No. 21-55456

In the United States Court of Appeals for the Ninth Circuit

JOHEL VALIENTE and ASHRAF AIAD,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

SWIFT TRANSPORTATION CO. OF ARIZONA, LLC,
Defendant-Appellees

On Appeal from the United States District Court,
for the Central District of California
D.C. No.: 2:19-cv-04217-VAP-KK (The Honorable Virginia A. Philips)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

INTRODUCTION

The plaintiffs—former truck drivers for Swift Transportation Co.—sued Swift in 2018 for denying them meal and rest breaks required by California law. When the plaintiffs filed their complaint, the Federal Motor Carrier Safety Administration (FMCSA) continued to adhere to its decade-old position that the break laws, as "simply one part of California's comprehensive regulations governing wages, hours and working conditions," were not subject to its statutory authority to preempt state laws "on commercial motor vehicle safety." *Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers*, 73 Fed. Reg. 79,204, 79,206 (Dec. 24, 2008); *see* 49 U.S.C. § 31141(a). Two weeks later, however, the FMCSA reversed itself. California, the agency decided, could "no longer enforce" its century-old break laws to protect truck drivers covered by the agency's rules. ER-61. Relying on that new agency rule, the district court granted summary judgment *sua sponte* to Swift. ER-16.

The district court's decision contravened the presumption, "deeply rooted in our jurisprudence," against retroactive applications of law. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Under well-established authority, a decision that "impair[s] Plaintiffs' right to bring suit" to enforce rights "possessed and exercised prior to" a newly enacted law "is enough to show … retroactive effect." *Beaver v. Tarsadia Hotels, Corp.*, 816 F.3d 1170, 1188 (9th Cir. 2016). The court here, by applying a newly enacted

agency rule to dismiss an already-pending lawsuit involving conduct that occurred years before the rule went into effect, did just that. Its decision did not just "impair" the plaintiffs' rights—it put the plaintiffs out of court, dismissing their claims with prejudice and leaving them with no path for vindicating their rights under California law. ER-16. That is a paradigmatic retroactive application of law. *See Beaver*, 816 F.3d at 1188.

Nevertheless, the district court concluded that its decision was not an impermissibly retroactive application of the FMCSA's new decision. ER-20. In reaching that conclusion, the court did not purport to apply the framework for evaluating retroactive laws established the Supreme Court's landmark decision in *Landgraf*. The court found it unnecessary to ask whether applying the FMCA's new decision to the plaintiffs' already-pending claims was a retroactive application of new law, as *Landgraf* requires. 511 U.S. at 280. Nor did it ask whether Congress expressly authorized the agency to make such a retroactive rule. *Id.* Instead, the court held—in a single sentence of analysis—that, given the agency's decision, "[t]he Court currently has no authority to enforce the regulations upon which Plaintiffs' meal and rest break claims rest." ER-20.

That conclusion misses the point of *Landgraf*'s retroactivity test. It is true that courts "may not enforce" a state law that the agency has decided to preempt. 49 U.S.C. § 31141(a). But the question under *Landgraf* is not whether the court has

"authority to enforce" preempted state laws, but whether it has authority to enforce those laws as to claims arising *before* the agency decided to preempt them. Under the "traditional presumption," where "Congress has not defined a statute's temporal reach and expressed no intent that it be given retroactive effect, courts follow the default rule that the statute has prospective application only." *Koch v. S.E.C.*, 177 F.3d 784, 785–86 (9th Cir. 1999). Here, that means that courts lack authority to enforce state laws only as to conduct occurring after the agency's decision to preempt them. By holding instead that the statute prohibits enforcement in *all* cases—even those already pending before the agency's decision—the court turned that traditional presumption on its head.

Once properly understood as a retroactive application of FMCSA's preemption determination, the district court's decision can survive *Landgraf*'s strict presumption only if Congress gave the agency the power to act retroactively "in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Section 31141's provision that courts "may not enforce" preempted state laws falls far short of that standard. The language authorizes the agency to preempt state laws. But it does not suggest, much less expressly provide, that the agency may do so *retroactively*—destroying state-law causes of action that existed for decades *before* the agency's determination.

The district court's decision to nevertheless apply the agency's new preemption decision to the plaintiffs' pending claims casts aside the governing *Landgraf* framework in favor of an eccentric approach supported by neither law nor common sense. And the court's application of that approach led it to a result incompatible with the principles of fairness and settled expectations that the presumption against retroactivity protects. This Court should reverse.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332(d)(2) because this is a class action in which the proposed class includes at least one hundred members, the matter in controversy exceeds five million dollars, exclusive of interests and costs, and the plaintiffs and Swift are citizens of different states—the plaintiffs are citizens of California, and Swift is citizen of Delaware and Arizona. Doc. 1 at 7, 12, 25–26. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291 because the appeal is from a final judgment of the district court. The court entered summary judgment against the plaintiffs *sua sponte* on April 5, 2021, and entered a final judgment that same day. ER-16, 21. The plaintiffs timely filed a notice of appeal from that final judgment under Federal Rule of Appellate Procedure 4(a)(1)(A) on May 4, 2021. ER-15.

STATEMENT OF THE ISSUE

Did the district court err in holding that the FMCSA's decision to preempt California's meal-and-rest-break rules retroactively applied to require dismissal of an already-pending lawsuit alleging violations that occurred years before the agency's decision?

PERTINENT STATUTES AND RULES

The Motor Vehicle Safety Act, 49 U.S.C. § 31141, provides in relevant part:

> (a) PREEMPTION AFTER DECISION.—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.

STATEMENT OF THE CASE

A. Statutory background

In the Motor Carrier Safety Act of 1984, 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 also expressed sensitivity to the importance of states' independent authority to regulate safety. It 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).

The FMCSA exercised its rulemaking authority under the Act to regulate driving hours. *See* 49 C.F.R. § 395.3. The agency's hours-of-service rules, for example, mandate limited rest breaks, requiring drivers to spend at least thirty minutes off duty within the first eight hours of their shifts. *See id.* § 395.3(a)(3)(ii). Like Congress, the agency in enacting these 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 … limit the policymaking discretion of States."). The rules thus provide that they are "not intended to preclude States ... from establishing or enforcing State or local laws relating to safety." 49 C.F.R. § 390.9. And the agency 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*, 73 Fed. Reg. at 79,206.

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 "on commercial motor vehicle safety." *See* 49 U.S.C. § 31141(a). The agency may invoke that authority if it "decide[s]" that the state law is less stringent than or has the same effect as its own regulations. *Id.* § 31141(c). The agency may also preempt state laws that are additional to or more stringent than its regulations if it 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.* Once the

agency invokes its preemption authority, states "may not enforce" their preempted laws. *Id.* § 31141(a).

B. Regulatory background

1. The FMCSA for a decade rejects preemption of California's break laws. 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). As they currently stand, those rules require employers to provide their employees with uninterrupted meal breaks of at least thirty minutes, and at least one ten-minute rest break for every four-hour work period. *Id.* at 537. 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.

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. *See Petition for Preemption*, 73 Fed. Reg. at 79,204. In a decision diametrically opposed to the decision that the district court applied here, the FMCSA rejected the companies' petition. California's meal-and-rest-break rules, it found, "are in no sense regulations 'on commercial motor vehicle safety," but "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. *Id.* at 79,206. The agency concluded that it had "no authority" under section 31141 to preempt the break laws. *Id.*

The agency reaffirmed that position in 2014, when it told this Court that it "continues to adhere to [its] view" that California's meal-and-rest-break rules are laws of "longstanding, general applicability" that are "not subject to statutory preemption" under section 31141. ECF No. 58 in *Dilts v. Penske Logistics, LLC*, No. 12-55705, 769 F.3d 637 (9th Cir. 2014), filed Feb. 18, 2014, at 11, 26–27. The agency represented that conclusion to this Court as its "considered judgment," which was "entitled to substantial deference." *Id.* at 31–32.

2. *The FMCSA flips its position on preemption.* In 2018, the FMCSA—in a clear break from the position it had announced in 2008—reversed itself and agreed to invoke its authority to preempt California's meal-and-rest-break laws. *See* ER-60–61. The agency concluded that California's generally applicable break laws were "regulation[s] on commercial motor vehicle safety" subject to its preemption authority under 49 U.S.C. § 31141(a). ER-60–61.

The FMCSA acknowledged that it had rejected that precise interpretation of "on commercial motor vehicle safety" in its denial of the 2008 petition. ER-31–32. It concluded, however, that its interpretation of the statutory language there was "unnecessarily restrictive" and should be "reconsidered." ER-35–36. Viewing the

question anew, the agency concluded that California's laws are "incompatible with" its hours-of-service regulations, ER-50–53—a conclusion directly at odds with its assertion in *Dilts* that the hours-of-service regulations are "not impeded by the California law." Br. for U.S. at 29–30, *Dilts*, No. 12-55705 (9th Cir. Feb. 18, 2014).

The agency, however, did not purport to preempt state law on a retroactive basis, providing only that California "may no longer enforce" its meal-and-rest-break laws for the protection of truck drivers subject to the hours-of-service rules. ER-61.

3. *After initially deeming its preemption decision non-retroactive, the agency flips on that too.* In line with the strong presumption against an agency's authority to promulgate retroactive rules, *see 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." ER-62–63.

But a few months later, the agency reversed itself on this question too. An agency legal memorandum, by the same deputy chief counsel, now opined that the preemption determination under section 31141(a) *is* retroactive in the broadest possible terms. In the memorandum's words, it "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." ER-65.

4. This Court upholds the agency's preemption decision, while expressly leaving open the question of its retroactive effect. Earlier this year, this Court upheld the FMCA's decision to preempt California's break laws. *Int'l Brotherhood of Teamsters, Loc. 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021). The Court deferred to the agency's conclusion that the break laws, at least as applied to truck drivers, were laws "on commercial motor vehicle safety" under section 31141(a). *Id.* at 851–52. And it held that California's "traditional regulation" of worker health and safety was "not, standing alone, sufficient to defeat preemption in the face of" the section's express grant of preemption authority. *Id.* at 853.

The Court declined, however, to review the agency's "legal memorandum" on retroactivity because the memorandum "was not part of the preemption determination on review, …nor was it final agency action." *Id.* at 858 n.5. The Court thus did "not consider the retroactivity issue." *Id.*

C. Procedural background

Plaintiffs Johel Valiente and Ashraf Aiad are former hourly truck drivers employed by defendant Swift Transportation Co. between September 2015 and January 2018. ER-68. The plaintiffs sued Swift for failing to provide meal and rest

breaks and related violations of California law. ER-71–81. They filed their complaint in October 2018. ER-67. Two months later, in December 2018, the FMCSA preempted the break laws on which their claims were based. ER-22.

After this Court upheld the FMCSA's preemption determination in *International Brotherhood of Teamsters,* the district court ordered the parties to brief the decision's impact on this case. ER-19. The court then entered summary judgment *sua sponte* for Swift. ER-17. It held that it was "not persuaded by" the plaintiffs' argument that the FMCA's preemption determination could not be applied retroactively. ER-20. Instead, it agreed with Swift that "the Court currently has no authority to enforce the regulations upon which Plaintiffs' meal and rest break claims rest." *Id.* In so holding, the court did not cite any of the governing Supreme Court and Ninth Circuit authority on retroactivity. Instead, it relied on a line of unpublished district court decisions holding that, because the FMCSA's decision "specifically bars *enforcement*" of the break laws, "the issue of retroactive effect is irrelevant." *Ayala v. U.S Xpress Enters., Inc.*, 2019 WL 1986760, at *3 (C.D. Cal. 2019); *see* ER-20.

STANDARD OF REVIEW

This Court reviews an order granting summary judgment de novo. *See Beaver*, 816 F.3d at 1177. "Whether a regulation may be applied retroactively is a question of law" that the Court also reviews de novo. *Elim Church of God, Wash. State Non-Profit Corp. v. Harris*, 722 F.3d 1137, 1140 (9th Cir. 2013).

SUMMARY OF ARGUMENT

I. The presumption against retroactive application of laws is rooted in fundamental principles of fairness and the protection of settled expectations. The Supreme Court's landmark decision in *Landgraf* provides the required two-step framework for evaluating a law's retroactive effect. The first step of the test asks whether Congress expressly provided for the statute's temporal reach. Here, nothing in section 31141 expressly gives the FMCSA retroactive preemption authority. On the contrary, the statute's language and structure suggest that the agency's preemption of state laws takes effect *after* it makes a determination based on the required findings. Moreover, it is particularly difficult to believe that Congress could have intended to delegate to an administrative agency the authority not only to preempt important state health and safety laws, but to do so retroactively.

Nor does the agency's preemption decision suggest the agency's intent to retroactively preempt state law. The decision provides only that "California may *no longer* enforce" its break laws, suggesting only a future effect. That the agency's own lawyer initially read the decision as purely prospective demonstrates that the agency's decision is at least ambiguous on its temporal scope. And given the strong presumption against retroactive laws, an ambiguously retroactive law is equivalent to an unambiguously prospective one.

The second step of the *Landgraf* test asks whether the statute would have a retroactive effect if applied to this case. A statute has a retroactive effect if it impairs vested rights, including by depriving a plaintiff of a pre-existing cause of action. The district court's application of the FMCSA's preemption decision to the plaintiffs here does exactly that by dismissing their pending claims with prejudice. Under well-established authority, that is a clear-cut retroactive effect. Accordingly, the presumption against retroactivity precludes the district court's application of the agency decision against the plaintiffs.

II. The district court declined to apply the *Landgraf* test, instead concluding only that the FMCSA's preemption decision deprived it of authority to enforce California's break laws. But the court cited no authority for setting aside *Landgraf*. And its conclusion that it lacks authority to enforce the break laws sheds no light on whether the agency's decision has an impermissibly retroactive effect. Instead, the court's conclusion *assumes* that the agency's decision applies retroactively to preclude the plaintiffs' claims, reversing the usual presumption against retroactivity. If the court had instead looked to the practical effect of the agency's preemption decision on the plaintiffs, as *Landgraf* requires, it would have had no choice but to conclude that its dismissal of the plaintiffs' claims is an impermissible retroactive effect.

ARGUMENT

I. The FMCSA's decision to preempt California's break laws does not retroactively foreclose the plaintiffs' existing claims.

The presumption against retroactive application of laws "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. The Supreme Court's decision in *Landgraf* provides the "framework for deciding when the retroactive application of the law is warranted" under those principles. *Beaver*, 816 F.3d at 1187. "The retroactive application of a new law to events that transpired prior to its passage requires … an analysis under *Landgraf* to ensure that such application reflects longstanding principles of fairness and respect for the parties' settled expectations of the law." *Id.* at 1185.

The *Landgraf* framework provides "a two-part analysis." *Koch*, 177 F.3d at 786. First, a court must "examine the statutory text in order to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* If so, that express language controls. *See id.* Second, the court must "determine whether the new statute would have retroactive effect" if applied to the case. *Id.* "If the statute does operate retroactively," the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

The district court here applied the FMCSA's preemption determination without recognizing or applying *Landgraf*'s presumption or its "require[d]" framework for analyzing retroactive laws. *Beaver*, 816 F.3d at 1185. Only by ignoring

that test was the court able to conclude that agency's new decision could permissibly be applied to the plaintiffs' already-pending claims.

A. Neither the statute nor the FMCSA's preemption determination expressly provide for a retroactive effect.

"The first step in the *Landgraf* analysis is a determination of whether the statute contains an express statement on its proper temporal reach." *Id.* at 1187. "When, as here, an administrative rule is at issue, the inquiry is two-fold: whether Congress has expressly conferred power on the agency to promulgate rules with retroactive effect and, if so, whether the agency clearly intended for the rule to have retroactive effect." *Elim Church of God,* 722 F.3d at 1141. Neither "congressional enactments [nor] administrative rules will [] be construed to have retroactive effect unless their language requires this result." *Bowen*, 488 U.S. at 208.

1. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Id.* Given the strong presumption against retroactivity, Congress's "statutory grant of legislative rulemaking authority will not … be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.*; *see, e.g.*, *Sacks v. S.E.C.*, 635 F.3d 1121, 1126 (9th Cir. 2011) (invalidating agency action as impermissibly retroactive); *Koch*, 177 F.3d at 789 (same).

Nothing in section 31141 even hints at Congress's intent to give the FMCSA authority to retroactively preempt state laws, let alone provides that intent in

"express terms." *See North v. Superior Hauling and Fast Transit, Inc.*, 2019 WL 6792816, at *3 (C.D. Cal. 2019) (noting the lack of "clear statutory authority granting [the FMCSA] authority to promulgate retroactive preemption determinations"). The statute provides only that states "may not enforce" laws that the agency decides are preempted. 49 U.S.C. § 31141(a). That language expressly gives the FMCSA "authority to determine that state laws on commercial motor vehicle safety are preempted, based on criteria Congress has specified." *Int'l Brotherhood of Teamsters*, 986 F.3d at 845. But it does not expressly state that the agency may preempt state laws *retroactively* to cases already pending in federal court. The statute, in other words, sets "substantive limits" on the enforceability of state laws without purporting to provide the "temporal scope" of those limits. *Martin v. Hadix*, 527 U.S. 343, 353 (1999).

"[C]ases where this Court has found truly 'retroactive' effect," in contrast, "involved statutory language that was so clear that it could sustain only one interpretation." *Immigr. & Naturalization Serv. v St. Cyr*, 533 U.S. 289, 316–17 (2001). The Supreme Court has said, for example, that express retroactive effect could be found from the language: "[T]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment." *Martin*, 527 U.S. at 354. Section 31141's provision that states "may not enforce" preempted laws contains no comparable "express command about its temporal scope." *Id.* at 361.

2. Although the absence of express retroactive language alone requires the conclusion that Congress did not intend a retroactive effect, there are particular reasons to doubt that Congress intended section 31141 to grant the FMCSA authority to retroactively preempt state laws.

First, unlike typical statutory preemption provisions, Congress in section 31141 created a framework under which state laws are preempted only when the agency, after making specific required findings, "decides" that they "may not be enforced." 49 U.S.C. § 31141(a), (c). The fact that the section's preemptive effect hinges on the agency's determination suggests that the preemption takes effect only *after* the determination is made. That conclusion is backed up by the title of subsection 31141(a)—"Preemption after decision"—which expressly states that preemption occurs *after* the agency's decision. 49 U.S.C. § 31141(a); *see Logan v. U.S. Bank Nat'l Ass'n,* 722 F.3d 1163, 1172 (9th Cir. 2013) (holding that, although a statute's title "cannot control the plain meaning of a statute," it "can be used to resolve ambiguity"). To conclude that the agency's decision also preempts state laws *before* the decision is made would, at a minimum, conflict "with widely held intuitions about how [laws] ordinarily operate." *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 620 (7th Cir. 2007).

But it would also undermine Congress's statutory preemption scheme, which ties preemption to specific findings about whether state laws are more, less, or equally stringent compared to federal requirements. *See* 49 U.S.C. § 31141(c). In deciding to

preempt California's break laws, for example, the FMCSA found that recent amendments to its hours-of-service rules brought its own break requirements into closer conflict with California law. ER-38–39. If the agency's preemption decision applied retroactively, however, it would prevent California from enforcing its break laws even to events arising *before* enactment of the hours-of-service amendments on which the agency relied—at a time when the reasons for the agency's preemption determination did not yet exist. That would turn section 31141's carefully calibrated preemption scheme into a blunt instrument, and cannot be what Congress intended. Although considerations of statutory structure and purpose cannot replace an express statement of Congress's intent that a law apply retroactively, they can, as here, serve as evidence that Congress had no such intent. *See Bowen*, 488 U.S. at 208–09; *Beaver*, 816 F.3d at 1188; *see, e.g.*, *Fitzgerald v. Century Park, Inc.*, 642 F.2d 356, 359 (9th Cir. 1981).

Second, section 31141 represents the kind of law for which Congress is perhaps least likely to have intended a retroactive effect. 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); *see Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 291 (Cal. 2007) (noting that the break laws "have long been

viewed as part of [California's] remedial worker protection framework"). In "all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [courts] 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 v. Levine*, 555 U.S. 555, 565 (2009) (alterations omitted).

To be sure, this Court in *International Brotherhood of Teamsters* held that section 31141's express grant of agency authority to preempt state laws trumped the normal presumption against preemption. 986 F.3d at 853. As the Court explained, "a state's traditional regulation in an area is not, standing alone, sufficient to defeat preemption in the face of an express preemption clause." *Id.* But although section 31141 expressly preempts state laws, it does not expressly preempt them *retroactively*. And in the absence of an express indication of Congress's intent, "courts ordinarily accept the reading that disfavors pre-emption." *Beaver*, 816 F.3d at 1179.

The presumption against preemption, considered in light of the additional presumption against retroactive laws, makes it extremely difficult to assume that Congress intended not only to preempt state health and safety laws, but to do so *retroactively*. And if Congress did intend such an extraordinary result, it is even harder to imagine that it would do so by delegating authority to an administrative agency. *See Bowen*, 488 U.S. at 208, 223–24. Given the important interests of state sovereignty

at stake, no court should lightly assume that Congress intended to give unelected federal bureaucrats the power to retroactively wipe out generally applicable state laws—in this case, workplace protections that had been in place for a century.

3. Even if Congress did give the FMCSA authority to retroactively preempt state laws, the agency did not purport to exercise that authority here. Nothing in the "language of the 2018 FMCSA Order clearly indicate[s] an intent to have retroactive effect." *North*, 2019 WL 6792816, at *3. "If anything, the decision suggests the opposite." *Id.* After recognizing that California's break laws had not previously been preempted, the order provide that "California may *no longer* enforce" its break laws. ER-61 (emphasis added). That language again "suggests prospective, not retroactive, application." *North*, 2019 WL 6792816, at *3.

Indeed, it is impossible to say that agency's preemption decision includes clear retroactive language given that the FMCSA's counsel initially concluded that the "determination does not have retroactive effect." ER-62–63. That the agency's own lawyer could read the decision as purely prospective shows that the rule's language is, at a minimum, ambiguous—an ambiguity that must be resolved in favor of the strong presumption against retroactive laws. *See St. Cyr*, 533 U.S. at 316–17. That alone compels the conclusion that the FMCSA's decision is not expressly retroactive. *See Mejia v. Gonzales,* 499 F.3d 991, 997 (9th Cir. 2007) (holding that regulation did not clearly state that it applied retroactively).

The later opinion of the same counsel—reached in a "legal memorandum issued months after the preemption determination," *Int'l Brotherhood of Teamsters*, 986 F.3d at 858 n.5—does not undo that ambiguity. "When the agency itself is uncertain of the meaning of its regulation" and "give[s] conflicting advice to private parties about how to comply," the regulation cannot be called "clear." *Rollins Env't Servs. (NJ) Inc. v. U.S.E.P.A.*, 937 F.2d 649, 653 (D.C. Cir. 1991).

Nor does this Court owe any deference to agency counsel's legal conclusions on the statute's retroactive effect. As this Court recognized in *International Brotherhood of Teamsters*, the memorandum is not a "final agency action" to which deference is due. 986 F.3d at 858, n.5. Courts do not defer "to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question"—as here it has not. *Bowen*, 488 U.S. at 212; *see also United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (deference unwarranted where the agency has "not formulated an official interpretation"). Indeed, the agency's legal memorandum itself recognized that the retroactivity question "will ultimately be determined by the courts." ER-63 n.2; *see Silva v. Domino's Pizza*, No. 18-cv-2145, 2019 WL 4187388, at *4 (C.D. Cal. 2019) (noting that the agency "appears to recognize that its position … does not foreclose alternative interpretations by courts").

Moreover, courts defer only "to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous." *St. Cyr*, 533 U.S.

at 320 n.45. But "a statute that is ambiguous with respect to retroactive application is construed," under *Landgraf*, "to be unambiguously prospective." *Id.* Thus, "there is … no ambiguity in such a statute for an agency to resolve." *Id.*

The agency thus got it right the first time: Neither Congress's grant of authority nor FMSCA's preemption decision indicate any intent to retroactively preempt California's longstanding worker-protection regime. The presumption against retroactivity thus fully applies.

B. Application of the FMCSA's decision to foreclose the plaintiffs' claims has an undeniable retroactive effect.

When, as here, a "law contains no 'express command' concerning its temporal scope," the second step of the *Landgraf* test requires a court to "examine whether its application would have a retroactive effect in this case." *Beaver*, 816 F.3d at 1187. "If so, then in keeping with [the] traditional presumption against retroactivity," courts "presume that the statute does not apply to that conduct." *Martin*, 527 U.S. at 352.

"A statute has [a] retroactive effect when it … impairs vested rights acquired under existing laws." *St. Cyr*, 533 U.S. at 321. In *Beaver*, for example, this Court held that a statutory amendment "would have retroactive effect because it would extinguish [the defendants'] liability … , thus depriving [the plaintiffs] of a pre-existing cause of action." 816 F.3d at 1187–88. Likewise, the Court found retroactive effect in *Scott v. Boos*, where an amendment "deprive[d] plaintiffs of the right to bring securities fraud based RICO claims." 215 F.3d 940, 945 (9th Cir. 2000). Numerous

other cases, in this circuit and others, have found similar retroactive effects from amendments that "foreclos[e] a cause of action which existed prior to the amendment." *TwoRivers v. Lewis*, 174 F.3d 987, 995 (9th Cir. 1999) (holding that a shortened statute of limitations had a retroactive effect when it "deprive[d] [the plaintiff] of his right to file suit").[1]

It is equally "clear that the 2018 FMCSA Order takes away or impairs vested rights acquired under existing California state law." *North*, 2019 WL 6792816, at *3. The retroactive effect of the agency's preemption determination, as applied to the plaintiffs, is straightforward: Before the agency's determination, the plaintiffs had a pending cause of action against Swift for violation of California's break laws, but afterward they did not. As in *Beaver*, the decision thus "impair[ed]" rights "possessed and exercised prior to" the order. 816 F.3d at 1188. Indeed, it did more than just "impair" the plaintiffs' rights—it affirmatively put them out of court. ER-16. Under well-established law, that is "enough to show … retroactive effect." *Beaver*, 816 F.3d at 1188; *see also Scott*, 215 F.3d at 946 (statute "impair[ed] rights a party once possessed").

Application of the agency's decision to the plaintiffs' claims would thus have a clear-cut "retroactive effect inconsistent with [the] assumption that statutes are prospective." *Martin*, 527 U.S. at 361–62. And because Congress has not expressed an

[1] *See also, e.g.*, *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 826 (5th Cir. 2014) (amendment "destroy[ed] a cause of action"); *Killingsworth*, 507 F.3d at 622 (same); *Mathews v. Kidder, Peabody, & Co.*, 161 F.3d 156, 163 (3d Cir. 1998) (same).

"intent that it be given retroactive effect," the district court was required to "follow the default rule that the statute has prospective application only." *Koch*, 177 F.3d at 785.

II. The district court's conclusion that it lacked "authority to enforce" the laws that FMCSA preempted is irrelevant to the preemption's retroactive effect.

The district court engaged in none of this analysis. It did not acknowledge the deeply rooted presumption against retroactivity or apply the "require[d]" *Landgraf* framework. *Beaver*, 816 F.3d at 1185. It did not purport to identify language in either section 31141 or the FMCA's preemption determination expressly applying to past conduct. Nor did it examine whether application of the agency's decision would have a retroactive effect on the plaintiffs here. Instead, the court granted summary judgment to Swift based on its one-sentence conclusion that, given the agency's preemption decision, the court "currently has no authority to enforce the regulations upon which Plaintiffs' meal and rest break claims rest." ER-20.

In reaching that conclusion, the court relied solely on a series of district court decisions holding that, because the FMCSA's decision "specifically bars *enforcement*" of the break laws, "the issue of retroactive effect is irrelevant." *Ayala*, 2019 WL 1986760, at *3. These decisions echo the conclusion of the FMCSA's own legal memorandum, which similarly concluded that the presumption against retroactivity does not apply to "attempts to enforce a State law or regulation after the issuance of

a preemption decision." ER-63–64. Like the district court here, courts applying this reasoning have seen no need to "address the presumption against retroactivity, whether the FMCSA could issue a retroactive decision, or whether [the decision] was retroactive." *Sales v. United Rd. Servs., Inc.*, 2020 WL 4035072, at *3 n.2 (N.D. Cal. 2020); *see also Robinson v. Chefs' Warehouse, Inc.*, 2019 WL 4278926, at *4 (N.D. Cal. 2019) (holding that "retroactivity was not an issue"). The only relevant consideration was the courts' lack of authority to enforce the preempted break laws.[2]

Neither the courts nor the agency's legal memorandum cite any authority applying an exception to the presumption against retroactivity for laws that restrict a court's enforcement authority. The question in *every* retroactivity case is whether a court may currently enforce a law as to conduct that occurred before its enactment. The mere existence of a retroactive law is not the problem—it is the "retroactive *application*" of the law to past conduct that creates the unfairness against which the presumption applies. *United States v. Bacon*, 82 F.3d 822, 824 (9th Cir. 1996) (emphasis added). And the whole meaning of the presumption against retroactivity is that

[2] Other courts "have reached different results" on this point. *Johnson v. Estension Logistics, LLC*, 2020 WL 8993120, at *4 (C.D. Cal. 2020); *see Silva*, 2019 WL 4187388, at *5 (noting the "split of authority"). In the only district court decision to apply the *Landgraf* test, the district court in *North* found it "clear that the 2018 FMCSA Order takes away or impairs vested rights acquired under existing California state law" without "clear statutory authority" to do so. 2019 WL 6792816, at *3.

"courts do not *enforce* a statute retroactively unless the Congress first make[s] its intention clear." *Koch v. S.E.C.*, 793 F.3d 147, 157 (D.C. Cir. 2015) (emphasis added).

This Court in *Gadda v. State Bar of California*, for example, held that a California law had a retroactive effect when it permitted "enforcement of an order imposing costs" against lawyers. 511 F.3d 933, 937–38 (9th Cir. 2007). The law had previously required disciplined lawyers to pay the costs of their disciplinary proceedings, but "did not provide a method for enforcing the cost award." *Id.* at 937. The California Bar argued that the amendment did not have a retroactive effect because it "merely provided a vehicle for the Bar to collect the debt … already owed." *Id.* But this Court disagreed. By "provid[ing] a method for *enforcing* the cost award," it held, the amendments affected "rights and obligations that existed prior to the amendments." *Id.* at 937–38 (emphasis added). It was thus "a retroactive application of the statute." *Id.*; *see also, e.g.*, *Hughes Aircraft v. United States*, 520 U.S. 939 (1997) (creation of a private cause of action for previously illegal conduct had retroactive effect).

This case is no different. It is true that courts under section 31141 "may not enforce" a preempted state law. 49 U.S.C. § 31141(a). But the question whether a court can enforce the plaintiffs' claims here turns on whether the FMCSA's preemption determination retroactively applies to those claims. If the decision applies retroactively, then the claims are preempted and a court may not enforce them. If, on the other hand, the decision does not apply retroactively, then the plaintiffs'

claims are not preempted and nothing prevents enforcement. Determining which is true here requires application of the *Landgraf* test. But the district court never asked that question. Instead, the court *assumed* that the agency's preemption decision applied retroactively to foreclose its enforcement of the plaintiffs' claims. That is the opposite of a presumption against retroactivity.

A hypothetical makes clear the problem with the district court's reliance on a court's enforcement authority to find retroactive effect. Suppose that, five years from now, the FMCSA again reverses course and determines that California may once again enforce its meal-and-rest-break laws. There would be no question, in that case, that imposing liability on the trucking companies that relied on the agency's preemption determination in the interim would be a retroactive application of law. Whether the agency action is characterized as giving plaintiffs new rights under the break laws or as just allowing "enforcement" of existing ones, the resulting liability would attach new "legal consequences" to "events completed before its enactment"—the definition of a retroactive effect. *Landgraf*, 511 U.S. at 270.

That the FMCSA's change in position here affects the rights of *plaintiffs* rather than defendants does not compel a different result: If "*creating* a new cause of action and impairing a party's rights" has a retroactive effect, "*destroying* a cause of action and impairing a party's rights" necessarily does too. *Mathews*, 161 F.3d at 165; *see also Killingsworth*, 507 F.3d at 622–23; *see, e.g.*, *Beaver*, 816 F.3d at 1187–88; *Scott*, 215 F.3d at

945; *TwoRivers*, 174 F.3d at 995. Because of the district court's application of the agency's preemption determination, the plaintiffs lost their already-pending claims under California law and found themselves out of court. The district court erred by retroactively applying the agency's decision while closing its eyes to those consequences.

CONCLUSION

This Court should reverse the district court's decision.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiffs-appellants are unaware of any cases pending before this Court that are closely related to these issues.

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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 6,575 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 reply brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by 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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