NO. 12-56250

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRANDON CAMPBELL, ET AL.,
Plaintiffs—Appellants,

v.

VITRAN EXPRESS, INC.,
Defendant—Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE R. GARY KLAUSNER, DISTRICT JUDGE • CASE NO. CV 11-05029-RGK (SHX)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

For all its rhetoric, Vitran's brief fails to offer this Court a coherent theory of preemption, or even a plausible account of the underlying state law. In Vitran's view, the FAAAA simply swallows burdensome state regulations affecting the trucking industry, including longstanding and generally applicable regulations that have nothing to do with the FAAAA's deregulatory objectives and that affect motor carriers only incidentally, in their capacity as employers. Vitran suggests no limiting principle and, indeed, makes no effort to deny that

its version of preemption would invalidate even the state labor protections at issue in *Lochner v. New York*, 198 U.S. 45 (1905).

Instead, Vitran's chief strategy is to repeatedly assert that the California break laws command motor carriers "*to stop providing services*" at certain times and " 'limit[ ] the carriers to a smaller set of possible routes.' " Red Br. at 30. But saying it, even repeatedly and with emphasis, does not make it so. Vitran shirks any obligation to demonstrate the laws' actual effects on Vitran's operations, leaving this Court to speculate in a vacuum. Indeed, Vitran's real complaint seems to be that motor carriers might not be able to provide certain services or routes that they would otherwise want to provide without "hir[ing] more drivers to make up for the lost capacity, purchase more tractors and trailers for those additional drivers, and incur all the related labor, maintenance, and insurance costs of the additional drivers and equipment." Red Br. at 33. Vitran's argument, in other words, boils down to a complaint that California's break laws might require the company to choose between decreasing service and increasing costs. But that is true of virtually all labor laws, and many other generally applicable state laws, and is no different from the argument that this

Court decisively rejected in *California for Sale & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998). No circuit has held that FAAAA preemption extends to generally applicable labor laws. And Vitran has provided no good reason for this Court of become the first.

In any event, more than mere speculation is required before this Court will strike down a state law as preempted, let alone a century-old state workplace protection. "Preemption analysis starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.,* 536 U.S. 424, 426 (2002) (discussing FAAAA) (citations omitted). Accordingly, Vitran bears the "considerable burden of overcoming the starting presumption that Congress did not intend to supplant state law." *Abdu-Brisson v. Delta Airlines, Inc.,* 128 F.3d 77, 83 (2d Cir. 1997) (citations and quotation marks omitted). Vitran has not come close to meeting its burden.

I. CALIFORNIA'S GENERALLY APPLICABLE EMPLOYEE BREAK LAWS FALL ON THE OTHER SIDE OF THE PREEMPTION LINE DRAWN BY *ROWE*.

A central theme of Vitran's brief is that California's longstanding employee break laws are, in its view, just as FAAAA-preempted as the Maine Tobacco Delivery Law found preempted in *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008), and that *Rowe* thus compels a finding of preemption. *See* Red Br. at 7–8, 17–20, 37–39. In fact, *Rowe* illustrates precisely why California's breaks laws fall on the other side of the preemption line. The Supreme Court's unanimous decision in *Rowe* hinged critically on its distinction between state laws that focus on trucking and regulate motor carriers' services directly (like Maine's delivery laws), and those that are generally applicable to all industries and affect motor carriers only incidentally (like California's break laws). Vitran's brief ignores that key distinction.[1]

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[1] Attacking a strawman, Vitran devotes many pages of its brief to discussing how *Rowe* forecloses categorical exceptions for "public health law," "police powers," and "wage laws." *See* Red Br. at 17–19. True, the FAAAA contains no such exceptions. But Appellants never contended otherwise. And Vitran misses the large point, which is that (continued...)

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

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

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(...continued)
"[u]nderstanding the objective of the [FAAAA] is critical to interpreting the extent of its preemption." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc). Vitran never shows (or even attempts to show) that Congress had the *purpose* of preempting break laws, let alone the "clear and manifest" purpose required in preemption cases.

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

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

California's break laws unmistakably fall on the other side of the line drawn by *Rowe*. They do not "focus[ ] on trucking and other motor

carrier services," or "require carriers to offer a system of services," or "regulate carrier delivery services themselves." They are instead prototypical "general" laws that "broadly prohibit[ ] certain forms of conduct"—namely, the practice of employing workers in any industry without providing sufficient breaks—and "affect[ ] truckdrivers" incidentally, to the same extent as all other employees in the state. As Vitran itself recognizes, the break laws apply "equally to various industries, not just to motor carriers." Red Br. at 50. And the break laws leave motor carriers free to offer whatever services or routes they prefer, provided they allow their workers to take sufficient breaks. As this Court has made clear, the fact that the laws may end up causing Vitran to "increase[ ] workforce or equipment" to maintain its desired level or service is not enough to warrant preemption. *See Mendonca*, 152 F.3d at 1189. In short, there is no question that this case involves general laws that—unlike the Maine law in *Rowe*—neither focus on nor directly regulate motor carrier routes, rates, or services.[2]

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[2] Because *Rowe* was an easy case, it is not surprising that the Court had no need to resort to the presumption against preemption. Certainly, there is no basis to read the Court's silence as a *repudiation* of the presumption, as Vitran does. Red Br. at 14; *see also Cal. Tow* (continued...)

As with *Rowe*, the Supreme Court's two cases finding preemption under the Airline Deregulation Act involved state efforts to specifically police the way that carriers offer their services to the public. In *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), the Court held that the Air Travel Industry Enforcement Guidelines adopted by the National Association of Attorneys General (NAAG) were preempted by the ADA. Those guidelines, although enforced through general state consumer laws, imposed "detailed standards governing the content and format of airline advertising, the awarding of premiums to regular customers (so-called 'frequent flyer'), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights." *Id.* at 379; *see also id.* at 391–418 (appendix reproducing NAAG standards). Likewise in *American Airlines v. Wolens*, 513 U.S. 219, 228 (1995), the Court held that the ADA preempted a similar attempt to use state laws to "guide and police" the specific ways in which airlines marketed their frequent flier programs.

(...continued)
Truck Ass'n v. City & Cnty. of S.F., 693 F.3d 847, 860 (9th Cir. 2012) (applying presumption in post-*Rowe* FAAAA case).

In all three cases—*Rowe, Morales*, and *Wolens*—the preempted state law sought to directly regulate core aspects of how air or motor carriers provided their services, as carriers, to their customers. And in all three, the state regulation directly implicated what *Rowe* called the "preemption-related objectives" of the FAAAA—namely, ensuring economic deregulation and avoiding the risk of re-regulation. 555 U.S. at 371. In none of these cases could the carrier escape the state law's commands by simply "increasing workforce and equipment," thus demonstrating that the focus of the state regulation was the carriers' operation *as carriers*, not the ordinary "inputs" of business—such as labor, capital, or technology—that are regulated by background state laws that reach all businesses equally. As Judge Diane Wood recently explained:

> These inputs are often the subject of a particular body of law. For example, labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations. Capital is regulated by banking laws, securities rules, and tax laws, among others. Technology is heavily influenced by intellectual properly laws. Changes to these background laws will ultimately affect the costs of these inputs, and thus, in turn, the "price . . . or service" of the outputs. Yet no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws, *see, e.g., California's For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152

> F.3d 1184, 1189 (9th Cir. 1998) (minimum wage laws not preempted), because their effect on price is too "remote." *Morales*, 504 U.S. at 390. Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its customer a service for a particular price.

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

Notably, Vitran's 54-page brief does not point to a single federal precedent, from any circuit, holding that the FAAAA preempts generally applicable labor or employment laws that "broadly prohibit[ ] certain forms of conduct"—such as requiring employees to work without breaks—and therefore "affect[ ], say truckdrivers, only in their capacity as [employees]." *Rowe*, 552 U.S. at 375. As explained in Appellants' opening brief, Blue Br. at 54–55, the federal circuits, including this one, have repeatedly rejected attempts to extend the FAAAA to generally applicable labor and employment laws.

II. VITRAN'S PREEMPTION ARGUMENTS ALL REST ON AN UNPROVEN OR SIMPLY MISSTATED ACCOUNT OF STATE LAWS' EFFECTS.

As already noted above, the chief strategy employed in Vitran's brief is an attempt to recharacterize California's break laws—as laws

that directly regulate the way in which motor carriers perform their services, organize their routes, or set their prices—rather than describe them for what they are: labor protections that regulate the hours of workers across all industries equally. Thus, Vitran asserts that California's break laws require motor carriers like Vitran "*to stop providing services*" at certain times and " 'limit[ ] the carriers to a smaller set of possible routes.' " Red Br. at 30; *see also id.* at 8, 30–33.

But if that were true—if California, for example, specifically prohibited motor carriers from making deliveries at certain times or places—this would be a very different case. Here, the state law governs only the length of time that individual workers may work continuously. It says nothing about how employers organize or deploy their workforces to meet various business needs. As explained in Appellants' opening brief, Blue Br. at 58–59, motor carriers like Vitran remain entirely free to provide whatever routes or services the market demands. Indeed, Vitran's real complaint seems to be that motor carriers might not be able to provide certain services or routes that they would otherwise want to provide without "hir[ing] more drivers to make up for the lost capacity, purchase more tractors and trailers for those

additional drivers, and incur all the related labor, maintenance, and insurance costs of the additional drivers and equipment," Red Br. at 33—in other words, without increasing their costs. That is precisely the argument this Court rejected in *Mendonca*, 152 F.3d 1189.

Moreover, even if a cost-based argument were not foreclosed by this Court's precedent, Vitran's argument relies entirely on generalized and unfounded speculation. Vitran makes no effort to show that compliance with the break laws would have caused Vitran to hire more drivers to maintain the routes at issue in this case. As explained in Appellants' opening brief, Blue Br. at 30–31, 64–67, Vitran's truck drivers are not long-haul truckers; they are local drivers that make, on average, 10 to 15 stops a day as part of their regularly scheduled routes. 6 ER 445, 452; *see also* 6 ER 338–50, 419–43. At each of these stops, Vitran's drivers are required to safely park their vehicles to enable the loading and unloading of cargo. 6 ER 445, 452. There is nothing, aside from Vitran's uniform policies and practices, that prevents its drivers from taking their meal and rest break at these frequent periodic stops. Notably, Vitran avoids discussing any of these facts that would affect the question of preemption. Because preemption is a "demanding

defense," it cannot be sustained absent clear evidence" concerning the state law's actual effects. *See Wyeth v. Levine*, 555 U.S. 555, 571 (2009). Vitran offers zero.

III. VITRAN DOES NOT DENY THAT CALIFORNIA'S BREAK LAWS RESPOND TO STATE'S SAFETY CONCERNS AND ARE GENUINELY RESPONSIVE TO THOSE CONCERNS.

Turning to the FAAAA's safety exception, Vitran argues that the exception cannot apply here because it extends only to the "safety regulatory authority of a state *with respect to motor vehicles*," 49 U.S.C. § 14501(c)(2)(A) (emphasis added), and California's break law is a generally applicable law—one that applies "equally to various industries, not just to motor carriers." Red Br. at 50. If Vitran's reading is correct—that is, if the "with respect to motor vehicles" qualifier is read as a specific-reference requirement that forecloses generally applicable laws altogether—then it would likewise also apply to the FAAAA's general rule of preemption, which preempts only those state laws related to prices, routes, or services "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). *See FCC v. AT&T*, 131 S. Ct. 1177, 1185 (2011) ("[I]dential words and phrases within the

same statute should normally be given the same meaning.") (quoting *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007)).

In any event, Vitran does not dispute that the IWC linked breaks in the transportation industry to the "public safety hazard due to driver fatigue." IWC, *Statement as to the Basis for Amendment to Sections 2, 11, and 12 of Wage Order No. 9. Regarding Employees in the Transportation Industry* 1 (2004) (http://www.dir.ca.gov/iwc/Stementastothebasis_WageOrder9.doc.). Nor does Vitran dispute that breaks in fact have "very substantial crash reduction benefits." *Hours of Service of Drivers*, 75 Fed. Reg. 82,170, 82,137 (2010). In 2010, 3,675 people were killed and 80,000 people were injured nationally in crashes involving large trucks. National Highway Traffic Safety Administration, *Traffic Safety Facts 2010 Data* 1 (2012) (http://www-nrd.nhtsa.dot.gov/Pubs/811628/pdf.)

That the IWC's wage order governing the transportation industry is part of California's broader regulation of worker health and safety is no reason for finding the law preempted. *See Am. Trucking Ass'ns v. City of L.A.*, 660 F.3d 384, 405 (9th Cir. 2011). To the contrary, Vitran's

recognition that the break law's purpose is to promote the health and welfare of all break law-covered workers, proves Appellants' central point—that the law is far removed from the sort of economic protectionism that Congress targeted in the FAAAA.

CONCLUSION

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

April 12, 2013

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STATEMENT OF FURTHER RELATED CASES

In addition to *Mickey Dilts* et al. *v. Penske Logistics LLC*, et al., No. 12-55705, which was identified in Appellants' opening brief, this case is also related to *James Cole v. CRST Van Expedited, Inc.*, No. 13-55507, an appeal docketed in this Court on March 27, 2013. There, the District Court for the Central District of California held that the Federal Aviation Administration Authorization Act preempts California's generally applicable requirements that employers provide their workers with meal and rest breaks. *See Jasper v. C.R. England, Inc.*, No. CV 08–5266–GW(CWx), 2012 WL 7051321 (C.D. Cal. Aug. 30, 2012). No briefs have been filed in the *James* appeal thus far.

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