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,

v.

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

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

For all its rhetoric, Penske's brief fails to offer this Court a coherent theory of preemption, or even a plausible account of the underlying state law. In Penske's view, the FAAAA simply swallows "burdensome state regulations affecting the trucking industry," including longstanding and generally applicable regulations that have nothing to do with the FAAAA's deregulatory objectives and that affect motor carriers only incidentally, in their capacity as employers. Penske Br. 17. Penske suggests no limiting principle and, indeed, makes no effort to deny that its version of preemption would invalidate even the state labor protections at issue in *Lochner v. New York*, 198 U.S. 45 (1905). *See* Plaintiffs' Br. 41.

Instead, Penske's chief strategy is to repeatedly assert that the California break laws "command motor carriers … to *stop* providing service and *alter* their routes," "command when *no service* may be performed at all," "dictate *when* motor carrier services may (and may not) be provided," "command that *no* service may be performed," "forbid[]" service, "stop service in its tracks," and regulate "*when* (and when *not*) to provide service." Penske Br. 16, 20, 29, 31 (all emphasis in original).

But saying it, even repeatedly and with emphasis, does not make it so. Describing its account (at 31) as "self-evident," Penske shirks any obligation to demonstrate the laws' actual effects on Penske's operations, leaving this Court to speculate in a vacuum. *See* Plaintiffs' Br. 46-48. And although Penske (at 44)

vigorously disclaims an argument based on increased costs, the most it can plausibly assert is that California law "reduces the amount of productive employee work time available to motor carriers and thus necessarily decreases the amount of service motor carriers can offer *without increasing workforce and equipment*." Penske Br. 33 (emphasis added). Penske's argument, in other words, boils down to a complaint that California's break laws might require the company to choose between decreasing service and increasing costs. But that is true of virtually all labor laws, and many other generally applicable state laws, and is no different from the argument that this Court decisively rejected in *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998). No circuit has held that FAAAA preemption extends to generally applicable labor laws. And Penske has provided no good reason for this Court to become the first.

In any event, more than mere speculation is required before this Court will strike down a state law as preempted, let alone a century-old state workplace protection. "Preemption analysis starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 426 (2002) (discussing FAAAA) (citations omitted). Rather than make an effort to demonstrate the required "clear and manifest" congressional intent, Penske invites this Court to follow a dissent by Justice Thomas

and disregard the bedrock presumption against preemption. Penske Br. 18 n.5. But the Supreme Court's *majority opinion* in that same case reiterated that the presumption applies whenever courts are "addressing questions of express or implied preemption," *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008), and this Court has regularly adhered to the presumption in FAAAA cases. *See* Plaintiffs' Br. 26. Accordingly, Penske bears the "considerable burden of overcoming the starting presumption that Congress did not intend to supplant state law." *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77, 83 (2d Cir. 1997) (citations and quotation marks omitted). Penske has not come close to meeting its burden.

A. California's Generally Applicable Employee Break Laws Fall On the Other Side of the Preemption Line Drawn by *Rowe*.

A central theme of Penske's brief is that California's longstanding employee break laws are, in its view, "just as FAAAA-preempted" as the Maine Tobacco Delivery Law found preempted in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), and that *Rowe* thus compels a finding of preemption. Penske Br. 1; 19-20. In fact, *Rowe* illustrates precisely why California's break laws fall on the other side of the preemption line. The Supreme Court's unanimous decision in *Rowe* hinged critically on its distinction between state laws that focus on trucking and regulate motor carriers' services directly (like Maine's delivery law), and those that are generally applicable to all industries and affect motor carriers only

incidentally (like California's break laws). Penske's brief ignores that key distinction.[1]

Rowe involved two provisions of Maine law, both of which specifically regulated delivery services. First, Maine prohibited tobacco retailers from "employ[ing] a 'delivery service' unless that service follow[ed] particular delivery procedures." *Id.* at 371. Maine's law thus "focus[ed] on trucking and other motor carrier services, … thereby creating a direct 'connection with' motor carrier services." *Id.* And it did so in a way that flew in the face of the FAAAA's "pre-emption related objectives": It "require[d] carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer)" and "would freeze in place services that carriers might prefer to discontinue in the future." *Id.* Accordingly, the Court had no trouble concluding that federal law preempted "Maine's efforts to *regulate carrier delivery services themselves*." *Id.* (emphasis added).

Second, Maine imposed civil liability on carriers for failing to sufficiently examine every package, "thereby directly regulat[ing] a significant aspect of the

[1] Attacking a strawman, Penske devotes many pages of its brief (17-29) to discussing how *Rowe* forecloses categorical exceptions for "health and safety laws," "police powers," and "noneconomic regulation." True, the FAAAA contains no such exceptions. But we never contended otherwise. And Penske misses the larger point, which is that "[u]nderstanding the objective of the [FAAAA] is critical to interpreting the extent of its preemption." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc). Penske never shows (or attempts to show) that Congress had the *purpose* of preempting break laws, let alone the "clear and manifest" purpose required in preemption cases.

motor carrier's package pick-up and delivery service." *Id.* at 372. This provision, the Court observed, applied "yet more directly" to delivery services. *Id.* There could be no serious dispute that the FAAAA preempts "state regulation of the essential details of a motor carrier's system for picking-up, sorting, and carrying goods—essential details of carriage itself." *Id.* at 373.

Rowe emphasized that "the state law [was] not general"—because, again, the law specifically focused on what delivery services could be provided—and contrasted this with state regulation "that broadly prohibits certain forms of conduct and affects, say, truckdrivers" only incidentally. *Id.* at 375-76. Maine's law was preempted because it "aim[ed] directly at the carriage of goods" and "require[ed] motor carrier operators to perform certain services, thereby limiting their ability to provide incompatible alternative services." *Id.* at 376. Indeed, the Court observed that Maine could likely achieve its public-health objectives by enacting "laws of general (non-carrier specific) applicability." *Id.* at 376-77.

California's break laws unmistakably fall on the other side of the line drawn by *Rowe*. They do not "focus[] on trucking and other motor carrier services," or "require carriers to offer a system of services," or "regulate carrier delivery services themselves." They are instead prototypical "general" laws that "broadly prohibit[] certain forms of conduct"—namely, the practice of employing workers in any industry without providing sufficient breaks—and "affect[] truckdrivers"

incidentally, to the same extent as all other employees in the state. As Penske itself recognizes (at 50), the break laws "apply equally to beauticians and barbers" as to truckers. And the break laws leave motor carriers free to offer whatever services or routes they prefer, provided they allow their workers to take sufficient breaks. As this Court has made clear, the fact that the laws may end up causing Penske to "increase[] workforce or equipment" to maintain its desired level or service (Penske Br. 15, 33, 47) is not enough to warrant preemption. *See Mendonca*, 152 F.3d at 1189. In short, there is no question that this case involves general laws that—unlike the Maine law in *Rowe*—neither focus on nor directly regulate motor carrier routes, rates, or services. [2]

As with *Rowe*, the Supreme Court's two cases finding preemption under the Airline Deregulation Act involved state efforts to specifically police the way that carriers offer their services to the public. In *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), the Court held that the Air Travel Industry Enforcement Guidelines adopted by the National Association of Attorneys General (NAAG) were preempted by the ADA. Those guidelines, although enforced through general state consumer laws, imposed "detailed standards governing the content and format of

[2] Because *Rowe* was an easy case, it is not surprising that the Court had no need to resort to the presumption against preemption. Certainly, there is no basis to read the Court's silence as a *repudiation* of the presumption, as Penske does. Penske Br. 3, 18; *see Cal. Tow Truck Ass'n v. City & Cnty. of San Francisco*, 693 F.3d 847, 860 (9th Cir. 2012) (applying presumption in post-*Rowe* FAAAA case).

airline advertising, the awarding of premiums to regular customers (so-called 'frequent flyers'), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights." *Id.* at 379; *see id.* at 391-418 (appendix reproducing NAAG standards). Likewise, in *American Airlines v. Wolens*, 513 U.S. 219, 228 (1995), the Court held that the ADA preempted a similar attempt to use state laws to "guide and police" the specific ways in which airlines marketed their frequent flier programs.

In all three cases—*Rowe*, *Morales*, and *Wolens*—the preempted state law sought to directly regulate core aspects of how air or motor carriers provided their services, as carriers, to their customers. And in all three, the state regulation directly implicated what *Rowe* called the "preemption-related objectives" of the FAAAA—namely, ensuring economic deregulation and avoiding the risk of re-regulation. 552 U.S. at 371. In none of these cases could the carrier escape the state law's commands by simply "increasing workforce and equipment," Penske Br. 33, thus demonstrating that the focus of the state regulation was the carriers' operation *as carriers*, not the ordinary "inputs" of business—such as labor, capital, or technology—that are regulated by background state laws that reach all businesses equally. As Judge Wood recently explained:

> These inputs are often the subject of a particular body of law. For example, labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, anti-discrimination

> laws, and pension regulations. Capital is regulated by banking laws, securities rules, and tax laws, among others. Technology is heavily influenced by intellectual property laws. Changes to these background laws will ultimately affect the costs of these inputs, and thus, in turn, the "price ... or service" of the outputs. Yet no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws, s*ee, e.g., Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir.1998) (minimum wage laws not preempted), because their effect on price is too "remote." *Morales*, 504 U.S. at 390. Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its customer a service for a particular price.

S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc., 697 F.3d 544, 558 (7th Cir. 2012).

Notably, Penske's 53-page brief does not point to a single federal precedent, from any circuit, holding that the FAAAA preempts generally applicable labor or employment laws that "broadly prohibit[] certain forms of conduct"—such as requiring employees to work without breaks—and therefore "affect[], say truckdrivers, only in their capacity as [employees]." *Rowe*, 552 U.S. at 375. As explained in our opening brief (at 36-37), the federal circuits, including this one, have repeatedly rejected attempts to extend the FAAAA to generally applicable labor and employment laws. There is therefore no basis for Penske's contention that "many post-*Rowe* authorities have struck down state 'wage law[s]' … at nearly every turn." Penske Br. 25.[3]

[3] In the labor law context, the only circuit that has even come close is the First Circuit, which held that a state tips law—as specifically applied to the skycaps at Logan Airport—had the impermissible effect of "directly regulat[ing] how an

B. Penske's Preemption Arguments All Rest on An Unproven or Simply Misstated Account of the State Laws' Effects.

As already noted above, the chief strategy employed in Penske's brief is an attempt to recharacterize California's break laws—as laws that directly regulate the way in which motor carriers perform their services, organize their routes, or set their prices—rather than describe them for what they are: labor protections that regulates the hours of workers across all industries equally. Thus, Penske asserts that California "command[s] motor carriers like Penske to *stop* providing service and *alter* their routes," Br. 16, and refers repeatedly to "California's effort to command when *no service* may be performed at all," *id.* at 20.

But if that were true—if California, for example, specifically prohibited motor carriers from making deliveries at certain times or places—this would be a very different case. Here, the state law governs only the length of time that individual workers may work continuously. It says nothing about how employers organize or deploy their workforces to meet various business needs. As explained in our opening brief (at 40), motor carriers like Penske remain entirely free to provide whatever routes or services the market demands. Indeed, although Penske

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airline service is performed and how its price is displayed to customers—not merely how the airline behaves as an employer or proprietor." *DeFiore v. Am. Airlines*, 646 F.3d 81, 88 (1st Cir. 2011). To avoid having state law deem curbside fees a "service charge" would have required "changes in the way the service is provided or advertised"—much in the same way that the state laws in *Rowe*, *Morales* and *Wolens* required actual changes in how carriers provide their services. *Id.*

disclaims a cost-based argument (at 44), its real complaint seems to be that motor carriers might not able to provide certain services or routes that they would otherwise want to provide without "increasing workforce and equipment," Penske Br. 33—in other words, without increasing their costs. That is precisely the argument this Court rejected in *Mendonca*, 152 F.3d 1189.[4]

Moreover, even if a cost-based argument were not foreclosed by this Court's precedent, Penske's argument relies entirely on generalized and unfounded speculation. Penske makes no effort to show that compliance with the break laws would have caused Penske to hire more drivers to maintain the routes at issue in this case, which were used to deliver Whirlpool appliances to homes within California. As explained in our opening brief (at 15-16, 46-48), those routes were entirely within one of several regional distribution areas within the state and thus were unlikely to be very long. Penske studiously avoids discussing any of the many variables (described in our brief at page 47) that would affect this question—such as the amount of time Penske employees spend driving or the average or maximum length of their routes. Because preemption is a "demanding defense," it cannot be

[4] The Chamber of Commerce, perhaps recognizing the flaws in Penske's argument, attempts to demonstrate that the law permits FAAAA preemption *based solely on increased cost*. Chamber Amicus Br. 4-10. Even if that were so (and it is not for the reasons explained in our opening brief at 47-78), Penske has made no effort to carry its burden on that score.

sustained "absent clear evidence" concerning the state law's actual effects. *See Wyeth v. Levine*, 555 U.S. 555, 571 (2009). Penske offers zero.

C. Penske Does Not Deny That California's Break Laws Respond to the State's Safety Concerns and Are Genuinely Responsive to Those Concerns.

Turning to the FAAAA's safety exception, Penske argues that the exception cannot apply here because it extends only to the "safety regulatory authority of a state *with respect to motor vehicles*," 49 U.S.C. § 14501(c)(2)(A) (emphasis added), and California's break law is a generally applicable law—one that applies equally to any "generic 'employer' and its employees." Penske Br. 49. If Penske's reading is correct—that is, if the "with respect to motor vehicles" qualifier is read as a specific-reference requirement that forecloses generally applicable laws altogether—then it would likewise also apply to the FAAAA's general rule of preemption, which preempts only those state laws related to prices, routes, or services "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). *See FCC v. AT&T*, 131 S. Ct. 1177, 1185 (2011) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.") (quoting *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007)).

In any event, Penske does not dispute that the IWC linked breaks in the transportation industry to the "public safety hazard due to driver fatigue." IWC, *Statement as to the Basis for Amendment to Sections 2, 11 and 12 of Wage Order No. 9*

Regarding Employees in the Transportation Industry 1 (2004).[5] Nor does Penske dispute that breaks in fact have "very substantial crash reduction benefits." *Hours of Service of Drivers*, 75 Fed. Reg. 82,170, 82,137 (2010). In 2010, 3,675 people were killed and 80,000 people were injured nationally in crashes involving large trucks. National Highway Traffic Safety Administration, *Traffic Safety Facts 2010 Data* 1 (2012).[6] As we explained in our opening brief (at 53)—and Penske nowhere disputes—driver fatigue is the leading cause of such accidents.

Instead, Penske argues that California's meal and rest breaks cannot, as a matter of law, be "genuinely responsive to motor vehicle safety" because the breaks also benefit workers in other industries. Penske Br. 49 (quoting *Am. Trucking Assn's. v. City of Los Angeles*, 559 F.3d 1046, 1055 (9th Cir. 2009)). But California's concern for worker health and safety *generally* does nothing to undermine the legitimacy of the IWC's *specific* concern about driver fatigue, much less suggest that the concern is merely "a pretext for undue economic regulation." *Cal. Tow Truck Ass'n*, 693 F.3d at 860. Although the lack of adequate breaks may also have health consequences for "beauticians and barbers," Penske Br. 50, the safety impact on truck drivers is far more direct. "When driving an 80,000-pound [truck] at highway speeds, any delay in reacting to a potentially dangerous situation can be deadly." *Hours of Service of Drivers*, 76 Fed. Reg. 81,134, 81,134 (2011).

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[5] http://www.dir.ca.gov/iwc/Stementastothebasis_WageOrder9.doc.
[6] http://www-nrd.nhtsa.dot.gov/Pubs/811628.pdf.

That the IWC's wage order governing the transportation industry is part of California's broader regulation of worker health and safety is no reason for finding the law preempted. *See Am. Trucking Ass'ns*, 660 F.3d at 405. To the contrary, Penske's recognition that the break law's purpose is "to promote the health and welfare of *all* break law-covered workers," Penske Br. 51 (emphasis added), proves our central point—that the law is far removed from the sort of economic protectionism that Congress targeted in the FAAAA.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 3,246 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

Deepak Gupta

January 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2013, I electronically filed the Reply Brief for Appellants Mickey Lee Dilts, et al., with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta

Deepak Gupta