASSOCIATION Plaintiff, vs. 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. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

JURISDICTION AND VENUE

This Court has jurisdiction of this action under 28 U.S.C. §§1331 and 2201, since this case arises under the Constitution, laws, or treaties of the United States and plaintiff is seeking declaratory and equitable relief. Specifically, this case concerns whether California's Industrial Welfare Commission Wage Order 9 is unconstitutional. As set forth below, the Wage Order is expressly preempted by the Federal Aviation Administration Authorization Act codified at 49 U.S.C. §14501, and as such is invalid under the Supremacy Clause of the United States

Constitution (Article VI, clause 2). Moreover, the Wage Order violates the dormant commerce clause because it discriminates against out of state transportation industries that send trucks into and through California, and places an undue burden on interstate commerce. In addition, it is preempted by the regulations promulgated by the Federal Motor Carrier Safety Administration.

Venue is appropriate in this district pursuant to 28 U.S.C. §1391, because the defendants reside in, are found within, and transact their affairs within this judicial district.

PARTIES

1. Plaintiff Western States Trucking Association ("WSTA") is a 501(c)(6) nonprofit trade association incorporated in 1941. WSTA's over 1,000 member companies and another 5,000 affiliated member motor carriers engage in multiple modes of trucking operations from construction-related to general freight operations. The diversified group of member motor carriers operates in intrastate, interstate, and foreign commerce. WSTA members operate many different types and classes of commercial motor vehicles, including dump trucks, concrete pumpers and mixers, water trucks, port and border drayage trucks, heavy-haul trucks, and class 8 over-the-road tractors. Member companies range in size from one-truck owner-operators to fleets with over 350 trucks. WSTA member employers provide work for approximately 10,000 drivers, mechanics, support personnel and managers. Many WSTA members are sole proprietors – small one-truck independent owner-operators, and the vast majority of WSTA members are motor carriers. Approximately 30% of WSTA members have federal operating authority to operate as interstate carriers. Dozens of members are actually headquartered in states outside of California.

2. Defendant Andre Schoorl is the Acting Director of the Department of Industrial Relations, an executive agency in California that is charged with defending, amending, and republishing California's wage orders. (Cal. Labor Code § 1182.13.)[1]

[1] By statute, the Industrial Welfare Commission ("IWC") is a five-member Commission within the Department of Industrial Relations. (Cal. Labor Code § 70.) The IWC is charged by statute with promulgating wage orders for

3. Defendant Xavier Becerra is the Attorney General of California and is charged with enforcing and defending all state laws. California's IWC wage orders are constitutionally-authorized, quasi-legislative regulations that have the force of law. See Cal. Const., art. XIV, § 1; Cal. Lab. Code, §§ 1173, 1178, 1178.5, 1182, 1185; *Industrial Welfare Com. v. Superior Court*, 27 Cal.3d 690, 700-703 (1980). Because this action challenges the constitutional validity of the wage order, the Attorney General is the proper party to defend this action. See Cal. Govt. Code §12510 et seq.

FACTS

Overview of How the Trucking Industry Operates

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

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

various industries. (Cal. Labor Code § 517.) Although the IWC was defunded by the Legislature effective July 1, 2004, its wage orders remain in effect. *Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 434 (2006).

6. In California general contractors typically obtain all the trucking services they need for a particular project from one independent trucking subcontractor. As a result, if a particular trucking company does not have enough employee drivers and trucks to serve the needs of a particular project, the trucking company will subcontract with other trucking companies to meet the needs of the job.

7. Virtually all trucking companies, from small one-truck owner-operators, to large companies with fleets of hundreds of trucks, are motor carriers. In California, the Department of Motor Vehicles issues a Motor Carrier of Property permit that specifically includes a category for owner-operators. A motor carrier is a person engaged in the transportation of goods or passengers for compensation. 49 C.F.R. 390.5.

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

9. Some brokers are also motor carriers, while other brokers do not own any power units and simply contract with general contractors to arrange trucking services. Trucking companies, both large and small, are referred work by brokers and generally pay a negotiated fee (typically 5% to 8%) to the broker for referring them the work.

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

11. In California, brokers are required to obtain a surety bond of at least $15,000 from an admitted surety insurer. Cal. Veh. Code. sec. 34510.5. In addition, brokers are required to

pay motor carriers for all transportation charges no later than the 25th day of the month following the month in which the transportation services were performed. These requirements ensure that trucking companies that use brokers are paid in a timely fashion, and ensures that brokers are solvent enough to ensure the trucking companies get paid.

12. The brokers refer hauling jobs to the trucking companies, and otherwise do not exercise any supervision over the trucking companies. While on the job site, only the building contractor's personnel direct the truck operators where to deliver a load, and this is done by hand signals. The trucking companies may accept referrals from more than one broker and are free to negotiate any job rate and terms of payment acceptable to both parties. The truck operators generally own their trucks, and arrange licensing, insurance, repairs and maintenance. They are responsible for operating expenses, may subcontract job referrals, are personally liable for spillage, pay Social Security taxes as self-employed persons, and often receive payment based on tonnage, mileage, or per load as opposed to hourly wages.

13. Trucking companies generally have either California or federal operating authority, or both, to operate as motor carriers. Alternatively, some owner-operators may lease their truck and their driving services to another overlying carrier who has operating authority, pursuant to California and federal leasing regulations. In either case, the smaller trucking companies often contract with brokers or other trucking companies on a day-to-day basis to haul materials to, from, and within construction sites.

14. In both the construction trucking and freight trucking industries, demand for equipment fluctuates daily. For example, even though jobs may be bid for 500 loads, it is extremely rare for that job to be performed at a rate of 10 loads a day for 50 straight work days. Rather, the demand for trucks and drivers changes frequently throughout the course of the job.

15. It is common for trucking companies to bid on jobs that exceed the capacity of their fleet and employee drivers. When those bids are successful, they need to engage the services of other trucking companies temporarily to complete that job, but they do not have sufficient ongoing business to permanently keep them as employees. In these situations, it is typical for the trucking company to act as both an independent contractor with respect to the

construction contractor by providing hauling and trucking services to the construction site, and as a broker to subcontract with other trucking companies and independent owner-operators to perform trucking and hauling work on the same construction project.

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

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

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

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

can make them more attractive to other trucking companies that need to temporarily increase their freight hauling capacity, because they can obtain the services of additional drivers and equipment without having to make large capital investments in either skilled operators or expensive equipment.

20. Other independent drivers do not wish to incur the expenses and spend the time necessary to maintain their own trucks and trailers, and prefer instead to lease their trucks and trailers from third parties. These people tend to hire out their services as skilled, reliable drivers while using trucks and trailers that belong to someone else, sometimes including the company hiring them as independent contractor drivers.[2]

21. The business of trucking necessarily involves jobs that vary significantly in frequency, location, duration, and type of cargo. A driver may haul gravel to a construction site on one day for one prime construction contractor, and may haul debris to a dump on the next day for a different contractor. Freight haulers may be needed for short one-day runs at times and at other times may be required to make longer, interstate trips. These different jobs typically require the use of different trailers depending on the type of cargo being hauled.

22. Because the shipment of goods can vary by season, consumer demand, overseas orders, natural disasters, and a multitude of other factors, it is highly unusual for a trucking company to rely solely on employee drivers. Almost all trucking companies contract with other trucking companies to engage the services of additional drivers, trucks and trailers, as their business needs fluctuate. Because of the fluctuation, it would be impossible for trucking companies to hire enough employees, so they could be staff at the level necessary to serve the maximum capacity of their business. Rather, because their business ebbs and flows unexpectedly throughout the year, they need to be able to expand and contract their labor force and fleet equipment as necessary.

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[2] While the lease purchase model is totally permissible under federal and state trucking regulations, it is not a generally practiced business model within construction trucking.

The California Wage Order as Interpreted by the California Supreme Court

23. The IWC has promulgated wage orders for 17 different industries and categories of employees. The wage orders set forth rules applicable to the treatment of employees in their respective industries, including hours of work, overtime, minimum wages, meal periods, and a variety of other provisions. IWC Order No. 9-2001 ("Order No. 9") applies to the transportation industry. The wage order was promulgated in 2001 and has since been periodically amended and republished to reflect changes in the minimum wage. The current version was effective January 1, 2017.

24. In *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) ("*Dynamex*"), the California Supreme Court recently announced a new rule of interpretation for Order No. 9 with respect to classifying workers as either employees (and thus covered by the order) or independent contractors.

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

26. As the foregoing requirements demonstrate, the cost of employment in California is a huge burden. Independent contractors are free to negotiate with service vendors for benefits

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

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

28. *Dynamex* adopted a new "A-B-C test" for determining whether a worker is an employee or independent contractor for purposes of the transportation industry wage order:

> Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply 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.
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> *Dynamex, supra*, 4 Cal.4th at 916-917.

29. In the context of the trucking industry, the "hiring entity" and the "worker" are both independent businesses. The "hiring entity" may be a large construction contractor, a large or mid-size trucking company that contracts with construction companies and occasionally uses non-employee drivers, or a broker that primarily refers motor carriers to businesses that need hauling services. It can even be a lone owner-operator who needs to temporarily employ the services of additional trucks and drivers for a particular job.

30. The new A-B-C test announced in *Dynamex* mandates that the "hiring entity" must prevail on all three prongs, to show that the "worker" is an independent contractor. Failing to prevail on even one prong means that the "worker" will be considered an employee, even though the "worker" is an independent business. In the trucking business, and construction

trucking in particular, both the "hiring entity" and the "worker" are independent trucking companies.

31. The "B" prong of the A-B-C test, which requires that the "worker" performs work that is outside the usual course of the "hiring entity's" business, means that virtually every independent contractor relationship in the trucking industry will be converted into an employer-employee relationship. This is because in all of the various models that predominate in the trucking industry, including those already described, both the "hiring entity" and the "worker" are both engaged in the same business – trucking. Under this new A-B-C test, 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 for failing to follow the wage and hour provisions of Order No. 9.

32. The *Dynamex* decision discarded decades of settled California law by abandoning the old *Borello*[3] standard for determining classification, in favor of the new "A-B-C test" for determining whether a worker is an employee or independent contractor. Under the old test, the wage order was interpreted using the familiar *Borello* test, which involved the principal factor of "whether the person to whom services is rendered has the right to control the manner and means of accomplishing the result desired," as well as a number of other factors including "(1) right to discharge at will, without cause; (2) whether the one performing the services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether in the locality the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) method of payment, whether by the time or by the job; (8) whether or not the work is part of the regular business of the principal; and (9) whether or not the parties believe they are creating the relationship of employer-employee." *Borello*, *supra*, 48 Cal.3d at p. 351. Moreover, it was understood that "the

[3] *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989).

individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." *Id.*

The Impact of Dynamex on the Trucking Industry

33. The trucking industry became familiar with how the *Borello* test was applied and most of the current trucking business models were developed in light of it. The decision in *Dynamex* throws into question the legality of the entire trucking industry in California.

34. Forcing trucking companies to classify all of the independent owner-operators who choose to contract with the business as employees would be cost-prohibitive, inefficient, and would cause them to have to significantly increase their prices to pay for additional staff when there was insufficient work to keep them productive. The companies would also have to significantly alter the services they could provide, because they would not have the ability to be as diverse as they are currently. Rather, their work force and available equipment would be static based on the number, type, and experience of the particular employees they had. They would not be able to easily acquire, on a short-term basis, the skills and experience of drivers necessary for a particular type of job that either their employees or their fleet of equipment may not be suited for. 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.

35. In addition, requiring trucking companies to classify all independent contractors as employees would eliminate the flexibility they currently enjoy to service a wide variety of routes throughout California and throughout the country as part of interstate commerce. With an employee-only model, cost and efficiency pressures would force companies to use only the most standardized routes where they could maximize the volume and productivity of their employees. It would become impractical and cost-prohibitive to service routes that only required occasional shipments.

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

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

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

39. The vast majority of small businesses impacted by *Dynamex* qualify as small, women-owned, minority owned, veteran owned, or disadvantaged businesses under one or more state or federal grant or funding programs. *Dynamex* will effectively eliminate the subcontractor model in the construction trucking industry, and will mandate that all of these small businesses be treated as employees of larger, more established businesses, thereby depriving these business owners of the opportunity to pursue the American dream and grow their own company. The

elimination of the subcontractor model will also make it difficult or impossible for general contractors to comply with the various requirements for using these businesses under existing governmental contracts.

40. In a perverse way, the decision in *Dynamex* will make convert that were intended to give small, minority-owned and women-owned businesses a chance to grow, into tools that force those owners to become employees and deprive them of the opportunity to grow their own business.

41. The recent decision in *Dynamex* has created confusion amongst the California legal community. See, e.g., Peter Tran, The Misclassification of Employees and California's Latest Confusion Regarding Who Is an Employee or an Independent Contractor, 56 Santa Clara L. Rev. 677, 701 (2016). In the immediate wake of the *Dynamex* decision, numerous legal commentators observed that the decision represented a sea change in the industry. For example, it was immediately recognized that "the new 'ABC' standard may place a heavy burden on companies with independent contractors in California. . . . Factor B, in particular, may be troublesome for any entity that uses independent contractors for its main service or product (such as delivery drivers hired by a delivery service company. . . ." 32 No. 22 Westlaw Journal Employment 02.

FIRST CAUSE OF ACTION

(Violation of Supremacy Clause)

42. All preceding paragraphs of this complaint are expressly incorporated herein.

43. The Federal Aviation Administration Authorization Act of 1994 ("FAAAA") is codified at 49 U.S.C. § 14501 et seq.

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

45. The new A-B-C test mandated by the California Supreme Court in *Dynamex* is an interpretation of state law that directly impacts the price, route, and service of the motor carrier

members of WSTA, and is therefore preempted by federal law pursuant to the supremacy clause of Article VI of the United States Constitution. The new interpretation of Order No. 9 mandates an employer/employee relationship between parties engaged in the business of trucking, and eliminates the independent contractor model that has flourished for years. This fundamental change will inevitably result in increased prices charged by motor carriers, and will severely limit the types of services they can provide and the routes they can utilize.

46. Prices will be impacted because it is significantly more expensive to utilize an all-employee model in the trucking industry, as compared to the efficient use of independent contractors when needed on an intermittent basis. It will cost companies significantly more money to train additional drivers, keep them on staff when there is insufficient work to justify their positions, and pay them all of the benefits mandated by California for employees. It will also require companies to make significant capital investment in trucks and trailers so that their fleets are large enough and diverse enough to accommodate the needs of any particular job, even if certain equipment will only be used occasionally.

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

48. Services will be impacted because currently, trucking companies can provide virtually any type and number of trucks, trailers and drivers and equipment needed for a particular job on very short notice. They are able to do this by using an extensive network of independent contractors. Without the ability to use this model, companies will simply have to cease operating the services of certain trucks, trailers, drivers, and equipment because they will not have that available in their own fleet or workforce. It will be cost-prohibitive to acquire every possible type of truck, trailer, and equipment that might possibly be needed, especially those trucks, trailers and equipment that are only utilized occasionally. Moreover, it will be cost-prohibitive and economically infeasible to train employees on how to safely and efficiently

operate equipment that is only rarely used. Thus, companies will scale back their service offerings to only those trucks, trailers, drivers, and equipment for which there is regular demand.

49. At least one federal Court of Appeals has already determined that the A-B-C test violates the FAAAA and thus was preempted. *Schwann v. FedEx Ground Package System, Inc.*, 813 F.3d 429 (2016).

50. The A-B-C test announced in *Dynamex* is preempted by the FAAAA.

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

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

53. Plaintiff and its members will suffer irreparable harm and injury if the illegal interpretation of the wage order is permitted to be enforced, including the loss of their businesses and livelihoods, which in turn will proximately cause some members to be at risk of losing their trucks, homes, cars, and the ability to purchase the basic necessities of life.

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

SECOND CAUSE OF ACTION

(Violation of Commerce Clause)

55. All preceding paragraphs of this complaint are expressly incorporated herein.

56. Article 1, section 8 of the United States Constitution gives to Congress the power to regulate commerce among the several States. The Supreme Court has recognized that this broad grant of authority to Congress may in and of itself prohibit certain state legislation by rendering congressional power exclusive over subjects that are in their nature national, even in the absence of a relevant federal statute.

57. The trucking industry is, by its very nature, a subject of national concern. Trucking companies send trucks – and drivers – on routes that may cross through several states to deliver vital goods in a timely and cost-effective manner. It would be impractical and likely impossible for trucking companies to comply with a patchwork of different state laws applicable to the transportation industry.

58. Many California trucking companies are by law engaged in interstate commerce even though they may never operate outside the State of California. For example, virtually all trucking at the ports of Oakland, Long Beach and Los Angeles is considered interstate trucking because it involves goods that are in transit from around the world (i.e. a location outside of California) to a location either inside or outside of California. 18 U.S.C. § 921. Many trucking businesses haul freight from the ports to other distribution centers within California, and thus never leave the State, but are nevertheless deemed to be engaged in interstate commerce, and are required to have federal operating authority.

59. Even in cases where a particular route is purely intrastate, the trucking company likely has other routes as part of its regular business that are interstate. Thus, in the course of a given month or year, an individual driver – whether that driver is an independent owner-operator or an employee – is likely to drive some purely intrastate routes and some interstate routes. It is imperative that the laws applicable to drivers do not change day to day based on the type of route they are driving for that particular load of cargo. Any other rule would introduce incredible inefficiencies into the trucking industry, thereby increasing the prices that trucking companies would have to charge and severely impacting the services they could provide.

60. As just one example, a small independent owner-operator trucking business based in Sacramento, California may occasionally contract with other trucking businesses to work on trucking jobs located purely in California. That same independent owner-operator may occasionally contract with other businesses to work on trucking jobs that require driving to Nevada to perform work there. Still other jobs may involve hauling cargo back and forth between the two states. In all cases, the independent owner-operator is a small trucking business contracting with other trucking businesses to provide services. Under the *Dynamex* decision, this

independent owner-operator would be classified as an independent contractor while working in Nevada, but when the driver crossed the state line into California, he or she would suddenly be deemed an employee of the trucking company that hired his or her small business. The trucking business with whom the independent owner-operator contracted would suddenly have to start withholding payroll taxes for the period of time that the owner-operator was in California, would have to suddenly start providing specified meal and rest breaks, and would have to take on all the additional burdens of being an employer. Then, when the owner-operator returned to Nevada, the owner-operator would, just as suddenly, revert to an independent contractor.

61. California's recent interpretation of the wage order in *Dynamex* means that independent contractor drivers will be instantly transformed – as a matter of law – into employees upon crossing into and through California. Because of the costs, paperwork, and logistics associated with treating truck drivers as employees as opposed to what they actually are – small businesses – trucking companies will be unable to efficiently carry out their trucking operations that go into and through California. They will have to employ strategies that, until the decision in *Dynamex*, were never necessary or contemplated.

62. For example, a trucking company that typically contracts with other trucking companies to haul loads into California may now have to hire as employees a whole cadre of drivers to pick up loads at the border and allow the independent contractor trucking companies. to turn around and haul other loads outside of California. This will be extremely expensive, as it will require keeping a staff of employee drivers on call at all the entry points to California, even though the precise arrival times of the out-of-state trucks will never be known with sufficient specificity to rationally schedule the on-call employee drivers.

63. Alternatively, the trucking companies may have to instead institute a whole new internal bureaucracy to accurately monitor the dates and times at which the small trucking companies. with whom they contract cross into California, modify their payroll system for the period of time that they are in California, and adjust their delivery schedules to allow the newly classified employee drivers to take state-mandated meal and rest breaks.

64. California's interpretation of the wage order on its face discriminates against out-of-state and interstate trucking companies. It mandates that these companies undertake expensive and inefficient measures in order to operate in California, while companies that operate purely intrastate in California can continue operating with employee drivers in a much more consistent, efficient and inexpensive manner. In this regard, it is key to understand that the costs and inefficiencies mandated on out-of-state and interstate trucking companies by the *Dynamex* decision is twofold. First, there are additional costs directly associated with converting an independent contractor to an employee, including, but not limited to, employer payroll withholding obligations, workers' compensation insurance, state disability insurance, etc. But second, and more importantly, is the requirement of alternating between the two categories of workers: when driving in California, a driver will have to be considered an employee; when driving almost anywhere else in the country, they can properly be considered an independent contractor. As discussed above, implementing measures to transition between these two different statuses, often mid-trip, will be extremely costly and inefficient.

65. The benefit to the State of California of the new interpretation of the wage order is difficult to discern. It arguably allows courts and administrative bodies charged with enforcing the wage order to apply a more mechanical three-prong test without having to focus on the multitude of fact-specific circumstances that previously informed the question of whether one was an employee or an independent contractor. But that ease of administration is of little value in the context of the transportation industry, which has adapted to the fact-specific nature of the old *Borello* test and is already familiar with commercial arrangements which are more likely to be characterized as employment relationships. As a general matter, mere ease of administering a state law is not an interest that can justify burdening out-of-state commercial actors. The burden imposed on interstate trucking companies is clearly excessive in relation to whatever local benefits may inure to the State of California under the new rule.

66. The wage order is unconstitutional in light of the dormant or negative Commerce Clause.

THIRD CAUSE OF ACTION

(Violation of Supremacy Clause)

67. All preceding paragraphs of this complaint are expressly incorporated herein.

68. The Federal Motor Carrier Safety Administration ("FMCSA") has promulgated hundreds of regulations governing motor carriers and the trucking industry. These are commonly known as the Federal Motor Carrier Safety Regulations or "FMCSRs." These regulations are codified in title 49, parts 300 to 399, and encompass dozens of subparts, and hundreds of individual regulations which exceed more than 600 pages in printed form. See https://www.gpo.gov/fdsys/pkg/CFR-2011-title49-vol5/pdf/CFR-2011-title49-vol5.pdf

69. The FMCSRs cover such varied subjects as vehicle inspections, exhaust systems, tires, state participation in safety programs eligible for federal grant funding, routing procedures, brokering services, leasing of vehicles, insurance requirements, hours of service, and scores of other topics. The FMCSRs 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.

70. For example, part 376 of Title 49 governs the leasing and interchange of vehicles between motor carriers registered with the Secretary of Transportation. 49 C.F.R. § 376.2(e) authorizes motor carriers to lease equipment to other motor carriers "with or without driver." The regulations go on to specify that motor carriers "may perform authorized transportation in equipment it does not own only under" very strict conditions. 49 C.F.R. § 376.11. There must be a written lease, for a specified duration, among other requirements. Most notably, 49 C.F.R. § 376.12(c)(4) provides that "[a]n independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements." Thus, the federal regulations specify conditions under which an independent contractor relationship may exist when equipment with a driver is leased to another motor carrier.

71. However, under the rule announced in *Dynamex*, there could *never* be an independent contractor relationship in this context, because the two motor carrier parties to the

lease are, by definition, engaged in the same type of business. As a result, they would fail the "B" prong of the newly announced A-B-C test, and the relationship would be classified as an employer-employee relationship. Thus, California's interpretation of its wage order is in direct conflict with the federal regulations, and is therefore preempted under the Supremacy Clause.

72. As another example, 49 C.F.R. § 376.12(j) specifies that the authorized carrier leasing the equipment (with or without driver) is responsible for obtaining specified amounts of liability insurance. If an independent contractor driver leased to one motor carrier agrees to haul for another motor carrier, which is a very common arrangement for WSTA members, that independent contractor would be deemed an employee of the second motor carrier under the rule in *Dynamex*. However, under the federal regulations, the "employee" would be responsible for obtaining insurance for the "employer's" equipment, which would contravene well-established employment law regarding the obligations of employees and employers. This is yet another example of how the federal regulations are in direct conflict with California law, and demonstrates that the interpretation of the wage order announced in *Dynamex* is preempted by federal law.

73. As another example, 49 C.F.R. § 376.12(k) provides that the lessor and the authorized carrier may include in the mandatory written lease agreement provisions for escrow funds to be paid by the lessor to the authorized carrier (or a third party) to pay for specific cost items that arise in connection with the transportation transaction. However, under California law, employers are by law required to reimburse their employees for all necessary and reasonable expenses incurred in connection with their duties. Because the regulations contemplate an escrow fund as the mechanism to pay for items that, under California law, would be considered reimbursable employee expenses, California law that deems the authorized carriers to be employees is in conflict with the federal regulations and is therefore preempted.

74. The FMCSRs prohibit States from implementing any changes to a law or regulation which makes that or any other law or regulation incompatible with a provision of the Federal Motor Carrier Safety Regulations. 49 C.F.R. §355.25(b). In order to be deemed compatible under federal law, State laws and regulations applicable to interstate commerce and

to intrastate movement of hazardous materials must be identical to the FMCSRs or have the same effect as the FMCSRs, and State laws applicable to intrastate commerce must be either identical to, or have the same effect as, the FMCSRs. 49 C.F.R. §355.5. Application of the A-B-C test announced in *Dynamex* will be incompatible with numerous provisions of the FMCSRs.

75. Numerous other provisions of the FMCSRs impose obligations or conditions on leasing arrangements or other aspects of the transportation of goods that are inconsistent with classification of the parties as employers/employees. The federal regulations were promulgated at a point in time when the governing test in California for classifying workers as employees or independent contractors was the now defunct *Borello* standard. The regulations may have been able to coexist with the prior interpretation of California's wage order, but in light of the California Supreme Court's abandonment of the *Borello* standard and adoption of an entirely new A-B-C test, the federal regulations as a whole occupy the field and are inconsistent with and preempt California's interpretation of the wage order.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff WSTA respectfully prays that:

1. This Court issue a declaration that the California Supreme Court's interpretation of the wage order in *Dynamex* is preempted by federal law;

2. This Court issue a declaration that the California Supreme Court's interpretation of the wage order in *Dynamex* violates the commerce clause and is therefore unconstitutional;

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

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

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

ELLISON, WHALEN & BLACKBURN

Dated: July 19, 2018

/s/ Patrick J. Whalen

PATRICK J. WHALEN

Attorneys for Plaintiff
WESTERN STATES TRUCKING ASSOCIATION