October 29, 2018

Administrator Ray Martinez
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue SE,
Washington, DC 20590-0001

Re: FMCSA-2018-0304 California Meal and Rest Break Rules; Petition for Determination of Preemption

Dear Administrator Martinez:

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America, submits comments regarding the American Trucking Associations' petition for determination of FMCSA preemption of California's meal-and-rest-break laws.

AAJ, with members in the United States and abroad, works to preserve the constitutional right to trial by jury and to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others. AAJ is an advocate for motorists who have been injured or killed in highway crashes as well as the commercial-motor-vehicle drivers themselves. AAJ opposes preemption of California's meal-and-rest-break laws. As this comment explains, preemption would not only make for bad public policy; it is also statutorily prohibited.

I. FMCSA does not have authority to preempt California's general meal-and-rest-break regime under 49 U.S.C. § 31141 because it is not a law "on commercial motor vehicle safety," and preemption would be unwarranted even if it were.

Under 49 U.S.C. § 31141, the Secretary of the Department of Transportation has authority to preempt "a State law or regulation on commercial motor vehicle safety." The threshold question presented by the ATA's petition is whether California's longstanding, generally applicable labor law is "a State law or regulation on commercial motor vehicle safety." If not, the Secretary has no authority to preempt it under section 31141—and the analysis ends there.

On the other hand, if "a State law or regulation on commercial motor vehicle safety" is at issue, the Secretary must then decide whether the law (1) has the same effect as a regulation prescribed under 49 U.S.C. § 31136 (the authority for much of the federal motor-vehicle safety regulations); (2) is less stringent than such a regulation; or (3) is additional to or more stringent than such a regulation. *See* 49 U.S.C. § 31141(c)(1). For state laws that fall into the third category, the default rule is that they may be enforced unless the Secretary also decides that the law or regulation has no safety benefit, is incompatible with the federal regulation, or causes an unreasonable burden on interstate commerce. *Id.* § 31141(c)(4).

A. For the last decade, FMCSA's considered position has been that the agency has no authority to preempt California's meal-and-break laws under section 31141.

i. 2008 FMCSA petition

This petition is not the first time that FMCSA has been asked to preempt California's meal-and-rest-break rules under section 31141. In 2008, a group of trucking companies filed a similar petition based on similar arguments to those now made by the ATA. *See Notice of Rejection of Petition for Preemption: "Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers"*, 73 Fed. Reg. 79204 (Dec. 24, 2008). The agency rejected the petition. It determined that the Secretary "has no authority" to preempt California's meal-and-rest-break rules "[b]ecause these rules are in no sense regulations 'on commercial motor vehicle safety,'" and so "are not subject to preemption under 49 U.S.C. § 31141." *Id.* at 79206. The agency did not think that the question was particularly close. It found that, far from being directed at motor-vehicle safety, the meal-and-rest-break rules "are simply one part of California's comprehensive regulations governing wages, hours and working conditions." *Id.* Further, the agency specifically rejected the argument that it "has power to preempt any state law or regulation that regulates or affects any matters within the agency's broad Congressional grant of authority"—the same argument that the ATA now repurposes in its petition. *Id.* That "far-reaching argument," the agency explained, finds no support in either the "statutory language or legislative history," and would expose "any number of State laws" to unintended preemption. *Id.*

ii. 2014 DOJ amicus brief in *Dilts v. Penske Logistics, LLC*

After FMCSA's decision, the trucking industry focused its quest for preemption on the courts. This time, it contended that California's meal-and-rest-break rules are preempted by statute—the express preemption provision contained in the Federal Aviation Administration Authorization Act of 1994 (or FAAAA). *See* 49 U.S.C. § 14501(c)(1) ("States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier.").

This argument failed as well. *See Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015). And just this year, the U.S. Supreme Court again denied certiorari on the question, in a case in which the ATA filed a brief supporting preemption. *See Ortega v. J. B. Hunt Transport, Inc.*, 694 Fed. Appx. 589 (9th Cir. 2017) (unpublished), *cert. denied*, 138 S. Ct. 2601 (2018).

In the course of the litigation, the United States filed a brief in 2014 making clear that "[t]he agency continues to adhere to [its] view" that California's meal-and-rest-break rules may not be preempted under section 31141 because they are not "specifically directed at commercial motor vehicle safety," but are instead "of general applicability." ECF No. 58 in *Dilts*, No. 12–55707 (9th Cir.), filed Feb. 18, 2014 (DOJ *Dilts* Br.), at 26–27. The government asked for deference to the agency's considered position on this question. *Id.*

B. The ATA's petition is inconsistent with its own previous position that the "only reasonable conclusion" is that California's meal-and-rest-break rules are "not a motor vehicle safety measure."

The ATA also filed a brief in *Dilts* in the Ninth Circuit. In arguing that the safety exception to the FAAA's preemption provision was inapplicable, *see* 49 U.S.C. § 14501(c)(2)(A), the ATA contended that the meal-and-rest-break rules are not safety regulations because they "expressly make clear that they are about employee health and welfare, while omitting any mention whatsoever of safety (with respect to motor vehicles)." *See* ECF No. 21, filed Nov. 16, 2012 (ATA *Dilts* Br.), at 27–30.

Further, the ATA took the position that there was no evidence that "the break requirements at issue were intended to address *motor vehicle safety*," and that "they are not *responsive* to any such concerns" in any event. *Id.* at 28 (emphasis in ATA's brief). As a result, the ATA told the Ninth Circuit, "the only reasonable conclusion is that California's break requirements are a worker health and welfare measure (which any given worker can therefore waive at risk only to him or herself), not a motor vehicle safety measure." *Id.* at 30. Because the Ninth Circuit found that the express preemption provision did not cover California's rules, it had no occasion to consider the ATA's argument.

After losing in the courts, the trucking industry turned to the last branch of government: Congress. It failed there too. *See* Brian Straight, *Denham Amendment booted from final FAA reauthorization bill*, Freight Waves, Sept. 26, 2018, https://goo.gl/yArv5H. Just last month, the House of Representative removed a provision from the Federal Aviation Administration's reauthorization bill that would have explicitly preempted California's meal-and-rest-break rules. *Id.*; *see* H.R.302 FAA Reauthorization Act of 2018, Public Law 115-254.

So now, having failed before all three branches of government, the industry is back before the FMCSA, asking it to reverse the position it has held for the past decade. And in doing so, the ATA is reversing its *own* position. Although the ATA has told the federal judiciary that the "only reasonable conclusion" is that the rules are "not a motor vehicle safety measure," ATA *Dilts* Br. 30, it now says just the opposite.

C. FMCSA should continue to adhere to its longstanding position that it lacks authority to preempt California's meal-and-rest-break rules because they are not "on commercial motor vehicle safety."

FMCSA's longstanding position is correct—it lacks statutory authority to preempt generally applicable state labor laws that are not specifically directed at safety.

The phrase "on commercial motor vehicle safety" is most naturally read to mean laws that are specifically directed at motor-vehicle safety, not any law that might have an *effect* on safety. That is the conclusion FMCSA reached in 2008 (in denying the preemption petition), and then again in 2014 (in the Ninth Circuit in *Dilts*). It is a conclusion courts have found persuasive (while noting that the agency has been "consistent" on this score). *See Yoder v. W. Express, Inc.*, 181 F. Supp. 3d 704, 717 (C.D. Cal. 2015) ("Although not bound by the reasoning of the

FMCSA, the Court finds it persuasive."). And it is the conclusion that makes the most sense in light of the text, context, and purposes of the statute.

The ATA's position would also create practical problems. If the ATA were correct, and state laws "on commercial motor vehicle safety" were given a broad sweep, extending to cover even generally applicable laws not targeted at motor-vehicle safety, that same phrase would have to be given the same sweep in the neighboring provision in subsection (c). That subsection says: "The Secretary *shall review* State laws and regulations on commercial motor vehicle safety," and "*shall decide* whether the State law or regulation" is more, less, or equally stringent to federal law. 49 U.S.C. § 31141(c) (emphasis added). Because this language is mandatory ("shall") rather than permissive ("may"), it would impose on the Secretary an implausible, impractical burden of reviewing many thousands of background state rules and then determining how their effect on safety compares with federal requirements. *See Nat'l Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661–62 (2007) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.").

The agency should not reverse its position to embrace a statutory reading that would carry with it such an absurdly onerous requirement. And this language, unlike identical language in a nearby provision, is not accompanied by the limiting phrase "to the extent practicable." *See* 49 U.S.C. § 31136(c)(2)(B) ("Before prescribing regulations under this section, the Secretary shall consider, to the extent practicable and consistent with the purposes of this chapter … State laws and regulations on commercial motor vehicle safety, to minimize their unnecessary preemption.").

The surrounding text in subsection 31141(a) also supports the agency's previous position that the provision covers only state rules that are specifically directed at motor-vehicle safety. The statute says—without qualification—that states "may not enforce" the preempted state rule, suggesting that the statute could not be used to partially preempt generally applicable background rules.

More broadly, section 31141(a) should be read in line with the safety exception to the FAAA's express preemption clause. *See id.* § 14501(c)(2)(A) (providing that this clause "shall not restrict the safety regulatory authority of a State with respect to motor vehicles"). In interpreting this exception, the U.S. Supreme Court has held that a state law "that is not genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)'s preemption rule." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 442 (2002). Laws genuinely directed at safety, by contrast, are exempt from that rule.

But they are not categorically exempt from preemption, because this is where section 31141 comes in. Not only is there the possibility of implied preemption, but "the Secretary can invalidate local safety regulations" under section 31141 "upon finding that their content or multiplicity threatens to clog the avenues of commerce." *Id.* at 441–42. In other words, these two provisions are related: Section 31141 "affords the Secretary . . . a means to prevent the safety exception from overwhelming [Congress's] deregulatory purpose." *Id.* at 441. And indeed, the ATA has argued just this point. It has taken the position that the scope of preemptive authority under 31141 should be construed "similarly" to the safety exception under section 14501, while also arguing that California's meal-and-rest-break rules are not genuine safety laws. ATA *Dilts* Br. 30 & n.10. If that is correct, those rules are not subject to preemption under section 31141.

This does not mean that there's a parallelism problem with section 31136(a), as the ATA contends. True, this section instructs the Secretary to "prescribe regulations on commercial motor vehicle safety." And true, the Secretary has exercised this authority to promulgate hours-of-service regulations for motor carriers. But that rule was specifically directed at (and genuinely responsive to) safety concerns. California's generally applicable meal-and-break rules are nothing of the sort—as both the agency and the ATA have previously recognized.

In any event, even if the ATA's petition had offered "a plausible alternative reading" of section 31141 to the one that the agency has taken for the last decade—and that the ATA itself later embraced in *Dilts*—the presumption against preemption would require adoption of "the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Only if Congress has made its preemptive intent "clear and manifest" will state law be forced to give way "[i]n areas of traditional state regulation." *Id.* (quotation marks omitted).

Whatever else can be said about section 31141(a), it does not clearly and manifestly cover meal-and-break rules. Very much the contrary: As the Supreme Court has explained in an analogous context, "[t]he notion that [the statute] contains a nonambiguous command to preempt" these rules "is particularly dubious given that just five years ago the United States advocated the [opposite] interpretation." *Id.*; *cf. Wyeth v. Levine*, 555 U.S. 555, 580–81 (2009) (holding that an agency's "newfound opinion" that preemption was warranted "does not merit deference" and finding that the state laws at issue were not preempted). And, once again, the ATA has itself argued in federal court that "the *only reasonable conclusion* is that California's break requirements are a worker health and welfare measure (which any given worker can therefore waive at risk only to him or herself), not a motor vehicle safety measure." ATA *Dilts* Br. 30 (emphasis added).

D. There is still no convincing evidence that California's meal-and-rest-break rules negatively impact safety.

In addition to misreading the statutory text, the ATA's petition also misconstrues the safety issues posed by meal-and-rest-break rules. The most obvious problem is that the petition incorrectly emphasizes the lack of adequate parking, rather the far more relevant safety issue: driver fatigue. Indeed, the federal hours-of-service regulations were intended to address that very issue by allowing drivers a break after a certain amount of driving and mandating off-duty time between shifts. The agency's focus on driver fatigue, moreover, is supported by several National Transportation Safety Board (NTSB) studies. For instance, NTSB found that driver fatigue is the leading probable cause or factor of driver-fatality accidents in heavy trucking—more probable than alcohol or drug use. NTSB, *Evaluation of U.S. Department of Transportation Efforts in the 1990s to Address Operator Fatigue*, Appendix B, at 49 (May 1999), https://goo.gl/hZJkJ2. And, as recently as 2016, the NTSB named "reduce fatigue-related accidents" as one of their most desired transportation-safety improvements. NTSB, *NTSB 2016 Most Wanted Transportation Safety Improvements: Reduce Fatigue Related Accidents*, https://goo.gl/kaCmvq. The ATA's petition, however, ignores this key point.

E. Even if FMCSA's previous position were incorrect, and section 31141(a) clearly and manifestly authorized preemption of meal-and-rest-break rules, none of the justifications for agency preemption under 31141 are met here.

As mentioned above, even assuming that section 31141(a) authorized preemption of California's meal-and-rest-break rules, preemption would be appropriate only if the rules (1) have no safety benefit, (2) are incompatible with the federal regulation, or (3) cause an unreasonable burden on interstate commerce. 49 U.S.C. § 31141(c)(4). None of these criteria are met.

As to the first requirement, the rules have a safety benefit because they help prevent driver fatigue—the same consideration that led the agency to promulgate the hours-of-service regulations. And to the extent they don't have a safety benefit, that only confirms that FMCSA's longstanding view is correct: they are not genuine safety laws, and thus not subject to the preemption under section 31141(a).

As to the other two requirements, the ATA's arguments are premised on a manifestly incorrect characterization of how the relevant state law operates. Although the ATA characterizes the rules as "inflexible," that is not so. Several years ago, in *Brinker Restaurant Corp v. Superior Court*, 273 P.3d 513 (Cal. 2012), the California Supreme Court made clear that the rules afford employers substantial flexibility, with respect to both timing and practicality—a fact that the Ninth Circuit in *Dilts* found significant in rejecting the preemption arguments before it. *See Dilts*, 769 F.3d at 642 ("The California Supreme Court [has] clarified that state laws allow some flexibility with respect to the timing and circumstances of meal breaks."). *Brinker* held that rest periods need not be taken at precise times, nor must they be taken before or after the meal period. 273 P.3d at 530. "The *only* constraint on timing," the court explained, "is that rest breaks must fall in the middle of work periods 'insofar as practicable.' Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period"—not a terribly onerous requirement in the first place—and "*may deviate from that preferred course where practical considerations render it infeasible*." *Id.* (emphasis added).

Similar, if not greater, flexibility is afforded for meal breaks. Where "the nature of the work prevents an employee from being relieved of all duty," employers and employees may waive the right to an off-duty meal period; in these circumstances, the period "shall be considered an 'on duty' meal period and counted as time worked." IWC Order 9, § 11, https://goo.gl/3t3DTY. In the absence of a waiver, "section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." *Brinker*, 273 P.3d at 537. The law imposes no other timing requirements. *Id.* "What will suffice may vary from industry to industry." *Id.*

So it is simply not the case that enforcement of California's meal-and-rest-break rules "will inevitably disrupt the flexible HOS framework" the agency has adopted, as ATA asserts. *See* Pet. 7. Nor is it the case that the rules are "incompatible" with that framework. If only laws that are "identical" to federal rules could meet this standard, as ATA claims, then *every* state law that is "additional to or more stringent" than federal law would meet this requirement and be preempted. *See* 49 U.S.C. § 31141(c)(1). But that's not what Congress intended: the default is that sate safety rules that are more stringent "may be enforced." *Id.* § 31141(c)(4).

II. Previous FMCSA preemption determinations have been specific and limited in scope.

As discussed above, the statutory authority for preemption under section 31141 is limited, based solely on safety considerations. FMCSA is among the federal transportation agencies that the DOT has delegated its authority to make preemption determinations for commercial-motor-vehicle-safety laws and regulations. *See* 49 C.F.R. 1.87(f). Historically, FMCSA has exercised this power only in a limited context, and only as to laws or regulations specific to the trucking industry. For example, petitions for determination of preemption reviewed by FMCSA over the last decade were limited to very specific transportation-regulation laws—such as a law regulating the transporting of metal coils,[1] truck registry sticker display program,[2] commercial motor vehicle identification requirements,[3] and highway routing requirements for hazardous materials.[4] This current petition is attempting to preempt a law that is neither limited to the trucking industry nor narrow in scope like the examples above, to qualify for preemption under this limited statutory authority.

III. There is no justification to preempt the law in only one state.

California is just one of 21 states that have meal and rest break laws on the books.[5] Many of these laws have been enacted for several years. The ATA provided no adequate justification for singling out the laws of one state when similar arguments can be made for the laws in the other twenty states. Additionally, as mentioned previously, the trucking industry filed a similar petition in 2008, asking to preempt only California law. It is arbitrary that the industry would attack the law of one state—not once, but twice—and fail to bring petitions for the similar laws in other states.

If FMCSA were to make this determination as to one state's employment law, all state laws that have any kind of impact on commercial motor vehicles would be thrown into question, including the many state meal-and-rest-break laws currently in effect. Granting the ATA's petition is outside the FMCSA's authority and would establish a terrible precedent of preempting state laws and regulations that have, at best, some downstream impact on commercial-motor-vehicle safety.

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[1] Petition for Preemption of Alabama's Metal Coil Securement Act; Petition Granted, 78 FR 14403.

[2] Petition for Preemption of the Port Authority of New York and New Jersey's Drayage Truck Registry Sticker Display Program; Petition Denied, 76 FR 54830.

[3] Petition for Preemption of the State of New Jersey, New York City, and Cook County, Illinois Commercial Motor Vehicle Identification Requirements, Petition granted, 75 FR 64779.

[4] Petition for Preemption of the District of Columbia's Routing Requirements for Hazardous Materials, Petition Granted, 70 FR 20630.

[5] Cal. Lab. Code 226.2, 512(a); Colorado minimum wage order number 30; Conn. Gen. Stat. 31-51ii; 19 Del. C. 707; Illinois: 820 ILCS 140/3 and 829 ILCS 140/3.1; Kentucky: KRS 337.355, 337.365, 339.270, 339.400; Maine: 26 M.R.S.A 601; Maryland: Md. Code Ann., Labor & Employment 3-710; Massachusetts: Mass. Gen. Laws Ch. 148, section 190; 148 section 100, 101.; Minnesota: Minn. Stat. 177.254; Minn. Stat. 177.253; Nebraska: Neb. Rev. Stat. 48-212; Nevada: NRS 608.019; NAC 608.145; New Hampshire: N.H. Rec. Stat. Ann. 275:30-a; New York: N.Y Labor Law 161, 162, 165; N.Y. Rules and Regulations, Tit. 12, Part 186 et seq.; North Dakota: N.D.A.C. 46-02-07-02(5); Oregon: OAR 839-020-005; OAR B39-021-0072; Rhode Island: R.I. Gen. Laws 28-3-14; Tennessee: Tenn. Code Ann. 50-2-103(h); Tenn. Code Ann. 50-5-115; Vermont: 21 V.S.A 304; Washington: Wash. Admin. Code 296-126-002; 296-126-092; West Virginia: W.Va. Code 21-3-10a

IV. Preemption in the area of state meal-and-rest-break laws has already been reviewed and rejected in all three branches of government.

Finally, as mentioned earlier, the issue of preemption of state meal-and-rest-break rules has already been reviewed, debated, and decided at all three branches of the federal government. California's rules, in particular, have been targeted through the federal agencies, the courts, and Congress. Each of these efforts failed: all three branches of government declined to preempt the rules, largely because of the important generally applied employment protections these laws create. This petition is just a resurrection of previous failed efforts.

In the last few months, the trucking industry has unsuccessfully tried to preempt state meal and rest laws through the legislative branch by amendments to the recently passed Federal Aviation Administration Reauthorization Act of 2018. *See* H.R.302 FAA Reauthorization Act of 2018, Public Law 115-254 (2018). Congress decided not to include these amendments in the final passage of the bill. Additionally, the trucking industry also unsuccessfully tried to preempt California's meal-and-rest-break rules by asking the U.S. Supreme Court to overturn yet another court of appeals decision upholding California's rules. *Ortega v. J. B. Hunt Transport, Inc.*, 694 Fed. Appx. 589 (9th Cir. 2017) (unpublished), *cert. denied*, 138 S. Ct. 2601 (2018). The Supreme Court declined the invitation, allowing the rules to continue to be enforced.

Having failed to persuade any of the three coordinate branches of government to preempt the rules, the trucking industry is now making the rounds once again. Its bid for preemption should meet the same fate as every time before. If you have any questions or comments, please contact Susan Steinman, Senior Director of Policy, at (202) 944-2885.

Sincerely,

Elise Sanguinetti
President
American Association for Justice