

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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.

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

MEMORANDUM AND ORDER

Through the present action, Plaintiff Western States Trucking Association (“Western States”) challenges a recent California Supreme Court decision, Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 (2018) on grounds that the so-called “ABC test” adopted by Dynamex for determining whether a worker should be deemed an employee or an independent contractor is preempted both by the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501 et seq. (“FAAAA”) and federal safety regulations, and further violates the dormant Commerce Clause of the United States Constitution. Western States has sued Defendant Andre Schoorl, as the individual in charge of the California Department of Industrial Relations, who it identifies as the agency in charge of implementing the test adopted by Dynamex. Western States

1 has also named California Attorney General Xavier Becerra as a Defendant on grounds
2 that Becerra is responsible for enforcing the test.

3 Now before the Court is Defendant Becerra's Motion to Dismiss (ECF No. 6), as
4 joined by Defendant School (ECF No. 11) (hereinafter "Defendants" unless otherwise
5 specified). Defendants first claim that Western States lacks standing to assert its claims
6 to enjoin application of the ABC test, and that accordingly jurisdiction is lacking under
7 Federal Rule of Procedure 12(b)(1). Defendants then assert that because Western
8 States cannot succeed on its preemption arguments under the FAAAA, applicable
9 federal motor vehicle safety regulations, or the so-called Dormant Commerce Clause of
10 the United States Constitution, Western States' lawsuit fails to state a claim upon which
11 relief can be granted under Rule 12(b)(6) in any event. As set forth below, while the
12 Court does find that Western States has standing to pursue its claim, Defendants' Motion
13 is nonetheless GRANTED on its merits.

14 **BACKGROUND**¹

15
16
17 Western States is a nonprofit trade association with over 1,000 member
18 companies and 5,000 affiliated member motor carriers. Western States' member
19 carriers operate in interstate, intrastate, and foreign commerce, and range in size from
20 single truck owner-operators, to fleets with over 350 trucks. According to Western
21 States, given fluctuating demand for trucking services, companies have hired smaller
22 carriers on a temporary basis for decades, and those smaller carriers frequently hire
23 their services out to contractors and other trucking companies as independent
24 contractors. Thousands of non-employee independent contractors are used in the
25 industry as a result, including owner-operators who both own and drive their own
26 ///

27 _____
28 ¹ The allegations contained in this section are drawn, sometimes verbatim, from Western States'
Complaint. ECF No. 1.

1 equipment. In addition, the trucking industry also includes brokerage services that
2 arrange for such independent contractors to provide transportation services.

3 In its 2018 Dynamex decision, the California Supreme Court articulated a new
4 standard, the so-called ABC test, in order to distinguish between employees and
5 independent contractors for purposes of California's wage orders. Wage orders are
6 constitutionally-authorized, quasi-legislative regulations issued by the California
7 Industrial Welfare Commission to provide for both minimum wages and the general
8 welfare of employees. Dynamex, 4 Cal. 5th at 914, n.3. The California Department of
9 Industrial Relations, the agency headed by Defendant School, is responsible for
10 enforcing the state's labor laws, including the Commission's wage orders. Huntington
11 Mem'l Hosp. v. Superior Court, 131 Cal. App. 4th 893, 902 (2005).

12 Factually, Dynamex involved a dispute between Dynamex and two individual
13 delivery drivers, who alleged that they were misclassified as independent contractors
14 rather than employees in violation of both Wage Order No. 9, the applicable state wage
15 order governing the transportation industry, and various provisions of the California
16 Labor Code. See Dynamex, 4 Cal. 5th at 914. According to the drivers, Dynamex's
17 policy under which all drivers were considered independent contractors rather than
18 employees violated the law.

19 In resolving the issue, the Court looked to the fact that for purposes of California
20 wage orders, the term "employ" means not only to be employed by an employer or
21 subject to the direction of one who "exercises control over the wages, hours, or working
22 conditions of a person," but also to "engage, suffer, or permit to work." Id. at 926-927.²
23 It noted that its previous decisions, most notably the case of S.G. Borello & Sons v.
24 Dept. of Ind. Relations, 48 Cal. 3d 341 (1989) focused on the intended scope and
25 purpose of particular statutory provisions that considered the employer's control over the
26 details of work performed (the so-called "statutory purpose" standard, see Dynamex,

27 ² Significantly, while for purposes of Wage Order No. 9 these definitions appear in the California
28 Code of Regulations, tit. 8, § 11090(2), the same definitions "are also included in each of the other 15
wage orders governing other industries in California." Id. at 926, fn.9.

1 4 Cal. 5th at 934-35). Because the wage orders include an alternate definition of employ
2 as meaning to “engage, suffer or permit to work”, however, Dynamex reasoned that
3 definition also had to be considered in assessing the scope of employment under the
4 wage orders. Finding the term to be “exceptionally broad,” Dynamex found that the
5 suffer or permit to work standard had to be “interpreted and applied broadly to include
6 within the covered ‘employee’ category all individual workers” reasonably viewed as
7 working within the hiring entity’s business. Id. at 952-953, citing Martinez v. Combs,
8 49 Cal. 4th 35, 69 (2010). That made for a more wide-range and inclusive definition of
9 employment than had previously been applied. Accordingly, for purposes of California
10 wage orders, and given the protective history and purpose of the suffer or permit to work
11 standard contained therein, Dynamex rejected a multifactor, totality-of-the-circumstances
12 standard for distinguishing between employees and independent contractors (which it
13 found difficult to easily and consistently apply, particularly in advance). Id. at 954-56.
14 Instead, Dynamex held that, for purposes of California wage orders, the burden should
15 be placed on the hiring entity to establish that the worker was an independent contractor
16 under the three-part ABC test. That test requires that each of the following factors be
17 established:

18 (A) that the worker is free from the control and direction of the
19 hiring entity in connection with the performance of the work,
20 both under the contract for the performance of the work and in
21 fact; and (B) that the worker performs work that is outside the
22 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.

23 Id. at 957.

24 According to Western States, this test fundamentally “discarded decades of
25 settled California law” by discarding previous precedent for assessing whether an
26 individual is deemed an employee or an independent contractor. Compl., ¶ 32.

27 Western States avers that because trucking business models were developed in light of
28 that prior precedent, as set forth in Borello, the implications of Dynamex for determining

1 employee status “throws into question the legality of the entire trucking industry in
2 California.” Id. at ¶ 33. By requiring that independent contractors not be engaged in the
3 same work as the hiring entity, Western States claims that Dynamex upends its
4 members’ flexibility to hire small, independent carriers, and especially owner-operators,
5 for transportation needs. As such, according to Western States, Dynamex limits the
6 ability of its members to easily obtain drivers on a short-term basis without making those
7 drivers employees. Moreover, as a result of the additional expense attendant with
8 conferring employee status, Western States opines that its members could be forced to
9 raise prices, reduce services, and/or limit available routes.

10 As indicated above, Western States’ Complaint makes three primary claims.
11 First, it contends that the ABC test adopted by Dynamex directly impacts the price,
12 routes, and services of its motor carrier members, and is therefore preempted by federal
13 law in the form of the FAAAA. Second, Western States claims that the ABC test “on its
14 face discriminates against out-of-state and interstate trucking companies,” thereby
15 violating the dormant Commerce Clause of the United States Constitution. Compl. at
16 ¶¶ 64-66. Third and finally, Western States maintains that the ABC test is preempted in
17 any event for the Federal Motor Carrier Safety Regulations as enacted at 49 C.F.R.
18 §§ 300-399. Id. at ¶¶ 68-69. Western States’ lawsuit seeks both declaratory and
19 injunctive relief prohibiting enforcement of the employment standard announced by
20 Dynamex.

21 In now moving to dismiss this lawsuit, Defendants claim as a preliminary matter
22 that Western States lacks standing to pursue this lawsuit because, in the lack of a
23 concrete legal dispute, Western States in essence seeks an advisory opinion not ripe for
24 judicial adjudication. The International Brotherhood of Teamsters (“IBT”), whose
25 intervention request in this matter was granted by Order filed November 13, 2018 (ECF
26 No. 27) submitted its own brief in support of Defendants’ Motion (ECF No. 6), and that
27 brief posits another standing argument. According to IBT, the allegations of Western
28 States’ Complaint are insufficient to confer associational standing since there has been

1 no showing that any Western States' member has suffered or will suffer harm in the
2 aftermath of the Dynamex decision.

3 On a substantive basis, both Defendants and IBT argue that the FAAAA does not
4 preempt Dynamex's interpretation of state law, since its criteria for establishing a viable
5 independent contractor relationship has "no more than [an] indirect remote and tenuous"
6 impact on prices, routes and services subject to FAAAA oversight, and consequently is
7 not preempted. See Californians for Safe and Competitive Dump Truck Transp. v.
8 Mendonca, 152 F.3d 1184, 1189 (9th Cir. 1998). Defendants also point out that under
9 another Ninth Circuit decision, Dilts v. Penske Logistics, LLC, 769 F.3d 637 (9th Cir.
10 2014), the Court further noted that in enacting the FAAAA, Congress did not "intend to
11 preempt generally applicable state transportation, safety, welfare, or business rules that
12 do not otherwise regulate prices, routes, or services." Id. at 644.

13 With regard to Western States' claim that regulations promulgated by the Federal
14 Motor Carrier Safety Administration ("FMCSA") also serve to preempt Dynamex,
15 Defendants and IBT again claim that under the circumstances of this matter
16 supplemental state regulation is proper, particularly since no conflict between the federal
17 regulations and Dynamex is present. Finally, with regard to Western States' claim that
18 the ABC test adopted by Dynamex violates the Dormant Commerce Clause, Defendants
19 and IBT maintain that any burden imposed on interstate commerce by the test is not
20 excessive in relation to state interests in properly classifying employees.

21 22 STANDARD

23 24 A. Motion to Dismiss under Rule 12(b)(1)

25 Federal courts are courts of limited jurisdiction, and are presumptively without
26 jurisdiction over civil actions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,
27 377 (1994). The burden of establishing the contrary rests upon the party asserting
28 jurisdiction. Id. Because subject matter jurisdiction involves a court's power to hear a

1 case, it can never be forfeited or waived. United States v. Cotton, 535 U.S. 625, 630
2 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at
3 any point during the litigation, through a motion to dismiss pursuant to Federal Rule of
4 Civil Procedure 12(b)(1).³ Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); see also
5 Int'l Union of Operating Eng'rs v. Cnty. of Plumas, 559 F.3d 1041, 1043-44 (9th Cir.
6 2009). Lack of subject matter jurisdiction may also be raised by the district court sua
7 sponte. Ruhrigas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999). Indeed, “courts
8 have an independent obligation to determine whether subject matter jurisdiction exists,
9 even in the absence of a challenge from any party.” Id.; see Fed. R. Civ. P. 12(h)(3)
10 (requiring the court to dismiss the action if subject matter jurisdiction is lacking).

11 There are two types of motions to dismiss for lack of subject matter jurisdiction: a
12 facial attack, and a factual attack. Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.,
13 594 F.2d 730, 733 (9th Cir. 1979). Thus, a party may either make an attack on the
14 allegations of jurisdiction contained in the nonmoving party's complaint, or may
15 challenge the existence of subject matter jurisdiction in fact, despite the formal
16 sufficiency of the pleadings. Id.

17 When a party makes a facial attack on a complaint, the attack is unaccompanied
18 by supporting evidence, and it challenges jurisdiction based solely on the pleadings.
19 Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the motion to
20 dismiss constitutes a facial attack, the Court must consider the factual allegations of the
21 complaint to be true, and determine whether they establish subject matter jurisdiction.
22 Savage v. Glendale High Union Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir.
23 2003). In the case of a facial attack, the motion to dismiss is granted only if the
24 nonmoving party fails to allege an element necessary for subject matter jurisdiction. Id.
25 However, in the case of a factual attack, district courts “may review evidence beyond the
26 ///

27 _____
28 ³ All further references to “Rule” or “Rules” are to the Federal Rules of Civil Procedure unless otherwise noted.

1 complaint without converting the motion to dismiss into a motion for summary judgment.”
2 Safe Air for Everyone, 373 F.3d at 1039.

3 In the case of a factual attack, “no presumptive truthfulness attaches to plaintiff’s
4 allegations.” Thornill, 594 F.2d at 733 (internal citation omitted). The party opposing the
5 motion has the burden of proving that subject matter jurisdiction does exist, and must
6 present any necessary evidence to satisfy this burden. St. Clair v. City of Chico,
7 880 F.2d 199, 201 (9th Cir. 1989). If the plaintiff’s allegations of jurisdictional facts are
8 challenged by the adversary in the appropriate manner, the plaintiff cannot rest on the
9 mere assertion that factual issues may exist. Trentacosta v. Frontier Pac. Aircraft Ind.,
10 Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting Exch. Nat’l Bank of Chi. v. Touche
11 Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976)). Furthermore, the district court may
12 review any evidence necessary, including affidavits and testimony, in order to determine
13 whether subject matter jurisdiction exists. McCarthy v. United States, 850 F.2d 558, 560
14 (9th Cir. 1988); Thornhill, 594 F.2d at 733. If the nonmoving party fails to meet its
15 burden and the court determines that it lacks subject matter jurisdiction, the court must
16 dismiss the action. Fed. R. Civ. P. 12(h)(3).

17 A court granting a motion to dismiss a complaint must then decide whether to
18 grant leave to amend. Leave to amend should be “freely given” where there is no
19 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
20 to the opposing party by virtue of allowance of the amendment, [or] futility of the
21 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
22 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
23 be considered when deciding whether to grant leave to amend). Not all of these factors
24 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
25 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
26 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
27 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,
28 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,

1 1013 (9th Cir. 2005)); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.
2 1989) (“Leave need not be granted where the amendment of the complaint . . .
3 constitutes an exercise in futility . . .”).

4 **B. Motion to Dismiss under Rule 12(b)(6)**

5 On a motion to dismiss for failure to state a claim under Federal Rule of Civil
6 Procedure 12(b)(6), all allegations of material fact must be accepted as true and
7 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.
8 Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) “requires only ‘a short and plain
9 statement of the claim showing that the pleader is entitled to relief’ in order to ‘give the
10 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell
11 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,
12 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require
13 detailed factual allegations. However, “a plaintiff’s obligation to provide the grounds of
14 his entitlement to relief requires more than labels and conclusions, and a formulaic
15 recitation of the elements of a cause of action will not do.” Id. (internal citations and
16 quotations omitted). A court is not required to accept as true a “legal conclusion
17 couched as a factual allegation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
18 Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a right to relief
19 above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright &
20 Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the
21 pleading must contain something more than “a statement of facts that merely creates a
22 suspicion [of] a legally cognizable right of action”).

23 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
24 assertion, of entitlement to relief.” Twombly, 550 U.S. at 555 n.3 (internal citations and
25 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard
26 to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of
27 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing Wright &
28 Miller, supra, at 94, 95). A pleading must contain “only enough facts to state a claim to

1 relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . . have not nudged their
2 claims across the line from conceivable to plausible, their complaint must be dismissed.”
3 Id. However, “[a] well-pleaded complaint may proceed even if it strikes a savvy judge
4 that actual proof of those facts is improbable, and ‘that a recovery is very remote and
5 unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

6 A court granting a motion to dismiss a complaint must then decide whether to
7 grant leave to amend. Leave to amend should be “freely given” where there is no
8 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
9 to the opposing party by virtue of allowance of the amendment, [or] futility of the
10 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
11 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
12 be considered when deciding whether to grant leave to amend). Not all of these factors
13 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
14 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
15 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
16 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,
17 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,
18 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.
19 1989) (“Leave need not be granted where the amendment of the complaint . . .
20 constitutes an exercise in futility”)).

21 22 ANALYSIS

23 24 A. Standing

25 1. Concrete Legal Dispute

26 As Defendants point out, the Declaratory Judgment Act requires, as a prerequisite
27 for litigating parties’ rights, that an “actual controversy” be present. 28 U.S.C. § 2201(a).
28 In order to satisfy this fundamental standing requirement, Western States must show

1 that its dispute is “definite and concrete, touching the legal relations of parties having
2 adverse legal interests, and that it be real and substantial and admit of specific relief
3 through a decree of a conclusive character, as distinguished from an opinion advising
4 what the law would be upon a hypothetical state of facts.” MedImmune Inc. v.
5 Genentech, Inc., 549 U.S. 118, 127 (2007).

6 According to Defendants, there is no concrete legal dispute here that confers
7 standing on Western States to seek legal redress. To the contrary, Defendants submit
8 that Western States simply seeks an advisory opinion as to whether potential application
9 of the ABC test adopted by Dynamex could violate its members’ rights under federal law.
10 While Defendants concede that a “genuine threat of imminent prosecution” can meet the
11 case or controversy requirement, they maintain that this matter lacks any allegation of
12 threatened enforcement at all. See Thomas v. Anchorage Equal Rights Com’n, 220 F.3d
13 1134, 1139 (9th Cir. 2000). IBT, for its part, contends that Western States has failed to
14 identify even one member who has any “concrete plan” to not comply with Wage Order
15 No. 9 as construed by Dynamex, let alone whether there has been any specific warning
16 or threat to initiate proceedings to demonstrate that Dynamex will be imminently
17 enforced against that member. As such, both Defendants and IBT argue that this matter
18 should be dismissed for lack of subject matter jurisdiction given the lack of any justiciable
19 controversy.

20 Western States takes issue with these contentions. As alleged in its Complaint, it
21 has over 1,000 member companies and another 5,000 affiliated member carriers who
22 provide work for some 10,000 drivers, mechanics, support personnel and managers.
23 Compl, ¶ 1. In addition to claiming that any of those workers could initiate a
24 misclassification claim at any point, Western States goes on to allege that the probability
25 of such claims goes beyond mere speculation. It points out that in just one of
26 California’s 58 counties, at least seven class action lawsuits expressly based on
27 Dynamex were filed within the first three months following issuance of the Dynamex
28 decision. Pl.’s Opp., 4:27-5:1. Western States maintains that this flurry of complaints

1 shows that the threat of legal liability is quite real. Moreover, and in any event, Western
2 States goes on to claim that the circumstances of this matter show that its members
3 “have a concrete interest in knowing whether they need to dramatically change their
4 business models in order to insulate themselves from liability” in the wake of Dynamex,
5 particularly since they routinely use independent subcontractors as subhauliers. Id. at
6 6:12-22. According to Western States, to the extent it identifies a conflict between state
7 and federal regulations (here the California Supreme Court’s holding in Dynamex versus
8 the strictures of the FAAAA and Federal Motor Carrier Safety Regulations) that alone
9 can create a justiciable controversy. See, e.g., First Fed. Sav. and Loan Ass’n of
10 Boston v. Greenwald, 591 F.2d 417, 423 (1st Cir. 1979) (discussing cases which provide
11 that state and federal regulations subjecting parties to conflicting requirements can
12 present a sufficient controversy).

13 The Court finds Western States’ position to be persuasive. It has shown that
14 application of the Dynamex ABC test not only fundamentally affects its current business
15 model in how independent contractors are characterized, but also has already spawned
16 litigation given the purported sea change that Dynamex represents in terms of those
17 relationships. A sufficiently concrete controversy has been demonstrated to confer
18 jurisdiction.

19 **2. Associational Standing**

20 As indicated above, in addition to supporting Defendants’ claim that Western
21 States has failed to show any real legal controversy, the IBT goes one step further in
22 also arguing that no associational standing is present. According to IBT, an association
23 like Western States has standing to represent its members’ interests only when the
24 operative complaint “make[s] specific allegations establishing that at least one identified
25 member has suffered or would suffer harm.” Summers v. Earth Island Inst., 555 U.S.
26 488, 498 (2009). Similar to the case and controversy addressed above, mere
27 speculation does not suffice; instead, an organization must “identify members who have
28 suffered the requisite harm” to establish standing. Id. at 499. IBT posits that because

1 Western States has failed to identify even one such member, its complaint must be
2 dismissed.

3 Western States claims that the IBT's arguments go too far. They maintain that
4 associational standing is present upon allegations that "its members, or any one of them,
5 are suffering immediate or threatened injury as a result of the challenged action of the
6 sort that would make out a justiciable case had the members themselves brought suit."
7 Warth v. Seldin, 422 U.S. 490, 511 (1975). They point to the requirements of
8 associational standing as follows:

9 [A]n association has standing to bring suit on behalf of its
10 members when: (a) its members would otherwise have
11 standing to sue in their own right; (b) the interests it seeks to
12 protect are germane to the organization's purpose; and (c)
neither the claim asserted nor the relief requested requires the
participation of individual members in the lawsuit.

13 Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

14 Here, given Western States' claim that virtually all of its members use
15 independent contractor trucking companies to handle dramatically fluctuating workloads,
16 and have a concrete interest in knowing whether their employee classification must be
17 fundamentally changed post-Dynamex, the Court believes that associational standing is
18 also present.

19 Summers is distinguishable from the present matter inasmuch as in that case, it
20 appears clear that the only dispute involving a concrete timber salvage project had
21 settled, with "no other project before the court in which respondents were [even]
22 threatened with injury in fact." Summers, 555 U.S. at 491-92. Under those facts, the
23 Summers court observed that "[w]e know of no precedent for the proposition that when a
24 plaintiff has sued to challenge the lawfulness of certain action or threatened action but
25 has settled that suit, he retains standing to challenge the basis for that action." Id. at 494.
26 Here, on the other hand, Western States avers that the challenge facing its members in
27 the wake of Dynamex remains very much alive. Moreover, Ninth Circuit cases decided
28 after Summers have recognized that the case does not extend as far as IBT would

1 advance. As the court in National Council of La Raza v. Cegavske, 800 F.3d 1032, 1041
2 (9th Cir. 2015) recognized:

3 We are not convinced that Summers, an environmental case
4 brought under the National Environmental Policy Act, stands
5 for the proposition that an injured member of an organization
6 must always be specifically identified in order to establish
7 Article III standing for the organization.

8 Importantly for purposes of the present matter, the Ninth Circuit went on to find:

9 Where it is relatively clear, rather than merely speculative, that
10 one or more members have been or will be adversely affected
11 by a defendant's action, and where the defendant need not
12 know the identity of a particular member to understand and
13 respond to an organizations claim of injury, we see no purpose
14 to be served by requiring an organization to identify by name
15 the member or members injured.

16 Id.

17 As in Cegavske, here it appears virtually uncontroverted that Western
18 States' members will be impacted by the ABC test by either fundamentally changing its
19 use of independent contract companies and owner-operators in favor of employee
20 drivers, or face liability for doing so. IBT has failed to show the need for identifying any
21 particular member in order to address the predominantly legal claims asserted by
22 Western States, and therefore its associational standing argument fails.

23 Having determined that the Court has jurisdiction to entertain this matter, the
24 Court now turns to the substantive issues raised by Western States, as well as
25 Defendants' claims that those claims necessarily fail and should accordingly be
26 dismissed under Rule 12(b)(6).

27 **B. FAAAA Preemption**

28 According to Western States, the FAAAA preempts the ABC test adopted by the
California Supreme Court in Dynamex to determine who qualifies as an employee for
purposes of California's wage orders. The preemption clause of the FAAAA states in
pertinent part as follows:

///

///

1 General Rule. Except as provided in paragraphs (2) and (3),
2 a State [or] political subdivision of a State. . . may not enact or
3 enforce a law, regulation, or other provision having the force
4 and effect of law related to a price, route or service of any
5 motor carrier. . . with regard to the transportation of property.

6 49 U.S.C. § 14501(c)(2). In interpreting whether a state rule “relates to” a motor carrier’s
7 price, route or service, this preemption provision should be “interpreted quite broadly.”
8 Independent Towers of Washington v. Washington, 350 F.3d 925, 930 (9th Cir. 2003).
9 Nonetheless, this “does not mean that the sky is the limit”. California Trucking Ass’n v.
10 Su, 903 F.3d 953, 960 (9th Cir. 2018). Preemption does not occur when the law is a
11 “generally applicable background regulation in an area of traditional state power that has
12 no significant impact on a carrier’s prices, routes or services.” Id. at 961; see also Dilts,
13 769 F.3d at 644.

14 In assessing whether the FAAAA preempts state law, the key question is
15 congressional intent. Wyeth v. Levine, 555 U.S. 555, 565 (2009). If a federal statute
16 contains an express preemption clause like that enumerated above for the FAAAA,
17 federal courts must ascertain the substance and scope of that clause. Altria Group,
18 Inc. v. Good, 555 U.S. 70, 76 (2008).

19 In enacting the FAAAA, Congress resolved to displace certain aspects of state
20 regulatory processes that “impeded the free flow of trade, traffic and transportation of
21 interstate commerce.” Dan’s City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 263 (2013).
22 In so doing, Congress specifically targeted “a State’s direct substitution of its own
23 governmental commands for competitive market forces in determining (to a significant
24 degree) the services that motor carriers will provide.” Id. Consequently, as the
25 California Supreme Court has noted, “the FAAAA was intended to prevent state
26 regulatory practices including ‘entry controls, tariff filing and price regulation, and
27 regulation of types of commodities carried.” People ex rel. Harris v. Pac Anchor Transp.,
28 Inc., 59 Cal. 4th 772, 779-80 (2014) (citing legislative history).

 The FAAAA’s preemption clause has already been interpreted by the Supreme
Court as preempting state laws that “aim directly at the carriage of goods” or have a

1 “significant impact’ on carrier rates, routes or services, while at the same time not
2 disturbing laws with only a “tenuous, remote or peripheral” connection to rates, routes, or
3 services. Rowe v. N.H. Motor Transp. Ass’n, 552 U.S. 364, 375 (2008) (quoting
4 Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992) (emphasis in original).

5 In moving to dismiss Western State’s FAAAA preemption claim, both Defendants
6 and IBT argue that because California Wage Order No 9’s substantive requirements
7 have only a tenuous, remote and peripheral relationship to motor carriers’ rates, routes,
8 or services, and consequently lack any significant impact on said rates, routes, or
9 services, its provisions as interpreted by Dynamex are accordingly not preempted. The
10 Court agrees.

11 As indicated above, Wage Order No. 9 is the applicable wage order providing how
12 persons employed in the transportation industry shall be paid. The definition of
13 “employ,” as requiring application of the ABC test pursuant to Dynamex, is not limited to
14 Wage Order No. 9. Instead, that definition is also “included in the definitions set forth in
15 each of the other 15 wage orders governing other industries in California.” Dynamex,
16 4 Cal. 5th at 926, n.9. Consequently, while Wage Order No. 9 may specifically relate to
17 the transportation industry, the rationale of Dynamex, which applies to all California
18 wage orders in its application of the ABC test, does not. Consequently, Western States’
19 attempt to distance itself from caselaw generally applicable to labor regulations, on
20 grounds that Dynamex specifically targets the transportation industry, fails.

21 In Californians for a Safe & Competitive Dump Truck Transp. v. Mendonca,
22 152 F.3d 1184 (9th Cir. 1998), the Ninth Circuit rejected a similar challenge to
23 California’s Prevailing Wage Law to the extent it prescribed minimum rates of
24 compensation for workers in the transportation industry. Similar to the circumstances
25 confronted in this matter, the parties in Mendonca argued that since complying with the
26 Prevailing Wage Law would increase its labor costs and price structure, and potentially
27 compel it to redirect and reroute equipment to compensate for lost revenue, the
28 provisions of the FAAA should preempt application of the Law. The Ninth Circuit

1 disagreed, holding that this kind of effect upon prices, routes and services was “indirect,
2 remote, and tenuous” and did not “frustrate[] the purpose of deregulation by acutely
3 interfering with the forces of competition” so as to result in FAAAA preemption. Id. at
4 1189.

5 Like Mendonca, Western States argues here that wage orders, which apply
6 across the gamut of California industry, should be preempted simply because they
7 happen to also include transportation workers. Also like Mendonca, Western States
8 claims that because application of California’s wage laws may affect the cost of
9 transportation services, they should be subject to FAAAA preemption.

10 Mendonca’s holding that any such effects did not rise to the level of triggering
11 preemption given their only indirect impact on prices, routes and services is equally
12 applicable to this case. Western States’ argument that Mendonca should be
13 distinguished on grounds it involves prevailing wage laws of general applicability is
14 unavailing given the fact that the linchpin of Dynamex (that employment for purposes of
15 California wage orders should be determined by reference to the ABC test) applies
16 across the board as to all wage orders even though the particular wage order before the
17 Court (Wage Order No. 9) happened to involve only the transportation industry.

18 Another more recent Ninth Circuit decision is also instructive. In Dilts v. Penske
19 Logistics, LLC, 769 F.3d 637 (9th Cir. 2014), the court held that the FAAAA did not
20 preempt California’s meal and rest break laws. As Dilts noted, “[t]he sorts of laws that
21 Congress considered included barriers to entry, tariffs, price regulations and laws
22 governing the types of commodities that a carrier could transport,” with Congress “not
23 intend[ing] to preempt generally applicable state transportation, safety, welfare or
24 business rules that do not otherwise regulate prices, routes, or services.” Id. at 644.
25 Dilts consequently rejected any notion that the FAAAA preempted rules like prevailing
26 wage laws or safety regulations on grounds that they are “several steps removed from
27 prices, routes or services, “even if employers must factor [such] provisions into their
28 decisions about the prices that they set, the routes that they use, or the services that

1 they provide.” Id. at 646. Consequently, according to Dilts, “California’s meal and rest
2 break laws plainly are not the sort of laws ‘related to’ prices, routes, or services that
3 Congress intended to preempt.” Id. at 647. And, as Dilts concluded, “even if state laws
4 increase or change a motor carriers’ operating costs, broad laws applying to hundreds of
5 different industries with no other forbidden connection with prices, routes, and services --
6 that is, those that do not directly or indirectly mandate, prohibit, or otherwise regulate
7 certain prices, routes, or services—are not preempted by the FAAAA.” Id. at 647
8 (internal quotes and citations omitted). Here, too, Dynamex’s interpretation of the term
9 “employ” as used in California across-the-board wage orders does not run afoul of the
10 FAAA simply because that interpretation may have some effect on transportation
11 services. Like Dilts, as well as Mendonca, any such effect is simply too remote.⁴

12 The California Supreme Court has also weighed in on whether the FAAAA
13 preempts state regulation of employment conditions. In People ex rel Harris v. Pac
14 Anchor Transportation, Inc., supra, the State of California sued a trucking company for
15 unfair business practices, based in part on alleged violations of state employment laws,
16 including Wage Order No. 9. 59 Cal. 4th at 776. Reasoning that the challenged laws
17 “make no reference to motor carriers, or the transportation of property”, but instead
18 “regulate employer practices in all fields and simply require motor carriers to comply with
19 labor laws that apply to the classification of their employers”, the California Supreme
20 Court rejected preemption. Id. at 785. With specific reference to Wage Order No. 9, the
21 court pointed out that to the extent prices, routes, or services were impacted, the effect
22 was indirect and insufficient to warrant preemption. Id.

23 Western States points to a 2018 Ninth Circuit case decided after Dynamex,
24 California Trucking Ass’n v. Su, supra, as potentially calling for a different result, but
25 again the Court disagrees. As opposed to addressing the California wage orders

26 ⁴ The Court notes that Western States has filed a notice of supplemental authority as to findings
27 made by the FMCSA on December 21, 2018 to the effect that California’s meal and rest break laws were
28 preempted. See ECF No. 32. While the FMCSA did decide that the state’s meal and rest break
requirements were preempted by the FMCSA Regulations’ Hours of Services rules, it did not purport to
reach the issue of FAAA preemption and accordingly is not dispositive on that issue.

1 confronted by the Dynamex court, Su dealt with the different question of whether the
2 common-law Borello standard for determining independent contractor status is
3 foreclosed by the FAAAA. The Su court again reiterated that “Congress did not intend to
4 preempt generally applicable state transportation, safety, welfare or business rules that
5 do not otherwise regulate prices, routes, or services (903 F.3d. at 961), and found that
6 the decisions in Dilts and Mendonca “all but dictate” a finding of no preemption. Id. at
7 963. Western States nonetheless seizes upon dicta in which Su discusses the ABC test
8 and hypothecates that it may effectively compel a motor carrier to use employees
9 because “providing a service within an employer’s usual course of business will never be
10 considered an independent contractor.” Id. at 964. The Court goes on to observe that
11 no showing has been made that “the Borello standard makes it difficult for [motor
12 carriers] to use independent contractors to provide their services.” Id.

13 According to Western States, this signals a departure by the Ninth Circuit from its
14 previous precedent, as represented by Mendonca and Dilts, with regard to application of
15 the ABC test to preemption under the FAAAA. Western States alleges that because
16 Dynamex makes it “impossible” to hire independent contractors (Opp. 11:11-13), Su
17 points towards preemption. Again, the Court disagrees. Nothing in either Dynamex or
18 Wage Order No. 9 precludes a motor carrier from hiring an independent contractor for
19 individual jobs or assignments; instead, all that is required if a carrier chooses to so hire
20 is that the wage order’s requirements be satisfied. The mere fact that increased costs
21 may result does not trigger preemption. Su, 903 F.3d at 965; Mendonca, 152 F.3d at
22 1189; Dilts, 769 F.3d at 647. Accordingly, the FAAAA does not preempt Dynamex’
23 interpretation of California wage orders.⁵

24 ///

25 _____
26 ⁵ Western States’ reliance on a First Circuit decision, Schwann v. FedEx Ground Package Sys.,
27 Inc., 813 F.3d 429 (1st Cir. 2016) in advocating a different result is unpersuasive inasmuch as Schwann is
28 contrary to the Ninth Circuit’s FAAAA preemption decisions in Dilts and Mendonca. In addition, the Court
is equally unpersuaded by the Central District’s decision in Alvarez v. XPO Logistics Cartage LLC , et al.,
CV 18-03736 SJO (E) (C.D. Cal. November 15, 2018) given its reliance on Schwann and another First
Circuit case, Mass. Delivery Ass’n v. Healey, 821 F.3d 187 (1st Cir. 2016) for the same proposition. The
Court therefore also declines to follow Alvarez as to FAAAA preemption.

1 **C. Preemption by Federal Motor Carrier Safety Regulations**

2 In addition to urging FAAA preemption, Western States also claims that
3 Dynamex’s interpretation of California wage orders, to the extent they impact
4 transportation, is preempted by regulations promulgated by the FMCSA, known as the
5 Federal Motor Carrier Safety Regulations and codified at 49 C.F.R. §§ 300-399
6 (hereinafter “Regulations”) According to Western States, the Regulations “are so
7 thorough, complete and detailed regarding every aspect of the trucking industry that they
8 preempt state laws in the area of trucking and the transportation of goods, especially
9 state laws which mandate an employer/employee relationship between parties that the
10 federal regulations contemplate be independent contractors.” Compl., ¶ 69. The
11 Regulations, however, are safety rules promulgated by the Federal Motor Carrier Safety
12 act that regulate safety in the motor carrier industry, including issues pertaining to drug
13 and alcohol use by motor carrier drivers, vehicle inspections, and driver’s license
14 standards. See generally 49 C.F.R. §§ 300-399. The Court is no more persuaded that
15 the Regulations preempt Dynamex than it is by Western States’ preemption argument
16 under the FAAAA as already rejected above.

17 “[A]n agency regulation with the force of law can pre-empt conflicting state
18 requirements” under certain conditions. Wyeth v. Levine, *supra*, 555 U.S. at 576. Those
19 circumstances include instances where a “state or local law.... conflicts with such
20 regulations or frustrates the purposes thereof.” City of New York v. FCC, 486 U.S. 57,
21 64 (1988). In addition, an agency can in the proper circumstances “determine that its
22 authority is exclusive and preempts any state efforts to regulate in the forbidden area.”
23 Id. Preemption is nonetheless not inferred simply because an agency’s regulations are
24 comprehensive. R.J. Reynolds Tobacco Co. v. Durham Cty., N.C., 479 U.S. 130, 149
25 (1986).

26 As indicated above, the Regulations codify various safety requirements regarding
27 the safety of motor carrier operations, and specify, with regard to their compatibility with
28 state rules, that they “apply to any State that adopts or enforces laws or regulations

1 pertaining to commercial motor vehicle safety in interstate commerce.” 49 C.F.R.
2 § 355.3. The Regulations go on to preclude a state from having in effect any “law or
3 regulation pertaining to commercial vehicle safety in interstate commerce which the
4 Administrator finds to be incompatible with the provisions of the [Regulations]. Id. at
5 § 355.25(a).

6 The Regulations are nonetheless not so comprehensive as to leave no place for
7 supplementary state regulations. In rejecting any such construction, the court in
8 Specialized Carriers & Rigging Ass’n v. Com. Of Va., 795 F.2d 1152, 1155 (4th Cir.
9 1987) pointed out that “Congress made clear in various sections of the Motor Carrier
10 Safety Act that no such comprehensive preemption was contemplated or intended.”
11 Here, Dynamex’s interpretation of California wage orders has, at best, only a tangential
12 impact on safety concerns and do not conflict with the federal Regulations, which do not
13 govern when an employee relationship exists or under what terms. Since preemption
14 under the Regulations is limited to conflicting state regulations on “commercial vehicle
15 safety” (see 49 C.F.R. § 355.25), and because the California wage orders do not so
16 conflict, there is no preemptive effect.⁶

17 **D. Dormant Commerce Clause Violation**

18 Finally, Western States alleges that the ABC test “on its face discriminates
19 against out-of-state and interstate trucking companies, and thus violates the so-called
20 dormant Commerce Clause.” Compl., ¶¶ 64-66.

21 The Commerce Clause empowers Congress to “regulate Commerce . . . among
22 the several States.” U.S. Const., art I, § 83, c. 3. “The modern law of what has come to
23

24 ⁶ While Western States again cites to the FMCSA’s December 21, 2018 Decision (see ECF
25 No. 32) as suggesting a contrary result, that Decision is distinguishable. Here, we are confronted with
26 Dynamex’s interpretation of what constitutes employment for purposes of California wage orders, an
27 interpretation which does not significantly impact vehicle safety and does not conflict with the federal
28 Regulations in any event. The December 21, 2018 Decision, on the other hand, found that California’s
meal and rest break rules imposed requirements in an area already addressed by the federal Regulations
and were rules “on commercial motor vehicle safety” subject to preemption review. Decision, pp. 17-18.
The FMCSA ultimately decided that the state’s rules were preempted because they were “additional to or
more stringent than the federal Regulations” and provided “no safety benefit beyond the safety benefit
already provided” by the Federal Regulations. Id. at 21, 23. No such considerations are present here.

1 be called the dormant Commerce Clause is driven by concern about ‘economic
2 protectionism that is, regulatory measures designed to benefit in-state economic
3 interests by burdening out-of-state competitors.’” Dep’t of Revenue of Ky. v. Davis, 553
4 U.S. 328, 337-338 (2008) (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-
5 74 (1988)). The key concern is whether “a challenged law discriminates against interstate
6 commerce.” Id. at 338. Economic protections or discrimination in this regard means
7 “differential treatment of in-state and out-of-state economic interests that benefits the
8 former and burdens the latter.” Or. Waste Sys., Inc. v. Dep’t of Env’tl Quality of State of
9 Or., 511 U.S. 93, 99 (1994). “Absent discrimination for [such] forbidden purpose,
10 however, [a challenged] law ‘will be upheld unless the burden imposed on [interstate]
11 commerce is clearly excessive in relation to the putative local benefits.’” Davis, 553 U.S.
12 at 338-39 (citing Pike v. Bruce Church, Inc., 397 US. 137, 142 (1970)).

13 As Defendants point out, California’s wage orders do not facially discriminate
14 against interstate commerce but instead set out generally applicable requirements that
15 apply equally to in-state, multi-state, and out-of-state employers within California. See
16 Nat’l Ass’n of Optometrists & Opticians LensCrafters, Inc. v. Brown, 567 F.3d 521, 525
17 (9th Cir. 2009) (finding no discriminatory effect where state law treats in-state and out-of-
18 state entities the same); see also Yoder v. Western Express, Inc., 181 F. Supp. 3d 704,
19 720 (C.D. Cal. 2015) (“California’s wage and hour laws regulate ‘even handedly’ as they
20 apply to almost all employers within the state, not just to those engaged in interstate
21 commerce”). Significantly, as Defendants note, Western States cites no provision of
22 either California’s wage orders or of the Dynamex decision that differentiates between
23 in-state and out-of-state commerce. Indeed, as the court in Yoder noted, there is no
24 evidence that California’s wage and hour laws operate “in practice as anything other
25 than an unobjectionable exercise of the State’s police power.” Id. at 723.

26 No prohibited discrimination has been identified here. In the absence of such
27 discrimination a state statute that even-handedly regulates an issue to further valid local
28 interests will not run afoul of the Dormant Commerce Clause so long as any effect on

1 interstate commerce is not excessive. Sullivan v. Oracle Corp., 662 F.3d 1265, 1271
2 (9th Cir. 2011). Here, because California’s wage orders treat in-state and out-of-state
3 residents equally, impose its minimum standards only with respect to work performed in
4 California, and secure benefits for California employees⁷ that are not clearly outweighed
5 by any impediment to interstate commerce., “[t]here is no plausible Dormant Commerce
6 Clause argument.” Id. Western States’ claim that that Dynamex invalidates the use of
7 independent contractor drivers, and consequently affects interstate commerce is
8 unavailing. As indicated above, California’s wage orders do not prohibit the use of such
9 drivers; instead, they simply provide a framework for establishing whether a given
10 individual should be deemed an employee or an independent contractor.

11 12 CONCLUSION

13
14 For all the foregoing reasons, while the Court finds that it does have jurisdiction to
15 hear this dispute and rejects Western State’s standing arguments made pursuant to
16 Rule 12(b)(1), it nonetheless finds that Western States has failed to state a viable claim
17 against Defendants either on preemption or constitutional grounds. Accordingly,
18 Western States’ Complaint is dismissed in accordance with Rule 12(b)(6). Because the
19 Court does not believe that the deficiencies of the Complaint can be rectified through
20 amendment, no leave to amend will be permitted. The Clerk of Court is directed to close
21 the file.

22 IT IS SO ORDERED.

23 Dated: March 28, 2019

24
25 
26 MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

27
28 ⁷ As noted, the basic objective of wage orders is to ensure that California 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.” Dynamex, 4 Cal. 5th at 952.