No. 12-56250

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRANDON CAMPBELL, ET AL.,
Plaintiffs-Appellants,

vs.

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-RGL (SHX)

APPELLEE'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Vitran Express, Inc. certifies that it is a wholly owned subsidiary of Vitran Corporation, a Nevada corporation. Other than Vitran Corporation, there is no other parent or publicly held corporation that directly owns ten percent or more of Appellee's stock.

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I. INTRODUCTION

While Plaintiffs'-Appellants' ("Plaintiffs") Appeal speculates at length about the legislative history of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) (the "FAAAA"), and seeks supportive authority in history books, Presidential speeches, and old ERISA preemption cases, their brief fails to apply the authoritative decisions from the U.S. Supreme Court, this Court, nine district courts in California, and from the California Supreme Court that fully support the District Court's decision.

Defendant-Appellee ("Vitran") presents overwhelming support for this Court to deny Plaintiffs' appeal and affirm the District Court's order that dismissed all of Plaintiffs' claims as a matter of law, based on FAAAA preemption. Based on FAAAA preemption, at least **nine** district courts in California have dismissed meal and rest break claims brought under the California Labor Code based on FAAAA preemption, as well as preemption under the similar Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713: *Blackwell v. Sky West Airlines, Inc.*, No. 06 cv 0307 DMS (AJB), 2008 WL 5103195 (S.D. Cal. Dec. 3, 2008) (ADA preempts meal and rest break claims); *Dilts v. Penske Logistics LLC*, 819 F.Supp.2d 1109 (C.D. Cal. Oct. 19, 2011)(FAAAA preempts meal and rest break claims); *Esquivel v. Vistar Corp.*, No. 2:11-cv-07284-JHNPJWX, 2012 WL 516094 (C.D. Cal. Feb. 8, 2012)(FAAAA preempts meal and rest break claims based on the pleadings alone) ; *Aguiar v. California Sierra Express, Inc.*, No. 2:11-cv-02827-JAM-GGH,

2012 WL 1593202 (E.D. Cal. May 4, 2012)(same); *Campbell v. Vitran*, No. CV11-11-05029 RGK (SHx), 2012 WL 2317233 (C.D. Cal. June 8, 2012)(same); *Jasper v. C.R. England, Inc.*, No. CV08-5266-GW (CWx), 2012 WL 7051321 (C.D. Cal., Aug. 30, 2012)(same); *Cole v. CRST, Inc.*, No. EDCY-08-1570-VAP (OPx), 2012 WL 4479237 (C.D. Cal. Sept. 27, 2012)(same); *Aguirre v. Genesis Logistics, et al*., SACV 12-00687 JVS (ANx)(C.D. Cal. Nov. 5, 2012)(same); and *Miller v. Southwest Airlines, Co.*, No. C12-03482 WHA, 2013 WL 556963 (N.D. Cal. Feb. 12, 2013)(ADA preempts meal and rest break claims based on the pleadings alone). In just the last year alone, **six** of those nine district courts dismissed the break claims based on the pleadings alone, and all six involved break claims brought by driver-employees against their motor carrier-employers: *Esquivel, Aguiar, Campbell, Jasper, Cole,* and *Aguirre*.

Moreover, in *Miller v. Southwest Airlines, Co.*, 2013 WL 556963, the district court recently dismissed, as a matter of law, the meal and rest break claims brought by employees against Southwest Airlines based on ADA preemption. Also, in *Dilts,* 819 F.Supp.2d 1109, the district court determined that "no factual analysis" was required to decide FAAAA preemption. *Id.* at 1120. *Dilts* explained that it is more importantly the imposition of "substantive standards" upon a motor carrier's routes and services that implicates preemption. *Id.* Thus, at least **eight** district courts have recognized that, **as a matter of law**, the FAAAA/ADA preempt claims

brought under California's meal and rest break laws.[1] All of these decisions are directly on point, and combined, they dispense with all of Plaintiffs' arguments on appeal. Accordingly, Vitran requests this Court to deny Plaintiffs' appeal, and affirm the District Court's order dismissing all of Plaintiffs' claims as a matter of law based on FAAAA preemption.

II. JURISDICTIONAL STATEMENT

Vitran agrees with the Appellants' Jurisdictional Statement pursuant to Circuit Rule 28-2.2.

III. STATEMENT OF THE ISSUES

Restated, the issues in this appeal are as follows:

> A. Did the District Court correctly decide that, as a matter of law, Plaintiffs' claims under California's meal and rest break laws are related to a rate, route, or service of any motor carrier, and thus are preempted pursuant to the Federal Aviation Administration Authorization Act (the "FAAAA"), 49 U.S.C. § 14501(c)(1)?
>
> B. Did the District Court also correctly decide that California's meal and rest break laws do not qualify under the motor vehicle safety exception to the FAAAA, 49 U.S.C. § 14501(c)(2)(A), because the break laws are not the result of an exercise of safety regulatory authority with respect to motor vehicles?

[1] Vitran could only find one case to the contrary, *Mendez v. R&L Carriers, Inc.*, No. C11-2478 CW, 2012 WL 5868973 (N.D. Cal. Nov, 19, 2012), which, as set forth more herein, is fatally flawed for misreading recent caselaw from the U.S. Supreme Court, this Court, and the California Supreme Court. Indeed, the more recent case from the same Northern District, *Miller v. Southwest Airlines, Co.*, 2013 WL 556963, found ADA preemption of meal and rest break claims *as a matter of law*, and made no reference to *Mendez*.

Pursuant to Circuit Rule 28-2.7, all applicable statutes are contained in Appellants' Statutory Appendix.

IV. STATEMENT OF THE CASE

On May 7, 2010, Brandon Campbell ("Campbell") and Ralph Maldonado ("Maldonado") (collectively, "Plaintiffs") filed the present class action Complaint in Superior Court for the County of Los Angeles against Vitran Express, Inc. *Campbell,* 2012 WL 2317233 at *1. On June 14, 2010, Vitran removed the case to the District Court on the grounds that jurisdiction was proper under the Class Action Fairness Act ("CAFA"). *Id.* The District Court remanded the case on August 25, 2011, a decision that was reversed by this Court on March 30, 2012. *Id.*

Plaintiffs allege numerous claims, all of which are based on alleged violations of California's meal and rest break laws (California Labor Code sections 226.7 and 512) and derivate claims. *Id.* On April 26, 2012, Vitran filed a Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment. *Id.* The District Court granted the Motion for Judgment on the Pleadings, concluding that, as a matter of law, the FAAAA preempts all of Plaintiffs' claims. *Id.*

The heart of Plaintiffs' allegations was that Vitran did not allow them to take meal and rest breaks that they were entitled to under California law, and that Vitran did not provide premium pay to Plaintiffs for the missed meal breaks. *Id.*

Plaintiffs also allege that Vitran failed to provide them with complete and accurate wage statements or pay them properly upon termination, as well as other claims that were all entirely derived from their meal and rest break claims. *Id.* Vitran's motion placed at issue whether California's meal and rest break laws relate to Vitran's rates, routes, or services, and are therefore preempted by the FAAAA. *Id.*

The District Court recognized that in *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1041 (2012), the California Supreme Court recently clarified that the first meal break must come at some point within the first five hours of work, and the second meal break, if applicable, before the end of the employee's tenth work hour, and that the law makes no other formal timing requirements besides these basic parameters. *Campbell,* 2012 WL 2317233 at *4. Furthermore, although a company has an obligation to provide rest periods to its eligible employees, it need not "police" the meal breaks to ensure that employees are taking their required time off. *Id.* (citing, *Brinker*, 53 Cal. 4th at 1040–41).

Thus, the District Court found that, as a matter of law, the meal and rest break requirements, even as clarified by *Brinker*, relate to the rates, services, and routes offered by Vitran. *Campbell,* 2012 WL 2317233 at *4. Citing to *Esquivel*, 2012 WL 516094 at *5 and *Dilts*, 819 F.Supp.2d at 1119, the District Court noted that the length and timing of meal and rest breaks affects the scheduling of transportation. *Id.* The District Court also stated that when employees must stop and take breaks, it takes longer to drive the same distance and companies may only

use routes that are amenable to the logistical requirements of scheduled breaks. *Id.* As such, the District Court stated that the Plaintiffs had argued that the inability to take meal or rest breaks comes from their need to otherwise comply with Vitran's tight scheduling requirements. *Id.* The District Court concluded that the FAAAA preempted all of Plaintiffs' claims, and stated that its holding is consistent with the broad preemptive scope of the statute. *Id.*

V. STATEMENT OF THE FACTS

The District Court's order was based on the pleadings. This putative class action arises out of an alleged failure to provide timely meal and rest breaks. *ER 6-27.* Plaintiffs allege that throughout their employment with Vitran, the Company intentionally and willfully required Plaintiffs to work during their meal and rest periods. *Id.* Plaintiffs also allege that Vitran pressured its drivers to make faster pick-ups/deliveries, and by overloading its drivers' workloads, Vitran failed to permit the drivers to take proper meal or rest breaks under California law. *Id.* Plaintiffs' *Complaint* alleges seven separate causes of action, all of which stem from Vitran's alleged violation of California's meal and rest break laws. *Id.*

ER 35-36. The District Court properly dismissed all of Plaintiffs' claims based on the pleadings alone.[2]

VI. SUMMARY OF THE ARGUMENT

The starting point for FAAAA preemption analysis is the text of the statute itself, which provides that the FAAAA preempts state laws "relating to" a motor carrier's prices, routes, **or** services. The law does not limit preemption only to laws that "regulate" motor carriers, or laws that "determine" prices, routes, or services, or laws that "apply" to motor carriers. The most recent U.S. Supreme Court decision on FAAAA preemption, *Rowe v. New Hampshire Transport Ass'n.*, 552 U.S. 364 (2008), and many federal appellate and district courts following *Rowe*, have broadly applied the FAAAA to preempt many state laws of general applicability, including meal and rest break laws, wage laws, and common law claims. This Court has also confirmed that ERISA preemption cases do not apply to the FAAAA analysis. Nevertheless, Plaintiffs rely on many ERISA cases in their attempt to narrow the scope of FAAAA preemption, and attempt to assert several atextual exceptions to the FAAAA. But *Rowe* clarified that there is no "public health" exception, no "police power" exception, and no "wage law"

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[2] Essentially conceding that their allegations fail as a matter of law, Plaintiffs now assert that Vitran "has a practice of automatically deducting pay for a full 30-minute meal break if a driver works a seven-hour shift." *Appellants' Brief at 68*. *No such allegations were ever in the Complaint*, and thus cannot be at issue on this appeal. See, *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) (Ninth Circuit declines arguments raised for the first time on appeal).

exception to FAAAA preemption. *Rowe* also stated that FAAAA preemption applies when the state law has a connection with, or reference to, a carrier's rates, routes, or services, and even if the state law's effects are "indirect".

In the instant case, it is self-evident that the meal and rest break laws relate to Vitran's prices, routes, and services. Seven district courts in California got it right when they dismissed meal and rest break claims brought by drivers against their motor carrier employers based on FAAAA preemption. As these courts recognized, the meal and rest break laws impose substantive standards on motor carriers, requiring drivers, from 3 to 5 times each workday, *to stop providing services* and to drive their tractor-trailers *off of their commercial routes* onto surface streets and towards safe and legal parking spaces where they must park their truck, secure the freight, and then take *duty-free breaks* from either 10 minutes or 30 minutes each. Clearly, by dictating when and how long drivers must drive off their routes and stop providing services, the meal and rest break laws have a prohibitive effect on the prices, routes, and services of motor carriers like Vitran. Accordingly, Vitran requests this Court to deny the appeal and to affirm the District Court's order dismissing all of Plaintiffs' claims.

VII. ARGUMENT

A. Congress Enacted the FAAAA to Broadly Preempt State Laws that Effect the Rates, Routes, or Services of Motor Carriers.

1. The Text of the FAAAA Governs This Case.

This Court must start its preemption analysis with the text of the statute itself, as the plain wording of a statute is the best evidence of Congress' pre-emptive intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). The expressed language of the statute, rather than its purported legislative purpose, reaffirms that the authoritative statement of Congress is the statutory text, not the legislative history. *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1980 (2011).

Plaintiffs' reliance on the Conference Report and related hearing testimony is unavailing. A federal statute can have effects beyond those enumerated in the legislative history. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). Moreover, the Conference report stated that "the conferees do not intend alter the broad preemption interpretation adopted by the United States Supreme Court in [*Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)]." H.R. Conf. Rep. 103-677, at 83.

2. The Text of the FAAAA Expressly Provides A Broad Preemptive Scope.

For over 100 years, Congress exclusively regulated the interstate transportation of cargo, whether by rail, motor, or air carriage. Since at least 1906, "the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the states to control in such respect by their own policy or legislation." *Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 110 (1914).

In 1978, Congress enacted the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. 41713(b) (1), to deregulate the airlines by expressly preempting state laws "related to" the prices, routes, or services of any air carrier. Congress intended to ensure that the States would not undo federal deregulation with regulations of their own. *Morales*, 504 U.S. at 378. In *Morales*, the U.S. Supreme Court explained that the ADA's key phrase "relating to" broadly means to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with. *Id.* at 383. The Court emphasized that the ADA's preemption provision has a broad scope, expresses a broad preemptive purpose, has an expansive sweep, is deliberately expansive, and is conspicuous for its breadth. *Id.* at 383-384. The Court thus explained that ADA preemption is not limited to laws that actually prescribe rates, routes or services. *Id*. at 385. "This simply reads the words "related to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to '*regulate*

rates, routes, and services.'" *Id*. The Court also noted that the Senate rejected a version of the ADA that preempted laws "determining" routes, schedules, or rates. *Id.* at 386 n. 2. Instead, the full Congress preferred the term "related to" over "determining." *Id.* The Court explained:

> Next, petitioner advances the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of general applicability. Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "related to" language.

Id. at 386. Accordingly, the Court stated that it has "consistently rejected" such attempts to restrict the preemptive effect of the "related to" language in the ADA. *Id.*

Applying the principles in *Morales*, the Supreme Court has twice held that the ADA preempts enforcement of generally applicable state consumer protection laws, once in *Morales* itself, in the context of enforcing guidelines for advertising airline fares, and once in the context of holding carriers liable for modifications of their frequent flier programs. See, *Rowe v New Hampshire Motor Transport Assoc.*, 552 U.S. 364, 368 (2008)(federal law preempts the application of a State's "general" consumer-protection statute to an airline's frequent flyer program)(citing *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226–228 (1995)).

In 1994, Congress enacted the preemption provisions of the FAAAA to invalidate state laws "related to" the price, route, or service of motor carriers,

thereby freeing them from the "patchwork of regulation" of the several States. *Rowe*, 552 U.S. at 373. The FAAAA also borrowed the preemption language from the ADA. 49 U.S.C. § 14501(c)(1). *Id*. at 368. Following *Morales*, the Court in *Rowe* determined that (1) state enforcement actions having a connection with, or reference to a carrier's rates, routes, or services are pre-empted; (2) such pre-emption may occur even if a state law's effect on rates, routes or services is only indirect; (3) in respect to pre-emption, it makes no difference whether a state law is consistent or inconsistent with federal regulation; and (4) pre-emption occurs at least where state laws have a significant impact related to Congress' deregulatory and pre-emption-related objectives. *Id.* at 370-371. Congress' overarching goal was to help ensure that transportation rates, routes, and services reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality. *Id.* at 371. *Rowe* also acknowledged that federal law might not pre-empt state laws that affect fares in only a tenuous, remote, or peripheral manner, like laws forbidding gambling. *Id.* at 390.

Accordingly, this Court recently confirmed that there can be no doubt that when Congress adopted the FAAAA, it intended to "broadly preempt" state laws that were related to a price, route, or service of a motor carrier. *American Trucking Assoc., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009)("*ATA 1*").

3. Starting with the Text of the FAAAA, the Preemption Analysis Then Proceeds with an Analysis of the Effects of the State Law at Issue.

The evaluation of federal preemption centers on the text of the FAAAA, and then on the "effect" of the state law, not the state's "purpose" for enacting the law. *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 78 (1st Cir. 2006); see also, *Rowe*, 552 U.S. at 372 (regulation preempted because of its effect on the carriers). This Court has thus stated that in "determining whether a provision has a connection to rates, routes, or services, we must examine the actual or likely effect of a State's action." *American Trucking Assoc. v. City of Los Angeles*, 660 F.3d 384, 396 (9th Cir. 2011)("*ATA 2*"); see also, *California Dump Truck Owners Assoc. v. Nichols*, No. 2:11-cv-co384-MCE-GGH, 2012 WL 273162 at *5 (E.D. Ca., Jan. 30, 2012)(same); *Travers v. JetBlue Airways Corp.*, No. 08-10730-GAO, 2009 WL 2242391 at *2 (D. Mass, July 23, 2009)(preemption analysis of the ADA should focus on the effect of the state law on airline services and rates).

4. No Presumption Against Preemption Applies Here.

As stated above, Congress has regulated the interstate transportation of cargo for over 100 years. Congressional regulatory presence in the field of interstate transportation for so many years precludes any presumption against preemption. See, *United States v. Locke*, 529 U.S. 89, 108 (2000) (holding that the presumption against preemption does not apply "in an area where there has been a history of significant federal presence").

In *New Hampshire Motor Trans. Ass'n v. Rowe*, 448 F.3d 66, 76 (1st Cir. 2006), affirmed by the Supreme Court in *Rowe*, 552 U.S. 364, the First Circuit explained that the FAAAA's intent to preempt state laws was so clear from the statutory language that it would overcome any presumption against preemption. See, *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 86 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011)(no U.S. Supreme Court case on ADA/FAAAA preemption has applied a presumption against preemption).

5. This Court Has Confirmed that ERISA Preemption Cases Do Not Apply to Narrow the Scope of Preemption Under the FAAAA.

The many ERISA preemption cases cited by Plaintiffs do not apply here. This Court has recently confirmed that ERISA preemption cases do not apply to ADA-FAAAA cases. In the decision, *In re Korean Air Lines Co.*, 642 F.3d 685, 697 (9th Cir. 2011), the Court referenced *Rowe* and explained that if "the Supreme Court intended to narrow the scope of these [ADA-FAAAA] preemption provisions because of its ERISA decisions, it could have done so in *Rowe*, but it did not." *Id.* As such, ERISA decisions cannot be used to narrow the broad preemptive effect of the FAAAA.

6. Numerous Courts Have Applied ADA/FAAAA Preemption to Laws of General Applicability.

Guided by the broad preemptive scope of the statutes, numerous courts have applied FAAAA preemption to various laws of general applicability. See, e.g., *Non Typical, Inc. v. Transglobal Logistics Group, Inc.*, Nos. 10-C-1058, 11-C-

0156, 2012 WL 1910076 (E.D. Wis. May 28, 2012)(FAAAA preempts negligence claims); *Chavis Van & Storage of Myrtle Beach, Inc. v. United Van Lines, LLC*, No. 4:11 CV1299 RWS, 2012 WL 47469 at (E.D. Mo. Jan. 9, 2012)(FAAAA preempts claims for breach of contract, promissory estoppel, fraudulent misrepresentation, negligent misrepresentation, tortious interference with business expectancies, and civil conspiracy); *State ex rel. Grupp v. DHL Express (USA), Inc.*, 83 A.D. 3d 1450 (N.Y.A.D. 2011)(false claims act claims preempted by the ADA and the FAAAA); *Tanen v. Southwest Airlines Co.*, 187 Cal. App. 4th 1156 (2010)(ADA preempted breach of contract as well as alleged violations of California law prohibiting the sale of gift certificates with expiration dates); *Weatherspoon v. Tillery Body Shop, Inc.*, 44 So. 3d 447 (Ala. 2010)(FAAAA preempts negligence and conversion claims); *Missing Link Jewelers, Inc. v. United Parcel Service, Inc.*, 2009 WL 5065682 (N.D. Ill.)(FAAAA preempts state common law claims relating to late payment fees); *Cerdant, Inc. v. DHL Express (USA), Inc.*, No. 2:08-cv-186, 2009 WL 723149 (S.D. Ohio 2009)(FAAAA preempts claims for breach of the obligation of good faith, fair dealing, and commercial reasonableness; an unjust enrichment and imposition of a constructive trust claim; a promissory estoppel claim; and claims seeking declaratory and injunctive relief); *Data Mfg., Inc. v. United Parcel Service, Inc.*, 557 F.3d 849 (8th Cir. 2009)(FAAAA preempted claims for fraudulent and negligent misrepresentation); *Samica Enterprises, LLC v. Mail Boxes Etc., Inc.*, 637 F. Supp.

2d 712 (C.D. Cal. 2008)(FAAAA preempted claims for breach of the implied covenant of good faith and fair dealing), *Ware v. Tow Pro Custom Towing and Hauling, Inc.*, 289 Fed. Appx. 852 (6th Cir. 2008)(FAAAA preempted conversion claims).

Similarly numerous courts have also applied ADA preemption to state laws of general applicability. See, e.g., *Witty v. Delta Airlines, Inc.*, 366 F.3d 380 (5th Cir. 2004)(ADA preempts tort claims for deep vein thrombosis injuries); *In re Korean Air Lines Co.*, 642 F.3d 685 (9th Cir. 2011)(ADA preempts California unfair competition law claim); *Benedetto v. Delta Air Lines, Inc.*, No. CIV. 12-4110-KES, 2013 WL 100055 (D.S.D. Jan. 7 2013)(ADA preempts common law negligence and unjust enrichment claims); *Madorsky v. Spirit Airlines*, No. 11-12662, 2012 WL 6049095 (E.D. Mich. Dec. 5, 2012)(ADA preempts Florida unfair trade practices claim and Michigan consumer protection act claims); *Newman v. Spirit Airlines, Inc.*, No. 12C 2897, 2012 WL 3134422 (N.D. Ill. July 27, 2012)(ADA preempts claim for breach of implied covenant of good faith and fair dealing); *Mitchell v. US Airways, Inc.* 858 F. Supp. 2d 137 (D. Mass. 2012) – following First Circuit Opinion in *DiFiore v. American Airlines*, 646 F. 3d 81 (1st Cir. 2011)(ADA preempts state tip law claims, and related tortious interference and unjust enrichment claims); *Aretakis v. Federal Express Corp.*, No. 10 civ 11696 (JSR) (KNF), 2011 WL 1226278 (S.D.N.Y. Feb. 28, 2011)(holding that preemption clauses of ADA and FAAAA are to be construed broadly to

preempt state false claims act actions related to charges for delivery of packages); *Miller v. Delta Air Lines, Inc.*, No. 4:11-cv-10099-JLK, 2012 WL 1155138 (S.D. Fla. April 5, 2012)(ADA preempts Florida deceptive and unfair trade practices claims); *Malik v. Continental Airlines, Inc.*, 305 Fed. Appx. 165 (5th Cir. 2008)(the ADA preempts claims for conversion, deceptive trade practices, invasion of privacy, and attorney fees); *National Fed. Of the Blind v. United Airlines, Inc.*, No. C10-04816 WHA, 2011 WL 1544524 (N.D. Cal. April 25, 2011)(ADA preempts state law disability discrimination claims under the Unruh Civil Rights Act and Disabled Persons Act).

B. The U.S. Supreme Court Decision in *Rowe v. New Hampshire Transport Ass'n*, 552 U.S. 364 (2008) and Its Progeny Preclude Plaintiffs' Attempts to Restrict the Broad Preemptive Effect of the FAAAA.

***Rowe* rejected Plaintiffs' argument that the FAAAA narrowly targets only "Economic" or "Public Utility-Like" regulation by the States.** *Rowe* clearly stated that Congress had no intent to limit FAAAA preemption to only state "economic" regulations, noting that Congress declined to insert the term "economic" into the language of the FAAAA, "despite having at one time considered doing so." 552 U.S. at 374.

***Rowe* also clarified that there is no "public health" exception to FAAAA preemption**. *Rowe*, 552 U.S. at 374. *Rowe* understood the importance of the public health objective of the Maine tobacco law, but emphasized that its laudable purpose did not exclude it from preemption. *Id.* *Rowe* said that the FAAAA says

nothing about a public health exception, and did not include it among the list of exceptions. *Id.* Moreover, in *Air Transport Assn of America, Inc. v. Cuomo*, 520 F.3d 218, 224 (2nd Cir. 2008), the Second Circuit held that the ADA preempted a law requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays. *Id.* at 223. With the ADA preempting state laws requiring the provision of such basic human necessities, it is clear that there is no public health exception to FAAAA preemption.

There is also no "police power" exception from preemption. The First Circuit in *Rowe* ruled out an exclusion from preemption for police-power enactments, explaining that it would surely swallow the rule of preemption, as most state laws are enacted pursuant to this authority. *Rowe*, 448 F.3d at 76; see also, *Travers*, 2009 WL 2242391 at *2 (D. Mass. July 23, 2009) ("state police power enactments are not excluded from preemption under the ADA").

The FAAAA's explicit delineation of exceptions also precludes the general police powers exception envisioned by Plaintiffs. Congress considered traditional areas in which the States might exercise regulatory authority over carriers, and specified in the text of the FAAAA the areas that were not subject to preemption (motor vehicle safety, route controls for specified purposes, insurance requirements, and the transportation of household goods). 49 U.S.C. 14501(c)(2). When Congress creates exceptions in a statute, courts have no authority to create others. See, *United States v. Johnson*, 529 U.S. 53, 58 (2000)(Congress limited the

statutory exceptions to the ones set forth). Thus, Plaintiffs' proposed atextual exception asks the Court to embark on an improper and vague purpose-bound inquiry without any textual guidance.

There is no "wage law" exception to the FAAAA. No matter how traditional the area of state law, it is still preempted by the FAAAA if it is "related to" rates, routes, or services. *Rowe*, 552 US at 364. Accordingly, post-*Rowe* decisions have found federal preemption of state wage laws. See, e.g., *Difiore*, 646 F.3d 81 (tips law wage claim ADA-preempted); *Travers*, 2009 WL 2242391 *3 (same). *Rowe's* emphasis on the expressed language of the statute, rather than the "reason why" it was enacted, reaffirms the principle that the authoritative statement of Congress is the statutory text, not the legislative history. *Whiting*, 131 S.Ct. at 1980. With no exception for state wage and hour laws in the FAAAA, *Rowe* disposes of Plaintiffs' musings about the FAAAA's legislative history, including the alleged Congressional "silence" as to whether preemption applies to state wage and hour laws.

***Rowe* also disposes of Plaintiffs' argument that the FAAAA does not preempt California's break laws because they do not have an anticompetitive effect.** FAAAA preemption applies whether or not a state law is consistent or inconsistent with federal regulations, including the goal of maximum reliance on competitive market forces. *Rowe*, 552 U.S. at 371. This Court has explained that it "is immaterial that the state laws do not interfere with the purposes of the federal

statute or that they might be consistent with promoting competition and deregulation." *In re Korean Air Lines Co.*, 642 F.3d at 697. Plaintiffs also fail to consider that a major purpose of the FAAAA is to prevent a patchwork of state laws that interfere with the operations of an interstate motor carrier like Vitran, which can result in different break laws applied to different carriers, depending on their states of operation. *Rowe*, 552 U.S. at 373.

C. At Least Nine District Courts in California Have Dismissed Meal and Rest Break Claims Based on ADA/FAAAA Preemption.

Since *Rowe*, at least **nine** district courts in California have dismissed meal and rest break claims as preempted by the ADA/FAAAA. *Seven* of those nine courts dismissed the break claims *on the pleadings alone*, which provide this Court with ample support to deny Plaintiffs' appeal.

In *Blackwell v. Sky West Airlines, Inc.*, No. 06 cv 0307 DMS (AJB), 2008 WL 5103195 (S.D. Cal. Dec. 3, 2008), the Southern District of California granted a summary judgment motion, finding that the ADA preempts California's meal and rest break laws. Blackwell, a customer service representative, claimed that she was rarely provided a duty-free meal period because she received no break at all, or it was less than 30 minutes, or it was not received within the first five hours of her shift. *Id.* at *10. The district court found that the ADA preempts California's meal break laws because they mandate duty-free breaks for minimum lengths of time, and dictate when the breaks must be provided. *Id.* at *17-*18.

The mandatory breaks had the effect of interrupting agent service that "could significantly and impermissibly impact point-to-point air carrier service." *Id.* at *17. The court thus concluded that the application of the break laws to SkyWest's agents would have the impermissible force and effect of regulating an air carrier's services. *Id.* at *15. The court also found that the ADA preempted the break laws because of their *potential* impact on routes and prices. SkyWest introduced evidence that *if* it must pay for the missed meal and rest breaks for all of its California agents, its labor costs would increase, which would be passed on to its customers in the form of higher airfares, and would thus negatively affect its ability to service particular routes. *Id.* at *18. Citing *Morales*, the court concluded that enforcing the break laws would result in a forbidden significant effect on the services, prices, and routes of air carriers. The court thus granted summary judgment on SkyWest's preemption defense.

In *Dilts v. Penske Logistics LLC*, 819 F.Supp.2d 1109 (C.D. Cal. Oct. 19, 2011), the Southern District of California granted Penske's summary judgment motion based on FAAAA preemption. The court held that the FAAAA preempts California's meal and rest break laws in connection with claims brought by Penske's employees (drivers and installers) who were engaged in delivery services. According to the employees, they had not been provided the appropriate duty-free breaks. The court found that the meal and rest break laws impose "substantive standards" upon a motor carrier's routes and services, which implicates

preemption. *Id.* at 1120. The court also recognized that requiring the drivers to make five break stops during a 12 hour workday would necessarily force them to alter their routes daily so that they must search out appropriate places to exit the highway to search for safe and legal parking spaces for their tractor-trailers:

> While the [break] laws do not strictly bind Penske's drivers to one particular route, they have the same effect by depriving them of the ability to take any route that does not offer adequate locations for stopping, or by forcing them to take shorter or fewer routes. In essence, the laws bind motor carriers to a smaller set of possible routes.

Id. at 1118-1119. The court also determined that "no factual analysis is required to decide this question of preemption. It is more importantly the imposition of substantive standards upon a motor carrier's routes and services, as in *Morales* and *Rowe*, that implicates preemption here." *Id.* at 1120. Thus, the court concluded:

> The key instead is that to allow California to insist exactly when and for exactly how long carriers provide breaks for their employees would allow other States to do the same, and to do so differently. "And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations." [*Rowe*, 552 U.S. at 373]. Thus, the Court finds state regulation of details significantly impacting the routes or services of the carrier's transportation itself preempted by the FAAAA Act.

Id. at 1120.

In *California Dump Truck Owners Association v. Nichols*, 2012 WL 273162 (E.D. Cal., Jan. 30, 2012), the Eastern District made a significant distinction between California's meal and rest break laws and other laws. In *Nichols,* the plaintiff (the California Dump Truck Owners Association) brought a

motion for preliminary injunction, arguing that the FAAAA preempts a California emission control law. *Id.* at *1. More importantly for this case, the court discussed *Dilts* and emphasized that the meal and rest break laws are significantly different than the emission laws, as the break laws "mandated that drivers *stop* at particular intervals throughout the day. During those intervals no services could be provided." *Id.* at *8. Thus, the court recognized that the meal and rest break laws force drivers to "stop" their trucks at particular intervals during the day, and thus to "stop" providing services, which clearly impacts (even directly) the delivery services of motor carriers. *Id.* This impact alone warrants preemption.

In *Esquivel v. Vistar Corp.*, 2012 WL 516094 (C.D. Cal. Feb. 8, 2012), the Central District of California granted a Rule 12(b)(6) motion, finding that, as a matter of law, the FAAAA preempts meal and rest break claims brought by driver-employees of a motor carrier. *Id.* at *6. The court emphasized the language in *Dilts* that "no factual analysis is required to decide this question of preemption," since California's break laws clearly impose substantive standards on motor carriers' routes and services. *Id.* at *4.

The *Esquivel* plaintiffs were employed by Vistar as route delivery drivers, and they alleged (similar to Plaintiffs' allegations in this appeal) that throughout their employment, Vistar scheduled their delivery routes such that the drivers were unable to take duty-free meal breaks. *Id.* According to the drivers, Vistar prevented breaks by imposing time pressures on drivers to make deliveries by

certain times of the day. *Id.* The court granted the Rule 12(b)(6) motion and dismissed the break claims based on preemption. *Id.* at *5. According to the court, the "key" is that "to allow California to insist exactly when and for exactly how long carriers provide breaks for their employees would allow other states to do the same, and to do so differently," leading to "a patchwork of state service-determining laws, rules, and regulations." *Id.* at *4 (citing *Rowe*, 552 U.S. at 373).

The court also concluded that, as in *Dilts*, "the length and timing of meal and rest breaks seems directly and significantly related to such things as the frequency and scheduling of transportation," such that requiring off-duty breaks "at specific times throughout the workday ... would interfere with competitive market forces within the ... industry." *Esquivel*, 2012 WL 516094 at *5 (citing, *Dilts*, 2011 WL 4975520 at *9).

In *Aguiar v. California Sierra Express, Inc.*, 2012 WL 1593202 (E.D. Cal. May 4, 2012), the Eastern District of California again granted a Rule 12(b)(6) motion finding that, as a matter of law, the FAAAA preempts meal and rest break claims brought by driver-employees of a motor carrier. *Id.* at *1. The court concluded that California Sierra Express could not avoid the break claims without significantly impacting its trucking routes, services, and pricing. *Id.* The break standards "would effectively bind" California Sierra Express only to schedules and frequencies of routes that allow for off-duty breaks at specific times throughout the

workday in a way that would interfere with competitive market forces within the industry." *Id.*

In *Jasper v. C.R. England, Inc.*, 2012 WL 7051321 (C.D. Cal., Aug. 30, 2012), the Central District of California again granted a Rule 12(c) motion based on FAAAA preemption of the break laws as applied to a commercial motor carrier. In *Jasper*, the plaintiffs, former truck driver employees of the defendant, CRE, alleged that the company failed to provide meal and rest breaks, and failed to pay premium wages for the missed breaks. *Id.* at *1. Similar to the Plaintiffs in the instant case, the plaintiffs in *Jasper* alleged that their inability to take meal or rest breaks comes from their need to otherwise comply with CRE's tight scheduling requirements. *Id.* at *8.

CRE's motion argued that based on the pleadings alone, the FAAAA preempted the break claims. *Id.* at *2. The court granted the motion, dismissed the break claims, and concluded that it would join the majority of district courts in finding that, as a matter of law, California's break laws, as applied to the interstate truck driver class members, are preempted by the FAAAA. *Id.* at *9. The court emphasized that precisely because the allegations involve scheduling and routing policies, no factual development was needed to determine that compliance with the break laws would have a forbidden effect of binding CRE to routes and schedules other than those they currently employ. *Id.* at *8.

The court also agreed with CRE that the break laws forced each driver to change a route each time a break is required when the driver is behind the wheel, because the driver must then search out an appropriate place to exit the highway, locate a safe and legal parking space, and then return to the route after the break. *Id.* at *6. Along with *Dilts,* the court said that the break laws deprive drivers of the ability to take any route that does not offer adequate locations for stopping, or by forcing them to take shorter or fewer routes. *Id.* at *7. The court also incorporated two recent decisions from the California Supreme Court, *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), which clarified that employers must provide meal and rest breaks (but not ensure that they are taken), and *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244, 1255 (2012) which clarified that meal and rest break claims pertain to the employer's obligation to provide the breaks, and thus are not claims for unpaid wages. Based on this recent authority, the *Jasper* court properly dispensed with the plaintiffs' argument that the break laws are "general wage regulations" that are somehow saved from preemption. *Id.* at *7.

Following the Central District's decision in the instant case (***Campbell v. Vitran***), on September 27, 2012, the Central District of California issued ***Cole v. CRST, Inc.*, 2012 WL 4479237 (C.D. Ca. Sept, 27, 2012).** In *Cole*, the court granted a Rule 12(c) motion concluding that, as a matter of law, the FAAAA

preempts meal and rest break claims brought by driver-employees of a motor carrier. *Id.* at *7. The court concluded:

> First, the Meal and Rest Break Laws affect routes by limiting the carriers to a smaller set of possible routes. Drivers must select routes that allow for the logistical requirements of stopping and breaking and they may be forced to take shorter or fewer routes. Second, the Meal and Rest Break Laws affect services by dictating when services may not be performed, by increasing the time it takes to complete a delivery, and by effectively regulating the frequency and scheduling of transportation. Finally, price is affected by the Meal and Rest Break Laws by virtue of the laws effect on routes and services.

Id. at *4. The court went on to explain that evidence outside of the pleadings "is not necessary to determine whether the Meal and Rest Break Laws have an impact on prices, routes, or services." *Id.* at *5. Instead, "no factual analysis is required to decide the question of preemption." *Id.*

In *Aguirre v. Genesis Logistics, et al*., SACV 12-00687 JVS (ANx)(C.D. Cal. Nov. 5, 2012), the Central District of California granted a Rule 12(c) motion, finding that, as a matter of law, the FAAAA preempts meal and rest break claims brought by driver-employees of a motor carrier.[3] *Request for Judicial Notice ("RJN"), at Tab 1.*

[3] The court distinguished *Reinhardt v. Gemini Motor Transport*, 869 F.Supp.2d 1158 (E.D. 2012), because the *Reinhardt* court noted the potential importance of evidence beyond the pleadings based on unique facts about "fixed, drone like routes." *Aguirre* at *4. No such facts apply in the instant case against Vitran, as the undisputed facts show that the routes of the drivers vary on a daily basis. *ER 87*.

Aguirre emphasized that it is "the imposition of substantive standards" upon a motor carrier's routes and services that implicates preemption, not the exact nature of Genesis' delivery structure. *Id.* at 5. The court further explained:

> Indeed, even if Genesis' current delivery structure is not impacted by the Meal and Rest Break Laws, it is entirely possible that it could restructure its routes, procure new clients, and change its business model such that its routes and services would be impacted by the Meal and Rest Break Laws and result in a holding that the laws are preempted based on those facts. Even though factual allegations could assist the court in reaching its conclusion, to accept plaintiffs contention could lead to a patchwork of conclusions about preemption even involving the same company. The vice preemption seeks to cure is the imposition of two standards upon an employer, regardless of whether there is an immediate conflict. Thus, the Court holds that the preemption issue as a legal one that can be resolved at this stage without further discovery.

Id.; see also, *Rowe*, 448 F.3d at 72 ("if a state law is preempted as to one carrier, it is preempted as to all carriers."). Indeed, even if Vitran's current delivery structure is not impacted by the break laws (but of course it is), it is entirely possible that Vitran could restructure its routes, procure new clients, and change its business model such that its routes and services *would be* impacted by the break laws that would warrant preemption. *Aguirre*, SACV 12-00687 JVS at *5.

The plaintiffs in *Aguirre* (just like in this case) argued that the preemption analysis in *Dilts* was based on a flawed understanding of meal and rest break laws in light of *Brinker*. *Id*. at *8. But the court explained that while *Brinker* "may provide some variability in the timing of meal and rest breaks, it is the imposition of that regime and not the particulars which compels preemption. As a matter of

law, these meal and rest requirements – which are governed by different standards – relate to the routes, services, and prices offered by Genesis because the length and timing of meal and rest breaks affects the scheduling of transportation." *Id.* at 8.

Aguirre also properly recognized that the break laws are not wage laws, as confirmed by the recent California Supreme Court decision in *Kirby*, 53 Cal. 4th at 1255. The court also properly determined that the meal and rest break laws do not fall within the FAAAA's exception for motor vehicle safety. *Id.* at 9.

Most recently, in *Miller v. Southwest Airlines, Co.*, 2013 WL 556963 (N.D. Cal. Feb. 12, 2013), the Northern District of California granted Southwest's Rule 12(c) motion by finding that, as a matter of law, plaintiff's break claims affected the airline's routes, services, and costs, thus warranting ADA preemption. *Id.* at *6. In *Miller*, the court rejected the plaintiff's appeal to *Californians For Safe And Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), and her attempt to equate break laws with wage laws. *Id.* at *6. The court also rejected plaintiff's appeal to *Ventress v. Japan Airlines*, 603 F.3d 676, 681 (9th Cir. 2010) because "whistleblower claims do not inherently conflict with an airline's scheduling and service" while "compliance with meal-and-rest breaks do impact an airline's scheduling and service because it dictates when, during the course of a shift, the employee can go off-duty." *Id.*

Combined, all of these several cases dispense with all of Plaintiffs' arguments in this appeal, which should be denied.

D. The District Court Properly Decided That, as a Matter of Law, the FAAAA Preempts Plaintiffs' Claims.

1. As a Matter of Law, Plaintiffs' Allegations Impose Substantive Standards on Vitran that Have a Prohibitive Effect on Vitran's Routes.

In *Campbell*, the court stated that "[w]hen employees must stop and take breaks, it takes longer to drive the same distance and companies may only use routes that are amenable to the logistical requirements of scheduled breaks." *Campbell*, 2012 WL 2317233 at *4. The *Cole* court also found that, as a matter of law, the break laws "affect routes by limiting the carriers to a smaller set of possible routes. Drivers must select routes that allow for the logistical requirements of stopping and breaking and they may be forced to take shorter or fewer routes." *Id.* at *4.

Clearly, Plaintiffs' compliance demands impose substantive standards on Vitran to make scheduling accommodations that provide drivers with more *non-working time* each day for stops and breaks. It is unquestionable that by mandating *when and for how long* drivers must stop working to take duty-free breaks, drivers will be limited to only using routes that are conducive to pulling off the interstate and finding a safe and legal place to park a tractor trailer, and near sufficient amenities that will enable the driver to take a restful break and/or eat a meal. It is also unassailable that by mandating the duty free breaks, drivers will need *more*

time to drive the same distance, which will result in shorter and/or fewer routes. The break laws will force drivers to change their routes every time they have to exit the route, drive on surface streets to a parking space, and park the tractor-trailer to take a break. Thus, as a matter of law, the FAAAA preempts meal and rest break laws because of their improper effects on Vitran's routes. *Esquivel*, 2012 WL 516094 at *5; see also *Jasper*, 2012 WL 7051321 at *8.

2. As a Matter of Law, Plaintiffs' Allegations Impose Substantive Standards on Vitran that Have a Prohibitive Effect on Vitran's Services.

As the district courts have recognized, it is self evident that the break laws mandate that drivers stop at particular intervals during throughout the day, and provide no services. *Nichols*, 2012 WL 273162 at *8. The *Cole* court also noted that the meal and rest break laws "affect services by dictating when services may *not* be performed, by increasing the time it takes to complete a delivery, and by effectively regulating the frequency and scheduling of transportation." *Cole*, 2012 WL 4479237 at *4. *Esquivel* further explained that by mandating duty-free breaks during certain periods, there is "no reason to conclude that [the motor carrier] could feasibly comply with California's meal break laws without altering routes and services." *Esquivel*, 2012 WL 516094 at *6.

The prohibitive impact on services is self evident. By requiring drivers to *stop work*, exit their route, park their truck, and then take 3 to 5 *duty-free* breaks each day, the break laws dictate that drivers *stop providing services* several times

in the workday. Forcing drivers to stop working at intervals throughout the day will necessarily result in a *reduction in services*. As the District Court properly recognized, "[w]hen employees must stop and take breaks, it takes longer to drive the same distance …" *Campbell*, 2012 WL 2317233 at *4. "By virtue of simple mathematics," the reduction in the amount of on-duty work time will reduce the amount of service Vitran can offer its customers. *Dilts*, 819 F. Supp. 2d at 1119.

Moreover, drivers in the putative class are subject to the federal Hours of Service regulations ("HOS") established by the Federal Motor Carrier Safety Administration ("FMCSA"). 49 C.F.R. § 395.3. The HOS regulations limit drivers to a maximum of 11 hours of driving and 3 hours of non-driving work time each day. *ER 83-86*. With these federal limits, the additional duty-free break times mandated by California law unquestionably reduce each driver's ability to provide driving services. *Id.* Also, Plaintiffs seek injunctive relief to compel Vitran to change its delivery practices with respect to the provision of breaks, which alone warrants preemption. See, *Travers*, 2009 WL 2242391 at *3 (allegations seeking injunctive relief shows direct impact on rates, routes, or services).

3. As a Matter of Law, Plaintiffs' Allegations Impose Substantive Standards on Vitran that Have a Prohibitive Effect on Vitran's Prices.

The language of the FAAAA is disjunctive, as the law prohibits state laws "related to a price, route **or** service of any motor carrier…" 49 U.S.C. § 14501(c)(1)(emphasis added). Although the District Court's decision must be

affirmed if Plaintiffs' claims have a prohibitive effect on Vitran's routes or schedules, the District Court also properly stated that the break laws effect Vitran's prices. Precisely because the break laws *limit* Vitran's routes and *reduce* its services, the break laws also impact Vitran's prices. 2012 WL 2317233 at *4. In *Cole*, the court found that "price is affected by the Meal and Rest Break Laws by virtue of the laws effect on routes and services." *Cole*, 2012 WL 4479237 at *4; *see also*, *Aguiar*, 2012 WL 1593202 at *1 (break laws significantly impact prices).

It is undeniable that if Vitran's drivers must reduce their daily services, and take 3 to 5 additional duty-free breaks each day, these ramifications will necessarily impact Vitran's prices. Vitran will need to hire more drivers to make up for the lost capacity, purchase more tractors and trailers for those additional drivers, and incur all of the related labor, maintenance, and insurance costs for the additional drivers and equipment. Thus, FAAAA preemption is warranted.

4. With a Patchwork of State-Specific Laws on Meal and Rest Breaks in Vitran's Operating Area, Plaintiffs' Compliance Demands Will Exacerbate the Prohibitive Effects on Vitran's Routes, Services, and Prices.

Rowe emphasized that a "major legislative effort" of the FAAAA is to prevent a "patchwork" of state laws that regulate motor carriers. 552 U.S. at 373. In *Dilts*, 819 F. Supp. 2d at 1120, the court noted that the "key" to the preemption analysis is that to allow California to insist exactly when and for exactly how long carriers must provide breaks for their employees would allow other states to do the same, and to do so differently. See, *Esquivel,* 2012 WL 516094 at *4 (same).

Here, Vitran operates in the 48 contiguous United States. *ER 52-53*. At least seven states, in addition to California, have specific laws requiring paid rest periods, and at least 17 states, in addition to California, have specific laws requiring meal periods for employees. *Id*. These laws vary significantly. While California's rest break requirements include a 10-minute paid break, Illinois requires a 15-minute paid break, Minnesota requires "adequate" rest breaks, and Vermont requires "reasonable opportunities" for rest breaks. *Id*. Examples of various meal break requirements include California's 30 minute meal period to commence within the first five hours of work, Illinois' requirement of a 20 minute meal break, Minnesota's requirement of "sufficient" time for meals, New York's various requirements, Rhode Island's requirement of a 20 minute mealtime, Vermont's requirement of "reasonable opportunities" for a meal, and West Virginia's requirement of a 20 minute meal period. *Id.* The states also vary in their requirements for when the meal period must be provided. *Id.* Clearly, the prohibitive effect on Vitran's prices, routes, or services shown above would be significantly exacerbated if Vitran's drivers had to comply with a patchwork of state-specific mandates of various meal and rest break requirements. *Id.*

Furthermore, the FMCSA (the successor to the ICC, and the agency charged with interstate transportation safety) has explained that motor vehicle **safety** requires "a familiar, uniform set of national rules" governing motor carrier transportation. *2007 HOS Interim Final Rule, 72 Fed. Reg. at 71249*. Thus,

underscoring the national uniformity purpose of the HOS Regulations, the FMCSA's 2007 Interim Final Rule sought "to ensure there will not be a patchwork of laws across the nation" governing drivers' hours of service. *Id.* Drivers would be unsure as to how their actions in one state should be treated in a state with a different HOS regime, and such uncertainty could "only impair highway safety." *Id.* As such, in both 1935 and again in 2005, the ICC and the FMCSA **rejected** California-like proposals to require the times when drivers must take meal and rest breaks during their shifts. See, *In Re Maximum Hours of Service of Motor Carrier Employees*, 3 M.C.C. 665, 688 (I.C.C. 1937); *70 Fed. Reg. 49978, 50011* (Aug. 25, 2005).

E. The Cases on which Plaintiffs Rely Fail To Support Their Appeal.

1. The Pre-*Rowe* Decision in *Mendonca* Provides No Support for Plaintiffs' Appeal.

Plaintiffs fail in their attempt to find any supportive authority in the pre-*Rowe* decision of *Californians For Safe And Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998). Decided 10 years before *Rowe*, the *Mendonca* decision involved the issue of whether the FAAAA preempted California's prevailing wage law ("CPWL"). For many important reasons, *Mendonca* has no application to this case, as more recent decisions from the U.S. and California Supreme Courts, as well as this Court, directly question *Mendonca*'s rationale and holding.

First, *Mendonca* involved the issue of whether the FAAAA preempts the CPWL, and thus it has no application to this case, which involves meal and rest break laws. In *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244 (2012), the California Supreme Court recently clarified that the meal and rest break laws are not wage laws:

> Nonpayment of wages is not the gravamen of a section 226.7 violation. Instead, subdivision (a) of section 226.7 defines a legal violation solely by reference to an employer's obligation to provide meal and rest breaks. … In other words, section 226.7 does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay. An employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer's provision of an additional hour of pay does not excuse a section 226.7 violation. The failure to provide required meal and rest breaks is what triggers a violation of section 226.7. Accordingly, a section 226.7 claim is not an action brought for nonpayment of wages; it is an action brought for non-provision of meal or rest breaks.

Kirby, 53 Cal. 4th at 1256-1257. Thus, *Kirby* confirmed that wage laws like the CPWL are distinctively different than break laws, and thus *Mendonca* does not apply. See also, *Esquivel*, 2012 WL 516094 at *5 ("*Mendonca* and other prevailing wage cases are fundamentally distinguishable from those involving meal and rest break laws for purposes of FAAAA preemption."); *Cole*, 2012 WL 4479237 at *6 (the California wage laws at issue in both *Dillingham* and *Mendonca* are not the same as the meal and rest break laws at issue here.). In *Dilts*, the court noted the important distinction between the break laws and wage laws, as the break laws impose "substantive standards" that prohibitively effect

routes and services by requiring more off-route driving and parking, as well as duty-free breaks that necessarily require that all services come to a halt. *Dilts*, 819 F. Supp. 2d at 1119-1120, and at n.6. Accordingly, *Mendonca* has no application to this meal and rest break case.

Moreover, *Rowe* displaced the earlier *Mendonca* decision on a number of central points. *Mendonca* acknowledged that it was relying on "recent" Supreme Court cases at that time, and that FAAAA preemption would require additional decisions and "a closer working out." *Id.* at 1185, 1188. *Mendonca*'s holding also rested in part on the premise that "state laws dealing with matters traditionally within a state's police powers" are subject to a heightened standard for preemption. *Mendonca*, 152 F. 3d at 1186. As set forth above, the First Circuit's decision in *Rowe*, later affirmed by the Supreme Court, rejected the notion of a presumption against preemption for police power enactments. *Rowe*, 448 F.3d at 74 n. 10. *Mendonca* also relied primarily on ERISA preemption cases, an analysis that this Court has since rejected. *In re Korean Air Lines Co.*, 642 F.3d at 697. *Mendonca* also concluded that traditional state laws having no more than an "indirect" effect on motor carriers are not preempted. *Id.* at 1185. But 10 years later in *Rowe*, the Supreme Court emphasized that preemption may occur even if a state law's effect on rates, routes, or services is only "indirect." *Rowe*, 552 U.S. at 370-371.

Moreover, *Mendonca* improperly relied on ERISA decisions to conclude: "We do not believe that the CPWL frustrates the purpose of deregulation by

acutely interfering with the forces of competition." 152 F.3d at 1189. However, *Rowe* disposed of the notion that the FAAAA preempts state laws only if they have an anticompetitive effect. FAAAA preemption applies whether or not a state law is consistent or inconsistent with federal regulations, including the goal of maximum reliance on competitive market forces. *Rowe*, 552 U.S. at 371. This Court recently explained that it "is immaterial that the state laws do not interfere with the purposes of the federal statute or that they might be consistent with promoting competition and deregulation." *In re Korean Air Lines Co.*, 642 F.3d at 697. Thus, more recent Supreme Court and Ninth Circuit decisions have displaced *Mendonca*.

Additionally, by surmising that state laws must have an "acute" effect on competition to be preempted, *Mendonca* misapplied ERISA cases in its preemption analysis. *Id.* at 1188. When the U.S. Supreme Court has used the word "acute" in connection with an ERISA preemption analysis (see, *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 816 n. 16 (1997); and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995)), the Court was noting that even a law of general applicability that only indirectly impacts ERISA plans by increasing costs to the plan *could be preempted* if the law's effects were "so acute 'as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *De Buono*, 520 U.S. at 816 n.16 (quoting *Travelers*, 514 U.S.

at 668). Thus, contrary to *Mendonca*, the Supreme Court did not suggest that an "acute" effect is a prerequisite to preemption. Instead, *Rowe* confirmed that preemption can apply even if a state law's effect is only indirect. 552 U.S. at 370-371; see also, *Travers*, 2009 WL 2242391 at *2 n.2 (*Mendonca* "is not persuasive because it contains little explanation for its holding...").

Plaintiffs also wrongly attempt use *Mendonca* to argue that preemption does not apply even if a state's laws increase a carrier's prices by 25 percent. Such a notion would read the word "prices" out of the FAAAA. In *Blackwell*, the court found that the break laws would sharply increase the employer's labor costs because the employer would "have to pass labor costs on to the consumer," resulting in price increases and the elimination of unprofitable routes, the very effect that ADA seeks to avoid. *Id.* at *52-54; see also, *UPS v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) (finding preemption because the "costs" of the state law necessarily have a negative effect on UPS's prices).[4]

Plaintiffs also erroneously argue that the CPWL at issue in *Mendonca* is a "law of generally applicability" or a "generally applicable state law" that survives

[4] In *Rowe*, the State of Maine (which opposed preemption) argued that the regulation would impose no significant additional costs on carriers, and thus preemption was not warranted. 552 U.S. at 373. The Supreme Court only bypassed the price issue because the Court already found that Maine's laws directly impacted motor carrier services, and thus preemption was needed to prevent a patchwork of such laws among the states. *Id.*; see also, *S.C. Johnson v. Transport Corp. of America*, 697 F.3d 544, 552 (7th Cir. 2012).

preemption. *Appellants' Brief at 24, 35*. The plaintiff in *Mendonca* was an association of public works contractors who provided transportation related services on publicly funded projects within California. *Mendonca*, 152 F.3d at 1186. The CPWL requires public works contractors to pay the prevailing wage to their employees in the performance of a public works contract. *RJN, at Tab 2*. The recent decision from the California Supreme Court in *State Building & Construction Trades Council of California, AFL-CIO v. Vista et al*, 54 Cal. 4th 547, 564-565 (2012) directly undermines Plaintiffs' arguments:

> Here, the state law at issue [the CPWL] is not a minimum wage law of broad general application; rather, the law at issue here **has a far narrower application**, as it pertains only to the public works projects of public agencies. In addition, it imposes substantive obligations on charter cities, not merely generally applicable procedural standards. These distinctions further undermine the Union's assertion that the matter here presents a statewide concern and therefore requires Vista, a charter city, to comply with the state's prevailing wage law on the city's locally funded public works projects.

Vista, 54 Cal. 4th at 564-565 (emphasis added). ***Vista* thus clarifies that the CPWL at issue in *Mendonca* is not a minimum wage law, nor a law of general application, nor a matter of state-wide concern.** As such, *Mendonca* provides no support whatsoever for the notion that FAAAA preemption does not apply to generally applicable employment or wage laws.

Moreover, *Vista* confirms that the CPWL "imposes substantive obligations on charter cities, not merely generally applicable procedural standards." 54 Cal. 4th at 564-565. This Court has repeatedly recognized (even in *Mendonca* and in

more recent decisions) that the ADA-FAAAA preemption clause "stops States from imposing their own substantive standards with respect to rates, routes, or services." *Mendonca*, 152 F.3d at 118 (quoting *Wolens*, 513 U.S. at 232); *ATA 2*, 660 F.3d at 397 (same); see also, *Nichols*, 2012 WL 273162 at *6 (same). As such, *Vista* further demonstrates that the holding in *Mendonca* is no longer valid. *Id.*

In sum, the *Rowe*, *Korean Air*, *Kirby* and *Vista* decisions clearly overrule *Mendonca*. Completely unlike the meal and rest break laws, the CPWL only applies to public works projects of public agencies. The California Division of Labor Standards Enforcement ("DLSE") (which opposed preemption in *Mendonca*) argued that precisely because the CPWL pertains to public works, it is not preempted because the State is acting as a proprietor rather than a regulator. *RJN, Tab 2 at 9.* The DLSE also argued that a contractor (including a motor carrier) cannot dictate the terms that govern public work, and that the state, as the guardian and trustee of its people, has the right to prescribe the conditions upon which it will permit public work to be done on its behalf. *Id.*

Similarly, the International Brotherhood of Teamsters filed a brief in *Mendonca* to oppose federal preemption. Just like the DLSE, the Teamsters stressed the limited nature of the CPWL, arguing that the CPWL "applies only to state public works projects, where the ultimate consumer is the state itself, and the state's sovereign interest in controlling its own affairs is at its zenith." *RJN, Tab 3 at 9*. This argument pervades the Teamsters' brief:

> As actually articulated, the plaintiffs arguments for the most part ignored the limited application of the prevailing wage law and create the impression that the statute regulates wage rates across the board, rather than only when the motor carrier chooses to perform work on public works contracts, thereby necessarily agreeing to abide by the prevailing wage requirements. *Id. at 17 n. 9.*
>
> The prevailing wage law applies only to contractors who choose to undertake state public works contracts, and then only with respect to the wages of the employees actually performing work on those contracts. *Id. at 25*.

Thus, the prevailing parties in *Mendonca* stressed that the CPWL is narrow in scope because it only applies to the "proprietary" or "sovereign" interests of the State or municipality. Clearly, the CPWL is in no way analogous to the meal and rest break laws at issue in this case, and thus *Mendonca* has no application here.

2. The *Reinhardt* Decision Provides No Support For Plaintiffs' Appeal.

Contrary to Plaintiffs' assertions, the decision in *Reinhardt, et al. v. Gemini Motor Transport*, 869 F.Supp.2d 1158 (E.D. Cal. April 25, 2012) provides no support for Plaintiffs' appeal. In *Reinhardt*, the preemption issue was raised in a challenge to the pleadings, but the court concluded that additional arguments and evidence were needed before resolving the issue. *Id.* at 1166-1167. The court denied the Rule 12(b)(6) motion because the court felt that it needed more evidence in order to address the preemption issue. The court also observed, incorrectly, that the *Dilts* court was convinced by the evidence that the break laws would have more than a tenuous effect on Penske's prices, routes and services. In

fact, the *Dilts* court explicitly stated that "no factual analysis is required to decide this issue of preemption." *Dilts*, 1119-1120.

3. The *Cardenas* Decision Provides No Support for Plaintiffs' Appeal.

Plaintiffs' reliance on *Cardenas v. McLane Foodservices, Inc.*, 796 F. Supp. 2d 1246 (C.D. Cal. 2011) is also unavailing. In *Cardenas*, the preemption issue was raised by way of cross-motions for partial summary judgment, both of which were denied based on the court's conclusion that the question of whether compliance with the break laws impacted McLane's prices, services, and routes is a genuine issue of material fact left to the factfinder. *Id.* at 1256. Thus, *Cardenas* never held that the FAAAA does not preempt meal and rest break laws. Moreover, *Cardenas* erroneously relied on *Mendonca* for the notion that the FAAAA does not preempt "wage laws." As explained above, *Mendonca* only pertained to the much narrower CPWL, which is not a minimum wage law, nor a law of general application, nor a law of statewide concern. *Vista*, 54 Cal. 4th at 564-565.

Cardenas also improperly equated the break laws with wage laws, as *Kirby* more recently clarified that the meal and rest break laws are significantly different than wage laws. *Kirby*, 53 Cal. 4th at 1256-1257; see also, *Dilts*, 819 F. Supp. 2d at 1120 (it is a mischaracterization to label the break rules as wage laws). *Cardenas* compounded this error when the court relied on other cases that equated the break laws with wage laws, like *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 195 Cal. App. 4th 765, 774 (2011)(rev. granted Aug. 10, 2011), and *Fitz-*

Gerald v. SkyWest, Airlines, Inc., 155 Cal. App. 4th 411, 423 (2007). All of these significant errors in *Cardenas* show that it provides no support for Plaintiffs' appeal. Similarly, all of Plaintiffs' decisions in their request for judicial notice erroneously rely on *Cardenas* and *Mendonca*, or (as in the *Marine* case, where preemption is still under consideration) misrepresented their holdings.

4. The *Mendez* Decision Provides No Support for Plaintiffs' Appeal.

The decision in *Mendez v. R+L Carriers, Inc.*, No. C11-2478 CW, 2012 WL 5868973 (N.D. Cal. Nov, 19, 2012) is also flawed in several respects, and thus does not support Plaintiffs' appeal.[5] First, the *Mendez* court improperly relied on *Mendonca* to conclude that federal preemption does not apply because the CPWL did not frustrate the purpose of deregulation by acutely interfering with the forces of competition. *Id.* at *5. As set forth above, federal preemption does not require that the state law have an "acute" effect on competition. Instead, *Rowe* confirmed that preemption can apply even if a state law's effect on rates, routes, or services is only "indirect." 552 U.S. at 370-371. FAAAA preemption also applies whether or not a state law is consistent or inconsistent with federal regulations, including the goal of maximum reliance on competitive market forces. *Id.* at 371; *In re Korean Air Lines*, 642 F.3d at 697.

[5] *Mendez* acknowledged, however, that along with *Esquivel*, *Aguiar*, *Campbell*, *Cole*, *Aguirre*, and *Jasper* (and *Miller* for the ADA), the issue of whether the FAAAA preempts meal and rest break claims is "a question of law." *Mendez*, 2012 WL 5868973 at *6, n. 3.

Second, the *Mendez* court erroneously cited *Mendonca* for the notion that the CPWL is a "generally applicable wage protection" and a "generally applicable provision of the Labor Code." *Id.* at *5 -*6. In fact, *Vista* clarified that the CPWL at issue in *Mendonca* is not a minimum wage law, nor a law of general application, nor a law of statewide concern. *Vista*, 54 Cal. 4th at 564-565. And according to *Kirby*, the break laws are not wage laws. *Kirby*, 53 Cal. 4th at 1256-1257. Thus, *Vista* and *Kirby* confirm that, contrary to the erroneous rationale in *Mendez*, *Mendonca* has no application to this case.

Third, *Mendez* is based on a misunderstanding of California's meal and rest break laws. The *Mendez* court erroneously states that an employer may simply choose a "wage alternative" to compliance with the rest break requirements "by simply paying its employees an additional hour of wages." *Id.* at *6. But *Kirby* explained that no such wage alternative option is valid, as the Supreme Court explained that "section 226.7 does not give employers a lawful choice between providing either meal and rest breaks or an additional hour of pay. An employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer's provision of an additional hour of pay does not excuse a section 226.7 violation." *Kirby*, 53 Cal. 4th at 1256-1257; see also, *Jasper*, 2012 WL 7051321 at *7-*8 (rejecting notion that break laws are similar to general wage provisions). To its detriment, *Mendez* never discusses *Kirby*.

Mendez also overstated the "flexibility" of the meal and rest break laws as clarified by *Brinker*, 53 Cal. 4th 1004. In *Brinker*, the California Supreme Court clarified that employers must provide a first meal break no later than the end of the employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work. *Id.* at 1039-1041. *Brinker* also emphasized that during those breaks, the employer "must afford employees uninterrupted half-hour periods in which they are relieved of any duty or employer control and are free to come and go as they please." *Id.* at 1037. *Brinker* further explained that a meal period's duty-free nature is "its defining characteristic." *Id.* at 1039. Thus, the employer must relieve its employees of all duty, relinquish control over their activities, and permit them a reasonable opportunity to take an uninterrupted 30-minute break, and not impede or discourage them from such breaks. *Id.* at 1040. The DLSE has also held that if a driver is taking a 30 minute meal break, the break is not considered "off duty" if the driver is required to watch over the trailer and freight during this period. See, *DLSE Opinion Letter* 2009.06.09 at *ER 638-643.* Moreover, failing to comply with Labor Code section 512 is a misdemeanor. Cal. Labor Code § 553. The contention that Vitran can simply pay a wage alternative and thus invite criminal prosecution is untenable.

Contrary to *Mendez*, Vitran cannot simply comply with the break requirements by arranging for on-duty meal breaks with its drivers. *Esquivel*, 2012 WL 516094 at *6 (rejecting the same argument). The DLSE has stated that

exceptions to the meal break requirement must be "narrowly construed" based on five objective criteria. *DLSE Opinion Letter 2002.09.04 at RJN, Tab 4*. Thus, an on-duty meal break is only permitted if Vitran can (a) show that five objective criteria are met about the nature of the drivers' work; (b) secure a written agreement with each driver authorizing on-duty meal periods, and (c) the signed agreement must state that it can be **revoked at any time**. *Id.*; see also, Cal. Lab. Code § 512(a) (prohibiting waiver of the second meal break in a 12-hour or more work day if the first meal break was waived); see also, *Esquivel*, 2012 WL 516094 at *6 (an off-duty meal period must be provided unless the five objective criteria, taken as a whole, "decisively point" to the conclusion that the nature of the work makes it "virtually impossible" for the employer to provide the employee with an off-duty meal period); *Aguirre*, SACV 12-00687 JVS at 9 (same). Moreover, "the burden rests on the employer for establishing the facts that would justify an on-duty meal period." *RJN, Tab 4 at 2-3*. There is nothing "flexible" about these requirements, and requiring Vitran to comply with a *patchwork* of such state-specific regulations clearly warrants preemption. *Rowe*, 552 U.S. at 373.

Compounding its errors, *Mendez* concludes that because of this so-called wage alternative, "the only breaks that motor carriers must actually provide to drivers are the less-frequent meal breaks." *Id.* at *6. However, Brinker states that employers must authorize and permit all employees to take rest breaks "at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof"

unless the employee's total daily work time is less than three and one-half hours. Thus, employees are entitled to 10 minute rest breaks for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on. *Brinker*, 53 Cal. 4th at 1029. Breaks must also be taken in the middle of each work period, insofar as practicable. Wage Order No. 9, § 12(A). Clearly, *Mendez*'s many flaws render it inapplicable to this case. See, *Miller v. Southwest Airlines, Co.*, 2013 WL 556963 (N.D. Cal. Feb. 12, 2013)(Northern District court judge granted ADA preemption of break claims as a matter of law, and never cited to or discussed the earlier *Mendez* decision that was recently decided in the same district). [6]

5. The FMCSA Ruling Cited by Plaintiffs Provides No Support for Their Appeal.

Plaintiffs cannot claim any support from the FMCSA ruling they cite. In the ruling, the FMCSA merely concluded that it had *no jurisdiction* to afford the sought-after relief under 49 U.S.C. § 31141. 73 Fed. Reg. 79205-79206 at *RJN,*

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[6] Vitran anticipates that Plaintiffs' Reply will seek support from a recent Seventh Circuit decision, *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.*, 697 F.3d 544 (7th Cir. 2012). But *S.C. Johnson* did not involve meal and rest break laws. The court also recognized that ADA/FAAAA preemption applies to laws of general applicability, rejected a "public health" exception to preemption, and emphasized that ERISA rulings do not apply to FAAAA preemption analysis. *Id.* at 550, 552-554. Unfortunately, *S.C. Johnson* misread and misapplied *Mendonca*'s holding as applying to "minimum wage laws", which is directly contradicted by *Vista*. *Id*. at 558. As such, *S.C. Johnson* provides no support for Plaintiffs' appeal.

Tab 5. Recognizing that its preemption authority is limited to laws or regulations "on commercial motor vehicle safety," the FMCSA decided that the California break laws did not meet "the threshold requirement for consideration" under 49 U.S.C. § 31141 because the break laws "cover far more than the trucking industry" and "are not even unique to transportation." *Id.* at 79205-79206. As such, the FMCSA merely stated that it lacked the authority to determine whether state laws are preempted. *Id.* at 79206; see also, *Aguirre*, SACV 12-00687 JVS at *10 (rejecting same argument Plaintiffs make here).

F. The Motor Vehicle Safety Exception Does Not Apply To California's Meal and Rest Break Laws.

Contrary to Plaintiffs' argument, the FAAAA's motor vehicle safety exception does not apply to California's break laws. This Court has confirmed that the application of whether the exception applies is based on a narrow question of whether the provision is intended to be, and is genuinely responsive to, motor vehicle safety. *ATA 1,* 559 F.3d at 1055; see also, *United Parcel Service, Inc. v. Flores-Galarza*, 385 F.3d 9, 13-14 (1st Cir. 2004)(no safety exception unless the statute addresses the regulation of motor vehicles). This Court has also recognized that even if some kind of general public health concerns are (or may be) involved in a statute or regulation (for example, the control of cigarette usage in *Rowe*), that intent alone does not bring the regulation within the ambit of the motor vehicle safety exception. *ATA 1,* 559 F.3d at 1054. "Indeed, if too broad a scope were given to the concept of motor vehicle safety, the exception would swallow the

preemption section itself or, at the very least, cut a very wide swath through it." *Id.*

There is nothing in Labor Code Sections 226.7 or 512 that addresses motor vehicle safety, as the IWC's wage orders apply the break requirements equally to various industries, not just to motor carriers. Cal. Code Regs. tit. 8, §§ 11010-11170, especially 11020, 11030, and 11040. Thus, even if general public health concerns are involved, that alone does not bring the regulation within the ambit of the motor vehicle safety exception. *ATA 1*, 559 F.3d at 1054; see also, *Dilts*, 819 F. Supp. 2d at 1123 (the exception only applies specifically to motor vehicle safety); *Cole*, 2012 WL 447237 at *6 (the general public health concerns in the break laws are not within the scope of motor vehicle safety); *Aguirre*, SACV 12-00687 JVS at *9-10 (same).

Moreover, Wage Order No. 9 does not apply only to motor carriers, but also to rail, air, and water carriers, whether they operate motor vehicles or not. *Wage Order No. 9*, § 2(N). It also applies not just to drivers, but to all transportation workers, including warehouse workers and those who clean vehicles. *Id*. at §§ 1(A); 2(N). Thus, contrary to Plaintiffs' argument, Wage Order No. 9 merely reflects the general purpose of promoting the health and welfare of all workers in the industry, not just drivers of motor vehicles.

With the restrictions outlined above, employees can waive meal breaks, and there are a number of carve-outs from Labor Code § 512, which all belie Plaintiffs'

assertion that motor vehicle safety was the basis for the break laws. While *Brinker* required employers to provide for breaks, employees could choose to frantically run errands or engage in other non-restful activities during breaks instead of eating or resting, which further undermines the claim that these laws pertain to motor vehicle safety. *Brinker*, 53 Cal. 4th at 1040. There is just no requirement as to what safety-related activity the employee must engage in during the break.[7]

Two sources relied upon by the Plaintiffs further confirm that the safety exception does not apply. In the FMCSA's decision of December 23, 2008 that rejected the petition, the FMCSA stated clearly that the meal and rest break laws are not laws and regulations on commercial vehicle safety. 73 Fed. Reg. 79204-79205, *RJN at Tab 5*. The FMCSA also listed numerous California break laws for numerous industries in the State, and concluded that California's meal and rest break rules are not even unique to transportation. *Id.* at 79205-79206. Also, in *Cardenas*, 796 F. Supp. 2d at 1257, the court found no evidence in the legislative history of the break laws having any purpose to promote motor vehicle safety. *Id.* at 1257. Accordingly, the motor vehicle safety exception does not apply here.

[7] To the extent that Plaintiffs, for the first time on appeal, attempt to add purported facts linking breaks to motor vehicle safety, such assertions are not part of the record on appeal. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). While the District Court properly decided Vitran's motion on the pleadings, Vitran also included ample facts in the record showing that the break laws actually impede the safety of drivers and the motoring public, which has also been acknowledged by the FMCSA. *ER 82-89.*

G. Supreme Court Authority Prevents Plaintiffs' Attempt To Limit Preemption Only To State Laws that Bind Vitran To a Particular Rate, Route, or Service.

Grasping at straws, Plaintiffs argue that FAAAA preemption does not apply to California's break laws unless they bind Vitran to a *particular* price, route, or service in a manner that interferes with competitive market forces within the trucking industry. *Appellants' Brief at 27*. Preemption, however, is not limited only to laws that restrict Vitran's drivers to ***one*** particular route (*i.e.*, limiting a driver's route only to I-5), or otherwise dictating ***specific*** prices or services. The *Dilts* court clarified:

> While the laws do not strictly bind Penske's drivers *to* one particular route, they have the same effect by depriving them of the ability to take any route that does not offer adequate locations for stopping, or by forcing them to take shorter or fewer routes. In essence, the laws bind motor carriers to a smaller set of possible routes.

Dilts, 819 F. Supp. 2d at 1118-1119; see also, *Esquivel*, 2012 WL 516094 at *4 (same); *Aguirre*, SACV 12-00687 JVS at 7 (same). Moreover, Plaintiffs' suggested standard has no support in the applicable U.S. Supreme Court decision in *Rowe*. Preemption applies when a state law has a connection with, or reference to, a carrier's rates, routes, or services, even if the effect is indirect. *Rowe* 552 U.S. at 370-371. This standard is far broader than Plaintiffs' alleged standard.

The origin of the language quoted by Plaintiffs was the decision in *Air Transport Ass'n of America v. City & County of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001) ("*SF*"), which was decided seven years before *Rowe*.

Without the benefit of *Rowe*, the *SF* court relied on ERISA preemption cases holding that preemption applies only to state laws that "compel or bind an ERISA plan administrator to a particular course of action with respect to the ERISA plan." *Id.* This is a much narrower standard than in *Rowe* and its progeny. There is a clear difference between dictating that a carrier use only one specific route between deliveries, and binding an ERISA plan administrator to a "particular course of action".

A more recent decision by this Court provided further clarification of the use of the "particular" language in the context of FAAAA preemption. In *ATA 2*, 660 F.3d at 384, this Court applied preemption to a state law even though it did not dictate a particular rate, route, or service for carriers. Moreover, in *Nichols*, 2012 WL 273162 at *7, the court noted that preemption would be justified if the regulation "binds" a party "to make ***any*** changes to their services." *Id.* at *7 (emphasis added). Both of these more recent decisions reaffirm *Dilts*'s application of the "particular" language. *Id.* at 1118-1119. Thus, Plaintiffs fail in their attempt to re-write the broad standard for FAAAA preemption set forth in *Rowe* and its progeny.

VIII. CONCLUSION

For the reasons set forth herein, Vitran requests that the Court deny the appeal and affirm the District Court's decision dismissing all of Plaintiffs' claims as a matter of law.

Dated: March 1, 2013

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STATEMENT OF RELATED CASES

Vitran agrees with Appellants' statement of related cases.

Dated: March 1, 2013

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