No. 19-70413
(Consolidated with Nos. 18-73488, 19-70323, and 19-70329)

In the United States Court of Appeals for the Ninth Circuit

DUY NAM LY and PHILLIP MORGAN,
Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and
U.S. DEPARTMENT OF TRANSPORTATION,
Respondents.

On Petition for Review of a Decision of the
Federal Motor Carrier Safety Administration
(Docket No. FMCSA-2018-0304)

CORRECTED BRIEF OF PETITIONERS DUY NAM LY AND PHILLIP MORGAN

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INTRODUCTION

For a decade, the Federal Motor Carrier Safety Administration consistently adhered to its position that it "has no authority" to preempt California's generally applicable employee meal-and-rest-break rules "[b]ecause these rules are in no sense regulations 'on commercial motor vehicle safety,'" and so "are not subject to preemption under 49 U.S.C. § 31141." ER92. In 2008, the FMCSA didn't consider this a close question. It found that, far from being directed at motor-vehicle safety, the state's meal-and-rest-break rules—first adopted a century ago, before commercial trucking regulation even existed—"are simply one part of California's comprehensive regulations governing wages, hours and working conditions." *Id.* The FMCSA rejected the argument that it "has power to preempt any state law or regulation that regulates or affects any matters within the agency's broad Congressional grant of authority." *Id.* That "far-reaching argument," it said, finds no support in the "statutory language or legislative history" and would expose "any number of State laws" to unintended preemption. *Id.*

Six years later, the FMCSA told this Court that "[t]he agency continues to adhere to [its] view" that California's meal-and-rest-break rules "do[] not fall within the agency's statutory authority under section 31141 to displace state laws" because they are not "specifically directed at commercial motor vehicle safety," but are instead laws "of general applicability." ER82-83. The agency, in an invited amicus

brief representing the views of the United States, asked this Court to defer to its position. *Id.*

Because the FMCSA lacked the requisite authority, the trucking industry next focused its quest for preemption on the courts, contending that California's meal-and-rest-break rules are preempted by the Federal Aviation Administration Authorization Act. *See* 49 U.S.C. § 14501(c)(1). Although that preemption provision sweeps quite broadly, this Court and the Supreme Court have repeatedly rebuffed efforts to deploy it to preempt California's break laws. *See Dilts v. Penske Logistics*, 769 F.3d 637 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015); *Ortega v. J. B. Hunt Transp., Inc.*, 694 Fed. Appx. 589 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2601 (2018).

Last year, after losing at all levels of the judiciary, the trucking industry turned to Congress. It failed there too. Despite intense industry lobbying, an amendment that would have explicitly preempted California's break rules was removed before the legislation was passed.

Within weeks, having now failed before all three branches of government, the industry asked the Trump Administration to reverse the FMCSA's position on the limits of its statutory authority and reach the result that Congress had just declined to enshrine into law. Acting quickly, the Administration did as it was asked, ruling that California's century-old break laws would "no longer" apply to commercial motor vehicle drivers covered by the agency's rules. ER11. Although this decision was

based solely on the agency's authority under 49 U.S.C. § 31141—the same authority the agency found plainly inapplicable over the past decade—the agency offered no new interpretation of the statutory text.

Two weeks after it was issued, an FMCSA official stated that the agency's "determination does not have retroactive effect." ER229. But just a few months later, bowing again to industry pressure, the agency changed its mind on this question too. An agency legal memorandum, by the same official, now opined that the preemption determination *is* retroactive. In the agency's words, it prevents courts from giving relief under state law "regardless of whether the conduct underlying the lawsuit occurred before or after the decision was issued, and regardless of whether the lawsuit was filed before or after the decision was issued." ER231.

Both of these 180-degree reversals contravene established presumptions in our legal system and should be rejected by this Court. On preemption: The agency's about-face cannot be reconciled with the presumption, "[i]n *all* pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," 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." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). That presumption is heightened where, as here, an agency's "recently adopted position" favoring preemption "represents a dramatic change in position." *Id.* at 579-81 (finding such a position

"entitled to no weight."). The Supreme Court, for example, has found an agency's pro-preemption position "particularly dubious given that just five years ago the United States advocated the [opposite] interpretation." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 448-49 (2005). Under the Supreme Court's cases, even if the FMCSA "had offered … a plausible alternative reading" of the statute, this Court "would nevertheless have a duty to accept the reading that disfavors pre-emption." *Id.* But the FMCSA has not offered any new interpretation. And the only reading that makes sense of the statute's text, structure, purpose, and history is the FMCSA's prior reading: state laws "on commercial motor vehicle safety" are laws "specifically directed at commercial motor vehicle safety"—not background laws "of general applicability," like the break laws here. ER82-83.

On retroactivity: The agency's second about-face contravenes "the presumption against retroactive legislation" that is "deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). More specifically, an agency's grant of rulemaking authority does not "encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Given the presumption against preemption and the important interests of state sovereignty at stake, no court should lightly assume that Congress gave unelected bureaucrats the

power to retroactively wipe out generally applicable workplace protections under state law—in this case, protections that were in place for a century.

JURISDICTIONAL STATEMENT

On February 19, 2019, petitioners Duy Nam Ly and Phillip Morgan timely petitioned this Court for review of the order and preemption determination issued by the FMCSA and published in the Federal Register on December 28, 2018. The petitioners sought review under Federal Rule of Appellate Procedure 15 and 49 U.S.C. § 31141(f), which allows any person adversely affected by such a preemption determination to seek review within sixty days of its publication. The petitioners are commercial truck drivers entitled to protections under California's meal-and-rest-break laws—the laws deemed by preempted by the agency—and are therefore directly and adversely affected by the challenged preemption determination.

STATEMENT OF THE ISSUES

1. Congress has given the FMCSA limited statutory authority to preempt "a State law or regulation on commercial motor vehicle safety." 49 U.S.C. § 31141(a). Until last year, the FMCSA consistently took the position that California's meal-and-rest-break laws "are in no sense regulations 'on commercial motor vehicle safety'" and hence the agency "has no authority" to preempt them. ER92 Given the presumption "that the historic police powers of the States were not to be superseded … unless that was the clear and manifest purpose of Congress,'" *Association des Éleveurs*

de Canards et d'Oies du Québec v. Becerra, 870 F.3d 1140, 1146 (9th Cir. 2017), did the FMCSA have the authority to preempt California's meal-and-rest-break rules?

2. Consistent with the strong presumption against an agency's authority to promulgate retroactive rules, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), an FMCSA official explained that its "determination does not have retroactive effect." ER229. But a few months later, the agency changed its mind. It opined that its preemption determination prevents courts from giving relief under state law "regardless of whether the conduct underlying the lawsuit occurred before or after the decision was issued, and regardless of whether the lawsuit was filed before or after the decision was issued." ER231. Did the agency have the authority to retroactively preempt California law?

STATEMENT OF THE CASE

This case is the latest chapter in a long campaign by the trucking industry to exempt itself from state worker-protection laws. After failing to achieve its goal before Congress and the courts, the industry persuaded the FMCSA that California's meal-and-rest-break laws dating from the dawn of the automobile era—before the nascent trucking industry was even subject to government regulation—are nevertheless regulations "on commercial motor vehicle safety" subject to preemption by agency fiat. In accepting that argument, the agency reversed its own decade-old position

that laws of general applicability—including California's break laws—are not subject to its preemption authority.

A. Statutory background

The argument adopted by the FMCSA turns on the intersection of two unrelated and very different statutory frameworks—California's broad, century-old remedial worker-protection scheme, of which the meal-and-rest-break laws are a part, and the FMCSA's narrow preemption authority under the Motor Carrier Safety Act of 1984.

1. California's worker-protection scheme

a. Regulation of wages and hours. For more than a century, "California law has guaranteed to employees wage and hour protection, including meal and rest periods intended to ameliorate the consequences of long hours." *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 520 (2012). California's protection of workers began in 1913 as part of a "wave" of similar laws that "swept the nation in the second decade of the 20th century." *Martinez v. Combs*, 231 P.3d 259, 270 (2010). Responding "to the problem of inadequate wages and poor working conditions," the California legislature established the Industrial Welfare Commission (IWC), *Brinker*, 273 P.3d at 527, a state agency broadly charged with protection of workers' "comfort, health, safety, and welfare." *Indus. Welfare Com. v. Superior Court*, 613 P.2d 579, 584 (1980).

To further that mission, "the commission beginning in 1916 promulgated a series of industry- and occupation-wide 'wage orders,' prescribing various minimum requirements with respect to wages, hours and working conditions." *Id.* at 583. By 1918, the IWC had issued wage orders regulating the canning, packing, manufacturing, mercantile, and laundry industries. *Martinez*, 231 P.3d at 272-73. It had not, however, sought to regulate trucking. That is not surprising, given that the concept of a "trucking industry" at that time had yet to be developed. *See* U.S. Dep't of Transportation, *America's Highways, 1776-1976*, at 92-93 (1977). The few trucks in the United States before 1918—before the interstate highways and diesel truck engines—were limited to local deliveries and operated in an "atmosphere unclouded by [g]overnment regulation." *See id.* at 92-93, 98. The IWC did not adopt Order Number 9, which covers truck drivers and other transportation-industry workers, until 1976. *Hitchcock Transportation Co. v. Indus. Welfare Com.*, 613 P.2d 605, 606 (1980); *see* Wage Order 9-2001, Cal. Code Regs., tit. 8, § 11090 ("IWC Wage Order").

Today, eighteen wage orders are in effect. *Martinez*, 231 P.3d at 273. The orders cover the full spectrum of industries, from agriculture to motion pictures. *Id.* Although the "IWC issues wage orders on an industry-by-industry basis," the orders are virtually identical across industries. *Brinker*, 273 P.3d at 521 n.1; *see* Cal. Code Regs., tit. 8, §§ 11010-11170. Collectively, they establish the "normal background rules for almost *all* employers doing business in the state of California." *Dilts*, 769 F.3d at 647;

see also Brinker, 273 P.3d at 521 n.1 (noting that the IWC's wage orders together cover "all … nonexempt employees in California").

b. Meal-and-rest-break laws. "From its earliest days, the commission's regulatory orders have contained numerous provisions aimed directly at preserving and promoting the health and safety of employees within its jurisdiction." *Indus. Welfare Com.*, 613 P.2d at 596. Those concerns "motivated the IWC to adopt mandatory meal and rest periods." *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 296 (Cal. 2007); *see also Brinker*, 273 P.3d at 520 (noting that meal-and-rest periods are "intended to ameliorate the consequences of long hours"). The IWC began including meal-and-rest-break rules in its wage orders in 1916 and 1932, respectively. *Murphy*, 155 P.3d at 291.

As they currently stand, those rules require employers to provide their employees with uninterrupted meal breaks of at least thirty minutes, with "a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." *Brinker*, 273 P.3d at 537; IWC Wage Order, § 11; *see also* Cal. Labor Code § 512(a). Employers must likewise "authorize and permit all employees to take rest periods." IWC Wage Order, § 12(A). Those periods must include one ten-minute rest break for every four-hour work period or "major fraction thereof," and "insofar as practicable shall be in the middle of each work period." *Id.* Employers that fail to provide the required

breaks must "pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided." Cal. Labor Code § 226.7; IWC Wage Order, §§ (11)(D) & 12(B) .

As the FMCSA has previously acknowledged, California's break laws fall "squarely within the states' traditional power to regulate the employment relationship and to protect worker health and safety" and are thus "manifestly an exercise of the state's traditional police power." Br. for U.S. at 18, *Dilts*, No. 12-55705 (9th Cir. Feb. 18, 2014) (ER74); *see Murphy*, 155 P.3d at 291 (noting that the laws "have long been viewed as part of [California's] remedial worker protection framework"). Those police powers give the state "broad authority … to regulate the employment relationship" and to "protect workers within the State." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976).

2. The Motor Carrier Safety Act of 1984

a. The FMCSA's regulatory authority. In the Motor Carrier Safety Act, Congress authorized the FMCSA to "prescribe regulations on commercial motor vehicle safety" to impose "minimum safety standards for commercial motor vehicles." 49 U.S.C. § 31136(a). Congress found that the resulting "improved, more uniform … safety measures" would help to "reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operation." *Id.* § 31131(b)(2).

Even while seeking uniformity, however, Congress also expressed sensitivity to the importance of states' independent authority to regulate safety. Congress found that "interested State governments can provide valuable assistance … in ensuring that commercial motor vehicle operations are conducted safely and healthfully." *Id.* § 31131(b)(4). And it required the agency, "[b]efore prescribing regulations" under the Act, to "consider … State laws and regulations on commercial motor vehicle safety" and "to minimize their unnecessary preemption," *id.* § 31136(c)(2)—a requirement "wholly inconsistent with a congressional intent to eclipse the states' role in ensuring safe commercial trucking." *Interstate Towing Ass'n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1161 (6th Cir. 1993).

The Motor Vehicle Safety Act thus expresses Congress's intent "not to supplant state laws regulating motor carriers, but to supplement them." *Id.* at 1159. State laws are only preempted, in other words, "where they [stand] in the way of achieving Congress's goal of 'improved, more uniform commercial motor vehicle safety measures.'" *Id.*; *see also Specialized Carriers & Rigging Assoc. v. Commonwealth of Virginia*, 795 F.2d 1152, 1156 (4th Cir. 1986) ("Congress intended an accommodation with state regulation so long as that could be achieved without violating federal law or valid federal regulation.")

b. The agency's hours-of-service regulations. The FMCSA exercised its rulemaking authority under the Motor Carrier Safety Act to regulate

truck drivers' maximum driving time. *See* 49 C.F.R. § 395.3. Those hours-of-service rules, for example, limit drivers to eleven hours of driving per day. *See id.* § 395.3(a)(3)(i). They also mandate limited rest breaks, requiring drivers to spend at least thirty minutes off duty within the first eight hours of their shifts. *See id.* § 395(a)(3)(ii).

Like Congress, the agency in enacting the rules stressed that it did not intend to intrude on the traditional authority of states to regulate health and safety. *See Hours of Service of Drivers*, 76 Fed. Reg. 81,134, 81,183 (Dec. 27, 2011) ("[T]his rule would not have a substantial direct effect on States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation."); *see also* 75 Fed. Reg. 82,170, 82,195 (Dec. 29, 2010) (same). Indeed, the rules expressly state that they are "not intended to preclude States … from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations." 49 C.F.R. § 390.9. The regulations reflect the agency's "understanding … that Congress did not intend for the [Motor Carrier Safety Act] to supplant state motor vehicle laws." *Interstate Towing Ass'n, Inc.,* 6 F.3d at 1161.

On the contrary, the FMCSA has "for decades required carriers and drivers to comply with all of the laws, ordinances, and regulations of the jurisdiction where they operate." *Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks*

for Commercial Motor Vehicle Drivers; Rejection for Failure To Meet Threshold Requirement, 73 Fed. Reg. 79,204, 79,206 (Dec. 24, 2008) (ER92). The agency's rule requires that "[e]very commercial motor vehicle must be operated in accordance" with the laws of the jurisdiction. 49 C.F.R. § 392.2.

c. The agency's preemption authority. In addition to its grant of regulatory authority, the Motor Carrier Safety Act grants the FMCSA authority, under limited conditions, to preempt conflicting state laws. *See* 49 U.S.C. § 31141. Congress, however, conditioned that authority on the threshold requirement that the preempted law must be a law "on commercial motor vehicle safety." *Id.* If the subject of the law is something *other* than commercial motor vehicle safety, the agency has no authority to preempt it—and the analysis ends there.

If, on the other hand, the FMCSA's preemption determination survives that threshold test, the statute requires that the agency "shall decide" whether the law (1) has the same effect as a regulation prescribed under 49 U.S.C. § 31136 (the authority for much of the federal motor-vehicle safety regulations); (2) is less stringent than such a regulation; or (3) is additional to or more stringent than such a regulation. 49 U.S.C. § 31141(c)(1). State laws that fall into the third category may be enforced unless the agency also decides that the law or regulation has no safety benefit, is incompatible with the federal regulation, or causes an unreasonable burden on interstate commerce. *Id.* § 31141(c)(4).

The statute also provides that the agency "shall review" any state law "on commercial motor vehicle safety." *Id.* § 31141(c)(1). To facilitate that mandatory review, it requires that a state enacting such a law "shall submit a copy" to the agency "immediately after the enactment." *Id.* § 31141(b).

The FMCSA has rarely invoked its preemption authority under section 31141, and has done so only for laws or regulations that are both narrow in scope and specific to the trucking industry. The agency has preempted, for example, a law regulating the transport of metal coils, an identification requirement for commercial motor vehicles, and a highway routing requirement for hazardous materials. Until the decision at issue in this case, the agency had never preempted a law of general applicability like California's meal-and-rest-break laws.[1]

B. Factual background

In a determined effort to deprive interstate truck drivers of the benefits of California's meal-and-rest-break laws, the trucking industry has repeatedly and for many years sought to preempt those laws in federal rulemaking, in the courts, and in Congress. Each of those efforts failed: All three branches of government declined

[1] *See Alabama Metal Coil Securement Act; Petition for Determination of Preemption*, 78 Fed. Reg. 14,403 (Mar. 5, 2013) ; *Identification of Interstate Motor Vehicles: New York City, Cook County, and New Jersey Tax Identification Requirements; Petition for Determination*, 75 Fed. Reg. 64,779 (Oct. 20, 2010); *Application by American Trucking Associations, Inc. for a Preemption Determination as to District of Columbia Requirements for Highway Routing of Certain Hazardous Materials*, 70 Fed. Reg. 20,630 (Apr. 20, 2005).

to preempt the rules, largely because of the important general employment protections that the rules embody.

1. The FMCSA rejects the trucking industry's petition to preempt California's meal-and-rest-break laws.

In 2008, a group of trucking companies petitioned the FMCSA to preempt California's meal-and-rest-break laws "as applied to drivers of commercial motor vehicles." ER90. The companies complained that, "by mandating when meal[] breaks must be taken," the break laws create a "lack of flexibility" that "hinders operations." ER91. Trucking companies, they contended, should "be free to schedule drivers to work … without regard for individual state requirements." *Id.*

Like the petitioner here, the companies argued that California's break laws are laws "on commercial motor vehicle safety" subject to the FMCSA's preemption authority under section 31141. *See id.* A law is "on commercial motor vehicle safety" for purposes of that authority, they contended, as long as it is a law "on commercial motor vehicle safety" for purposes of the agency's rulemaking authority under section 31136. *See id.* In other words, "any state law or regulation that regulates subject matter within the FMCSA's [rulemaking] authority" is also subject to preemption by the agency. *Id.*

In a decision diametrically opposed to the decision it defends here, the FMCSA rejected the companies' petition. ER92. California's meal-and-rest-break rules, it found, "are in no sense regulations 'on commercial motor vehicle safety,"

but rather "appl[y] *generally* to California employers." ER90, ER92 (emphasis added). As the agency noted, the relevant IWC wage order "appl[ies] to the entire 'transportation industry,'" and thus "cover[s] far more than … trucking." ER91. "In fact," the laws "are not even unique to transportation" because "California imposes virtually the same rules" on a wide variety of other industries. ER91-92. Thus, the break laws are "simply one part of California's comprehensive regulations governing wages, hours and working conditions"—regulations the agency has "for decades" required motor carriers to follow. ER92. The agency concluded that it "has no authority" to preempt the break laws. *Id.*

The agency rejected the companies' argument that it "has power to preempt any state law or regulation that … *affects* any matters within the agency's broad Congressional grant of authority." *Id.* (emphasis added). That "far-reaching argument," the agency explained, finds no support in either the "statutory language or legislative history," and would expose "any number of State laws" to challenge "merely because they have some effect" on a trucking company's operations. *Id.* "For example," the agency wrote, "it is conceivable that high State taxes and emission controls could affect a motor carrier's financial ability to maintain compliance" with federal regulations. *Id.* Yet "it is doubtful that the Agency would be viewed as thus having the authority to preempt State tax or environmental laws." *Id.*

For those reasons, the agency concluded that the meal-and-rest-break laws "do not meet the threshold requirement for consideration under 49 U.S.C. § 31141." ER91. The agency's conclusion is one that courts have found persuasive. *See Yoder v. W. Express, Inc.*, 181 F. Supp. 3d 704, 716-17 (C.D. Cal. 2015).

2. The courts also reject the industry's argument that the break laws are preempted.

After the FMCSA rejected the petition, the trucking industry focused its quest for preemption on the courts. In *Dilts v. Penske Logistics*, the industry argued that California's meal-and-rest-break laws are preempted by statute—specifically, the express preemption provision of the Federal Aviation Administration Authorization Act (or FAAAA). 769 F.3d 637; *see* 49 U.S.C. § 14501(c)(1). *Dilts* marked just the latest of the industry's many failed attempts to preempt state worker-protection laws through litigation, following past arguments that such laws were impliedly preempted by the FMCSA's hours-of-service regulations. *See, e.g.*, *Agsalud v. Pony Express Courier Corp.*, 833 F.2d 809 (9th Cir. 1987) (rejecting the argument that federal hours-of-service regulations preempt state minimum-wage laws); *Pettis Moving Co. v. Roberts*, 784 F.2d 439, 441 (2d Cir. 1986) (same); *Cole v. CRST Van Expedited, Inc.*, 2010 WL 11463494, at *8 (C.D. Cal. 2010) (rejecting the argument that the FMCSA's hours-of-service regulations preempt California's meal-and-rest-break laws).

The FMCSA in *Dilts* filed a brief in this Court arguing that California's break laws are not preempted either by the FAAAA or by the hours-of-service regulations,

and that the agency lacked authority to preempt them under section 31141. The FAAAA, the agency argued, must "be construed in light of the principle that state laws dealing with matters traditionally within a state's police powers are not to be preempted unless Congress's intent to supersede state law is clear and manifest." ER66. The FAAAA "does not preempt the state meal and rest break law," it explained, because the law "is squarely within the states' traditional power to regulate the employment relationship and to protect worker health and safety," and because it "is a law of longstanding, general applicability [that] does not reflect any state effort to regulate motor carriers directly." ER66-67. Likewise, the agency argued that the hours-of-service rules do not preempt the break laws because the purpose of those rules—to "improve motor vehicle safety and driver health by reducing driver fatigue"—is "not impeded by the California law." ER85-86.

As to preemption under section 31141, the FMCSA made clear that it "continue[d] to adhere to [its] view" that California's meal-and-rest-break laws are laws of "longstanding, general applicability" that are "not subject to statutory preemption." ER67, 82-83. As the agency explained, a state law is not "on commercial motor vehicle safety," and thus not subject to preemption, unless it is "*specifically directed* at commercial motor vehicle safety." ER82-83 (emphasis added). Because California's laws do "not reflect any state effort to regulate motor carriers directly," they are not subject to preemption. ER67.

The agency asked this Court to defer to its judgment as to the scope of each form of preemption. ER86. Its views on preemption under the FAAAA and federal regulations, it wrote, represented the "agency's considered judgment" on those issues, and were consistent with its prior expressed views on preemption under section 31141. ER87-88. Those views, it argued, were thus "entitled to substantial deference." *Id.*

This Court agreed with the FMCSA. Following the agency's lead, the Court held that the FAAAA does not preempt California's meal-and-rest-break laws because the laws are not "related to" trucking prices, routes, or services, but rather are just "normal background rules for almost *all* employers doing business in the state of California." *Dilts*, 769 F.3d at 647. In reaching that conclusion, the Court credited the FMCSA's "reasoned consideration of the question" and noted that the agency's position was "generally consistent with its approach to other preemption questions concerning California's meal and rest break laws"—in particular, its denial of the 2008 preemption petition. *Id.* at 650. The Supreme Court denied certiorari. *See Penske Logistics, LLC v. Dilts*, 135 S. Ct. 2049 (2015).

Last year, the industry again tried to preempt California's meal-and-rest-break laws by asking the U.S. Supreme Court to overturn a different decision of this Court upholding the laws under the FAAAA. *See Ortega v. J. B. Hunt Transp., Inc.*, 694 Fed. Appx. 589 (9th Cir. 2017). The Supreme Court again declined the invitation, denying

certiorari and thus allowing California to continue enforcing its laws. *See J.B. Hunt Transp., Inc. v. Ortega*, 138 S. Ct. 2601 (2018).

3. The industry fails to persuade Congress to adopt its view of the law.

After losing in the courts, the trucking industry turned to the last branch of government: Congress. It failed there too. A broad coalition of industry groups pushed for an amendment to the Federal Aviation Administration Reauthorization Act that the bill's sponsor described as an effort to reverse this Court's decision in *Dilts*. *See* 164 Cong. Rec. H3673 (daily ed. Apr. 26, 2018) (Amendment No. 79 Offered by Mr. Denham); H.R. 4, 115th Cong. (2018). The amendment would not only have prevented California and other states from enforcing meal-and-rest-break requirements, but would also have preempted other state laws that "impos[e] *any* additional obligations on motor carriers." *See id.* (emphasis added).

Despite the industry's efforts, however, the House of Representatives removed the amendment from the bill before passing it. *See* Pub. L. 115-254 (2018) (omitting Amendment No. 79); Brian Straight, *Denham Amendment booted from final FAA reauthorization bill*, Freight Waves, Sept. 26, 2018, http://bit.ly/2MU6aC6.

4. The industry again turns to the FMCSA—this time with a different result.

Having failed before all three branches of government, the industry went back to the FMCSA, asking the Trump Administration and Secretary of Transportation

Elaine Chao to reverse the agency's established interpretation of the Motor Carrier Safety Act—an interpretation that for a decade had represented the agency's "considered judgment regarding the preemptive scope of the statute," and to which the agency asked this Court to defer. U.S. Br. in Dilts at 32 (ER 88). This time, the agency was more receptive to the industry's position.

a. The industry's petition. In a petition by the American Trucking Associations (ATA), the industry rehashed its argument that California's meal-and-rest-break laws are laws "on commercial motor vehicle safety" and are thus subject to preemption under section 31141. ER2. As in the 2008 petition, the ATA argued that the agency's preemption authority under section 31141 "mirrors" its authority to "prescribe regulations on commercial motor vehicle safety" under section 31136. ER4. Because the FMCSA has authority under section 31136 to regulate the hours of commercial drivers, the ATA concluded, it must also have the authority under section 31141 to preempt general laws with that same effect. *See id.*

The ATA acknowledged that the FMCSA had rejected that precise argument in its denial of the 2008 petition. It argued, however, that the 2008 decision was "wrong as a matter of statutory interpretation." ER2.

b. The FMCSA's preemption decision. A little more than a week after the ATA filed its petition, the FMCSA published a notice in the Federal Register seeking public comment on whether the California meal-and-rest-break

rules should be preempted. *California Meal and Rest Break Rules; Petition for Determination of Preemption*, 83 Fed. Reg. 50,142 (Oct. 4, 2018). Many industry groups submitted comments supporting the ATA's petition. The California Labor Commissioner, Teamsters, American Association for Justice, and consumer groups, in contrast, opposed preemption. ER3, 4 & n.4.

Soon after the close of the comment period, the FMCSA granted the ATA's petition. *See California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption*, 83 Fed. Reg. 67,470, 67,480 (Dec. 28, 2018) (ER11). In its decision, the agency acknowledged that it had already rejected the ATA's interpretation of "on commercial motor vehicle safety" in its denial of the 2008 petition. ER4-5. It concluded, however, that its contrary interpretation of the statutory language was "unnecessarily restrictive" and should be "reconsidered." ER4.

The agency, however, did not precisely adopt the industry's interpretation of the statutory language. The ATA's petition had argued that the phrase "on commercial motor vehicle safety" means the same thing in § 31141 as it does in § 31136. *See* ER4. The agency, in contrast, concluded that a state law is "on commercial motor vehicle safety" under section 31141 only if the law covers the same subject matter as a regulation *already promulgated* by the agency under section 31136. *See id.* (concluding that a state law is "on commercial motor vehicle safety" under section 31141 "if the

law … imposes requirements in an area of regulation that is *already addressed* by a regulation promulgated under 31136" (emphasis added)). In the agency's view, California's meal-and-rest-break laws are thus preempted only because the agency has already adopted rules regulating truck drivers' breaks and hours of service. *See id.*

In reaching that result, the FMCSA abandoned its long-held position—set forth in its 2008 decision and in its amicus brief in *Dilts*—that California's meal-and-rest-break laws are not subject to preemption because they are laws of general applicability that are not specifically directed to truck safety. The agency relied on legislative history for the proposition that Congress wanted "as much uniformity as practicable," ER4, without acknowledging Congress's express findings regarding the "valuable" role of state regulation, 49 U.S.C. § 31131(b)(4), or its requirement that the agency "consider … State laws and regulations on commercial motor vehicle safety, to minimize their unnecessary preemption." *Id.* § 31136(c)(2)(B).

The FMCSA considered it unnecessary to reach the question whether the scope of its preemption authority also encompasses laws that merely "affect" commercial motor vehicle safety. *See* ER4. The agency had no need to decide whether it could preempt state tax laws, environmental laws, or other laws of general applicability, it concluded, given that it had not promulgated rules on those subjects. *See id.*

After concluding that the threshold requirement was satisfied, the agency next agreed to invoke its authority to preempt California's meal-and-rest-break laws. ER5. The break laws, the agency reasoned, are "additional to or more stringent than" the federal hours-of-service regulations because they require additional rest breaks and, unlike the federal regulations, provide general time ranges during which breaks must be taken. *See id.* Based on those requirements, the agency concluded that California's laws are "incompatible with" its hours-of-service regulations, ER9—a conclusion directly at odds with its assertion in *Dilts* that the hours-of-service regulations are "not impeded by the California law." ER86.

For those reasons, the FMCSA granted the petition for preemption. Under the agency's decision, California "may no longer enforce" its meal-and-rest-break laws for the protection of truck drivers subject to the hours-of-service rules. ER11.

c. The agency's retroactivity decision. In line with the strong presumption against an agency's authority to promulgate retroactive rules, *Bowen*, 488 U.S. at 208, the FMCSA initially considered its preemption decision to be prospective only. In response to an inquiry concerning the decision, the agency's deputy chief counsel wrote in a January 7, 2019, email that the "determination does not have retroactive effect." *See* FMCSA, *Legal Opinion of the Office of the Chief Counsel* 2 (Mar. 22, 2019) (ER229).

But, less than two weeks later, the same counsel wrote that the agency was "giving the retroactivity issue further consideration," and would "provide additional clarification as soon as possible." *Id.* The agency then posted a public statement that the deputy chief counsel's expressed views did not represent the views of the FMCSA and that it "intend[ed] to post a more detailed public statement in the near future, addressing how the December 21, 2018 preemption determination applies to pending cases." *Id.*

The FMCSA provided that statement in the form of a "legal opinion of the office of the chief counsel," signed by the deputy chief counsel. ER228. In it, the agency stated its "considered judgment" that "an FMCSA preemption decision under Section 31141 precludes courts from granting relief pursuant to the preempted State law or regulation at any time following issuance of the decision, regardless of whether the conduct underlying the lawsuit occurred before or after the decision was issued, and regardless of whether the lawsuit was filed before or after the decision was issued." ER228, 231. The agency based that conclusion on "the nature of Federal preemption." ER229. Because a preempted state law is "without effect," it argued, "courts lack the authority to take any contrary action on the basis of" a preempted law, "regardless of when the underlying conduct occurred." *Id.*

C. Procedural background

Petitioners Duy Nam Ly and Phillip Morgan are commercial truck drivers entitled to protections under California's meal-and-rest-break rules. Mr. Ly drives for J.B. Hunt Transport, was misclassified as an independent contractor, and is currently a named plaintiff in a class action seeking to enforce his rights under California's break rules. *See Ly v. J.B. Hunt Transport, Inc.*, No. 2:19-cv-01334-SVW-SS (C.D. Cal. filed June 25, 2018). Mr. Morgan is a truck driver employed with Core-Mark International, Inc., at its Sacramento, California distribution center. He is also currently a named plaintiff in a class action seeking to enforce his rights under California's break rules. *See Morgan v. Core-Mark Int'l, Inc.*, No. 34-2018-00228207-CU-OE-GDS (Cal. Super. Ct., Sacramento, filed Mar. 1, 2018).

Shortly after the agency granted the petition for preemption, the petitioners filed for review in this Court under 49 U.S.C. § 31141(f), which allows any person adversely affected by an FMCSA preemption determination to seek review within sixty days. Their case was then consolidated with similar challenges by other petitioners. *See International Brotherhood of Teamsters, Local 2785 et al. v. FMCSA*, No. 18-73488; *International Brotherhood of Teamsters et al. v. FMCSA et al.*, No. 19-70323; *Labor Commissioner for the State of California v. FMCSA*, No. 19-70329.

SUMMARY OF ARGUMENT

I. Because California's meal-and-rest-break rules are not laws "on commercial motor vehicle safety," the agency lacks statutory authority to preempt them. Applying the traditional tools of construction—text, structure, history, and purpose—this Court should reach the same conclusion that the agency itself reached in 2008 and urged on this Court in 2014: Section 31141 "does not allow the preemption" of general, longstanding state laws. Instead, in the agency's own words, only laws "*directed at*" or "*specifically addressed to* commercial motor vehicle safety" fall under the agency's authority. ER82-83. That conclusion follows from the ordinary meaning of "on commercial motor vehicle safety," which means on the topic of, or targeted at, commercial-motor-vehicle safety.

The plain meaning is confirmed by structure. The statute uses the same phrase—"on commercial motor vehicle safety"—multiple times. Under the normal rules of construction, those same words must mean the same thing. And under our reading, they do: One section tasks the agency with prescribing regulations directed at motor-vehicle safety, while another tasks the states and the agency with the obligation to submit and review, respectively, state laws specifically directed at motor-vehicle safety. The alternative reading, by contrast, poses numerous practical problems that the agency can't satisfactorily explain away: The agency's authority to prescribe rules would be much broader than it is; the statute would impose onerous

or impossible reporting and preclearance requirements on the states and the agency; and the agency would gain unprecedented authority to wipe out longstanding, generally applicable state law by bureaucratic decree.

The legislative history also supports the agency's prior reading. When Congress enacted the statute, it emphasized the need to "minimize unnecessary preemption"; it considered and specifically rejected a proposal to preempt hours-of-service rules, after hearing testimony on the proposal's intrusive effects on state sovereignty; and it exempted from preemption two categories (traffic and roadside-inspection laws) that are consistent with a narrower understanding of the agency's authority.

Finally, in considering legislative purpose, this Court applies the presumption that state law—especially in areas of traditional regulation like workplace protection—will not be preempted unless it was "the clear and manifest purpose of Congress" to do so. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). This Court has repeatedly and recently applied this presumption in cases involving statutory preemption provisions and should do so here too. Because the agency erroneously concluded that the presumption does not apply, its analysis was flawed from the start.

II. The agency's attempt to retroactively preempt California's break laws also contravenes the "deeply rooted" "presumption against retroactive legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). This presumption, too, requires

clear evidence of congressional intent. An agency that purports to regulate events that took place before a rule's issuance may do so only if Congress has conveyed the power to act retroactively "in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Here, Congress did no such thing. And, once again, the agency initially acknowledged that lack of authority before changing its mind under industry pressure. It was right the first time.

III. The agency's newly expanded view of its own preemption authority deserves no deference. "Even under *Chevron*," courts "owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction," the court is "unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). But as Part I shows, section 31141's meaning can be discerned using the traditional toolkit. At the very least, the statute lacks the requisite "clear and manifest" indication of Congress's intent to preempt.

Regardless, deference here would still be inappropriate. Courts do not ordinarily defer to an agency's interpretation of its own preemptive authority—particularly where, as here, the agency's "recently adopted position" favoring preemption "represents a dramatic change in position." *Wyeth*, 555 U.S. at 579-81. Such positions are "entitled to no weight." *Id.* For example, the Supreme Court has found an agency's position "particularly dubious given that just five years ago the United States advocated the [opposite] interpretation." *Bates v. Dow Agrosciences LLC*,

544 U.S. 431, 449 (2005). And for good reason: An agency's prior contrary position is strong evidence that the statute lacks the clear congressional intent necessary to displace state law. A contrary rule, moreover, would create perverse incentives for agencies to reverse course and expand their own power—even where Congress hasn't authorized (and would not authorize) preemption. Due respect for the role of the states in our federalist system demands that federal courts, before allowing unelected bureaucrats to nullify the laws enacted by the fifty state legislatures, should insist on clear evidence that that is what Congress really intended.

STANDARD OF REVIEW

In this proceeding for review of the FMCSA's decision under 49 U.S.C. § 31141(f), the court is required to set aside agency action that is "not in accordance with law" or is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A) & (C). This Court's review of agency action is ordinarily deferential. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1145-46 (9th Cir. 2016). But, as explained in Part III below, no deference is warranted here because (1) the statute is not genuinely ambiguous and (2) even if the statute were ambiguous, deference to the agency's view of its own preemptive authority is nevertheless inappropriate—particularly where the agency radically changes position without offering a new interpretation. "Judicial deference to agency action is not warranted where the agency had no authority to act," *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*,

325 F.3d 1155, 1164 n.4 (9th Cir. 2003), where it "has not formulated an official interpretation," *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995), or where it has offered "[r]adically inconsistent interpretations of a statute." *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996). The legal questions presented here—whether the FMCSA acted within its authority in preempting state law, and whether it could do so retroactively—should be reviewed de novo.

ARGUMENT

I. Because California's meal-and-rest-break rules are not laws "on commercial motor vehicle safety," the FMCSA lacks the statutory authority to preempt them under section 31141.

The sole statutory authority on which the FMCSA relies for its decision to preempt California's meal-and-rest-break rules is section 31141. That statute provides that "[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced." 49 U.S.C. § 31141(a). This case turns on the meaning of the phrase "on commercial motor vehicle safety." Does this phrase include background state laws that, like California's, are not specifically directed at commercial motor vehicle safety?

To answer that question, this Court looks to "the text, structure, history, and purpose" of section 31141. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Each of these point in the same direction and together yield a clear answer: As the agency correctly

concluded in 2008, and reaffirmed to this Court in 2014, section 31141 "does not allow the preemption" of general, longstanding state laws, including California's meal-and-rest-break rules. ER92. Those rules are "simply one part of California's comprehensive regulations governing wages, hours, and working conditions." *Id.* Because they are not "directed at" or "specifically addressed to commercial motor vehicle safety," they are not laws on "commercial motor vehicle safety and thus fall[] outside the agency's statutory authority under 49 U.S.C. § 31141(a) to declare [] laws unenforceable." ER68, ER82-83 & n.5.

A. Section 31141 authorizes the FMCSA to preempt only those state laws that are specifically directed at commercial motor vehicle safety.

1. Text

a. The statutory analysis "begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). The text of section 31141—delegating authority to the agency to displace state laws "on commercial motor vehicle safety"—is most naturally read to cover only those laws that are *specifically directed at* motor-vehicle safety. The agency itself understood that this was the phrase's ordinary meaning when it "previously determined," in 2008, that the statute "authorizes the FMCSA to declare unenforceable a state law that is specifically addressed to commercial motor vehicle safety" or "specifically directed to" it. ER68.

That straightforward reading is consistent with the ordinary meaning of the word "on," which is defined as "having (the thing mentioned) as a topic," or "having (the thing mentioned) as a target, aim, or focus." *New Oxford American Dictionary* 1224 (3d ed. 2010); *see also American Heritage Dictionary of the English Language* 1230 (5th ed. 2011) ("Concerning; about. *A book on astronomy.*"). And "[w]hen a term goes undefined in a statute, [courts] give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012).

Thus, the ordinary meaning of the phrase "on commercial motor vehicle safety" limits the laws that the agency may preempt to those that are targeted at or focused on motor-vehicle safety. The preposition "on," in other words, denotes more than an incidental effect or relation. As the agency itself explained in 2008, laws that "merely … have some effect on CMV operations" are not laws "on commercial motor vehicle safety." ER92. In everyday parlance, nobody would sensibly describe Tolstoy's *Anna Karenina* as a "book on railroad accidents." True, *Anna Karenina* has some relation to railroad accidents because at key moments in the novel protagonists are injured and killed by trains. But it is not a book *on* railroad accidents because railroad accidents are neither its subject nor its target.

So, too, with California's meal-and-rest-break rules. True, the rules carry some relation to commercial-motor-vehicle-safety laws because drivers who take the prescribed meal-and-rest breaks might become safer drivers as a result. But they are

not laws *on* motor-vehicle safety because they are not specifically directed at that topic. Rather, their subject is the general regulation of labor conditions across the state and their target is the health and wellbeing of employees.

Every previous preemption decision by the FMCSA, throughout the history of the statute, conforms to this ordinary meaning. In 1995, for instance, the FMCSA's predecessor agency decided to preempt a Mississippi law that exempted "vehicles engaged in certain industries, such as lumber and gravel hauling and farming, from compliance with State motor carrier safety laws and regulations." *State Commercial Motor Vehicle Safety Law Affecting Interstate Commerce; Notice of Preemption Determination*, 60 Fed. Reg. 47421 (Sep. 12, 1995). And in 2013, the FMCSA decided to preempt an Alabama law that imposed additional certification requirements on commercial drivers because of the requirements' alleged safety benefits. *Alabama Metal Coil Securement Act; Petition for Determination of Preemption*, 78 Fed. Reg. 14403. Both of these laws were thus specifically directed at motor-vehicle safety.

Conversely, the one time before now that the agency was asked to preempt state laws that were *not* specifically directed at motor-vehicle safety was in 2008, when it considered the very same rules at issue here and rejected the argument that they fall within section 31141 as "far-reaching." ER92. The agency had it right the first time. Because California's meal-and-rest-break rules "are in no sense regulations 'on

commercial motor vehicle safety,' they are not subject to preemption under 49 U.S.C. § 31141." *Id.*

b. In both 2008 and 2018, the industry proposed to interpret the phrase much more expansively—as sweeping in any "state laws or regulations that regulate or *affect* subject matter within the FMCSA's authority under 49 U.S.C. 31136." ER91; *see* ATA Petition, 4 (Sept. 24, 2018), https://bit.ly/2MpOsa0. But, as the agency rightly observed in 2008 (and then reiterated in 2014), "[t]here is nothing in the statutory language … of 49 U.S.C. § 31141 that would justify reading into it the authority to preempt State laws 'affecting' CMV safety." ER92; *see* ER82; *see also Yoder*, 181 F. Supp. 3d at 717 (noting that the agency had previously been "consistent" in its rejection of this reading and that, "[a]lthough not bound by the reasoning of the FMCSA, the Court finds it persuasive"). And such a capacious reading, as we will explain, would carry with it intolerable practical consequences that Congress could not have condoned.

Which is likely why the agency, in its 2018 preemption order, declined to explicitly embrace such a reading. It went out of its way to try to make clear that its "determination does not rely on a broad interpretation of section 31141 as applicable to any State law that 'affects' CMV safety." ER4. But this is out of the frying pan and into the fryer: If the agency now finds the "directed at" reading to be

"unnecessarily restrictive," *id.*, yet it does not subscribe to an "affects" reading, what exactly is its reading of the phrase "on commercial motor vehicle safety"?

Strikingly, the agency offers no answer. It provides no textual account of what this language means, but offers only the *structural* argument that the "language of section 31141 mirrors that of section 31136," so "the scope of the Secretary's preemption authority" should be understood as coextensive with "the scope of the Secretary's authority to regulate the CMV industry." *Id.* This structural argument, however, is question-begging. The threshold issue this Court must resolve is the scope of the phrase "on commercial motor vehicle safety." In other words: what does this language mean? On that dispositive question, the agency has offered nothing.

2. Structure

Far from supporting a broader conception of the phrase, statutory structure confirms its plain meaning. The Motor Vehicle Safety Act, which contains section 31141, uses the same phrase several other times. *See, e.g.*, 49 U.S.C. § 31136(a) ("[T]he Secretary of Transportation shall prescribe regulations *on commercial motor vehicle safety*."); *id.* § 31141(b) ("A State receiving funds made available under section 31104 that enacts a State law or issues a regulation *on commercial motor vehicle safety* shall submit a copy of the law or regulation to the Secretary immediately after the enactment or issuance."); *id.* § 31141(c)(1) ("The Secretary shall review State laws and regulations *on commercial motor vehicle safety*.") (all emphasis added). Given the normal rule that

"identical words used in different parts of the same statute carry the same meaning," the phrase "on commercial motor vehicle safety" should bear the same meaning in section 31141(a) that it does in sections 31141(b), 31141(c)(1), and 31136(a). *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017).

The agency's previous, considered interpretation of the phrase—that "on" means "specifically addressed to" or "directed at"—comports with this rule. Under that ordinary understanding of the phrase, the statutory scheme coheres: Section 31136(a) requires the Secretary to prescribe regulations specifically directed at motor-vehicle safety. Section 31141(a) authorizes the Secretary to preempt state laws and regulations specifically directed at motor-vehicle safety. And sections 31141(b) and (c) task states and the Secretary with the obligation to submit and review, respectively, state laws and regulations specifically directed at motor-vehicle safety.

By contrast, the industry's proposed "affects" interpretation would have sweeping ramifications and serious practical consequences that Congress could not have intended. If laws and regulations "on commercial motor vehicle safety" referred to any laws and regulations somehow affecting or relating to motor-vehicle safety, consider what would happen:

First, section 31136(a) would suddenly authorize the Secretary to make rules on any subject matter, as long as those rules also have incidental effects on motor-vehicle safety.

Second, if the phrase were to cover even generally applicable laws not specifically directed at motor-vehicle safety, sections 31141(b) and (c) would impose onerous reporting and preclearance requirements on states and the Secretary, respectively. Subsection (b) provides that any "State receiving funds made available under section 31104 that enacts a State law or issues a regulation on commercial motor vehicle safety *shall submit* a copy of the law or regulation to the Secretary immediately after the enactment or issuance." 49 U.S.C. § 31141(b) (emphasis added). And subsection (c) says: "The Secretary *shall review* State laws and regulations on commercial motor vehicle safety," and "*shall decide* whether the State law or regulation" is more, less, or equally stringent to federal law. *Id.* § 31141(c)(1) (emphasis added). Because this language is mandatory ("shall") rather than permissive ("may"), it would impose on states and the Secretary an implausible, impractical burden of submitting and reviewing many thousands of background state rules and then (for the Secretary) determining how their effect on safety compares with federal requirements. *See Nat'l Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive."). And unlike identical language in a nearby provision, the mandatory language of section 31141(c) is not accompanied by the limiting phrase "to the extent practicable." *See* 49 U.S.C. § 31136(c)(2).

Finally, there is the provision at issue here, section 31141(a). This section would now hand the Secretary unprecedented authority to wipe out untold numbers of longstanding, generally applicable state laws as long they somehow affected or related to motor-vehicle safety. Such vast preemption power would not stop at California's meal-and-rest-break rules. For starters, it would immediately threaten to upend similar worker-health-and-welfare laws in twenty other states. *See* ER10. Moreover, as the agency itself acknowledged in 2008, its newfound interpretation could pave the way to federal preemption of "any number of state laws"—such as "high State taxes and emission controls"—that "could affect a motor carrier's financial ability to maintain compliance" with the agency's regulations. ER92. Similarly, the agency could now use incidental safety effects as a basis to nullify state laws requiring vehicles to stop at tolls and weigh stations or setting environmental standards, to name a few more examples. So it's no wonder that the agency rejected this interpretation as "far-reaching" the first time around. *Id.* Congress doesn't hide "elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In its recent reversal, the agency appeared to recognize (and sought to avoid) these intolerable consequences by saying that it was not embracing an "affects" reading. *See* ER4. That is all well and good. But again, it is not enough for the agency to say what it thinks the phrase *doesn't* mean; the agency must also say what it means. On that question, one of two things must be true. Either the agency was in fact

adopting an "affects" reading, even as it purported not to be doing so, or it was adopting some different, unarticulated definition in place of the "specifically directed at" reading it had adhered to up until that point.

Either way, the agency's position is fraught with problems. If the agency was in fact adopting an "affects" reading, that reading fails for the same reasons the industry's reading fails—and it is internally inconsistent, and thus arbitrary and capricious, to boot. If, on the other hand, the agency was in fact adopting some mysterious middle-ground interpretation of the phrase "on commercial motor vehicle safety," it was incumbent on the agency to say what that is. The agency instead tried to duck the question, stating that it could preempt the meal-and-rest-break rules "without deciding" what the key statutory phrase actually means. *Id.* But the agency cannot punt this question to some later date. It is under a continuing, affirmative obligation to review state laws "on commercial motor vehicle safety" (and states are under a reciprocal obligation to submit copies of these laws to the Secretary). 49 U.S.C. § 31141(c). How does the agency comply with this statutory mandate? Does it review "State tax laws, environmental laws, [and] other laws that 'affect' CMV safety," including workplace health-and-welfare laws? ER4. Or does it not? And if it does not, is that because the agency reads the same phrase to mean something different for purposes of this subsection, or because the agency is violating its statutory requirement?

A comment submitted to the agency made this very point. *See* American Association for Justice Comments re: FMCSA-2018-0304 California Meal and Rest Break Rules; Petition for Determination of Preemption (ER46). The agency chose to ignore it. This Court, however, will have to decide what the phrase means. And the only two contenders offered to date are "specifically directed at" (which harmonizes the statute) and "affects" (which doesn't).

3. History

The Motor Carrier Safety Act's history further supports the conclusion that section 31141 grants the agency authority to preempt only state laws and regulations specifically directed at motor-vehicle safety—not laws merely having some effect on motor-vehicle safety. In drafting the Act, Congress made three decisions that shed light on the scope of the agency's preemptive authority.

First, Congress emphasized that the agency, in exercising its authority, should "minimize unnecessary preemption of [] State laws and regulations under this Act." Pub. L. 98-554 § 206(c)(2) (1984). By adding this language, Congress explicitly declined to authorize sweeping agency preemption solely for the sake of creating "more uniform commercial motor vehicle safety measures." *Id.* § 203(2). Yet the agency ignores this statement of legislative intent and points instead (and exclusively) to Congress's desire for greater uniformity. *See* ER4.

Second, Congress initially considered authorizing the preemption of state hours-of-service rules in a separate provision of the Act. *See* S. 1108, 98th Cong. § 312(b) (1983). Congress ultimately declined to include this provision after hearing testimony on its intrusive effects on state sovereignty. *See Highway Safety Act of 1983: Hearing on S. 1108 Before the S. Comm. on Commerce, Science, and Transportation*, 98th Cong. 237 (1983) (statement of the Nat'l Assoc. of Regulatory Utility Comm'rs) ("The NARUC would also suggest that the Committee delete Section 312(b) of the bill, authorizing Federal preemption of State hours-of-service regulation, as *another* unnecessary intrusion into the exclusive regulatory jurisdiction of the States." (emphasis added)). Congress's separate consideration of state hours-of-service rules strongly suggests that Congress did not view section 31141(a)'s predecessor as already covering such rules.

That view makes sense. As explained above, state hours-of-service rules were not considered to be laws on "commercial motor vehicle safety" because they are not specifically directed at motor-vehicle safety. Congress assumed that general and longstanding state laws, such as California's meal-and-rest-break rules, would stay in effect and coexist with federal law, unless explicitly targeted by the Act. Congress declined to target these state laws in 1984, just as it again declined to preempt them last year. *See* Straight, *Denham Amendment booted from final FAA reauthorization bill*, http://bit.ly/2MU6aC6. In the absence of an amendment, California's meal-and-

rest-break rules and other general state laws should continue to coexist with federal law, as they did until the agency flipped its position in December 2018.

Finally, Congress specifically exempted two categories of state laws and regulations from the agency's scope of preemptive authority in the Motor Carrier Safety Act. One is "State traffic regulations." Pub. L. 98-554 § 229(a). The other includes various state motor-vehicle-inspection programs, such as "periodic roadside inspection programs of commercial motor vehicles" with "more stringent standards" than federal programs. *Id.* § 210(d)(1). Both exemptions concern state laws that are specifically directed at motor-vehicle safety. But for Congress's exemption, these state laws would have fallen squarely within the agency's scope of preemptive authority. By contrast, Congress refrained from exempting any general state laws not specifically directed at motor-vehicle safety. It did not exempt, say, state inspection, weight, occupancy, or emissions standards, despite their effects on motor-vehicle safety. Nor did it see a need to exempt state hours-of-service rules after declining to enact the provision that would have authorized the Secretary to preempt those rules. The fact that Congress felt the need to exempt only certain state laws specifically directed at motor-vehicle safety provides further indication that Congress understood the preemption provision in exactly the same way that the agency did until changing its position in 2018.

4. Purpose

Congress's purpose in enacting section 31141 further corroborates the agency's previous, considered interpretation. When Congress wrote section 31141, it did so against the backdrop of the "presumption against federal preemption"—one of the "traditional tools of statutory construction." Antonin Scalia & Bryan A. Garner, *Reading Law* 290 (2012). This presumption dictates that, "[i]n *all* pre-emption cases, and particularly in those in which Congress has 'legislated … in a field which the States have traditionally occupied,' [courts] 'start 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.'" *Wyeth*, 555 U.S. at 565 (emphasis added). Mindful of this presumption—and thus knowing full well that courts would interpret the FMCSA's preemptive authority only as far as the statute clearly authorizes—Congress chose the words "on commercial motor vehicle safety." Those are not the words one would choose to signal a "clear and manifest purpose" to preempt longstanding and generally applicable state employment laws that do *not* specifically address motor-vehicle safety. *Id.* Had Congress intended to grant the agency that authority, it would have spoken more clearly.

This Court has repeatedly (and recently) applied the presumption against preemption in cases involving statutory preemption provisions. In *Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, for instance, this Court explained that,

"[w]here the federal statute contains an express preemption clause, we must determine the substance and scope of the clause" and "assume 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." 870 F.3d 1140, 1146 (9th Cir. 2017). That means that "'when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption.'" *Id.* (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)). This Court recognized the same in *Beaver v. Tarsadia Hotels*, explaining that "[o]ur preemption analysis is driven by the presumption" against preemption. 816 F.3d 1170, 1179 (9th Cir. 2016); *see also Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 666 (9th Cir. 2019) (applying a "'starting presumption" against preemption in interpreting ERISA's express-preemption provision).

The presumption applies with particular force to cases like this one, where an agency seeks to preempt state laws "in a field which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "This is especially true in the area of employment law." *Ventress v. Japan Airlines*, 603 F.3d 676, 682 (9th Cir. 2010). Because "the establishment of labor standards falls within the traditional police power of the State," the Supreme Court has emphasized that "pre-emption should not be lightly inferred in this area." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987). "States possess broad authority under their police powers to regulate the

employment relationship to protect workers" through "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws." *DeCanas*, 424 U.S. at 356. Even where federal statutes broadly preempt state law relating to labor relations, the Supreme Court has historically been reluctant to extend preemption to the field of "wages, hours, or working conditions." *Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 6 (1943).

California's meal-and-rest-break laws fall squarely into this area of traditional state legislation because they concern workers' health and wellbeing. As the Supreme Court concluded with regard to California's wage laws and apprenticeship standards, which similarly seek to protect workers' health and wellbeing: "We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort." *Calif. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 334 (1997).

The agency's preemption analysis, however, did not even *consider* the presumption against preemption. Instead, the predicate for the agency's entire analysis was the erroneous proposition that the presumption simply "does not apply here." ER4. For support, the agency relied on one sentence of dicta in a recent case involving whether the Bankruptcy Code—which requires insolvent municipalities to restructure their debts through Chapter 9 rather than state bankruptcy law—

preempted a contrary Puerto Rico law. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). But the law preempted by the FMCSA, unlike in *Puerto Rico*, concerns an area of traditional state regulation. It also involves a rare kind of preemption provision in which Congress delegated preemption authority to the agency but did not itself expressly preempt state law. In any event, this Court has repeatedly applied the presumption in express-preemption cases after *Puerto Rico*. *See, e.g.*, *Association des Éleveurs*, 870 F.3d at 1146; *Depot*, 915 F.3d at 666; *see also Arellano v. Clark Cnty. Collection Serv., LLC*, 875 F.3d 1213, 1216 (9th Cir. 2017) ("[W]e read even express preemption provisions narrowly."). Indeed, this Court has been explicit that, "[a]lthough some Justices have cast doubt on the continued viability of the presumption against preemption … the Supreme Court has not yet abandoned this principle." *Knox v. Brnovich*, 907 F.3d 1167, 1174 n.3 (9th Cir. 2018) (citing *Arizona v. United States*, 567 U.S. 387, 400 (2012); *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621-23 (2011) (plurality op.)). Unless and until the Supreme Court overrules these cases, they remain binding precedent in this Court. The presumption against preemption thus applies with full force.

B. California's meal-and-rest-break laws are not specifically directed at motor vehicle safety, so they are not laws "on commercial motor vehicle safety."

Once the statute's proper meaning is understood, its application to California's meal-and-rest-break laws is straightforward. As the agency explained in

2008 when it rejected the industry's arguments: California's meal-and-rest-break rules are not "on commercial motor vehicle safety," but are instead "simply one part of California's comprehensive regulations governing wages, hours, and working conditions." ER92. They are "not intended to regulate motor carriers in any capacity other than their general role as employer." ER72.

The meal-and-rest-break rules are part of California's longstanding legislative efforts to protect employees' health and welfare. *See* Joseph G. Rayback, *A History of American Labor* 260-72 (1966); David Neumark & William L. Wascher, *Minimum Wages* 11-12 (2008). These rules were issued in 1916 and 1932, respectively, and "have long been viewed as part of the remedial worker protection framework." *Murphy*, 155 P.3d at 291. Over the past century, the California legislature has also enacted statutes directly regulating wages, hours, and working conditions, so that the field is "governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC." *Brinker*, 273 P.3d at 527.

Section 226.7(a) of the California Labor Code prohibits an employer from requiring an employee "to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." Section 512 prescribes meal periods, while the various wage orders prescribe both meal and rest periods. The wage orders cover the full spectrum of industries, from manufacturing to motion

pictures. Although the meal-and-rest-period rules apply to specific industries through separate wage orders, they are virtually identical across industries. *See* Cal. Code Regs., tit. 8, §§ 11010-11170. IWC Order 9.1 covers the transportation industry, which includes not only truck drivers, but anyone "conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations and services in connection therewith; … include[ing] storing or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles." *Id.* § 11090(2)(N).

California's meal-and-rest-break laws are thus firmly embedded in California's general and longstanding employment laws. They are, in the agency's own words, laws "of longstanding, general applicability and do[] not reflect any state effort to regulate motor carriers directly." ER67. As such, they are not laws "on commercial motor vehicle safety," and the agency lacks the authority to preempt them under section 31141.

II. The FMCSA's attempt to retroactively preempt California's meal-and-rest-break rules underscores that the agency has acted well beyond its statutory authority.

The FMCSA's attempt to retroactively preempt California's meal-and-rest-break rules contravenes a separate rule of construction—the "presumption against retroactivity," which is "almost [an] invariable rule." Scalia & Garner, *Reading Law* 261. Here, too, the agency got it right the first time: the presumption fully applies.

The "presumption against retroactive legislation is … deeply rooted in our jurisprudence." *Sacks v. S.E.C.*, 635 F.3d 1121, 1126 (9th Cir. 2011) (quoting *Landgraf*, 511 U.S. at 265). Under this presumption, courts will "only apply a statute or regulation retroactively if there is 'clear congressional intent' that it should be applied retroactively." *Id.* Likewise, and more to the point, an agency's grant of rulemaking authority will not be "understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen*, 488 U.S. at 208.

Consistent with this precedent, the FMCSA originally took the position that its 2018 preemption decision would not have retroactive effect. ER228-29. But then, facing further industry pressure, the agency again reversed course. Without identifying any "express" authority to regulate retroactively, the agency issued a legal opinion saying that "courts lack the authority" to apply any state law later preempted under section 31141, "regardless of when the underlying conduct occurred," because of "the nature of Federal preemption." ER229. According to the agency, "[t]his view is not inconsistent with the presumption against retroactive legislation or rulemaking, because it does not involve the retroactive application of an FMCSA decision, and instead involves only attempts to enforce a State law or regulation *after* the issuance of a preemption decision." ER230. "An FMCSA preemption decision," the agency elaborated, "has the same effect as a statute that removes jurisdiction in a pending

lawsuit, as it eliminates a legal predicate for the lawsuit. Thus, just as a statute removing jurisdiction applies 'whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed,' so too does an FMCSA preemption decision apply without regard to any consideration of retroactivity." *Id.* (quoting *Landgraf*, 511 U.S. at 274). In other words: As the agency sees it, immunizing companies from liability for violating state law *before* the agency purported to preempt that law is not the same as applying the preemption determination retroactively.

That is dumbfounding. Determining whether applying a provision would be retroactive "demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001). The answer here is plainly yes. The agency's own authority (*Landgraf*) and its own example (jurisdiction-stripping) make this clear. Unlike the rule at issue in this case, "[a]pplication of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Landgraf*, 511 U.S. at 274. "Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Id.* This case is the opposite. The "relevant activity that the rule regulates" is not the court's power but a private party's substantive obligation to provide benefits to workers required by state law. *Id.* at 291 (Scalia, J., concurring). Simply put, a statute or rule that is "meant

to regulate primary conduct"—which is what we have here—"will not be applied in [litigation] involving conduct that occurred before [its] effective date." *Id.* "Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered." *Id.*

No clear statement exists here. To the contrary, the only thing that was clear before December 2018 was that private plaintiffs could enforce these exact same rules, and trucking companies in California had to comply with them—as the agency itself said in 2008. To allow the agency's about-face to have retroactive effect under these circumstances would be nonsensical and unwarranted.

III. The agency's newly expanded view of the scope of its preemption authority is not entitled to deference.

In support of its decision to reverse course and adopt a more expansive view of its delegated authority to preempt state law, the FMCSA cited *Chevron*—an implicit appeal to administrative deference. *See* ER4. But the agency is not entitled to deference as to the proper scope of section 31141. That is true for two independent reasons. *First*, as explained in Part I, the statute is not genuinely ambiguous. *Second*, even if the statute were genuinely ambiguous, deference would still be inappropriate here.

A. Deference is inappropriate because section 31141 is not "genuinely ambiguous."

"Even under *Chevron*," the Supreme Court recently explained, courts "owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,'" the court is "unable to discern Congress's meaning." *SAS Inst., Inc.*, 138 S. Ct. at 1358 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (making same point); *Kisor*, 139 S. Ct. at 2414 (explaining in an analogous context that "the possibility of deference can arise only if [the law] is genuinely ambiguous" "even after a court has resorted to all the standard tools of interpretation"). In other words, deference to an agency's legal position is permissible only *after* a court "exhaust[s] all the 'traditional tools' of construction,'" for "only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is more [one] of policy than of law." *Id.* at 2415 (quoting *Chevron*, 467 U.S. at 843 n.9). And a statute is "not ambiguous merely because 'discerning the only possible interpretation requires a taxing inquiry.'" *Id.* (citation omitted).

As shown in Part I, section 31141 is not "genuinely ambiguous." *Id.* at 2414. Even assuming that its meaning were not apparent "on first read," application of the traditional tools of construction—"text, structure, history, and purpose"—would "resolve []any seeming ambiguit[y]" and produce a correct answer. *Id.* at 2415. The statutory phrase "on commercial motor vehicle safety," as the FMCSA previously

concluded, requires that the state law or regulation be "specifically directed at" commercial motor vehicle safety. *See* ER82-83 & n.5.

At the very least, as noted, exhaustion of the interpretive toolkit shows that the statute lacks the requisite "clear and manifest" indication that Congress intended to preempt laws beyond that category, so there is no unresolved ambiguity in the relevant sense. *See Association des Éleveurs*, 870 F.3d at 1146; *Bates*, 544 U.S. at 449 (applying this "canon[] of interpretation" and holding that, even if the agency "had offered … a plausible alternative reading" of the express preemption provision at issue in the case, the Court "would nevertheless have a duty to accept the reading that disfavors pre-emption"). Under the Supreme Court's precedent, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc*, 555 U.S. at 77; *see also Medtronic*, 518 U.S. at 485 (holding that this rule applies not "only to the question whether Congress intended any pre-emption at all," but also to "questions concerning the *scope* of its intended invalidation of state law"). Applying that rule here, in combination with the other tools of construction, "is more than up to the job of solving today's interpretive puzzle." *Epic Sys.*, 138 S. Ct. at 1630. "Where, as here, the canons" and interpretive tools "supply an answer, *Chevron* leaves the stage." *Id.*

B. Deference would be inappropriate in this context even if section 31141 were "genuinely ambiguous."

Quite apart from whether the statute qualifies as "genuinely ambiguous," deference would be inappropriate for a separate reason. Congress's decision to delegate limited preemptive authority in section 31141 "says nothing about the *scope* of that pre-emption." *See Bates*, 544 U.S. at 443-44. On that legal question, there is no basis for deferring to the agency's newfound position.

For starters, an agency's interpretation of its own preemptive authority is ordinarily not entitled to *Chevron* deference. *See Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 116-117 (1st Cir. 2015) (collecting cases). That is all the more true in cases like this one, where an agency's "recently adopted position" favoring preemption "represents a dramatic change in position." *Wyeth*, 555 U.S. at 579-81 (noting further that deference is inappropriate when "Congress has repeatedly declined to pre-empt state law," as it has here); *accord United States v. Mead*, 533 U.S. 218, 228 & n.8 (2001) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due." (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993))). In that scenario, the agency's position "is entitled to no weight." *Wyeth*, 555 U.S. at 581; *see Chae v. SLM Corp.*, 593 F.3d 936, 949-50 (9th Cir. 2010) (noting that the Supreme Court in *Wyeth* declined to defer where the agency had "recently, abruptly, and sweepingly changed its view about the preemptive role of its regulations"). Indeed, even in cases involving an express preemption provision, the Supreme Court has refused to give

weight to an agency's newfound pro-preemption position. To the contrary, the case for preemption in that scenario, the Court explained in one case, is "particularly dubious given that just five years ago the United States advocated the [opposite] interpretation." *Bates*, 544 U.S. at 449. That is precisely the scenario we have here. *See* ER51-89.

There is good reason for not deferring in this scenario. For one thing, when an agency has previously adopted and adhered to the view that it lacks statutory authority to preempt, that is strong evidence that the statute, whatever else it does, lacks the clear congressional intent necessary to displace state law. For another, a contrary rule—where courts reflexively defer to the agency under *Chevron*—would create perverse incentives for the agency to do exactly what the FMCSA has attempted to do here: disregard its previous position (for which it sought deference from this Court "just five years ago," *Bates*, 544 U.S. at 449) to expand its power by the stroke of a bureaucratic pen.

That would pose a serious threat to our federalist system because, "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting). Which is why, even when the agency has maintained a consistent position, several Justices have

advocated the rule that, "when an agency purports to decide the scope of federal pre-emption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting, joined by Roberts, C.J., and Scalia, J.).[2] Put simply, whether Congress has conferred authority on an agency to preempt state law in an area of traditional local concern "is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency." *Smith v. Berryhill*, 139 S. Ct. 1765, 1778-79 (2019) (saying same about an agency's view of when its action is subject to judicial review).

This case provides a stark illustration of why that's so. Immediately on the heels of a failed attempt to secure preemption from Congress, the industry turned to the FMSCA. The agency abruptly reversed its previous "legal position," finding it to be "unnecessarily restrictive," and adopted a new, more expansive view of its power to wipe out state law and deliver the industry's deregulatory objectives. ER4. In doing so, the agency did not offer *any* interpretation of what the key statutory language means, much less explain why its previous interpretation of that language (that "on" means "directed at") is incorrect. The agency then exercised its newly

[2] *See also Medtronic*, 518 U.S. at 512 (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference"); *cf. Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996) (assuming arguendo that a statute's preemptive scope "must always be decided *de novo* by the courts").

(self-)conferred authority to nullify state rules that had been in force for a century in an area traditionally occupied by the states. And if all that weren't troubling enough, the agency then proceeded to flip again. After initially signaling that its order would *not* have retroactive effect (in accordance with black-letter law), the agency adopted the extraordinary position that its order would now somehow reach back to immunize even those who had openly flouted the state rules while they were in effect—"without offering States or other interested parties notice or opportunity for comment." *Wyeth*, 555 U.S. at 577.

No case from this Court or the Supreme Court, to our knowledge, has ever deferred to an agency's interpretation of its statutory authority to preempt under remotely comparable facts. This case should not become the first. Allowing the agency to avail itself of *Chevron* deference in this context would be inconsistent with the "core theory" animating administrative-deference principles—that "sometimes the law runs out, and policy-laden choice is what is left over." *Kisor*, 139 S. Ct. at 2415. It would be an abdication of the judicial role, particularly given that the threshold question is purely legal, involving the meaning of a statutory phrase that the agency here did not even interpret. *See Lopez v. Terrell*, 654 F.3d 176, 182 (2d Cir. 2011) ("[Where] the agency does not speak to the statutory ambiguity at issue, *Chevron* deference is inappropriate."). It would reward the "agency's effort to transform the preemption question from a judicial inquiry into an administrative *fait accompli*." *Watters*, 550 U.S.

at 40 n.24 (Stevens, J., dissenting). And it would, at the same time, amount to a transfer of power away from the state legislatures and Congress—the people's representatives—to a federal agency. That result, at least under the unique circumstances of this case, should not be condoned.

CONCLUSION

This Court should set aside the FMCSA's preemption determination as contrary to law and in excess of the agency's statutory authority.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,758 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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STATEMENT OF RELATED CASES

As required by Circuit Rule 28-2.6, petitioners state that they are aware of three other cases pending before this Court that present related legal issues: *International Brotherhood of Teamsters, Local 2785 et al. v. FMCSA*, No. 18-73488; *International Brotherhood of Teamsters et al. v. FMCSA et al.*, No. 19-70323; and *Labor Commissioner for the State of California v. FMCSA*, No. 19-70329. These three cases have been consolidated with this case.

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2019, I electronically filed the foregoing corrected brief with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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