No. 12-55705

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICKEY LEE DILTS, RAY RIOS, AND DONNY DUSHAJ,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

vs.

PENSKE LOGISTICS, LLC AND PENSKE TRUCK LEASING CO., LP,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:08-cv-00318-CAB

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for American Trucking Associations, Inc. ("ATA") certifies that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

American Trucking Associations, Inc., ("ATA") is the national association of the trucking industry. Its direct membership includes approximately 2,000 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including on numerous occasions before this Court and the United States Supreme Court.

ATA and its members have a strong interest in motor carrier regulations generally, and ATA has special familiarity with the issue of preemption under the Federal Aviation Administration Authorization Act ("FAAAA") raised in this case because it actively participated in the formulation of federal motor carrier deregulation policy in Congress. *See* H.R. Conf. Rep. No. 103-677, at 88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760. Since that time, ATA has been involved (ei-

ther as a party or an *amicus*) in many of the decisions of this Court and the Supreme Court interpreting and applying the FAAAA's preemption provision.

The national trucking industry is of massive size and scope and is an essential pillar of the American economy and lifestyle. To efficiently and competitively undertake the millions of daily shipments on which the U.S. economy depends, trucking companies need to employ uniform procedures free of individualized state regulatory requirements that impede the free flow of trucking commerce. An overarching federal regulatory network accompanied by strong FAAAA preemption allows the trucking industry to meet the needs of the American economy. Thus, ATA and its members have a direct and immediate interest in the Court's decision of this matter, and can provide an industry-wide perspective on the consequences at stake.[1]

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[1] Both parties have consented to the filing of this *amicus* brief. *See* Fed. R. App. P. 29(a). No counsel for either party authored this brief in whole or in part, and no party, party's counsel, or person other than the *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(c)(5).

ARGUMENT

I. THE FAAAA BROADLY PREEMPTS STATE LAWS THAT ARE DIRECTLY OR INDIRECTLY RELATED TO MOTOR CARRIER PRICES, ROUTES, OR SERVICES.

The Federal Aviation Administration Authorization Act ("FAAAA") preempts any "law related to a price, route, or service of any motor carrier" or any "air carrier * * * transporting property * * * by motor vehicle." 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). This broad preemption provision was enacted in 1994 with the goal of eliminating the patchwork of burdensome state trucking regulations that had previously developed, and to ensure that states would not undo federal deregulation with regulations of their own. As the Supreme Court has explained, a "state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008). To achieve its goal, Congress expressly incorporated the preemptive language and effect of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), as the Supreme Court had broadly interpreted it in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). Accordingly, like the ADA, the FAAAA preempts all laws

that significantly affect a price, route, or service of any motor carrier—whether that effect is direct or indirect. *See Rowe*, 552 U.S. at 370.

FAAAA preemption is an essential component of the broader federal policy of uniform regulation of interstate motor carriers, as evidenced by the FAAAA's legislative history and the structure of federal motor carrier regulation as a whole. As the Supreme Court has explained, "Congress' overarching goal" in enacting the ADA and FAAAA preemption provisions was to "help[] assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices' as well as 'variety' and 'quality.'" *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378). This Congressional policy permits motor carriers to implement efficient, standard business practices nationwide. And those standard practices—along with the timely, efficient, and cost-effective delivery of goods they enable—in turn are essential not only to carriers themselves but also to the customers who rely on them for timely shipments and, by extension, to the national economy as a whole.

Application of California's meal- and rest-break requirements to motor carrier operations would impermissibly disrupt this federal poli-

cy, and by opening the door to a 50-state patchwork of similar regulations would reduce the uniformity Congress envisioned to a shambles. For this and related reasons, it is of great concern to ATA's membership that the FAAAA be applied as it is written—as preempting any state measure that "relate[s] to" rates, routes, and services, and ***not*** just economic regulations that constitute "barriers to competition in the transportation industry," as plaintiffs would have it. Appellants' Br. at 24. Anything less than the broad preemptive scope that Congress intended will be insufficient to keep this vital channel of interstate commerce clear and unobstructed.

A. Congress Enacted the FAAAA's Preemption Provision to Protect Motor Carriers from a Burdensome, Inefficient Patchwork of State Regulation.

Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, Congress has made a commitment to deregulate the motor carrier industry. At that time, Congress found that "[t]he existing regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and ha[d] failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. Rep. No. 96-1069, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2292; *see also*,

e.g., Michael J. Norton, *The Interstate Commerce Commission and the Motor Carrier Industry—Examining the Trend Toward Deregulation*, 1975 Utah L. Rev. 709, 709 (reporting that federal motor carrier "regulation has recently come under attack for causing inefficiency and wastefulness, and for repressing technological advances in the industry"). Thus, in order to remove obstacles to innovation and to encourage efficiency, Congress significantly deregulated the industry at the federal level.

It soon became clear, however, that federal deregulation could not achieve its objectives so long as burdensome and inconsistent state regulation persisted. As ATA testified in support of broad federal preemption:

> A single shipment may begin in one state and pass through several other states on the way to its destination. The shipper and receiver of the goods may be located in different states. Without uniform federal laws and regulations governing the provision of such services, the potential conflicts and confusion between and among state laws is beyond comprehension.

Hearing Before Subcomm. on Surface Transp. of the S. Comm. on Commerce, Sci., and Transp., 103d Cong., 2d Sess. (July 12, 1994) (statement of Thomas J. Donohue), 1994 WL 369290. Congress agreed,

concluding that "the regulation of intrastate transportation of property by the States" continued to "impose[] an unreasonable burden on interstate commerce;" "impede[] the free flow of trade, traffic, and transportation of interstate commerce;" and "place[] an unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605. Specifically, Congress found that state regulation "causes significant inefficiencies," "increase[s] costs," and "inhibit[s] * * * innovation and technology." H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759.[2] Indeed, despite deregulatory efforts at the federal level, "[t]he sheer diversity of [state] regulatory schemes [remained] a huge problem for national and regional carriers attempting to conduct ***a standard way of doing business***." *Ibid.* (emphasis added). Therefore, in order to free carriers from this burdensome "patchwork" of state regulation, Congress concluded that "preemption legislation [was] in the public interest as well as necessary to facilitate interstate commerce." *Ibid.*

To achieve its deregulatory goals, Congress purposefully copied

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[2] *See also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440–41 (2002) (referring to the same Conference Report for guidance as to Congressional intent in interpreting the preemption language).

the preemptive language of the ADA (H.R. Conf. Rep. No. 103-677 at 83): Like the ADA, the FAAAA preempts any "law related to a price, route, or service of any * * * carrier." 49 U.S.C. § 14501(c)(1); *see also id.* § 41713(b)(4)(A). Further, Congress specifically intended to incorporate "the broad preemption interpretation adopted by the Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83; *see also Morales*, 504 U.S. at 383 (these "words * * * express a broad pre-emptive purpose"). Under *Morales*, any state law that significantly affects a price, route, or service of any carrier is preempted. 504 U.S. at 388. As the Supreme Court has repeatedly made clear, state laws are preempted even if such effects are "only indirect." *Rowe*, 552 U.S. at 370; *Morales*, 504 U.S. at 384. And the Court expressly recognized that the preemption threshold is a low one: so long as a state law has an effect on prices, routes, or services that is not "tenuous, remote, or peripheral," it is preempted. *Rowe*, 552 U.S. at 375.

B. The Structure of Federal Laws Governing Motor Carriers Reflects Congressional Intent to Promote Regulatory Uniformity.

A further indication that FAAAA preemption was intended to promote a uniform national regulatory framework for the trucking in-

dustry can be found in the structure of the Act as a whole and its relationship to other federal provisions. Before the FAAAA, federal law promoted uniformity in specific areas, such as vehicle safety, highway route controls, and transportation of hazardous materials. But inconsistent state regulations in *other* areas continued to affect motor carriers' prices, routes, and services and impose significant inefficiencies. *See* pages 5-8, *supra*. The FAAAA's preemption provision thus plugged a gap in previous efforts to foster a uniform business environment for the trucking industry.

This "gap plugging" role is reflected in the *exceptions* to preemption the FAAAA enumerates. While the language of the statute is broad, it exempts from preemption state laws that regulate motor vehicle safety; that limit or control highway routes based on a vehicle's size or weight or the hazardous nature of its cargo; or that impose insurance or financial responsibility requirements. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). But far from reflecting an intent to open the door to a patchwork of state regulations, these "saved" areas are subject to separate federal regulatory schemes with their own preemptive effects.

For example, the Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, 98 Stat. 2832, instructs the Secretary of Transportation to review state laws and regulations "on commercial motor vehicle safety," and to declare them preempted in a variety of circumstances: if they are more stringent than federal measures but have "no safety benefit"; if they are "incompatible" with federal law; or if they "would cause an unreasonable burden on interstate commerce." 49 U.S.C. § 31141. And the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-404, 96 Stat. 2154-2157, directs the Secretary to prescribe guidelines and standards "for ensuring compatibility of intrastate commercial motor vehicle safety laws" with federal laws, for states participating in the Motor Carrier Safety Assistance Program. 49 U.S.C. § 31104(h). Congress directed that the guidelines and standards "ensur[e] the degree of uniformity that will not diminish transportation safety." *Ibid.* *See also* 49 C.F.R. § 350.331 (requiring participating states to review their laws and regulations affecting commercial motor vehicle "for compatibility with" federal motor carrier safety regulations).[3]

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[3] Much the same is true regarding state regulation of routes based on vehicle size and weight, which must conform to federal guidelines. *See* 49 U.S.C. §§ 31111, 31113, 31114. And the Hazardous Materials (cont'd)

Thus, even though Congress saved certain types of state laws from FAAAA preemption, it did so with the knowledge that prior federal statutes and regulations already provided a substantial degree of uniformity in those areas. That is, the FAAAA's preemption exceptions *advance*—rather than undermine—Congress's goal of promoting uniformity and preventing states from imposing a burdensome patchwork of regulation on the motor carrier industry.

C. Plaintiffs' Narrow View of FAAAA Preemption Has Been Decisively Rejected by the Supreme Court.

Plaintiffs, ignoring the low preemption hurdle articulated by the Supreme Court in *Rowe* and *Morales*, maintain that the FAAAA preemption threshold is a high one. As an initial matter, they start from the mistaken premise that there is a strong presumption against preemption in this case. *See* Appellants' Br. at 19-20. On the contrary, there is no presumption against preemption when, as here, "the State regulates in an area where there has been a history of significant feder-

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Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, 104 Stat. 3244, authorizes the Secretary to establish standards and guidelines for state laws governing the highway routing of hazardous materials, which may be enforced only if they comply with those standards. 49 U.S.C. §§ 5112, 5125(c); *see also id.* § 5125(d) (allowing affected parties to petition the Secretary to determine whether a state hazmat regulation is enforceable).

al presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). In other words, when a State extends its "police power" into an area of traditional federal concern—rather than vice versa—any such benefit of the doubt disappears. That is precisely what occurred here: as we explain in greater detail below, the trucking industry in general, and the hours of service of truck drivers in particular, has long been a subject of extensive federal regulation. *See* pp. 17-21, *infra*. [4] Unsurprisingly, therefore, the Supreme Court made no mention whatsoever of a presumption against preemption in *Rowe*, even though Maine had urged the Court to take just such an approach. *See* Br. for Pet'r at 25, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (No. 06-457), 2007 WL 2428380 (Aug. 23, 2007).

Plaintiffs' argument for a high FAAAA preemption threshold relies heavily on this Court's decision in *Californians for Safe & Competi-*

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[4] Against this backdrop, plaintiffs try to back away from the realm "of significant federal presence" (*Locke*, 529 U.S. at 108) by casting the California requirements as mere labor and employment law measures. *See, e.g.*, Appellants' Br. at 25-26. But whatever their general purpose, the undeniable *effect* of these provisions is to regulate the hours of service of truck drivers. *See generally Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105-07 (1992) (state regulations cannot evade preemption "simply because the regulation serves several objectives rather than one").

tive Dump Truck Transportation v. Mendonca, 152 F.3d 1184 (9th Cir. 1998). They suggest, among other things, that *Mendonca* stands for the proposition that state laws are not preempted by the FAAAA so long as they "do not 'frustrate[] the purpose of deregulation by ***acutely*** interfering with their forces of competition.'" Appellants' Br. at 32 (quoting *Mendonca*, 152 F.3d at 1189) (emphasis in *Mendonca*). They argue, starting from this untenable premise, that *Mendonca* compels this Court to reverse here. They are wrong, for several reasons.

First, although *Mendonca* held that California's prevailing wage law had "no more than indirect, remote, and tenuous" effects on prices, routes and services (152 F.3d at 1189), that holding says nothing whatsoever about the effect of the meal and rest break requirements at issue in this case. Plaintiffs offer repeated, conclusory assertions that the two provisions are on an equal footing vis-à-vis FAAAA preemption. *See, e.g.*, Appellants' Br. at 2, 21, 24, 32, 37-38. But as defendants have explained in great detail, the effects of California's break requirements on motor carrier services are altogether different from the effects of its prevailing wage law. *See* Appellees' Br. at 30-48. While California's minimum wage law merely had the potential to put upward pressure on

a motor carriers' costs, which in turn had the potential to affect their prices, this is precisely the kind of "remote" or "tenuous" effect that the Court in *Rowe* explained would not trigger preemption. California's break requirements, by contrast, have the palpable, immediate effect of limiting the routes motor carriers may use and the services they may offer within the duty limits imposed by federal hours-of-service regulations. *See id.* at 40-48. That is, unlike the wage law at issue in *Mendonca*, the break requirements at issue here have an effect on routes and services that is far from remote and tenuous. So, while the *holding* of *Mendonca* remains valid law in this Circuit, it does not compel the conclusion plaintiffs suggest it does here.

Second, plaintiffs rely not just on *Mendonca*'s holding but on its *discussion* of FAAAA preemption—but much of that discussion has been overtaken by the Supreme Court's intervening decision in *Rowe*. For example, plaintiffs say that under *Mendonca*, the FAAAA preempts only state measures that are "within the 'field of laws' that Congress intended to preempt." Appellants' Br. at 2 (quoting *Mendonca*, 152 F.3d at 1189); *see also id.* at 37. And plaintiffs argue that under *Mendonca* and earlier decisions of this Court, the FAAAA preempts only "public-utility-

like regulations" that "'acutely interfer[e] with their forces of competition'" and "'would adversely affect the economic deregulation of'" the trucking industry. *Id.* at 32 (quoting *Mendonca*, 152 F.3d at 1189; *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc)).

But such a narrow approach to preemption is no longer viable in light of *Rowe*, which rejected the very contentions plaintiffs here make about the FAAAA's scope.[5] Indeed, the Maine law at issue in *Rowe*—which required carriers to verify the identity and age of recipients of tobacco shipments—would have applied evenhandedly to all carriers, and thus would not have constituted the kind of anticompetitive barrier to entry—"like entry controls and tariffs"— regulation that plaintiffs appear to believe is the touchstone for FAAAA preemption. Appellants' Br. at 20; *see also id.* at 32. Nevertheless, the Supreme Court held that

[5] To be clear, ATA is not suggesting that this Court reject the *holding* of *Mendonca*, which rested on the conclusion—unchallenged here—that the wage law in question had "no more than an indirect, remote, or tenuous effect on a motor carrier's prices, routes, and services." 152 F.3d at 1188. The narrow view of FAAAA preemption plaintiffs here attribute to this Court depends on *dicta* from *Mendonca* and earlier cases that were not necessary to that holding. In any event, there can be no question that *Rowe* represents "intervening higher authority" that is "clearly irreconcilable" with that narrow view. *Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003) (en banc).

Maine's law "produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces.'" *Rowe*, 552 U.S. at 372.

In reaching this conclusion, the Supreme Court considered an argument much like the one plaintiffs make here, that under *Mendonca* California's break requirements do not fall into the "field of laws" that the FAAAA preempts. In *Rowe*, Maine argued that the law at issue was intended to promote public health—unquestionably an area of traditional state concern—and that "Congress' primary concern was not with the sort of law it has enacted, but instead with state 'economic' regulation." *Rowe*, 552 U.S. at 374; *compare* Appellants' Br. at 20 ("Congress's purpose in enacting the FAAAA was not to preempt state worker protections, but to ensure competition in the trucking industry."). The Supreme Court squarely rejected Maine's argument, noting that, on the contrary, Congress had expressly "declined to insert the term 'economic' into the operative language" of the statute, "despite having at one time considered doing so." *Rowe*, 552 U.S. at 374 (citing S. Rep. No. 95-631, at 171 (1978)).

Since *Rowe*, this Court has implicitly recognized that the narrow

approach to preemption articulated in *Mendonca* is no longer viable, observing for example that "[t]here can be no doubt that when Congress adopted the FAAA Act, it intended to ***broadly preempt*** state laws that were 'related to a price, route, or service' of a motor carrier." *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009) (emphasis added). The proper inquiry is *not*, as this Court appeared to suggest in *Mendonca* (and as plaintiffs urge here), whether a state or local regulation "***acutely***" affects a motor carrier's prices, routes, or services (*Mendonca*, 152 F.3d at 1189; *see* Appellants' Br. at 32), but rather simply whether its effect is "'more than * * * indirect, remote, or tenuous'" (*Am. Trucking Ass'ns*, 559 F.3d at 1053, quoting *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1047 (9th Cir. 2000)).

II. APPLICATION OF CALIFORNIA'S MEAL AND REST BREAK REQUIREMENTS TO MOTOR CARRIER OPERATIONS WOULD RESULT IN PRECISELY THE INEFFICIENT REGULATORY PATCHWORK THAT THE FAAAA PROHIBITS.

A. Congress Has Entrusted FMCSA to Uniformly Regulate Hours of Service in the Trucking Industry, to Promote Road Safety and Driver Health While Maintaining Operational Efficiency and Flexibility.

"The federal government has regulated the hours of service (HOS) of commercial motor vehicle operators since the late 1930s, when the Interstate Commerce Commission * * * promulgated the first HOS reg-

ulations under the authority of the Motor Carrier Act of 1935." *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 193 (D.C. Cir. 2007). At present, the Federal Motor Carrier Safety Administration ("FMCSA") comprehensively regulates the number of hours truck drivers may spend on the road, under a Congressional mandate to ensure safe operation of commercial motor vehicles and prevent adverse health effects on drivers. *See* 49 U.S.C. §§ 31136, 31502; 49 C.F.R. § 395.

FMCSA's current HOS regulations limit the hours of drivers of property-carrying commercial motor vehicles in two primary ways: First, following ten consecutive hours off duty, a driver may not drive more than eleven hours total or beyond the fourteenth hour after coming on duty. Second, a driver may not drive beyond his sixtieth hour on duty over the course of a seven-day period or beyond his seventieth hour on duty over the course of an eight-day period. A driver may restart the seven- or eight-day period after taking at least thirty-four consecutive hours off duty. *See* 49 C.F.R. § 395.3.[6]

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[6] The current federal HOS regulations also eliminate a provision of the pre-2003 regulations that permitted a driver to extend the on-duty period during which his allotted daily driving time could be completed (cont'd)

Under current FMCSA regulations, "drivers are free * * * to take rest breaks at any time" as necessary for safe operation of their vehicles, but otherwise have discretion as to when to drive within the broad parameters of the HOS rules. *See* Hours of Service of Drivers, 68 Fed. Reg. 22,456, 22,466 (Apr. 28, 2003).[7] This flexibility is crucial "in a business requiring fluctuating hours of employment." *Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48 (1943). Thus, the federal HOS rules

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by taking "off-duty" breaks during the day. *See* Hours of Service of Drivers, 68 Fed. Reg. 22,456, 22,471 (Apr. 28, 2003). Thus, under the pre-2003 regime, break periods mandated by state law would not have reduced the total driving time or on-duty time allowed by federal law; although they would have interrupted (and likely disrupted) the driver's duty period, they also would have extended the period by the length of the breaks. Under the current regime, however, application of California's break requirements would simply eat into the time that federal law permits drivers to complete their work, and thus directly limit the services carriers can provide within that framework.

[7] As defendants have explained, under a change to the federal HOS regulations set to go into effect next year, drivers will be required to take a 30-minute break at a time of their choosing within eight hours of going on duty—an approach that FMCSA took specifically in order to address flexibility concerns. *See* Appellees' Br. at 35 n. 16. ATA filed a petition for review of this new break requirement, which remains pending. That challenge, however, takes issue only with the condition that the break be completely free not just of driving but of any work whatsoever; no party has questioned the safety-motivated requirement that drivers take a mandatory 30-minute break from *driving* in order to mitigate fatigue potentially generated by excessive time spent on a single task. *See Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, No. 12-1092 (D.C. Cir.).

have developed to ensure safety while at the same time preserving, to the greatest extent safely possible, the operational and scheduling flexibility of motor carriers. *See, e.g.*, *Levinson v. Spector Motor Serv.*, 330 U.S. 649, 657-62 (1947); *Southland Gasoline*, 319 U.S. at 48; Hours of Service of Drivers, 70 Fed. Reg. 49,978, 49,981 (Aug. 25, 2005) ("The operational and scheduling flexibility of an 11-hour limit, even when it is not utilized fully, is both economically and socially valuable.").

Congress recognized the potential for wage and hours laws to interfere with the framework constructed by the HOS rules, and took steps to ensure that they would not. As the Supreme Court put it, "Congress * * * relied upon the [HOS rules] to work out satisfactory [hours] for employees charged with the safety of operations in a business requiring fluctuating hours of employment"—*i.e.*, drivers and certain other employees of motor carriers—"without the burden of additional pay for overtime." *Southland Gasoline*, 319 U.S. at 48. Even though overtime regulations would not *directly* regulate or limit the hours of truckers, Congress exempted drivers from the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, so that the economic incentives of overtime pay would not upset the balance that the HOS rules strike

between safety and operational flexibility and efficiency. *See Southland Gasoline*, 391 U.S. at 48-49 (Congress sought "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers"); *Levinson*, 330 U.S. at 657 (noting that Congress exempted certain employees in the motor carrier industry from the Fair Labor Standards Act because the economic incentives that overtime pay creates may not always be compatible with the HOS rules). That is, the FLSA exception reflects Congressional intent to maintain a uniform regulatory environment for the trucking industry in general, and in particular to prevent generally applicable federal wage and hours laws from displacing federal HOS regulations. The FAAAA's preemption provision furthers that goal with respect to state law.

B. The FAAAA Prohibits States from Creating a Burdensome Patchwork of Conflicting Hours of Service Rules.

The California break requirements are "related to" carriers' services and routes—and are thus preempted by the FAAAA—because they limit the services carriers can provide and the routes they can maintain under the federal regulatory framework. In many cases, carriers' operations are timed precisely to take advantage of the full flexibility offered by the federal HOS rules. Application of California's break

requirements would make that impossible.

By way of example, in order to maximize speed of service and driver efficiency, some carriers schedule their drivers' meal periods to take place at the carrier's facilities after they have delivered an inbound load there. Dock workers can then unload and process the inbound load and prepare and load a new outbound load while the driver takes his or her meal period. This allows drivers to deliver outbound loads to their destinations earlier, thereby enabling the carriers to offer more timely services. The timing limitations of California's break requirements, however, would frequently force a driver to take a break *before* returning to the carrier's facilities with an inbound load, thereby introducing substantial delays into the carrier's schedule.[8] This, in turn, delays out-

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[8] The delays involved would, as a practical matter, be considerably longer than the 30-minute meal breaks and 10-minute rest breaks required under California's rules. Truck drivers—unlike, *e.g.*, office workers or retail employees—cannot simply stop what they're doing at an arbitrary point in their routes and immediately pick up where they left off when the break period is over. Rather, as a required break period approaches, a driver must begin to plan for the break and identify a safe, permissible stopping place. In some cases, this may result in a significant detour from a driver's planned route, and will in every case involve the overhead of getting off and back on the road. As a result, a nominally 30- or 10-minute break will consume far more than 30 or 10 minutes of a driver's federally prescribed daily duty period. Thus, while California's break requirements might require that a driver give up 1.5 (cont'd)

bound deliveries and limits the services that the carrier is able to offer. In addition, the driver can no longer use the time necessary to unload and reload the truck as a break period; this period of time simply becomes an inefficient downtime for the driver. And the inefficiencies created by this problem can be further compounded in situations involving drivers who are scheduled to load or unload at multiple locations during the course of a single day. In such cases, a single delay can have a ripple effect, causing additional delays for additional drivers at several locations during the day.

California's break requirements would also disrupt the services offered by carriers that rely on "turn drivers" who meet at specified points to exchange loads. For example, drivers from Los Angeles and Sacramento might meet at an intermediate point to exchange loads. The drivers would typically break for a meal at the meeting point—which might be their carrier's terminal—exchange loads, and then depart for a delivery point. If, however, one driver cannot reach the meeting point within five hours, California's meal break requirement would require

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hours of his or her federally-defined 14-hour duty period—itself no minor burden—the actual reduction of that duty period would generally be significantly greater.

him or her to stop *before* meeting up with the other driver, thereby introducing an additional, unnecessary stop into the route and also delaying the other driver.

As another example, some less-than-truckload ("LTL") carriers deliver products in the morning and make pickups in the afternoon. These pickups are precisely timed so that the LTL trucks can return to their terminals late in the day and just in time to load their shipments onto long-haul trucks scheduled to depart for various destinations. Because California's break requirements would require LTL drivers to take a second daily meal break in the afternoon, such drivers would run into delays in making either their afternoon pickups or late afternoon transfers to the long-haul trucks. Given that the pickups and deliveries of these drivers are precisely timed to maximize the efficiency of the carriers' operations, a delay for a thirty-minute meal period—which, for the reasons discussed above, inevitably stretches into a delay that is significantly longer than the break period itself (*see* n. 8, *supra*)—would frequently prevent them from reaching the long-haul trucks in time to load their shipments and get them out the door to their next or ultimate destination.

Application of California's meal break requirements would also create a problem for carriers' ability to get loads to distribution points in time to begin the morning delivery process. For example, a driver may be scheduled to deliver a truckload of small shipments to a carrier's facility in Los Angeles by 6:00 a.m. so that they can be unloaded and then reloaded onto smaller trucks for delivery within the area beginning at 9:00 a.m. That driver likely would be scheduled to drive through the night to reach the carrier's Los Angeles facility, at which point he or she would likely have breakfast. If, however, the driver is required by California law to make a stop for a meal period *before* reaching the facility, the carriers' ability to meet distribution schedules will be disrupted. In turn, the unloading and reloading process would be delayed, as would the drivers scheduled to make deliveries in the city. In some cases, this would mean that the carrier is simply unable to make deliveries within the time frame promised—a time frame that the uniform federal HOS regulations would have permitted. The effect of California's break requirements on a carrier's services, in other words, would be immediate and significant.

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Such examples represent precisely the sort of interference with carriers' services that the FAAAA was designed to prevent. Since the FAAAA's enactment, carriers have been able to schedule their operations in order to become as efficient as possible by tuning their complex logistics to a single, uniform set of HOS parameters. If California's break requirements were applied to these finely-tuned operations—to say nothing of the break requirements that might be imposed by 49 other states if FAAAA preemption did not apply here—those efficiencies would be lost.

The California break rules, like the Maine law at issue in *Rowe*, would result in a "direct substitution of * * * governmental commands for 'competitive market forces' in determining (to a significant degree) the services motor carriers will provide." *Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378). The break requirements would require motor carriers to offer more limited services that "differ significantly from those that, in the absence of regulation, the market might dictate." *Ibid.* All of this would be directly at odds with Congress's decision to let competitive forces and uniform regulation shape transportation services so

as to "stimulat[e] 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" *Id.* at 371 (quoting *Morales*, 504 U.S. at 378).

III. CALIFORNIA'S BREAK RULES DO NOT FALL UNDER THE SAFETY EXCEPTION TO FAAAA PREEMPTION.

The FAAAA exempts from preemption "the safety regulatory authority of a State ***with respect to motor vehicles***." 49 U.S.C. § 14501(c)(2) (emphasis added). As explained above, that is not to suggest that federal law *as a whole* gives states a free hand to regulate the field of motor vehicle safety. *See* pages 9-11, *supra*. Nonetheless, plaintiffs argue that California's meal and rest break requirements are "genuinely responsive to safety concerns," and thus would be rescued from federal preemption even if they otherwise would come under the FAAAA's preemptive scope. *See* Appellants' Br. at 48-9 (citing 49. U.S.C. § 14501(c)(2) and *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 442 (2002)).

But the relevant California Labor Code provisions expressly make clear that they are about employee health and welfare, while omitting any mention whatsoever of safety (with respect to motor vehicles). *See* Cal. Labor Code § 512(b) (authorizing Industrial Welfare Commission ["IWC"] to issue meal-period orders "consistent with the health and wel-

fare of the affected employees"); *id.* § 516 (authorizing IWC to issue break- or meal-period orders "consistent with the health and welfare of those workers"). Against this express purpose, plaintiffs cite a handful of cases that discuss break requirements in terms of worker health and safety generally; an IWC order that does the same; and a legislative act that discussed the relationship between work hours and work-related injuries in general. *See* Appellants' Br. at 49-50. But while the health and general safety *of workers* may go hand in hand in this context, that is a far cry from demonstrating that the break requirements at issue were intended to address *motor vehicle safety*. Nothing offered by plaintiffs suggests that they were. *See* Appellees' Br. at 48-52.

Even assuming *arguendo* that California's meal and rest break requirements may have been in some measure *motivated* by motor vehicle safety concerns, they are not *responsive* to any such concerns. Plaintiffs argue to the contrary, citing FMCSA's findings concerning fatigue and its effect on safety, and pointing to the agency's conclusion that rest breaks alleviate fatigue and thus improve safety. *See* Appel-

lants' Br. at 52.[9] But whatever the connection between rest breaks and fatigue-related safety risk, the break requirements actually implemented by California cannot effectively respond to it. As plaintiffs acknowledge in a different context, California's break requirements merely require an employer to provide *an opportunity* for employees to take a break; they do not require employers to ensure that employees *actually take* a break. *See id.* at 45.

On the contrary, as the California Supreme Court recently held, employees are free to use the required break periods "for whatever purpose he or she desires." *Brinker Rest. Corp. v. Super. Ct.*, 273 P.3d 513, 520-21 (Cal. 2012). As plaintiffs themselves put it, "[t]he employee is thus free to keep working." Appellants' Br. at 45. In light of this reality, plaintiffs' contention that California's break requirements respond to a genuine concern about motor carrier safety defies reason. If California had actually implemented its break requirements in the belief that they were necessary to ameliorate unsafe driving conditions, the require-

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[9] In this discussion, plaintiffs pass over the fact that the findings FMCSA relied on in its 2011 hours-of-service rulemaking, and which plaintiffs rely on here, led the agency to adopt a break requirement much less restrictive than California's. *See* Hours of Service of Drivers, 79 Fed. Reg. 81,134, 81,136 (Dec. 27, 2011).

ments could only meaningfully respond to that concern if drivers were *required* to take them (like the *mandatory* 30-minute break scheduled to go into effect under the federal regulations next year). Combined with the express terms of the Labor Code, the only reasonable conclusion is that California's break requirements are a worker health and welfare measure (which any given worker can therefore waive at risk only to him or herself), not a motor vehicle safety measure. Accordingly, the measures do not fall into the FAAAA's motor vehicle safety exception. [10]

CONCLUSION

The decision of the district court should be affirmed.

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[10] As defendants explained in detail, FMCSA has similarly concluded that California's break rules are not motor vehicle safety measures, when it determined that it had no jurisdiction to review the measures under its statutory authority to determine whether or not "a State law or regulation commercial on motor vehicle safety" may be enforced. 49 U.S.C. § 31141. *See* Appellees' Br. at 9-11; Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers, 73 Fed. Reg. 79,204 (Dec. 24, 2008).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,362 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century font.

DATED: November 16, 2012

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of November 2012, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: November 16, 2012

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