No. ____

In the Supreme Court of the United States

PENSKE LOGISTICS, LLC,
AND PENSKE TRUCK LEASING CO., L.P.,
Petitioners,

v.

MICKEY LEE DILTS, RAY RIOS, AND DONNY DUSHAJ,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAAA) provides that a state "may not enact or enforce a law . . . related to a price, route, or service of any motor carrier with respect to transportation of property." 49 U.S.C. § 14501(c)(1). This is the lead appellate case of more than a dozen class actions brought against motor carriers in California, alleging that the carriers—here, a national trucking company—have violated California's meal and rest break laws (M&RB laws). The district court below—like most district courts that have considered the issue—held that California's M&RB laws are preempted because they force motor carriers to alter their routes and services to accommodate the requisite breaks, and thereby impact carriers' prices as well.

The Ninth Circuit reversed. The court acknowledged that California's M&RB laws impact carriers' services and control their routes. But following circuit precedent that predates this Court's leading FAAAA preemption decisions—including *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008)—the court reasoned that these impacts were insufficient to trigger preemption because "the laws do not 'bind' motor carriers to specific prices, routes, or services," and the laws' impact on routes, services, and prices do not otherwise satisfy the Ninth Circuit's FAAAA preemption test. App. 17a (citation omitted). The question presented is:

Did the Ninth Circuit err by holding that California's M&RB laws are not preempted under the FAAAA, applying a preemption test that conflicts with the decisions of this Court and other circuits and has consistently produced flawed results?

RULE 29.6 STATEMENT

Neither Penske Logistics, LLC, nor Penske Truck Leasing Co., L.P., is a publicly-held entity. Penske Logistics, LLC, is wholly-owned by Penske Truck Leasing Co, L.P., and Penske Truck Leasing Co., L.P., does not have a parent corporation. General Electric Capital Corporation, a publicly held corporation, indirectly owns 10% or more of an ownership interest in Penske Truck Leasing Co., L.P. No other person or publicly held corporation owns 10% or more of the partnership interest of Penske Truck Leasing Co., L.P.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Penske Logistics, LLC, and Penske Truck Leasing Co., L.P. (together, Penske), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals and order denying Penske's petition for rehearing en banc is reported at 769 F.3d 637. App. 1a-25a. The original opinion of the court of appeals is available at 757 F.3d 1078. The order of the district court granting Penske's motion for summary judgment is reported at 819 F. Supp. 2d 1109. App. 26a-55a.

JURISDICTION

The court of appeals entered judgment on September 8, 2014, after denying Penske's timely petition for rehearing. App. 1a. On September 30, 2014, the court granted Penske's motion to stay the mandate pending this Court's review. *Id.* at 56a. On December 2, 2014, Justice Kennedy granted Penske's timely request for an extension of time to file a petition for certiorari to January 7, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution (art. VI, cl. 2) provides in part that "the laws of the United States . . . shall be the supreme law of the land." Relevant provisions of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. § 14501, and Airline Deregulation Act, 49 U.S.C. App. §§ 1302 and 1305 (1988), are reproduced at

App. 80a-82a. Relevant provisions of California Labor Code sections 226.7 and 512, and California Code of Regulations title 8, section 11090, are reproduced at App. 83a-85a.

STATEMENT OF THE CASE

The Ninth Circuit has serially refused to heed this Court's FAAAA preemption decisions and, instead, has charted its own course and greatly narrowed the scope of the FAAAA's preemption clause. In this class action, the Ninth Circuit held that California's meal and rest break (M&RB) laws are not preempted, even though the laws significantly—and undeniably—impact motor carriers' routes and services. Few (if any) well-traveled routes in California permit a driver simply to pull a commercial vehicle to the side of the road for a meal or rest break at the mandated time, and scheduling routes that may accommodate the requisite breaks impacts the timing and number of deliveries that can be made. Adhering to Ninth Circuit precedent that pre-dates this Court's leading decisions in this area, including *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364, 368 (2008), the Ninth Circuit nevertheless held that the M&RB laws are not preempted. That decision is not only wrong when it comes to the M&RB laws, but reaffirms circuit precedent that has consistently produced flawed results on preemption for both motor and air carriers. This Court's intervention is needed to bring the Ninth Circuit's case law into conformity with the decisions of this Court, so that the Ninth Circuit does not continue to spin out of orbit on FAAAA preemption issues.

A. The FAAAA and This Court's Cases

Congress enacted the Airline Deregulation Act (ADA) in 1978 with the purpose of furthering "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces." 49 U.S.C. App. § 1302(a)(4) (1988). The Act included a preemption provision that Congress enacted "to 'ensure that the States would not undo federal deregulation with regulation of their own.'" *Rowe*, 552 U.S. at 368 (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992)). The provision provides that "'no State . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier.'" 49 U.S.C. App. § 1305(a)(1) (1988).

In 1980, Congress deregulated trucking. *See Rowe*, 552 U.S. at 368 (citing Motor Carrier Act of 1980, 94 Stat. 793). Then, in 1994, Congress borrowed the preemption language from the ADA to preempt state trucking regulation and thereby ensure that the States would not undo the deregulation of trucking. *Id.* (citing FAAAA, Pub. L. No. 305, § 601, 108 Stat. 1569, 1605-06 (1994)). The FAAAA preemption provision states:

> A State . . . may not enact or enforce a law … related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). Consistent with its text and history, the Court has instructed that, in interpreting the preemption language of the FAAAA, courts should follow decisions interpreting the similar language in the ADA. *See, e.g.*, *Rowe*, 552 U.S. at 371.

This Court has consistently emphasized the broad preemptive scope of the FAAAA and ADA. Among other things, the Court has held that Congress's use of

the phrase "relating to" indicates the "broad pre-emptive purpose" of the ADA's preemption clause; a state law "relates to" rates, routes, or services if it has "'a connection with, or reference to'" them; pre-emption may occur even if a state law's effect on rates, routes, or services "'is only indirect'"; and the phrase "relates to" does not require that the state law "'regulate[] rates, routes, or services.'" *Morales*, 504 U.S. at 383-86 (citations omitted). Only those laws that affect rates, routes, or services in a "'tenuous, remote, or peripheral ... manner'"—like a law proscribing "gambling" or "prostitution"—can survive preemption. *Id.* at 390 (citation omitted). The Court has held that the FAAAA's preemption clause has the same broad preemptive scope. *See Rowe*, 552 U.S. at 370-71, 376.

Twice in recent terms, this Court has reviewed—and reversed—the Ninth Circuit's unduly narrow preemption analysis under these statutes. *See Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013). In *Ginsberg*, the Court reversed the Ninth Circuit's holding that a breach-of-implied-covenant claim was not preempted under the ADA because it does not "*force* the Airlines to adopt or change their prices, routes or services," which the Ninth Circuit had held was "the prerequisite for ... preemption." 134 S. Ct. at 1428 (emphasis added). The Court noted that the Ninth Circuit had erroneously based its holding on earlier circuit precedent, *id.*, and found it evident that the claim at issue "relates to" "rates, routes, or services." *See id.* at 1430. As explained below, despite the Court's remonstration in *Ginsberg*, the Ninth Circuit below relied on the same flawed circuit precedent that produced *Ginsberg*.

B. California's M&RB Laws

This class action seeks damages for defendants' alleged failure to comply with California's M&RB laws. The laws require employers to provide a "duty-free" 30-minute meal break for employees who work more than five hours a day, plus a second "duty free" 30-minute meal break for employees who work more than 10 hours a day. *See* Cal. Lab. Code § 512(a); App. 5a. The laws also dictate that the first break must come before the end of the fifth hour of work, and the second, if applicable, before the employee's tenth work hour. *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 537-38 (Cal. 2012). Employers also must provide a paid rest break of 10 minutes every four hours or major fraction thereof. Cal. Code Regs. tit. 8, § 11090(12)(A). Unlike other employment settings, providing these breaks in the transportation industry requires more than just clocking out and taking a break. Each meal or rest break requires a driver to deviate from his route to find a place to park his vehicle, take the meal or rest break, and then return to the scheduled route.

The M&RB laws further provide that an employer may not require an employee to work during any required meal or rest period. Cal. Lab. Code § 226.7(b). The California Supreme Court has clarified that "an employer must relieve the employee of all duty for the designated [meal] period, but need not ensure that the employee does no work." *Brinker*, 273 P.3d at 532. For truck drivers this means that they must be able to leave their trucks for the mandated breaks, which means they must arrange their routes so that they may legally park their trucks at the appointed times. Employers must provide these breaks and may not choose "between providing *either* meal and rest breaks

or an additional hour of pay." *Kirby v. Immoos Fire Prot., Inc.*, 274 P.3d 1160, 1168 (Cal. 2012).

In recent years, more than a dozen class actions, including this case, have been filed in federal court in California against motor carriers or air carriers, alleging violations of the M&RB laws and seeking damages and injunctive relief. Heeding this Court's decisions and the logistical realities created by these breaks in this context, the vast majority of district courts—including the one below—have held that the M&RB laws are preempted by the FAAAA. Those courts have found that plaintiffs' efforts to enforce the M&RB laws "affect routes by limiting the carriers to a smaller set of possible routes"; "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 schedule of transportation"; and affect prices "by virtue of the laws['] effect on routes and services." *Cole v. CRST, Inc.*, No. EDCV 08-1570-VAP (OPx), 2012 WL 4479237, at *5 (C.D. Cal. Sept. 27, 2012).[1]

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[1] *See* App. 4a n.1; *Rodriguez v. Old Dominion Freight Line, Inc.*, No. CV 13-891 DSF (RZx), 2013 WL 6184432, at *4-5 (C.D. Cal. Nov. 27, 2013); *Parker v. Dean Transp., Inc.*, No. CV 13-02621 BRO (VBKx), 2013 WL 7083269, at *6-8 (C.D. Cal. Oct. 15, 2013); *Ortega v. J.B. Hunt Transp., Inc.*, No. CV 07-08336(BRO) (FMOx), 2013 WL 5933889, at *4-8 (C.D. Cal. Oct. 2 2013); *Burnham v. Ruan Transp.*, No. SACV 12-0688 AG (ANx), 2013 WL 4564496, at *5 (C.D. Cal. Aug. 16, 2013); Order Granting Mot. for J. on the Pleadings 12, *Burnell v. Swift Transp. Co., Inc.*, No. 5:10-cv-00809-VAP-OP (C.D. Cal. May 29, 2013), ECF No. 82; Minutes of Proceedings on Order Granting Def.'s Mot. for Partial J. on the Pleadings 10, *Aguirre v. Genesis Logistics*, SACV 12-

C. This Litigation

Plaintiffs in this case represent a certified class of 349 delivery truck drivers, all of whom are assigned to the Penske account for servicing Whirlpool products. App. 3a. Plaintiffs drive on routes within California delivering products that have traveled interstate, and typically work more than 10 hours a day. *Id.*

1. The district court (Sammartino, J.) granted Penske's motion for summary judgment on the ground that the FAAAA preempts California's M&RB laws. Penske supported its motion with declarations explaining the M&RB laws' impact on rates, routes, and services. *Id.* at 62a-69a (Kitt Decl.); *id.* at 73a-77a (Russell Decl.). Plaintiffs argued that preemption is "a purely *legal issue* . . . not subject to the need for fact-intensive inquiry." CA9 SRE 2. The district court recognized that "Congress' 'related to' language has a 'broad scope,' is 'deliberately expansive,' and 'conspicuous for its breadth.'" App. 40a (quoting *Morales*, 504 U.S. at 384). It further stated that "[i]t is

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00687 JVS (C.D. Cal. Nov. 2012), ECF No. 39; *Cole*, 2012 WL 4479237, at *5-7; *Jasper v. C.R. England, Inc.*, No. CV 08-5266-GW(CWx), 2012 WL 7051321, at *4-9 (C.D. Cal. Aug. 30, 2012); *Campbell v. Vitran Express, Inc.*, No. CV 11-05029-RGK (SHx), 2012 WL 2317233, at *3-4 (C.D. Cal. June 8, 2012); *Aguiar v. California Sierra Express, Inc.*, No. 2:11-cv-02827-JAM-GCH, 2012 WL 1593202, at *1 (C.D. Cal. May 4, 2012); *Esquivel v. Vistar Corp.*, No. 2:11-cv-07284-JHN-PJWx, 2012 WL 516094, at *3-6 (C.D. Cal. Feb. 8, 2012). A handful of district courts have gone the other way. *See, e.g.*, *Brown v. Wal-Mart Stores, Inc.*, No. C 08-4221 SI, 2013 WL 1701581, at *3 (N.D. Cal. Apr. 18, 2013); *Mendez v. R.L. Carriers, Inc.*, No. C 11-2478 CW, 2012 WL 5868973, at *7 (N.D. Cal. Nov. 19, 2012).

clear that the law at issue need not directly regulate motor carriers in order to be preempted." *Id.* Instead, the court explained, "it is enough that the effect of the regulation would be that motor carriers would have to offer different services than what the market would otherwise dictate or 'freeze into place services that carriers might prefer to discontinue in the future.'" *Id.* (quoting *Rowe*, 552 U.S. at 371-72).

The district court had no difficulty concluding that California's M&RB laws impose requirements "related to" prices, routes, and services. As the court explained, the laws dictate "exactly when" and "for exactly how long" drivers must take breaks. *Id.* at 45a. Although the laws "do not strictly bind Penske's drivers to one particular route," the court found that "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." *Id.* at 42a; *see id.* at 44a ("[T]he laws bind Penske to a schedule and frequency of routes that ensures many off-duty breaks at specific times throughout the workday . . . ."). The court also found that the M&RB laws "have a significant impact on Penske's services," noting that "[t]he parties both agree that scheduling off-duty meal periods for drivers would require one or two less deliveries per day per driver" and that the laws "reduce the amount and level of service." *Id.* at 42a-43a (citation and quotation marks omitted). Finally, the court found that these impacts on Penske's routes and services also have a significant impact on prices. *Id.* at 44a.

In holding that California's M&RB laws are preempted, the district court distinguished cases involving "simpl[e] wage laws which require employers to pay employees a certain wage and thus indirectly

affect the prices of a service." *Id.* at 46a-47a (discussing *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316 (1997), and *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184 (9th Cir. 1998), *cert. denied,* 526 U.S. 1060 (1999)). As the court explained, "[t]he M & RB laws at issue here are significantly more connected to the routes and services of a motor carrier than laws that merely impact the cost of labor." *Id.* at 50a; *see id.* (unlike the prevailing wage cases, here "the impact is not derived from the increased cost of labor and is not tenuous").

2. The Ninth Circuit reversed. The court—following prior circuit precedent on FAAAA preemption—held that, where the law at issue is generally applicable, "'the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service.'" App. 14a (quoting *Air Transp. Ass'n of Am. v. City of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2011)). The Ninth Circuit has applied this test in what it calls "'"borderline" cases' in which a law does not refer directly to rates, routes, or services." *Id.* (quoting *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011)). This is the same circuit precedent that the Ninth Circuit applied in rejecting preemption in *Ginsberg*—a ruling that this Court unanimously reversed. *Compare Ginsberg v. Northwest, Inc.,* 695 F.3d 873, 877-81 (9th Cir. 2013), *with Ginsberg*, 134 S. Ct. at 1431.

The Ninth Circuit found that the M&RB laws do not satisfy that court's "binds to" test—and accordingly are not preempted—because "[t]hey do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide." App. 17a; *see id.* ("[T]he laws do not 'bind' motor

carriers to specific prices, routes, or services."). As to services, the court acknowledged that motor carriers would have to "take drivers' break times into account" in setting schedules and "hire additional drivers or reallocate resources in order to maintain a particular service level." *Id.* at 20a, 19a. But according to the court, the M&RB laws did not "bind[] motor carriers to specific services," and so did not trigger preemption. *Id.* at 20a. In addition, the Ninth Circuit reasoned that alterations to "'the frequency and scheduling of transportation'" did not sufficiently "relate to" services to trigger preemption under *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-66 (9th Cir. 1998) (en banc), because the M&RB laws only impact the scheduling of "*individual drivers*," not motor carriers. App. 20a (quoting *Charas*, 160 F.3d at 1265-66).

As to routes, the Ninth Circuit recognized that the M&RB laws effectuate "route control," but concluded that the laws nevertheless do not "relate to" routes because they did not alter the carrier's "'point-to-point transport . . . [and] courses of travel.'" *Id.* at 21a (alterations in original) (quoting *Charas*, 160 F.3d at 1265). The court reasoned that the disruptions in routes that the M&RB laws command *during the course of travel* did not trigger preemption because they do "not meaningfully interfere with a motor carrier's ability to select its *starting points, destinations, and* routes." *Id.* (emphasis added).

Although the court acknowledged that compliance with California's M&RB laws limits the available routes (as the district court found), it held that Penske had not shown that the impact on routes was sufficient to trigger preemption. *Id.* at 21a-22a. Applying its "binds to" test, the court stated that "the record fails to suggest that state meal and rest break requirements

will so restrict the set of routes available as to indirectly bind Defendants, or motor carriers generally, to a limited set of routes." *Id.* at 22a. At the same time, the Ninth Circuit made clear that its holding in this case was that California's M&RB laws are not preempted "as *generally* applied to motor carriers," thereby resolving the matter as to all motor carriers in the state. *Id.* at 18a n.2.

Underscoring the scope of its ruling, the Ninth Circuit summarily disposed of a separate class action brought under the M&RB laws on the same day in a three-paragraph, follow-on decision. *See Campbell v. Vitran Express, Inc.*, 582 F. App'x 756 (9th Cir. 2014).

REASONS FOR GRANTING THE WRIT

This case has all the hallmarks of a case warranting this Court's review (*see* S. Ct. Rule 10), and then some. The Ninth Circuit's FAAAA and ADA preemption jurisprudence has long been—and remains—hopelessly out of step with this Court's precedents. This Court has repeatedly emphasized the broad preemptive scope of the FAAAA and ADA, including recently in *Northwest, Inc. v. Ginsberg*—a case out of the Ninth Circuit. But the Ninth Circuit has repeatedly ignored this Court's decisions and applied a preemption analysis that has no basis in the statutes' text, conflicts with this Court's precedents, and severely curtails the Acts' intended preemptive scope. The problem will not go away until the Ninth Circuit's mistaken preemption analysis goes away. Indeed, the Ninth Circuit relied on its same flawed circuit precedent in this case that produced its "no preemption" ruling in *Ginsberg*—which this Court unanimously reversed. This Court's intervention is needed again. And this case presents an opportunity to eliminate the root of the problem.

The Ninth Circuit's decision below is grounded in circuit precedent that predates this Court's decision in *Rowe v. New Hampshire Motor Transport Association*. That circuit precedent applies an impermissibly demanding standard to laws of general applicability, requiring that such laws affirmatively regulate—and "bind" carriers to—prices, routes, and services to trigger preemption. In addition, the Ninth Circuit holds that only those interferences with "point-to-point" routes and services trigger preemption. The Ninth Circuit's preemption analysis is directly at odds with this Court's precedent—including *Rowe* and now *Ginsberg*—and conflicts with the decisions of other courts of appeals. Yet the Ninth Circuit brazenly continues to apply its flawed precedent in this area. In this case, that precedent produced a result that is utterly at odds with Congress's intent in enacting the FAAAA, and profoundly disruptive for the transportation industry. Certiorari is warranted.

I. THE NINTH CIRCUIT'S FAAAA PREEMPTION TEST CONFLICTS WITH THE DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS

The Ninth Circuit's steadfast refusal to conform its FAAAA preemption analysis to this Court's precedents is reason enough to grant certiorari. The decision also conflicts with the majority of the circuits' approach to preemption, creating a conflict among the lower courts that warrants this Court's review.

A. The Ninth Circuit's Decision Conflicts With This Court's Precedents

1. In the decision below, the Ninth Circuit applied the anomalous "binds to" test that it developed to

address so-called ""'borderline" cases' in which a law does not refer directly to rates, routes, or services." App. 14a (quoting *Am. Trucking Ass'ns*, 660 F.3d at 397). Under that test, any law that does not single out a motor carrier presents a "borderline case," in which the Ninth Circuit will find preemption only if "'the provision, directly or indirectly, *binds* the carrier to a particular price, route or service.'" *Id.* (citation omitted). That test disregards the text of the FAAAA and directly conflicts with this Court's precedents.

This Court's precedents consistently hold that the phrase "related to" embraces state laws "having a connection with or reference to carrier 'rates, routes, or services,' whether directly or indirectly." *See Morales*, 504 U.S. at 384; *Rowe*, 552 U.S. at 370; *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013); *Ginsberg*, 134 S. Ct. at 1430. *Morales* drew this definition from "[t]he ordinary meaning of these words," which it recognized is "a broad one." 504 U.S. at 383. *Morales* explicitly rejected the argument that the Act "only pre-empt[ed] States from actually *prescribing* rates, routes, or services." *Id.* at 385 (emphasis added). That standard, the Court held, "reads the words 'relating to' out of the statute." *Id.* at 388. The Court explained: "Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden States to '*regulate* rates, routes, and services.'" *Id.* But Congress did not write the statute that way; to the contrary, Congress *rejected* a bill that would have substituted "determining" for "relating to." *Id.* at 386 n.2.

The decision below directly conflicts with *Morales*. The Ninth Circuit's "binds to" test is just a rebranding of the "regulates" or "prescribes" test rejected in *Morales*. The decision below even uses the same

language that the Court rejected in *Morales*—stating that "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise *regulate* prices, routes, or services." App. 11a (emphasis added). Likewise, saying that the FAAAA only preempts laws that "'bind' motor carriers to specific prices, routes, or services" (*id.* at 17a (citation omitted)) is the same thing as saying that it only preempts laws that "actually *prescribe* rates, routes, or services," *Morales*, 504 U.S. at 385 (emphasis added).

Far from demanding that the state law *bind* a motor carrier to a *specific* rate, route, or service to trigger preemption, this Court has found preemption based on the practical impact of laws on rates, routes, or services. *See, e.g.*, *Ginsberg*, 134 S. Ct. at 1430-31 (finding the requisite effect on airline rates because mileage credits would "either eliminate[] or reduce[]" the rate that a customer pays); *see id.* at 1431 (finding the requisite effect on services because the plaintiff's claim would grant him "access to flights and to higher service categories"); *Rowe*, 552 U.S. at 372 (finding the law preempted because "the effect of the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of regulation, the market might dictate"). This practical approach accounts for the "'real-world consequences'" of state laws, as Congress intended. *Ginsberg*, 134 S. Ct. at 1430 (quotation omitted).

Although this Court has observed that a law's impact on rates, routes, or services may be "too tenuous, remote, or peripheral" to trigger preemption, it has never found that exception satisfied. *Morales*, 504 U.S. at 390. Moreover, the example it has repeatedly given of a law that would qualify as "too

tenuous, remote, or peripheral" to trigger preemption is telling—a state law prohibiting gambling or prostitution. *See id.*; *Dan's City Used Cars*, 133 S. Ct. at 1778; *Rowe*, 128 S. Ct. at 375-76. Nevertheless, the Ninth Circuit's "binds to" test effectively precludes finding preemption where the law's impact on prices, routes, and services is "indirect," a result that is at odds with each of this Court's FAAAA and ADA precedents. The M&RB laws in this case—which indisputably require changes to motor carriers' routes and services—are a far cry from state gambling or prostitution laws, which "broadly prohibit[] certain forms of conduct" wholly unrelated to prices, routes, or services. *Rowe*, 552 U.S. at 375.

The Ninth Circuit's "binds to" test is flawed in another fundamental respect. This Court has never suggested that any sort of heightened standard should be applied to laws of general applicability—however that category is defined. Rather, the Court has applied the same "related to" test regardless of whether the laws or causes of action directly or indirectly impact rates, routes, or services. *See Morales*, 504 U.S. at 384, There is no basis for imposing the Ninth Circuit's more demanding, "binds to" test to laws that do not single out motor carriers or so-called "borderline cases." Congress fashioned *one* test, for *all* laws: whether the laws "relate to rates, routes, or services."

2. The Ninth Circuit's preemption analysis is misguided in other important respects as well. In its decision below, the Ninth Circuit specifically relied on its prior decision in *Charas*, which narrowed Congress's use of "routes" and "services" in ways that defy the Act's plain text and are irreconcilable with the Court's case law. In *Charas*, an ADA case, the Ninth Circuit held that the terms "rates" and "routes" "refer

to the point-to-point transport of passengers," and that the term "service" accordingly refers only to "the provision of air transportation *to and from* various markets at various times." 160 F.3d at 1265-66 (emphasis added). *Charas* also concluded that the term "services" narrowly encompasses only "such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." *Id.* at 1266.

The decision below explicitly reaffirmed *Charas* in holding that California's MR&B laws are not preempted. First, the Ninth Circuit rejected Penske's argument "that break laws require carriers to alter 'the frequency and scheduling of transportation,' which directly relates to services under *Charas*." App. 20a. Citing to *Charas*'s limited definition of "services," the court rejected Penske's argument that the M&RB laws "relate to" services, reasoning that the laws impact the scheduling only of "*individual drivers*" and do not interfere with "'the frequency and scheduling of transportation'" by *motor carriers*. *Id.* (quoting *Charas*, 160 F.3d at 1265-66). Second, the Ninth Circuit, citing *Charas* again, held that the only type of "route control" Congress sought to preempt is "point-to-point transport . . . [and] courses of travel." *Id.* at 21a (alterations in original) (quoting *Charas*, 160 F.3d at 1266). Each of those holdings conflicts with this Court's decisions on the preemptive reach of the Act.

Charas was part of a widely recognized and well-established conflict among the circuits over the meaning of "relating to . . . services" in the ADA, with the Ninth Circuit in the minority. *See, e.g.*, *Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058, 1058 (2000) (O'Connor, J., dissenting from denial of certiorari)

(noting that the courts of appeals "have taken directly conflicting positions" on this question); *Ventress v. Japan Airlines*, 603 F.3d 676, 682 (9th Cir. 2010) (acknowledging that "[o]ur circuit has adopted a relatively narrow definition" of "service"). As courts have recognized, *Rowe* rejected *Charas*'s narrow interpretation of "services." *See Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) ("*Charas*'s approach . . . is inconsistent with the Supreme Court's recent decision in *Rowe*."); *Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 94 (1st Cir. 2013) (noting that *Rowe* "treated service more expansively" than the Ninth Circuit did in *Charas*), *cert. denied*, 134 S. Ct. 1788 (2014); *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) ("The weight of circuit authority now favors the broader definition" of service.), *cert. denied*, 132 S. Ct. 761 (2011).

Charas's narrow view of the "route control" protected by the FAAAA is equally misguided. As a textual matter, there is no reason to interpret the Act's broad reference to routes as relating only to *point-to-point* routes—negating the law's reach to impacts on transportation *en route*. And as a real-world matter, that interpretation makes no sense. Interrupting service *during* a route can be just as disruptive as interrupting "point-to-point" routes. This Court has never suggested such a narrow interpretation. Rather, the Court has weighed a variety of impacts on rates, routes, and services that apply at various stages of transport, and considered only whether that impact—whether it occurs *during* the route or on a *point-by-point* basis—has "'a connection with, or reference to'" rates, routes, or services, even if "'only indirect.'" *Morales*, 504 U.S. at 384, 386 (citations omitted). The

Ninth Circuit's point-to-point restriction conflicts with this Court's repeated admonition that the "relates to" language be given broad preemptive scope and artificially limits the scope of the FAAAA.

B. The Ninth Circuit's Decision Conflicts With Decisions Of Other Circuits

By deviating from this Court's precedent, the Ninth Circuit's FAAAA preemption jurisprudence also has fallen starkly out of sync with the preemption analysis applied in other circuits. As just discussed, this Court has found preemption whenever a law has a connection with prices, routes, and services. With the exception of the Ninth Circuit, the courts of appeals apply that standard no matter whether the law at issue is one of general applicability or not. The Ninth Circuit is the only court of appeals to apply a heightened standard to so-called laws of general applicability.

For example, in considering whether "background" laws are preempted under the ADA and the FAAAA, the First and Seventh Circuits have applied this Court's straightforward "connection with, or reference to" test—not a heightened "binds to" standard like the Ninth Circuit's. In *Massachusetts Delivery Ass'n v. Coakley*, the First Circuit flagged the approach taken by the Ninth Circuit's decision in this case and—parting with the Ninth Circuit—expressly rejected a broad-based rule that would exempt laws of general applicability from preemption, emphasizing that this idea "runs counter to Supreme Court precedent broadly interpreting the 'related to' language in the FAAAA." 769 F.3d 11, 19 (1st Cir. 2014). The First Circuit also noted that the Ninth Circuit has recognized that "generally applicable statutes" *might* be preempted "if they have a 'forbidden connection

with prices, routes, and services.'" *Id.* at 20 (quoting App. 16a-17a). But for the Ninth Circuit—unlike the First—a law has a "forbidden connection" only if it meets the circuit's anomalous "binds to" test. App. 14a.

Similarly, in *DiFiore*, the First Circuit found that a Massachusetts law governing tips for service employees had "a direct connection to air carrier prices and services" when applied to airline skycaps. 646 F.3d at 87. The tips law governed all "service employees," and thus would have escaped preemption under the Ninth Circuit's "borderline" test because it did not *bind* airlines to specific services. But the First Circuit applied "the reasoning and results in the three Supreme Court cases" governing ADA preemption, noting that in each case the Court considered laws in "areas historically regulated by states." *Id.* at 86, 89. Applying this Court's decisions, the First Circuit had no difficulty holding that the law was preempted. *Id.*

In *S.C. Johnson & Son, Inc. v. Transport Corp. of America*, 697 F.3d 544 (7th Cir. 2012), the Seventh Circuit likewise applied this Court's "connection with, or reference to" test in determining whether generally applicable laws were preempted under the FAAAA, not a heightened standard like the Ninth Circuit's "binds to" test. After surveying this Court's case law, Judge Wood—writing for the court—explained that laws prohibiting bribery and racketeering, like the anti-gambling laws held out in *Morales* as the example of generally applicable laws that do not trigger preemption, only "set basic rules for a civil society" and "operate one or more steps away from the moment at which the firm offers its customer a service for a particular price" and are thus not preempted. *Id.* at 558. In holding that certain state bribery and racketeering laws were not preempted, the court

explained that those laws have only "a generalized effect on transactions in the economy as a whole" and do not affect particular arrangements relating to prices, routes, or services. *Id.* at 559.[2]

The inquiry framed by Judge Wood in determining whether the generally applicable laws at issue in *S.C. Johnson & Son* were preempted stands in stark contrast to the preemption analysis applied by the Ninth Circuit below. In *S.C. Johnson & Son*, the Seventh Circuit did not look to whether the laws *bound* transportation carriers to *particular* routes or services. Rather, the court analogized the laws before it to the category of laws that the Court has already identified as likely outside the scope of preemption (anti-gambling and prostitution laws) and took to heart this Court's repeated admonition that "the broad applicability of the preemption statutes should be understood in light of their deregulatory purpose." *Id.* at 559 (citing *American Airlines v. Wolens*, 513 U.S. 219, 230 (1995); *Morales*, 504 U.S. at 390).

Like the First and Seventh Circuits, every other court of appeals to have considered preemption under the ADA or the FAAAA has applied this Court's—and Congress's—broad "relates to" test and found a variety of state laws preempted by the ADA and FAAAA, irrespective of whether the laws "refer[red] directly to rates, routes, or services." *Cf.* App. 14a. For example, in *Cuomo*, the Second Circuit held that the New York

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[2] Applying that understanding, the Seventh Circuit found that state consumer protection laws barring fraudulent misrepresentation and conspiracy to commit fraud *were* preempted, because "they relate sufficiently to rates, routes, or services" to trigger preemption. 697 F.3d at 557.

Passenger Bill of Rights was preempted by the ADA, finding that "requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays does relate to the service of an air carrier." 520 F.3d at 223. The court rejected the district court's conclusion that because the Bill of Rights was "a health and safety regulation" it was exempt from preemption. *Id.* at 224. No matter the purpose of the law, the court recognized that the law's potential interference with airline services meant that the law "related to" such services and was preempted.

Likewise, in *United Airlines, Inc. v. Mesa Airlines, Inc.*, the Seventh Circuit held that claims for tortious interference with contract, breach of fiduciary duty, and fraudulent inducement were preempted because they represented an effort to change the parties' financial arrangement with respect to the provision of air services. 219 F.3d 605, 610-11 (7th Cir.), *cert denied*, 531 U.S. 1036 (2000); *see also Onoh v. Northwest Airlines, Inc.*, 613 F.3d 596, 599-600 (5th Cir. 2010) (holding that a tort claim for intentional infliction of emotional distress and a breach of contract claim arising from an airline's refusal to let a passenger board the plane were preempted because those claims "related to" airline services); *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 852 (8th Cir. 2009) (concluding that tort claims arising from UPS's re-billing charges to a company using its shipping services "related to" both price and services because the charge was "part of UPS's 'operations'").

None of these laws or claims could be said to "bind" the carrier to any specific prices, routes, or services. But the courts of appeals consistently concluded that they nonetheless would have had a sufficient effect on the carriers' operations "relating to" prices, routes, and

services to trigger preemption. And although many of these claims were based on state tort laws that were generally applicable, the courts had no trouble concluding that they were preempted given their impact on rates, routes, or services. The Ninth Circuit decision in this case—just like the prior Ninth Circuit precedent on which that decision is built—is fundamentally out of step with the law of other circuits.

II. THE NINTH CIRCUIT'S CONCLUSION THAT CALIFORNIA'S M&RB LAWS ARE NOT "RELATED TO" PRICES, ROUTES, OR SERVICES IS WRONG AND AT ODDS WITH THIS COURT'S PRECEDENTS

This case underscores how far afield the Ninth Circuit's preemption analysis has strayed from this Court's precedents and the intent of Congress. As the district court recognized, California has imposed its "'own public policies [and] ... regulation on the operations of [a motor] carrier'" through its M&RB laws, *Wolens*, 513 U.S. at 229 n.5 (citation omitted), because complying with those laws requires motor carriers to alter their routes and limit their services and thereby impacts carriers' prices as well. Under this Court's decisions and the FAAAA's "relates to" language, California's M&RB laws are preempted.

A. California's M&RB Laws Are Preempted

California's M&RB laws indisputably have a "connection with" carrier prices, routes, and services, and thus satisfy the Court's FAAAA preemption test. *E.g.*, *Morales*, 504 U.S. at 384. The only question is whether that connection is "'too tenuous, remote, or peripheral'" to trigger preemption. *Id.* at 390 (citation omitted). As the vast majority of the dozen plus

district courts that considered this question held before the Ninth Circuit's decision below, the answer is no.

As Judge Sammartino found below, the M&RB laws limit Penske's drivers to shorter and fewer routes by "depriving them of the ability to take any route that does not offer adequate locations for stopping." App. 42a. That is undisputed—"[b]oth parties agree[d] that the M&RB laws impact the number of routes each driver/installer may go on each day." *Id.* at 44a. California roadways are notoriously congested and difficult to navigate, and parking can be challenging, to say the least. The challenges are greatest for commercial trucks. A truck driver cannot just pull his or her box truck (like the ones used by Penske's drivers here) to a stop on the L.A. Freeway to take a meal or rest break at the appointed hour. The driver must pull off the highway (and off his or her designated route), onto a different road (a new route) and find a safe and legal place to park (which can require multiple redirections). *See id.* at 65a-66a (Kitt Decl.).

The Ninth Circuit itself recognized that California's M&RB laws require "adjustments to drivers' routes" and "restrict the set of routes available as to indirectly bind Defendants, or motor carriers generally, to limited set of routes." *Id.* at 22a. Numerous district courts have made similar findings. *See, e.g.*, *Aguiar v. California Sierra Express, Inc.*, No. 2:11-cv-02827-JAM-GCH, 2012 WL 1593202, at *1 (C.D. Cal. May 4, 2012); *Ortega v. J.B. Hunt Transp., Inc.*, No. CV 07-08336(BRO) (FMOx), 2013 WL 5933889, at *6 (C.D. Cal. Oct. 2 2013); *Campbell v. Vitran Express, Inc.*, No. No. CV 11-05029-RGK (SHx), 2012 WL 2317233, at *4 (C.D. Cal. June 8, 2012). And motor carriers—whose drivers operate under innumerable different and

changing circumstances in the field while operating heavy machinery that cannot simply be brought to a halt in the highway at break time—are significantly impacted by these laws in a way that other workers (who may simply punch out at break time) are not. Under *Morales*, *Rowe*, and *Ginsberg*, these real-world consequences trigger preemption under the FAAAA .

The M&RB laws also significantly impact Penske's services. Indeed, plaintiffs have *agreed* that "scheduling off-duty meal periods for drivers 'would require one or two less deliveries per day' per driver." App. 42a-43a. The district court also found that plaintiffs "did not contest" that the M&RB laws "reduce driver flexibility, interfere with customer service, and 'by virtue of simple mathematics,' reduce the amount of on-duty work time allowable to drivers and thus reduce the amount and level of service Penske can offer its customers without increasing its workforce and investment in equipment." *Id.* at 43a. Here again, numerous other district courts have reached the same conclusions. *See, e.g.*, *Campbell*, 2012 WL 2317233, at *4; *Cole*, 2012 WL 4479237, at *4.

Remarkably, however, the Ninth Circuit held that none of these impacts mattered because the M&RB laws do not *bind* carriers to *specific* routes or services. App. 17a. In addition, the court reasoned that the laws did not impact the covered services of *motor carriers* because the break requirements apply to "*individual drivers*." *Id.* at 20a (emphasis in original). Of course, a motor carrier provides its transportation services through individual drivers. And laws—like California's M&RB laws—that prevent "individual drivers" from operating their vehicles, whether for ten minutes, or for 30 minutes multiple times during each workday,

directly impact motor carrier services. Indeed, this Court's ruling in *Ginsberg* disposes of the Ninth Circuit's reasoning. If a *single* mileage-program participant's claims can sufficiently impact an air carrier's services and prices to trigger preemption under the ADA, then the impact of the M&RB laws on motor carriers cannot be saved by the fact that those laws mandate breaks by each driver individually.

The California M&RB laws also "relate to" prices. As the district court found, the "ramifications of California's M&RB laws upon Penske's routes and services all contribute to create a significant impact upon prices," including "the cost of additional drivers, helpers, tractors, and trailers that would have been needed to ensure off-duty breaks under California's rules and maintain the same level of services." App. 44a. The Ninth Circuit suggested that these effects are insufficient for preemption because Penske could prevent them by simply "hir[ing] additional drivers or reallocat[ing] resources." *Id.* at 19a. But the Ninth Circuit ignored that such changes themselves would impose substantial costs, which thereby would impact prices—once again overlooking the real-world consequences of the M&RB laws.

Nor can the undeniable impact of California's M&RB laws be dismissed as "'tenuous, remote, or peripheral.'" *Morales*, 504 U.S. at 390 (citation omitted). As discussed, the M&RB laws have a direct and significant impact on routes and services. Moreover, the M&RB laws are fundamentally different from the "anti-gambling laws to which [this] Court referred in *Morales*" as well as "wage laws, safety regulations . . . , zoning laws, laws prohibiting theft and embezzlement, or laws prohibiting bribery or

racketeering." *S.C. Johnson & Son, Inc.*, 697 F.3d at 558. Unlike those laws, California's M&RB laws directly alter the services that motor carriers can offer, the routes through which they can provide them, and the prices at which they can offer them. Moreover, the M&RB laws do not "set basic rules for a civil society" by increasing the costs of underlying *inputs* to doing business. *Id.* Rather, they affect the "particular terms of trade between parties to a transaction" by disrupting the market-driven operations of motor carriers. *See id.* State laws, like the ones at issue, that require motor carriers to alter their routes and limit their services fall squarely with the scope of the FAAAA's preemption clause.

The specific exemptions from preemption Congress included in the FAAAA underscore this conclusion. Among other things, Congress exempted from preemption certain "highway route controls . . . based on the size or weight of the motor vehicle or the hazardous nature of the cargo" as well as safety regulations "with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). These express exemptions underscore that laws effectuating "highway route controls" ordinarily fall within the Act's preemptive reach; otherwise there would be no need for an *exemption*. California's M&RB laws effectuate "route controls" in an analogous manner as such weight and cargo laws; yet there is no express exemption to save the laws from the Act's preemptive reach. *See Rowe*, 552 U.S. at 374 (pointing to the FAAAA's exemptions as evidence that Congress did not intend for the courts to carve out additional exemptions).

C. The Ninth Circuit Identified No Reason To Block The FAAAA's Preemptive Reach Here

Despite its recognition that the M&RB laws impact both carrier routes and services, the Ninth Circuit concluded that these impacts were insufficient to trigger preemption. As this Court observed in *Morales* in a similar vein, "[t]hat conclusion is unexplained, and seems to us inexplicable." 504 U.S. at 390 n.3. The Ninth Circuit's failure to evaluate the M&RB laws in accord with this Court's teachings at a minimum requires a remand under the proper standard. But by any measure, the California M&RB laws sufficiently impact routes and services to trigger preemption.

Even though it is undeniable—and conceded—that California's M&RB laws impact routes and services, the Ninth Circuit rejected Penske's argument that the M&RB laws require motor carriers to use a "smaller set of possible routes" because the court concluded that Penske purportedly had not met its "burden of proof" in establishing that the Act triggered the FAAAA's preemption clause. App. 21a. There are several problems with that analysis. To begin, as respondents themselves argued, preemption is "a purely *legal issue* . . . not subject to the need for fact-intensive inquiry." CA9 SRE 2. As the First Circuit recognized in *Rowe* (and the Court did not expressly disagree), courts need only "look[] to the logical effect that particular scheme has on the delivery of services or the setting of rates." *New Hampshire Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 82 n.14 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008). Here, the "logical effect" of California's M&RB laws is to constrain carriers' routes and services.

Penske submitted declarations in support of its summary judgment motion summarizing the obvious

impact of the laws on routes, services, and prices (and, if need be, could explain the impacts in even greater detail). But no evidence is necessary to demonstrate that a truck must go off route to comply with the M&RB laws in light of legal restrictions on where trucks may park and idle. Indeed, as the district court noted, "[b]oth parties *agree* that the M&RB laws impact the number of routes each driver/installer may go on each day, and Plaintiffs do not oppose Penske's argument that the laws impact the types of roads their drivers/installers may take and the amount of time it takes them to reach their destination from the warehouse." App. 44a (emphasis added). Similarly, plaintiffs conceded as to services that the break requirements would reduce the number of deliveries that could be accomplished in a day. *See id.* at 42a-43a ("The parties both agree that 'scheduling off-duty meal periods for drivers would require one or two less deliveries per day' per driver.'" (citation omitted)).

Moreover, as the experienced district court judge below—the same district court judge whose decision in *Ginsberg* this Court ultimately upheld in that case—recognized, Penske more than adequately supported its claim that the laws restrict motor carriers to a limited set of routes. *See id.* at 50a. Numerous other district courts reached the very same conclusion based on comparable declarations or evidence. There is no basis to second-guess those findings. And, in any event, the Ninth Circuit's rejection of Penske's evidence only affected *one* of its several grounds for demonstrating the impact on routes and services—the laws' impact on services. The Ninth Circuit found the evidence sufficient to conclude that the laws would require

"adjustments to drivers' routes," which, as explained above, is itself sufficient to trigger preemption.

Nor does the United States Department of Transportation (DOT) have the final, or authoritative, say on how the California M&RB laws impact Penske's—or other motor carriers'—routes and services. *Cf.* App. 22a-23a (deferring to DOT amicus brief submitted at the court's invitation). DOT has no authority to implement the FAAAA, and it is not an expert in evaluating state M&RB laws, much less in second-guessing the impacts those laws impose on motor carriers. DOT's failure to appreciate the laws' real-world impacts is underscored by its crude attempt to differentiate airline services by saying that those services are "tightly scheduled." CA9 DOT Br. 25. Scheduling ground services and deliveries, especially in a complex urban environment and marketplace like California's, presents comparable challenges. DOT had no institutional basis to second-guess the district court's findings on the M&RB laws' impact on carriers.

More fundamentally, DOT's amicus brief in the Ninth Circuit suffers from the same overriding flaws as the Ninth Circuit's decision in this case—DOT based its preemption analysis on the Ninth Circuit's flawed prior precedent in this area. Thus, for example, DOT argued that the M&RB laws are not preempted because they do not "*dictate* changes in routes or services." CA9 DOT Br. 21 (emphasis added); *see id.* (emphasizing that state law "does not compel a carrier to abandon its route choices"). In addition, DOT followed the Ninth Circuit's prior precedent "constru[ing] the preemption provision's reference to 'routes' as a reference to 'courses of travel.'" *Id.* at 21 n.3 (quoting language from *Charas*). That may fly in

the Ninth Circuit, but it is insufficient under this Court's precedent and the law of other circuits.

Indeed, the Ninth Circuit's erroneous preemption analysis is in direct tension with arguments that the Solicitor General has made to this Court on behalf of the United States in other FAAAA and ADA cases. For example, in both *Ginsberg* and *Rowe*, the Solicitor General correctly emphasized that "*Morales* rejected the contention that the ADA 'only pre-empts the States from actually prescribing rates, routes, or services.'" U.S. *Ginsberg* Br. 13 (quoting *Morales*, 504 U.S. at 385); *see* U.S. *Rowe* Br. 8, 15. Yet, as discussed, that is the upshot of the Ninth Circuit's flawed "binds to" test. And, in *Rowe*, the United States supported its argument for preemption by refuting the State's attempt to limit the FAAAA's preemptive reach to economic laws. *See* U.S. *Rowe* Br. 23. That argument is inconsistent with the arguments advanced by the DOT below in arguing that California's M&RB laws were not preempted. *See* CA9 DOT Br. 26-30.

Under the principles established by this Court's decisions (and recognized by the Solicitor General in other cases), California's M&RB laws are preempted.[3]

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[3] Federal regulations also impose certain break requirements on drivers. *See* 49 C.F.R. pt. 395. As DOT recognized, however, those break requirements apply only to long-haul drivers and are not as extensive as the California M&RB laws. CA9 DOT Br. 28-30; *see* App. 62a-64a (Kitt Decl.). Moreover, the federal regulations are uniform—across the nation. Congress intended the FAAAA preemption to combat the competitive drain caused by subjecting motor carriers—like Penske—with operations in multiple States to a patchwork of different state laws.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS THIS COURT'S REVIEW

The exceptional importance of this case and the question presented is beyond doubt. The decision below has widespread ramifications for transportation carriers subject to California's M&RB laws, and for any motor carrier or airline operating within the Ninth Circuit's jurisdiction. Each time a carrier seeks to conduct operations in California, it risks exposure to a class action alleging violations of the M&RB laws. The Ninth Circuit has permitted California to impose its public policies on the operations of motor carriers conducting business within the state, thereby displacing competitive forces that would otherwise operate. The Ninth Circuit's decision thereby subjects carriers to a patchwork of state regulation, precisely what the FAAAA's preemption provision was designed to guard against. The importance of this issue to transportation carriers in California is illustrated by the sheer number of class actions brought against transportation companies under the M&RB laws, resulting in more than a dozen district court decisions.

More broadly, the Ninth Circuit's decision effectively insulates laws of general applicability from the preemptive reach of the FAAAA, directly contrary to Congress's intent and this Court's precedent. The Ninth Circuit's precedent construing the ADA and the FAAAA's preemption provisions has repeatedly warranted this Court's intervention. The Court's intervention is needed again here. While other circuits have faithfully applied the teachings of *Morales* and *Rowe*, the Ninth Circuit has stubbornly adhered to its own course under these statutes. Until this Court

eliminates the root of the problem (the Ninth Circuit's flawed preemption analysis), the problem—as the Ninth Circuit's track record in FAAAA and ADA cases and the decision below attest—is not going away.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 6, 2015

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UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Mickey Lee DILTS; Ray Rios; and Donny Dushaj, on behalf of themselves and all others similarly situated, Plaintiffs–Appellants,

v.

PENSKE LOGISTICS, LLC; and Penske Truck Leasing Co., L.P., a Delaware corporation, Defendants–Appellees,

and

Does 1–125, inclusive, Defendants.

No. 12–55705.

Argued and Submitted March 3, 2014.

Filed July 9, 2014.

Amended Sept. 8, 2014.

769 F.3d 637

Before: ALEX KOZINSKI, Chief Judge, SUSAN P. GRABER, Circuit Judge, and JACK ZOUHARY,* District Judge.

Opinion by Judge GRABER.

Concurrence by Judge ZOUHARY.

ORDER AND AMENDED OPINION

ORDER

The opinion filed on July 9, 2014, and published at 757 F.3d 1078, 2014 WL 3291749, are amended by the

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

opinion and concurrence filed concurrently with this order.

With these amendments, Chief Judge Kozinski and Judge Graber have voted to deny the petition for rehearing en banc, and Judge Zouhary has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for rehearing en banc is **DENIED.** No further petitions for rehearing may be filed.

OPINION

GRABER, Circuit Judge:

Plaintiffs, a certified class of drivers employed by Defendants Penske Logistics, LLC, and Penske Truck Leasing Co., L.P., appeal from a judgment dismissing their claims under California's meal and rest break laws. The district court held on summary judgment that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") preempts those state laws as applied to motor carriers. Reviewing de novo the interpretation and construction of the FAAAA and the question of federal preemption, *Tillison v. Gregoire*, 424 F.3d 1093, 1098 (9th Cir.2005), we hold that the state laws at issue are not "related to" prices, routes, or services, and therefore are not preempted by the FAAAA. Accordingly, we reverse.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Mickey Lee Dilts, Ray Rios, and Donny Dushaj brought this class action against Defendants, which are motor carriers, alleging that Defendants routinely violate California's meal and rest break laws,

Cal. Lab.Code §§ 226.7, 512; Cal.Code Regs. tit. 8, § 11090. Plaintiffs represent a certified class of 349 delivery drivers and installers, all of whom are assigned to the Penske Whirlpool account. Plaintiffs work exclusively on routes within the state of California, typically work more than 10 hours a day, and frequently work in pairs, with one driver and one deliverer/installer in each truck.

California law generally requires a 30–minute meal break for every five hours worked, Cal. Lab.Code § 512, and a paid 10–minute rest break for every four hours worked, Cal.Code Regs. tit. 8, § 11090. Plaintiffs allege that Defendants automatically program 30–minute meal breaks into employees' shifts while failing to ensure that employees actually take those breaks and that Defendants create a working environment that discourages employees from taking their meal and rest breaks.

Plaintiffs initially filed this action in state court. Defendants removed the case to federal district court under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d)(2), 1441(b), 1453. Following removal, Defendants moved for summary judgment, claiming a preemption defense. Defendants argued that the state meal and rest break laws as applied to motor carriers are preempted under the FAAAA, which provides that "States may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Concluding that California's meal and rest break laws impose "fairly rigid" timing requirements, dictating "exactly when" and "for exactly how long" drivers must take breaks, and restricting the routes that a motor carrier may select,

the district court held that California's meal and rest break laws meet the FAAAA preemption standard and granted summary judgment for Defendants. *Dilts v. Penske Logistics LLC*, 819 F.Supp.2d 1109, 1119–20 (S.D.Cal.2011).[1] Plaintiffs timely appeal.

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[1] Since *Dilts* was decided, eight other California district court decisions have held that the FAAAA preempts California's meal and rest break laws, while four have held that it does not. The other cases that followed *Dilts* are: *Rodriguez v. Old Dominion Freight Line, Inc.*, No. CV13–891DSF(RZx), 2013 WL 6184432, at *4 (C.D.Cal. Nov. 27, 2013); *Parker v. Dean Transp. Inc.*, No. CV13–02621BRO(VBKx), 2013 WL 7083269, at *9 (C.D.Cal. Oct. 15, 2013); *Ortega v. J.B. Hunt Transp., Inc.*, No. CV07–08336(BRO)(FMOx), 2013 WL 5933889, at *7 (C.D.Cal. Oct. 2, 2013); *Burnham v. Ruan Transp.*, No. SACV12–0688AG(ANx), 2013 WL 4564496, at *5 (C.D.Cal. Aug. 16, 2013); *Cole v. CRST, Inc.*, No. EDCV08–1570–VAP(OPx), 2012 WL 4479237, at *4–6 (C.D.Cal. Sept. 27, 2012); *Campbell v. Vitran Express, Inc.*, No. CV11–05029–RGK(SHx), 2012 WL 2317233, at *4 (C.D.Cal. June 8, 2012); *Aguiar v. Cal. Sierra Express, Inc.*, No. 2:11–cv–02827–JAM–GGH, 2012 WL 1593202, at *1 (E.D.Cal. May 4, 2012); *Esquivel v. Vistar Corp.*, No. 2:11–cv–07284–JHN–PJWx, 2012 WL 516094, at *4–6 (C.D.Cal. Feb. 8, 2012) (unpublished decisions); *see also Miller v. Sw. Airlines Co.*, 923 F.Supp.2d 1206, 1212–13 (N.D.Cal.2013) (holding California's break laws preempted under the analogous provision of the Airline Deregulation Act); *Helde v. Knight Transp., Inc.*, 982 F.Supp.2d 1189, 1195–96 (W.D.Wash.2013) (applying similar analysis to Washington's rest break provisions and holding them preempted under the FAAAA). The cases holding that California's meal and rest break laws are not preempted by the FAAAA are: *Villalpando v. Exel Direct Inc.*, No. 12–cv–04137JCS, 2014 WL 1338297, at *12 (N.D.Cal. Mar. 28, 2014); *Brown v. Wal–Mart Stores, Inc.*, No. C08–5221 SI, 2013 WL 1701581, at *3–4 (N.D.Cal. Apr. 18, 2013); *Mendez v. R+L Carriers, Inc.*, No. C11–2478CW, 2012 WL 5868973, at *4–7 (N.D.Cal. Nov. 19, 2012) (unpublished decisions); *Reinhardt v. Gemini Motor Transp.*, 869 F.Supp.2d 1158, 1165–67 (E.D.Cal.2012).

DISCUSSION

A. California's Meal and Rest Break Laws

California Labor Code sections 226.7 and 512, and the related regulations for the transportation industry promulgated by California's Industrial Welfare Commission as California Code of Regulations title 8, section 11090, together constitute the state's meal and rest break laws.

Employers must provide a meal break of 30 minutes for an employee who works more than five hours a day, plus a second meal break of 30 minutes for an employee who works more than 10 hours a day. Cal. Lab.Code § 512(a). For employees who work no more than six hours, the meal break may be waived by mutual consent of the employer and employee; for employees who work no more than 12 hours, one of the two meal breaks may be waived by mutual consent. *Id.* If the nature of the work prevents an employee from taking an off-duty meal break, the employer and employee may agree to an on-duty meal break by mutual consent. *Id.* For transportation workers whose daily work time is at least three and one-half hours, employers must provide a paid rest period of 10 minutes for every four hours "or major fraction thereof." Cal.Code Regs. tit. 8, § 11090(12)(A). The regulations governing transportation workers are consistent with those governing workers in other industries. *See id.* §§ 11010–11170.

An employer may not require an employee to work during any meal or rest period. Cal. Lab.Code

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This is the first time that the question is before us. It is also before us in *Campbell v. Vitran Express, Inc.*, No. 12–56250, which we decided concurrently in a memorandum disposition.

§ 226.7(b). An employer must pay an employee for an additional hour of work at the employee's regular rate for each workday for which a meal or rest period is not provided. Cal. Lab.Code § 226.7(c). "[S]ection 226.7 does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay.... The failure to provide required meal and rest breaks is what triggers a violation of section 226.7." *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal.4th 1244, 140 Cal.Rptr.3d 173, 274 P.3d 1160, 1168 (2012). "The 'additional hour of pay' ... is the legal remedy ...." *Id.*

The California Supreme Court, in an opinion published after the order on summary judgment issued in this case, clarified that state laws allow some flexibility with respect to the timing and circumstances of meal breaks. *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513 (2012). In the absence of a waiver, California law "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," but "does not impose additional timing requirements." *Id.* at 537. "[A]n employer must relieve the employee of all duty for the designated [meal] period, but need not ensure that the employee does no work." *Id.* at 532. When the nature of the work makes off-duty meal breaks infeasible, the employer and employee may, by mutual written agreement, waive the off-duty meal break requirement. *Id.* at 533 (citing California's Industrial Welfare Commission Wage Order No. 5). Finally, "as a general matter, one rest break should fall on either side of the meal break. [But s]horter or longer shifts and

other factors that render such scheduling impracticable may alter this general rule," and employers have flexibility in scheduling breaks according to the nature of the work. *Id.* at 531 (citation, brackets, and internal quotation marks omitted).

B. The "Related to" Test for FAAAA Preemption

In considering the preemptive scope of a statute, congressional intent "is the ultimate touchstone." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040 (9th Cir.2007) (internal quotation marks omitted). "Congress' intent ... primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed ... through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (citations and internal quotation marks omitted).

"Preemption analysis begins with the presumption that Congress does not intend to supplant state law. Although Congress clearly intended FAAAA to preempt some state regulations of motor carriers who transport property, the scope of the pre-emption must be tempered by the presumption against the pre-emption of state police power regulations." *Tillison*, 424 F.3d at 1098 (citation and internal quotation marks omitted); *Medtronic, Inc.*, 518 U.S. at 485, 116 S.Ct. 2240; *see also Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (noting that the presumption against preemption applies "in all

preemption cases" and is especially strong in areas of traditional state regulation (internal quotation marks and brackets omitted)). Wage and hour laws constitute areas of traditional state regulation, although that fact alone does not "immunize" state employment laws from preemption if Congress in fact contemplated their preemption. *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 330–34, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997).

"Where, as in this case, Congress has superseded state legislation by statute, our task is to identify the domain expressly pre-empted. To do so, we focus first on the statutory language, which necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars, Inc. v. Pelkey*, —— U.S. ——, 133 S.Ct. 1769, 1778, 185 L.Ed.2d 909 (2013) (citation and internal quotation marks omitted) (interpreting the FAAAA). The FAAAA's preemption clause provides, in relevant part: "States may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The statutory "related to" text is "deliberately expansive" and "conspicuous for its breadth." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (internal quotation marks omitted). That said, the FAAAA does not go so far as to preempt state laws that affect prices, routes, or services in "only a tenuous, remote, or peripheral manner, such as state laws forbidding gambling." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008) (internal quotation marks and alteration omitted). As the Supreme Court recently observed, "the breadth of the words 'related to' does

not mean the sky is the limit." *Dan's City Used Cars*, 133 S.Ct. at 1778.

Because "everything is related to everything else," *Dillingham Constr.*, 519 U.S. at 335, 117 S.Ct. 832 (Scalia, J., concurring), understanding the nuances of congressional intent is particularly important in FAAAA preemption analysis. We must draw a line between laws that are significantly "related to" rates, routes, or services, even indirectly, and thus are preempted, and those that have "only a tenuous, remote, or peripheral" connection to rates, routes, or services, and thus are not preempted. *Rowe*, 552 U.S. at 371, 128 S.Ct. 989. To better discern congressional intent, we turn next to the legislative history and broader statutory framework of the FAAAA. *Lohr*, 518 U.S. at 486, 116 S.Ct. 2240.

Enacted in 1994, the FAAAA was modeled on the Airline Deregulation Act of 1978. In 2008, the Supreme Court summarized the history behind the FAAAA:

> In 1978, Congress "determin[ed] that 'maximum reliance on competitive market forces'" would favor lower airline fares and better airline service, and it enacted the Airline Deregulation Act. *Morales* [, 504 U.S. at 378, 112 S.Ct. 2031] (quoting 49 U.S.C.App. § 1302(a)(4) (1988 ed.)); see 92 Stat. 1705. In order to "ensure that the States would not undo federal deregulation with regulation of their own," th[e Airline Deregulation] Act "included a pre-emption provision" that said "no State ... shall enact or enforce any law ... relating to rates, routes, or services of any air carrier." *Morales*, *supra*, at 378 [112 S.Ct. 2031]; 49 U.S.C.App. § 1305(a)(1) (1988 ed.).

> In 1980, Congress deregulated trucking. See Motor Carrier Act of 1980, 94 Stat. 793. And a little over a decade later, in 1994, Congress similarly sought to pre-empt state trucking regulation. See Federal Aviation Administration Authorization Act of 1994, 108 Stat. 1605–1606; see also ICC Termination Act of 1995, 109 Stat. 899. In doing so, it borrowed language from the Airline Deregulation Act of 1978 and wrote into its 1994 law language that says: "[A] State ... may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." 49 U.S.C. § 14501(c)(1); see also § 41713(b)(4)(A) (similar provision for combined motor-air carriers).

Rowe, 552 U.S. at 367–68, 128 S.Ct. 989.

By using text nearly identical to the Airline Deregulation Act's, Congress meant to create parity between freight services provided by air carriers and those provided by motor carriers. *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir.1998). Therefore, the analysis from *Morales* and other Airline Deregulation Act cases is instructive for our FAAAA analysis as well. The one difference between the Airline Deregulation Act and the FAAAA is that the latter contains the additional phrase "with respect to the transportation of property," which is absent from the Airline Deregulation Act and which "massively limits the scope of preemption ordered by the FAAAA." *Dan's City Used Cars*, 133 S.Ct. at 1778 (internal quotation marks omitted). Here, the parties do not dispute that the transportation of property is involved, so our analysis turns on the "related to price,

route, or service" element of the FAAAA preemption test.

The principal purpose of the FAAAA was "to prevent States from undermining federal deregulation of interstate trucking" through a "patchwork" of state regulations. *Am. Trucking Ass'ns v. City of Los Angeles,* 660 F.3d 384, 395–96 (9th Cir.2011). The sorts of laws that Congress considered when enacting the FAAAA included barriers to entry, tariffs, price regulations, and laws governing the types of commodities that a carrier could transport. H.R. Conf. Rep. No. 103–677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. The FAAAA expressly does *not* regulate a state's authority to: enact safety regulations with respect to motor vehicles; control trucking routes based on vehicle size, weight, and cargo; impose certain insurance, liability, or standard transportation rules; regulate the intrastate transport of household goods and certain aspects of tow-truck operations; or create certain uniform cargo or antitrust immunity rules. 49 U.S.C. § 14501(c)(2), (3). This list was "not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103–677, at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756. Accordingly, Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services. Consistent with that instruction, we have held that the FAAAA does not preempt a state's prevailing wage law, *Mendonca,* 152 F.3d at 1189, or a state law requiring that towing services obtain express authorization to tow from private property, *Tillison,*

424 F.3d at 1099–1100, and that the Airline Deregulation Act does not preempt a generally applicable city anti-discrimination law, *Air Transp. Ass'n of Am. v. City of San Francisco*, 266 F.3d 1064, 1071 (9th Cir.2001).

In 2008, after reviewing the relevant statutory text, legislative history, and jurisprudence, the Supreme Court identified four principles of FAAAA preemption: (1) "'state enforcement actions having a connection with, or reference to,' carrier '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) "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." *Rowe,* 552 U.S. at 370–71, 128 S.Ct. 989 (brackets and emphasis omitted) (quoting the Airline Deregulation Act analysis in *Morales*, 504 U.S. at 384, 386–87, 390, 112 S.Ct. 2031).

Contrary to Defendants' argument, *Rowe* did not represent a significant shift in FAAAA jurisprudence. Nor did it call into question our past FAAAA cases, such as *Mendonca*, 152 F.3d at 1187–89. *See also Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir.2003) (en banc) (holding that a three judge panel may ignore binding circuit precedent only if it is "clearly irreconcilable with the reasoning or theory of intervening higher authority"). *Rowe* instructs us to apply to our FAAAA cases the settled preemption principles developed in Airline Deregulation Act cases, including the rule articulated in *Morales* that a state law may "relate to" prices, routes, or services for

preemption purposes even if its effect is only indirect, 504 U.S. at 385–86, 112 S.Ct. 2031, but that a state law connected to prices, routes, or services in "too tenuous, remote, or peripheral a manner" is not preempted, *id.* at 390, 112 S.Ct. 2031 (internal quotation marks omitted). *See also* H.R. Conf. Rep. No. 103–677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755 (noting that the drafters of the FAAAA did "not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales* "). We applied precisely that rule in *Mendonca,* 152 F.3d at 1187–89. *Rowe* simply reminds us that, whether the effect is direct or indirect, "the state laws whose effect is forbidden under federal law are those with a *significant* impact on carrier rates, routes, or services." 552 U.S. at 375, 128 S.Ct. 989 (internal quotation marks omitted).

Rowe concerned a Maine law requiring tobacco retailers to use a delivery service that provided recipient verification. The Supreme Court held that the verification requirement interfered with the deregulatory goals behind the FAAAA's preemption clause because it would "require carriers to offer a system of services that the market does not provide[,] ... would freeze into place services that carriers might prefer to discontinue in the future," and would directly substitute Maine's "own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." 552 U.S. at 372, 128 S.Ct. 989 (internal quotation marks omitted). The Maine statute also required that carriers provide a special checking system to receive any shipment originating from a known tobacco retailer. *Id.* at 373, 128 S.Ct. 989. The

Supreme Court held that requiring the carriers to check packages in this way would "regulate a significant aspect of the motor carrier's package pickup and delivery service" and, again, could freeze into place services that the market would not otherwise provide. *Id.*

In short, the Maine statute required carriers to provide or use certain special services in order to comply with the law. The statute was, as we have described other preempted laws, one in which "the existence of a price, route or service [was] essential to the law's operation." *Air Transp. Ass'n*, 266 F.3d at 1071 (internal quotation marks and brackets omitted). In an Airline Deregulation Act case following *Rowe*, we held that, in " 'borderline' cases" in which a law does not refer directly to rates, routes, or services, "the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry." *Am. Trucking*, 660 F.3d at 397 (emphasis added) (internal quotation marks and alterations omitted). Thus, laws mandating motor carriers' use (or non-use) of particular prices, routes, or services in order to comply with the law are preempted.

Laws are more likely to be preempted when they operate at the point where carriers provide services to customers at specific prices. In *Northwest, Inc. v. Ginsberg*, —— U.S. ——, 134 S.Ct. 1422, 1431, 188 L.Ed.2d 538 (2014), the Supreme Court held that an airline customer's claim against the airline for breach of an implied covenant, stemming from the termination of his frequent flyer account, was "related to" prices, routes, and especially services. The Court held that,

because frequent flyer credits could be redeemed for services offered for free or at reduced prices, the state law contract claim met the "related to" test, *id.*, and, because the state law claim sought to enlarge the contractual relationship that the carrier and its customer had voluntarily undertaken, was preempted under the Airline Deregulation Act, *id.* at 1433; *see also S.C. Johnson & Son v. Transp. Corp. of Am.*, 697 F.3d 544, 558 (7th Cir.2012) (noting that *Morales* and *Mendonca* both stand for the proposition that the Airline Deregulation Act and FAAAA do not preempt "laws that regulate ... inputs [that] operate one or more steps away from the moment at which the firm offers its customer a service for a particular price"); *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir.2011) (the preempted law "directly regulates how an airline service is performed and how its price is displayed to customers—not merely how the airline behaves as an employer or proprietor").

On the other hand, generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide. Such laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment. *Mendonca*, 152 F.3d at 1189. Indeed, many of the laws that Congress enumerated as expressly *not* related to prices, routes, or services—such as transportation safety regulations or insurance and liability rules, 49 U.S.C. § 14501(c)(2)—are likely to increase a motor carrier's operating costs. But

Congress clarified that this fact alone does not make such laws "related to" prices, routes, or services. Nearly every form of state regulation carries some cost. The statutory text tells us, though, that in deregulating motor carriers and promoting maximum reliance on market forces, Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability. 49 U.S.C. § 14501(c); *see also*, *e.g.*, *Rowe*, 552 U.S. at 375, 128 S.Ct. 989 (holding that a state law is not preempted when it "prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public").

Nor does a state law meet the "related to" test for FAAAA preemption just because it shifts incentives and makes it more costly for motor carriers to choose some routes or services *relative* to others, leading the carriers to reallocate resources or make different business decisions. For example, a San Francisco city ordinance requiring equal protection for domestic partners did not "compel or bind the Airlines to a particular route or service," even though it might increase the cost of doing business at the San Francisco airport relative to other markets. *Air Transp. Ass'n*, 266 F.3d at 1074. Despite the potential cost increase associated with using the San Francisco airport as a result of the city ordinance, carriers could still "make their own decisions about where to fly and how many resources to devote to each route and service." *Id.*

In short, even if state laws increase or change a motor carrier's operating costs, "broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices[, routes,] and services"—that is, those that do not directly or

indirectly mandate, prohibit, or otherwise regulate certain prices, routes, or services—are not preempted by the FAAAA. *Id.* at 1072.

C. California's Meal and Rest Break Laws are Not Preempted

Although we have in the past confronted close cases that have required us to struggle with the "related to" test, and refine our principles of FAAAA preemption, we do not think that this is one of them. In light of the FAAAA preemption principles outlined above, California's meal and rest break laws plainly are not the sorts of laws "related to" prices, routes, or services that Congress intended to preempt. They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly. They are "broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices[, routes,] and services." *Air Transp. Ass'n*, 266 F.3d at 1072. They are normal background rules for almost *all* employers doing business in the state of California. And while motor carriers may have to take into account the meal and rest break requirements when allocating resources and scheduling routes—just as they must take into account state wage laws, *Mendonca*, 152 F.3d at 1189, or speed limits and weight restrictions, 49 U.S.C. § 14501(c)(2)—the laws do not "bind" motor carriers to specific prices, routes, or services, *Am. Trucking*, 660 F.3d at 397. Nor do they "freeze into place" prices, routes, or services or "determin[e] (to a significant degree) the [prices, routes, or] services that motor carriers will provide," *Rowe*, 552 U.S. at 372, 128 S.Ct. 989.

Further, applying California's meal and rest break laws to motor carriers would not contribute to an impermissible "patchwork" of state-specific laws, defeating Congress' deregulatory objectives. The fact that laws may differ from state to state is not, on its own, cause for FAAAA preemption. In the preemption provision, Congress was concerned only with those state laws that are significantly "related to" prices, routes, or services. A state law governing hours is, for the foregoing reasons, not "related to" prices, routes, or services and therefore does not contribute to "a patchwork of state *service-determining* laws, rules, and regulations." *Rowe*, 552 U.S. at 373, 128 S.Ct. 989 (emphasis added). It is instead more analogous to a state wage law, which may differ from the wage law adopted in neighboring states but nevertheless is permissible. *Mendonca*, 152 F.3d at 1189.[2]

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[2] We recently noted that it was an "open issue" "whether a federal law can ever preempt state law on an 'as applied' basis, that is, whether it is proper to find that federal law preempts a state regulatory scheme sometimes but not at other times, or that a federal law can preempt state law when applied to certain parties, but not to others." *Cal. Tow Truck Ass'n v. City of San Francisco*, 693 F.3d 847, 865 (9th Cir.2012). We need not resolve that issue here. For the reasons discussed in this section, we hold that California's meal and rest break laws, as generally applied to motor carriers, are not preempted.

Were we to construe Defendant's argument as an "as applied" challenge, we would reach the same conclusion and, if anything, find the argument against preemption even stronger. Plaintiff drivers work on short-haul routes and work exclusively within the state of California. They therefore are not covered by other state laws or federal hours-of-service regulations, 49 C.F.R. § 395.3, and would be without *any* hours-of-service limits if California laws did not apply to them. *See Hours of Service of Drivers,* 78 Fed.Reg. 64,179–01, 64,181 (Oct. 28, 2013) (amending 49 C.F.R. § 395.3 to

Defendants argue that California's meal and rest break laws are "related to" routes or services, "if not prices too," in six specific ways. None of those examples convinces us that California's laws are "related to" prices, routes, or services in the way that Congress intended.

First, Defendants argue that the state break laws impermissibly mandate that *no* motor carrier service be provided during certain times because the laws require a cessation of work during the break period. But the state law requires only that *each individual employee* take an off-duty break at some point within specified windows—not that a motor carrier suspend its service. Defendants are at liberty to schedule service whenever they choose. They simply must hire a sufficient number of drivers and stagger their breaks for any long period in which continuous service is necessary.

Second, Defendants argue that mandatory breaks mean that drivers take longer to drive the same distance, providing less service overall. But that argument equates to nothing more than a modestly increased cost of doing business, which is not cause for preemption, *Air Transp. Ass'n*, 266 F.3d at 1071; *Mendonca*, 152 F.3d at 1189. Motor carriers may have to hire additional drivers or reallocate resources in order to maintain a particular service level, but they remain free to provide as many (or as few) services as

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exclude short-haul drivers, in compliance with *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243 (D.C.Cir.2013), *cert. denied*, – — U.S. ——, 134 S.Ct. 914, 187 L.Ed.2d 781 (2014)). Consequently, Defendants *in particular* are not confronted with a "patchwork" of hour and break laws, even a "patchwork" permissible under the FAAAA.

they wish. The law in question has nothing to say about *what* services an employer does or does not provide.

Third, Defendants argue that break laws require carriers to alter "the frequency and scheduling of transportation," which directly relates to services under *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265–66 (9th Cir.1998) (en banc). *Charas* held that, under the Airline Deregulation Act, services include "such things as the frequency and scheduling of transportation, and ... the selection of markets to or from which transportation is provided." *Id.* Again, this argument conflates requirements for *individual drivers* with requirements imposed on motor carriers. Motor carriers may schedule transportation as frequently or as infrequently as they choose, at the times that they choose, and still comply with the law. They simply must take drivers' break times into account—just as they must take into account speed limits or weight restrictions, 49 U.S.C. § 14501(c), which are not preempted by the FAAAA.

Fourth, Defendants argue that California break laws require motor carriers to schedule services in accordance with state law, rather than in response to market forces, thereby interfering with the FAAAA's deregulatory objectives. But the mere fact that a motor carrier must take into account a state regulation when planning services is not sufficient to require FAAAA preemption, so long as the law does not have an impermissible effect, such as binding motor carriers to specific services, *Am. Trucking,* 660 F.3d at 397, making the continued provision of particular services essential to compliance with the law, *Rowe,* 552 U.S. at 372, 128 S.Ct. 989; *Air Transp. Ass'n,* 266 F.3d at 1074,

or interfering at the point that a carrier provides services to its customers, *Nw., Inc.*, 134 S.Ct. at 1431. Moreover, all motor carriers in California are subject to the same laws, so all intrastate carriers like Defendants are equally subject to the relevant market forces.

Turning to routes, Defendants' fifth argument is that the requirement that drivers pull over and stop for each break period necessarily dictates that they alter their routes. To the extent that compliance with California law requires drivers to make minor deviations from their routes, such as pulling into a truck stop, we see no indication that this is the sort of "route control" that Congress sought to preempt. "'[R]outes' generally refer[s] to ... point-to-point transport ... [and] courses of travel." *Charas*, 160 F.3d at 1265. The requirement that a driver briefly pull on and off the road during the course of travel does not meaningfully interfere with a motor carrier's ability to select its starting points, destinations, and routes. Indeed, Congress has made clear that even more onerous route restrictions, such as weight limits on particular roads, are not "related to" routes and therefore are not preempted. 49 U.S.C. § 14501(c).

Sixth, and relatedly, Defendants argue that finding routes that allow drivers to comply with California's meal and rest break laws will limit motor carriers to a smaller set of possible routes. But Defendants, who bear the burden of proof in establishing the affirmative defense of preemption, *PLIVA, Inc. v. Mensing*, —— U.S. ——, 131 S.Ct. 2567, 2587, 180 L.Ed.2d 580 (2011), submitted no evidence to show that the break laws in fact would decrease the availability of routes to serve the Whirlpool accounts, or would meaningfully decrease the availability of routes to motor carriers in

California. Instead, Defendants submitted only very general information about the difficulty of finding parking for commercial trucks in California. Although compliance with California's meal and break laws may require some minor adjustments to drivers' routes, the record fails to suggest that state meal and rest break requirements will so restrict the set of routes available as to indirectly bind Defendants, or motor carriers generally, to a limited set of routes, *Am. Trucking,* 660 F.3d at 397, or make the provision or use of specific routes necessary for compliance with the law, *Air Transp. Ass'n,* 266 F.3d at 1074. Moreover, drivers already must incorporate into their schedule fuel breaks, pick ups, drop offs and, in some cases, time to install products or wait for their partner to complete an installation.

Finally, in an amicus brief filed at our invitation, the Secretary of Transportation argued that: (1) state laws like California's, which do not directly regulate prices, routes, or services, are not preempted by the FAAAA unless they have a "significant effect" on prices, routes, or services; (2) in the absence of explicit instructions from Congress, there is a presumption against preemption in areas of traditional state police power, including employment; and (3) there is no showing of an actual or likely significant effect on prices, routes, or services, and so the California laws at issue are not preempted. *See also Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers,* 73 Fed.Reg. 79,204–01, 79,206 (Dec. 24, 2008) (determining, in an order issued by the Department of Transportation, that the agency lacked jurisdiction to preempt California's meal and rest break laws under another statute, 49 U.S.C. § 31141, because those state laws are

not "laws [or] regulations on commercial motor safety").

Although the Department of Transportation's interpretation of the FAAAA is not controlling, we find it persuasive in light of: (1) the agency's general expertise in the field of transportation and regulation, (2) the fact that the position taken in the brief represents the agency's reasoned consideration of the question, and (3) the fact that the government's position is generally consistent with its approach to other preemption questions concerning California's meal and rest break laws (although this is the first time that the government has taken a position on FAAAA preemption specifically). *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944) (holding that a non-controlling agency opinion may carry persuasive weight, depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); *see also Van Asdale v. Int'l Game Tech.*, 763 F.3d 1089, 1092 (9th Cir.2014) (applying *Skidmore* deference to the Department of Labor's view on the appropriate statutory interpretation of a damages provision in the Sarbanes–Oxley Act of 2002, as expressed in the agency's amicus brief).

For the reasons discussed above, we agree with the Department of Transportation. Although we would reach the same result in the absence of the agency's brief, the government's position provides additional support for our conclusion that the FAAAA does not preempt California's meal and rest break laws.

CONCLUSION

The FAAAA does not preempt California's meal and rest break laws as applied to Defendants, because those state laws are not "related to" Defendants' prices, routes, or services. The district court dismissed this action on summary judgment because of Defendants' preemption defense, so it has not yet considered the merits of Plaintiffs' claims. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

ZOUHARY, District Judge, concurring:

I write separately to emphasize several aspects of this case. As the Majority notes, Penske bears the burden of proof on its preemption defense. *See supra* at 649. But Penske did not offer specific evidence of (for example) the actual effects of the California law on Penske's own routes or services. Instead, Penske relied on a general hypothetical likelihood that a Penske delivery driver, with limited flexibility in traveling from point A to point B, is further restricted to certain routes that would allow a driver to park his or her truck and enter "off-duty" status.

Penske failed to carry its burden. I consequently express no opinion, for example, that the possibility a "driver [must] *briefly* pull on and off the road during the course of travel *does not meaningfully interfere* with a motor carrier's ability to select its starting points, destinations, and routes." *Id.* (emphases added). Maybe so. Maybe not.

Further, the Majority incorrectly posits that Defendants are at liberty to schedule as they choose, tempered only by hiring more drivers and staggering breaks. Customer demands and practicalities must

also be considered. As in air and train transportation, substitution crews may now be needed when hours of service are reached with some expense, delay, and impact on service. With respect to costs-of-labor, Penske did produce specific evidence, reflecting an estimated 3.4 percent increase in annual pricing to service a relevant account. Without more, that minimal increase in pricing is an insufficient basis for preempting the decades-old meal and rest break requirement. *Mendonca,* 152 F.3d at 1189 (finding California's prevailing wage requirement, which increased a motor-carrier defendant's prices by 25 percent, "in a certain sense ... 'related to' [the motor carrier-defendant's] prices, routes and services," but had an effect that was "no more than indirect, remote, and tenuous").

Finally, I note what this case is *not* about. This case is not an occasion for us to reexamine prior precedent—the discussion of *Rowe*, *Northwest, Inc.*, and *Gammie* makes that clear. Nor is this case about FAAAA preemption in the context of interstate trucking—though one gets the sense that various *amici* wish it were. On this record, and in the intrastate context, California's meal and rest break requirements are not preempted.

UNITED STATES DISTRICT COURT,
S.D. CALIFORNIA

Mickey Lee DILTS, Ray Rios, Donny Dushaj,
Plaintiffs,

v.

PENSKE LOGISTICS LLC; Penske Truck Leasing Co LP; et al., Defendants.

Case No. 08–CV–318 JLS (BLM).

Oct. 19, 2011.

819 F.Supp.2d 1109

ORDER:

(1) GRANTING PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE, (2) DENYING PLAINTIFF'S MOTION TO STRIKE, AND (3) GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

(ECF Nos. 108, 93, 87)

JANIS L. SAMMARTINO, District Judge.

Presently before the Court are Defendant's[1] motion for partial summary judgment and Plaintiffs' motion to strike several Declarations submitted by Defendant in support of its motion for summary judgment, as well as Plaintiff's request for judicial notice. Having considered the parties' arguments and the law, the Court **GRANTS** Plaintiff's request for judicial notice, **DENIES** Plaintiffs' motion to strike and evidentiary

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[1] Because Defendants Penske Logistics, LLC and Penske Truck Leasing Co. LP share a common factual and legal position, this order treats them as a single Defendant, "Penske."

objections **AS MOOT,** and **GRANTS** Defendant's motion for summary judgment.

BACKGROUND

This case arises out of Penske's alleged failure to provide lunch and rest breaks, pay overtime compensation, reimburse business expenses, and pay wages due to its employees. (*See* Class Cert. Order 1, ECF. No. 72.)[2] On April 26, 2010, the Court certified this case as a class action (ECF No. 72.) The class consists of "349 hourly appliance delivery drivers and installers in California who were assigned to its state-wide Whirlpool account." (Class Cert. Order 4.)

Defendant Penske operates "warehouse, distribution and inventory management services throughout the State of California," and hires hourly employees to engage in the "inventory, delivery, and installation of a multitude of vendor products." (Pl.'s Mem. ISO Mot. for Class Cert. 7, ECF No. 55.) Although it has since lost its contract with Whirlpool, during the time period in question Penske provided both transportation and warehouse management services to Whirlpool in California. (Def.'s Mem. ISO MSJ 8, ECF No. 87.) Under its contract with Whirlpool, Penske employees received customer orders and based on those orders "caused appliances to be manufactured outside California and then delivered by third-party motor carriers" to one of Whirlpool's two Regional Distribution Centers (RDCs) within California. (*Id.*) Penske warehouse employees

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[2] Where different, citations to the parties' filings in this order will refer to the page numbers assigned in electronic docketing, not to the documents' internal page numbering.

inventoried the appliances at the RDC warehouses and then loaded the appliances onto trucks for delivery to Local Distribution Centers (LDCs) or for delivery and installation to customers in California. (*Id.*) These trucks were driven either by Penske drivers/installers or by third-party motor carriers. (*Id.*) The driver/installers are accompanied by installers, who generally did not hold a commercial motor vehicle license but assisted in the unloading and installing of appliances at their destinations. (Pl.'s Mem. ISO Mot. for Class Cert. 9.) The Penske employees did not travel over state lines in the course of carrying out their duties, but remained within California at all times.

Because Penske "expected" the Plaintiffs to take their meal breaks, they utilized "a systematic policy of automatically deducting 30–minutes of work time [to account for those] daily meal periods." (Pl.'s Mem. ISO Mot. for Class Cert. 9; Def.'s Opp'n to Mot. for Class Cert. 2) "The deduction was taken without inquiry into whether the employee was actually provided with a timely 30–minute uninterrupted and duty-free meal period or not." (Pl.'s Mem. ISO Mot. for Class Cert. 9.) Further, "Company policy ... did not permit the driver/installers to leave their truck unattended, nor were the teams allowed to turn off their Nextel during breaks." (Pl.'s Memo. ISO Mot. for Class Cert. 8.)

The California meal and rest break (M & RB) laws involved in this motion are codified in Labor Code §§ 226.6 and 512. Section 226.6 states that employers shall not require employees to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission (IWC). Cal. Labor Code § 226.6. The applicable IWC order dictates, in

pertinent part, a 30 minute meal period for every work period of more than five hours, and second 30 minute meal period for every work period of more than ten hours. IWC Order 9–2001(11).[3] With regard to rest periods, the IWC order requires every employer to permit all employees to take rest periods at the rate of ten minutes per four hours worked, in the middle of the work period if possible. IWC Order 9–2001(12). Employers must provide one additional hour of pay for each day that the employer fails to provide the meal period or rest period. Cal. Labor Code § 226.6; IWC Order 9–2001(11–12).

Plaintiffs state five causes of action, alleging violations of several provisions of the California labor code as well as unfair business practices in violation of California Business and Professions Code Section 17200(UCL). All three lead Plaintiffs worked "out of Whirlpool's Ontario, California facility." (Def.'s Opp'n to Mot. for Class Cert. 4–6, ECF No. 36.) Both Lead Plaintiff Rios and Lead Plaintiff Dushaj were employed as "installers" or helpers while Lead Plaintiff Dilts worked as a "driver/installer." (Memo. ISO Mot. for Class Cert. 17.) Plaintiffs contend that Penske "used a uniform dispatch record that identified a delivery/installation schedule, but did not schedule meal periods for the proposed class." (*Id.* at 8.) Driver/installers were required to document their lunch period on "a pre-printed area on [the dispatch record] form." (*Id.*) Defendant "provided each driver/installer a Nextel device for communication with the dispatchers, supervisor and customers during the

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[3] These same requirements are codified with respect to meal periods in Section 512. Cal. Labor Code § 512.

day" but "did not require the driver/installer teams to use the Nextel to notify the company of meal or rest periods." (*Id.*)

Penske filed its present motion for partial summary judgment on May 11, 2011. (ECF No. 87.) Penske claims it is entitled to summary judgment on all of Plaintiffs' meal and rest break claims, Counts II, III, and Count V to the extent that it alleges a UCL claim derivative of Counts II and III, arguing that these claims are preempted by federal law. (Defs.' Mem. ISO MSJ 7.) Plaintiffs filed an opposition to Penske's motion on June 20, 2011, along with a motion to strike the declarations attached to Penske's motion. (Pl.'s Opp'n, ECF Nos. 92 & 93.) Penske filed a reply to Plaintiffs' opposition on July 7, 2011 (Def.s' Reply, ECF No. 99) and an opposition to Plaintiffs' motion to strike on September 12, 2011. (Def.s' Opp'n, ECF No. 104.) Plaintiffs filed a request for judicial notice on October 10, 2011 (ECF No. 108), and Penske responded on October 11, 2011 (ECF No. 109). The Court heard oral argument on October 13, 2011.

At issue in the instant motion for summary judgment is not whether Penske violated California's M & RB laws, but instead whether these M & RB laws are preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAA Act) as a matter of law.[4]

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[4] Penske also argues that the M & RB laws are impliedly preempted by the hours of service (HOS) regulations promulgated by the Federal Motor Carrier Safety Administration (FMCSA) of the U.S. Department of Transportation as applied to Penske's driving activities only. (Def.'s Mem. ISO MSJ 19.) Plaintiffs barely address this argument in their opposition. However,

LEGAL STANDARD

Federal Rule of Civil Procedure 56 permits a court to grant summary judgment where (1) the moving party demonstrates the absence of a genuine issue of material fact and (2) entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Material," for purposes of Rule 56, means that the fact, under governing substantive law, could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.1997). For a dispute to be "genuine," a reasonable jury must be able to return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

The initial burden of establishing the absence of a genuine issue of material fact falls on the moving party. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. The movant can carry his burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party "failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 322–23, 106 S.Ct. 2548. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987).

Once the moving party establishes the absence of genuine issues of material fact, the burden shifts to the nonmoving party to set forth facts showing that a

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because the Court finds statutory preemption exists based on the FAAA Act, the Court need not reach the merits of this argument.

genuine issue of disputed fact remains. *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. The nonmoving party cannot oppose a properly supported summary judgment motion by "rest[ing] on mere allegations or denials of his pleadings." *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505. When ruling on a summary judgment motion, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

ANALYSIS

1. Plaintiff's Request for Judicial Notice

Plaintiffs move the Court to take judicial notice of a determination by the FMCSA, 73 Fed.Reg. 79204–01 (Dec. 24, 2008), in which the agency rejected a petition for preemption of the M & RB laws because it did not have the authority under its authorization statute. (*See* Pl.'s Supp. RJN, ECF No. 108.) The Court finds that the documents are properly judicially noticed. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992) ("We may take judicial notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue." (internal quotation marks omitted)); *see also* Fed.R.Evid. 201. This agency determination is a matter of public record, and Penske does not dispute the authenticity of the document. (*See* Def.'s Opp'n to Pl.'s Supp. RJN, ECF No. 109.)

Accordingly, the Court **GRANTS** Defendant's request for judicial notice.[5]

2. Preemption Under the FAAA Act

Penske argues it is entitled to judgment as a matter of law as to Claims II, III, and V, because the California M & RB laws are expressly preempted by the FAAA Act. Plaintiffs respond that Penske's activities do not fall within the scope regulated by the

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[5] The petitioners before the FMCSA were represented by James H. Hanson, who also represented Penske at oral argument before this Court on October 13, 2011. The petitioners included the Defendants in this case, Penske Logistics, LLC, and Penske Truck Leasing Co., LP. In taking judicial notice, the Court points out the inconsistency between Penske's position before the administrative agency and the position taken in this action. Before the FMCSA, Penske argued that the agency had the power to order the California M & RB laws preempted. However, for the FMCSA to hear the petition, the state law or regulation must be "on commercial motor vehicle safety" under 49 U.S.C. § 31141. The agency found the M & RB laws are not regulations on commercial motor vehicle safety, and declined to exercise authority over the petition. In complete contradiction, Penske argues before this Court that the laws do *not* fall within the motor vehicle safety exception of the FAAA Act's preemption provision, as discussed below. Nevertheless, the Court finds judicial estoppel is not appropriate here, because the inconsistent positions were not taken in the same or related proceedings, and Penske was not successful in convincing the FMCSA of its position, nor did it derive benefit or unfair advantage from taking the position. (*See United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir.2008) (explaining the factors courts may consider in applying the equitable doctrine of judicial estoppel)). Further, Plaintiffs have not argued Penske should be judicially estopped in this regard. However, although neither binding nor subject to the Court's deference under *Chevron* because it is an agency's determination of a different statute than the one at issue here, the administrative determination is related to the instant action, and the Court finds it is properly judicially noticed.

FAAA Act. Next, they contend that even if the FAAA Act applies, it does not preempt California's M & RB laws because those laws do not regulate the same sphere as the FAAA Act, in that they impose no substantive standards on "price, route, or service" of motor carriers. Third, Plaintiffs reason that even if the laws fall within the same sphere as the FAAA Act, they come within the "safety exemption" of the Act. Finally, Plaintiffs state that the doctrines of judicial estoppel and judicial admission should operate to bar preemption in this case. The Court addresses each of these arguments in turn, and concludes that none of them is persuasive.

A. Penske's Activities Fall within the Scope Regulated by the FAAA Act

Plaintiffs argue that the application of the FAAA Act to Penske's activities in this case is a disputed material fact for two reasons: (1) the employees operated solely within California, and thus performed intrastate activity not covered by the Act; and (2) driving and delivery was purely incidental to the manual installation of appliances within California, and thus the employees are not "motor carriers" under the definition of the Act. (Pl.'s Opp'n 10.) However, this is incorrectly posed as a factual dispute. Both parties agree on the duties Plaintiffs performed within the scope of their employment. These duties included loading Whirlpool appliances from warehouses in California onto their trucks, transporting the appliances to other locations within California, and installing the appliances. The dispute is not over these facts, but instead over whether or not these activities fall within the scope regulated by the FAAA Act as a

matter of law. The Court concludes they do fall within the FAAA Act's scope.

The FAAA Act of 1994 regulates several different categories of transportation. Under Subtitle IV of Title 49, which regulates interstate transportation, Chapter 145 specifically addresses federal-state relations and federal authority over intrastate transportation. 49 U.S.C. § 14501. Subsection (c)(1) states as follows:

> Except as provided in paragraphs (2) and (3), a State ... 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 ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property. 49 U.S.C. § 14501(c)(1).

The task before this Court, then, is to determine (1) whether or not intrastate activity is covered by the act, and (2) whether Penske qualifies as a "motor carrier ... with respect to the transportation of property" in this case as a matter of law.

First, the FAAA Act states that it preempts state regulation in the arena of intrastate transportation. Penske properly points to the findings of Congress with regard to preemption of intrastate transportation of property by the FAAA Act: "Congress finds and declares that ... the regulation of intrastate transportation of property by the States has imposed an unreasonable burden on interstate commerce ... and certain aspects of the State regulatory process should be preempted." Pub.L. No. 103–305, § 601(a), 108 Stat. 1569, 1605 (1994). These findings, along with the text of the statute, make clear that Congress intended to preempt State regulation in the areas governed by the FAAA Act to avoid and unreasonable burden on

interstate commerce. Thus, Plaintiffs are incorrect that Penske's purely intrastate operations in this case exempts them from the FAAA Act's regulatory scope.

Second, the undisputed facts establish Penske's activities as those of a "motor carrier" under the definition of the FAAA Act. The definitions section of the act provides a very broad definition of the term which cannot be read to exclude Penske's activities. "The term 'motor carrier' means a person providing commercial motor vehicle ... transportation for compensation." 49 U.S.C. § 13102(14). Further, the term "transportation" includes "services related to that movement." 49 U.S.C. § 13102(23). Plaintiffs, as Penske drivers/installers, operated commercial motor vehicles which transported property and conducted services related to that movement. That they performed other services in addition to the transportation of property, such as installing appliances, is not enough to exempt them from regulation under the FAAA Act.

For these reasons, the Court concludes that Penske's operations at issue in this case are within the scope of the FAAA Act's regulation.

B. California's M & RB Laws Fall within the "Preemptive Scope" of the FAAA Act

Plaintiffs next argue that, even if the FAAA Act governs Penske's activities in this case, it does not preempt California's M & RB laws because those laws do not impose substantive standards "related to" the price, route or service of a motor carrier. (Pl.'s Opp'n 11.) However, the history of the FAAA Act and its preemption provision, as well as binding authority from case law, inform the Court otherwise.

Federal law may preempt state law under the supremacy clause either by express provision, by implication, or by a conflict between federal and state law. *N.Y. Conference of Blue Cross v. Travelers Ins.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (citations omitted). When addressing preemption claims, "the question whether a certain state action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 137–38, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). The Court will not assume lightly that Congress intended to supplant state law, but instead starts with the opposite presumption. *Id.* Indeed, "where federal law is said to bar state action in fields of traditional state regulation," it is assumed that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Blue Cross*, 514 U.S. at 655, 115 S.Ct. 1671 (citations omitted).

California's M & RB laws regulate an area of law traditionally regulated by the states, falling within states' "broad authority under their police powers to regulate the employment relationship...." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). Thus, the crux of the Court's task is to determine whether Congress exhibited a clear and manifest intent to preempt California's M & RB laws.

To determine Congressional intent, the Court first must consult the text of the FAAA Act, as well as its structure and purpose, mindful of the Supreme Court's admonition that preemption "is compelled whether Congress' command is explicitly stated in the statute's

language or implicitly contained in its structure and purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

(1) Interpreting Congressional Intent

The preemption language of the FAAA Act contained in Section 14501 does not, on its face, explicitly encompass state regulation of meal and rest breaks. Thus, the Court must next consider the legislative history of Section 14501 to determine if it was Congress's "clear and manifest purpose" that the California M & RB laws be preempted.

Congress regarded the preemption clause of the FAAA Act as a solution to several problems facing interstate commerce. *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir.1998). First, Congress stated that deregulation was necessary to eliminate non-uniform state regulation of motor carriers which had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtail[ed] the expansion of markets." H.R. Conf. Rep. No. 103–677, at 86–88 (1994), 1994 U.S.C.C.A.N. 1715, 1759–1760. Second, by enacting a preemption provision identical to that of the Airline Deregulation Act of 1978(ADA) which deregulated air carriers, Congress sought to "even the playing field" between air carriers and motor carriers. *Id.* at 85.

This imbalance between air and motor carriers arose after the 9th Circuit concluded that Federal Express fit within the ADA's definition of "air carrier," and held that California's intrastate economic regulations of the carrier's shipping activities were preempted. *Federal Express Corp. v. California Pub.*

Utils. Comm'n, 936 F.2d 1075 (9th Cir.1991). As a result, ground-based shippers were faced with more strict regulation than their air-based competitors. By preempting the states' authority to regulate motor carriers, Congress sought to balance the regulatory "inequity" produced by the ADA's preemption of the states' authority to regulate air carriers. *See* H.R. Conf. Rep. No. 103–677, at 87, 1994 U.S.C.C.A.N. 1715, 1759; *see also Mendonca*, 152 F.3d at 1187.

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), the Supreme Court held that state consumer protection laws were preempted by the ADA. In subsequent cases, the Supreme Court made clear that the same standard should be used in interpreting the identical language of the FAAA Act's preemption provision. *See Rowe v. New Hampshire*, 552 U.S. 364, 370, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008) ("when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006).)) Congress deliberately copied the preemption provision of the ADA into the FAAA Act, fully aware of the Court's interpretation of that language as set forth in *Morales*. *See* H.R. Conf. Rep. No. 103–677, at 83.

Thus, the Court turns to *Morales* and *Rowe*, which outline four principles guiding the Court's interpretation of FAAA Act preemption, for guidance.

> (1) [T]hat state enforcement actions having a connection with, or reference to carrier rates, routes,

> or services are pre-empted; (2) that such pre-emption may occur even if a state law's effect on rates, routes or services is only indirect; (3) that, in respect to pre-emption, it makes no difference whether a state law is consistent or inconsistent with federal regulation; and (4) that pre-emption occurs at least where state laws have a significant impact related to Congress' deregulatory and pre-emption-related objectives.

Rowe, 552 U.S. at 370–371, 128 S.Ct. 989; Morales, 504 U.S. at 384, 386–87, 390, 112 S.Ct. 2031 (internal citations omitted). Courts have found that Congress' "related to" language has a "broad scope," is "deliberately expansive," and "conspicuous for its breadth." *Morales*, 504 U.S. at 384, 112 S.Ct. 2031 (surveying other Supreme Court decisions in which the pre-emptive reach of the "related to" provision was discussed.) Federal law, however, might not preempt state laws that affect fares in "only a 'tenuous, remote, or peripheral ... manner,' such as state laws forbidding gambling." *Rowe*, 552 U.S. at 371, 128 S.Ct. 989 (quoting *Morales*, 504 U.S. at 390, 112 S.Ct. 2031.)

Although the scope of the preemption clauses of both the ADA and the FAAA Act has been hotly debated, it has never been fully resolved. *See, e.g., Am. Trucking Assoc., Inc. v. City of Los Angeles*, 660 F.3d 384 (9th Cir.2011). It is clear that the law at issue need not directly regulate motor carriers in order to be preempted; it is enough that the effect of the regulation would be that motor carriers would have to offer different services than what the market would otherwise dictate or "freeze into place services that carriers might prefer to discontinue in the future." *See Rowe*, 552 U.S. at 371–72, 128 S.Ct. 989 ("the effect of

the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate"). However, neither *Morales* nor *Rowe* indicate exactly where, or how, it would be appropriate to draw the line between a significant impact and a tenuous effect because neither of the state laws at issue in those cases presented a "borderline question." *Morales*, 504 U.S. at 390, 112 S.Ct. 2031; *Rowe*, 552 U.S. at 371, 375–76, 128 S.Ct. 989.

In a very recent decision, the Ninth Circuit examined a "borderline case" of federal preemption under the FAAA Act. *See Am. Trucking Assoc., Inc. v. City of Los Angeles*, 660 F.3d 384 (9th Cir.2011). *American Trucking* acknowledged that "[t]he waters are murkier ... when a State does not directly regulate (or even specifically reference) rates, routes, or services." *Id.* at 396. Recognizing that preemption by the FAAA Act may occur even when the effect on rates, routes, and services is only indirect, *American Trucking* sets out the proper inquiry in "borderline cases" where the effect on prices, routes, and services may be close to merely tenuous or remote: "the proper inquiry is whether the provision, directly or indirectly, 'binds the ... carrier to a particular price, route or service and thereby interferes with competitive market forces within the ... industry.'" *Id.* (citing *Air Transport Ass'n of Am. v. City & Cnty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir.2001)). *Air Transport* considered whether a city ordinance relating to equal protection of domestic partners had an effect on the routes of airlines, finding that the ordinance was not preempted because it "cannot be said to compel or bind the Airlines to a particular route or service," even

though it might require airlines to increase their rates or cease operating at San Francisco Airport. *Air Transport*, 266 F.3d at 1072–74. In spite of the ordinance, air carriers could still "make their own decisions about where to fly and how many resources to devote to each route and service." *Id.* at 1074.

Thus, *American Trucking* and *Air Transport* make clear that the Court's task here is to determine whether these laws, which do not directly target the motor carrier industry, "bind" Penske's prices, routes, or services and thereby "interfere with competitive market forces within the ... industry." Although it is a close question, the Court finds that they do.

(2) California's M & RB Laws Are "Related to" Prices, Routes, or Services

Penske argues these M & RB laws have a significant effect on the routes of a motor carrier. The fairly rigid meal and break requirements impact the types and lengths of routes that are feasible. "The five stops Plaintiffs insist Penske should have ensured at specified times in a 12–hour workday would thus have necessarily forced drivers to alter their routes daily while searching out an appropriate place to exit the highway, [and] locating stopping places that safely and lawfully accommodate their vehicles." (Def.'s Mem. ISO MSJ 31.) 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.

Additionally, the M & RB laws have a significant impact on Penske's services. The parties both agree

that "scheduling off-duty meal periods for drivers 'would require one or two less deliveries per day' per driver." (Def.'s Mot. ISO MSJ 31 (quoting Pl.'s Reply ISO Mot. for Class Cert. 14 n. 9, ECF No. 65.)) Penske states further that the mandated duty-free 10–minute rest periods every four hours (preferably in the middle of the four-hour period) and duty-free 30–minute meal breaks every five hours reduce driver flexibility, interfere with customer service, and, "by virtue of simple mathematics," reduce the amount of on-duty work time allowable to drivers and thus reduce the amount and level of service Penske can offer its customers without increasing its workforce and investment in equipment. (*Id.*) Plaintiffs do not contest these facts.

In *Charas v. Trans World Airlines, Inc.*, the en banc 9th Circuit considered the meaning of "services" in the context of the ADA's preemption clause to refer

> to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, "This airline provides service from Tucson to New York twice a day.")
>
> ...
>
> Congress used "service" in § 1305(a)(1) in the public utility sense—i.e., the provision of air transportation to and from various markets at various times.

160 F.3d 1259, 1265–66 (9th Cir.1998). In applying *Charas* to reject the ADA's preemption of state common law contract claims, the 9th Circuit recently explained that "a claim for breach of good faith and fair dealing does not relate to 'services' because it has nothing to do with schedules, origins, destinations,

cargo, or mail." *Ginsberg v. Northwest, Inc.*, 653 F.3d 1033, 1042 (9th Cir.2011).

Here, the length and timing of meal and rest breaks seems directly and significantly related to such things as the frequency and scheduling of transportation. Both parties agree that the M & RB laws impact the number of routes each driver/installer may go on each day, and Plaintiffs do not oppose Penske's argument that the laws impact the types of roads their drivers/installers may take and the amount of time it takes them to reach their destination from the warehouse. The connection to "schedules, origins, ... and destinations" is far from tenuous. While Penske has not shown that the M & RB laws would prevent them from serving certain markets, the laws bind Penske to a schedule and frequency of routes that ensures many off-duty breaks at specific times throughout the workday in such a way that would "interfere with competitive market forces within the ... industry."

Lastly, these ramifications of California's M & RB laws upon Penske's routes and services all contribute to create a significant impact upon prices. Penske produces facts regarding the cost of additional drivers, helpers, tractors, and trailers that would have been needed to ensure off-duty breaks under California's rules and maintain the same level of service. (Def.'s Mot. ISO at 33.) Plaintiffs do not dispute these facts, instead arguing that the M & RB laws, like some wage laws, do not have a close enough connection to impact prices or, in the alternative, that this evidence going to an "impact analysis" should be stricken, or, in the alternative, that the Court sustain objections to this evidence. (Pl.'s Opp'n 24, 25.)

As Penske admits, this is not an "increased cost of business" issue, and no factual analysis is required to decide this question of preemption. (Def.'s Reply ISO MSJ 14.) 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. Just as in *Rowe*, an emphasis on the additional imposition of costs upon carriers is "off the mark." *Rowe*, 552 U.S. at 373, 128 S.Ct. 989. 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." *Id.* Thus, the Court finds state regulation of details significantly impacting the routes or services of the carrier's transportation itself preempted by the FAAA Act.

Because the Kitt and Russell Declarations are not necessary to resolve the instant motion, the Court **DENIES** Plaintiffs' motion to strike and evidentiary objections **AS MOOT**. To the extent that these evidentiary issues are pertinent to subsequent motions or at trial, the Court can rule on those relevant issues at that time.

(3) Case Law Cited by Plaintiffs is Distinguishable or Not Persuasive

Plaintiffs point to cases in which various state laws were not preempted by federal law in opposition to application of federal preemption here. However, the Court is not persuaded by these cases.

Plaintiffs attempt to recast the M & RB laws as "simply the requirement to pay one hour of wages" (Pl.'s Opp'n 7) in order to analogize the instant case to several cases in which courts have found wage laws not preempted. However, this is a mischaracterization.[6] The M & RB laws require off-duty breaks for employees at certain times and of certain lengths. Thus, these are not simply wage laws which require employers to pay employees a certain wage and thus indirectly affect the prices of a service. These rules prescribe certain events (meal and rest breaks) that must occur over the course of the driver/installer's day, if Penske wishes to avoid paying a penalty. Although this penalty has been framed as a wage, the laws are distinct in formulation and impact.

Both *Dillingham* and *Mendonca* held that California wage statutes were not preempted by federal law. *California Div. of Labor Standards Enforcement v. Dillingham Const., Inc.*, 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) and *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir.1998), *cert. denied*

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[6] Plaintiffs repeatedly mischaracterize the M & RB laws as "wage laws" in arguing against preemption. In one such argument, Plaintiffs assert that preemption would create an "unnecessary conflict of law" with the Fair Labor Standards Act (FLSA) (Pl.'s Opp'n 21.) This argument presupposes the M & RB laws are "minimum wage laws." ("Under the FLSA, Congress *specifically allowed* states to enact more rigorous minimum legal protection for employee rights in wages and compensation." (*Id.*)) However, as discussed, the M & RB laws are not identical to minimum wage laws. Because Plaintiffs' argument is off base in painting the M & RB laws as "simply the requirement to pay one additional hour of wages," it is not persuasive, and the Court need not address other flaws in Plaintiffs's reasoning with regard to the FLSA.

at 526 U.S. 1060, 119 S.Ct. 1377, 143 L.Ed.2d 535 (1999). In *Dillingham*, the Court found that the connection was “too tenuous” between the California’s prevailing wage laws and the employee benefit plans of the Employee Retirement Income Security Act of 1974 (ERISA). 519 U.S. at 319, 117 S.Ct. 832. In so determining, the Court looked to “the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,” as well as to the “nature of the effect of the state law on ERISA plans.” *Id.* at 325, 117 S.Ct. 832. Not only are the objectives of ERISA distinct from those of the FAAA Act, but the California wage laws at issue in both *Dillingham* and *Mendonca* are not the same as the M & RB laws at issue here. As discussed above, the M & RB laws do not require the payment of a higher wage. Instead, they establish requirements which substantively impact a motor carrier’s routes and services.

The connection between the instant case and two other cases cited by Plaintiffs, *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Company, et al.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) is even more tenuous. In *Travelers*, the Supreme Court held state statutes exacting surcharges for hospital care did not relate to employee benefit plans and were not preempted by ERISA. 514 U.S. at 662, 115 S.Ct. 1671. In *Wolens*, the Supreme Court held the ADA preempted state consumer fraud laws, but not breach of contract claims. To the extent that either holding is relevant here, both are entirely consistent with the Court finding

preemption of the M & RB laws and UCL claims derivative thereof.

The other cases cited by Plaintiffs are neither binding nor persuasive. In *Fitz–Gerald v. Skywest Airlines, Inc.*, 155 Cal.App.4th 411, 65 Cal.Rptr.3d 913 (2007), the state appellate court held that the M & RB claims were preempted by the Railway Labor Act and then stated, in dicta, that the parties did not offer authority indicating that the ADA preempted the claims. Further, *Fitz–Gerald* held that the ADA did preempt the UCL claims, which were presumably based upon the MR & B claims. This reasoning, while difficult to decipher, in any event does not support the proposition Plaintiffs offer it for. In *People v. Pac Anchor Transportation, Inc.*, 195 Cal.App.4th 765, 125 Cal.Rptr.3d 709 (2011), the state appellate court held that the FAAA Act does not preempt California wage laws, which, as discussed above, are distinct from the M & RB laws at issue here.

Plaintiffs also attempt to undercut the reasoning of a 2008 order from Judge Sabraw in the Southern District of California finding that the ADA preempted claims brought under California's M & RB laws. *See Blackwell v. SkyWest Airlines, Inc.*, 2008 WL 5103195 (S.D.Cal.2008). Plaintiffs argue that "it is clear that the safety exemption was not considered, nor does it appear that the court engaged in a rigorous analysis of whether Congress intended such a sweeping result.... While *Blackwell* acknowledges *Rowe*, it neither cites nor distinguishes the case from *Mendonca*." (Pl.'s Opp'n 17.)

However, the reasons cited by Plaintiff against *Blackwell* do not persuade the Court to find the opposite result here. Judge Sabraw's opinion in

Blackwell focuses on the "robust and uncontroverted" evidence that high labor costs had led Skywest to discontinue services on routes to 16 stations across 11 states, that compliance would likely cause smaller communities to lose access to air transportation, that it would cost over $3,250,000 in additional annual labor costs if Skywest complied with California law, and that to retain profitability Skywest would have to pass labor costs onto the consumer. 2008 WL 5103195 at *18–19. While the Court does not agree that this type of factual analysis of the economic impact on Penske of higher labor costs imposed by compliance with the M & RB laws is necessary or entirely persuasive, Plaintiff's arguments against the decision in *Blackwell* miss the mark. (*See* Pl.'s Opp'n 17.)

First, as the Court will discuss below, the safety exception does not apply to the M & RB laws. Second, Congressional intent to deregulate the motor carrier industry in order to eliminate a patchwork of state laws and to level the playing field between ground and air shipping is clear. Third, the instant case is distinguishable from *Mendonca*, which concerned the preemption of California wage statutes, and found there was only a tenuous connection to the routes, prices, and services of motor carriers. 152 F.3d at 1189.

At oral argument, Plaintiffs contended that by finding the M & RB laws preempted, the Court would embark down a slippery slope that would drag in nearly every state labor law as applied to motor carriers. To the contrary, the Court believes that few labor laws of general applicability would "relate to" the prices, routes, or services of a motor carrier under the standard set forth in *American Trucking* and applied here. It is important to distinguish the M & RB laws

from wage laws for the very reason that this distinction helps mark the guardrail at the top of the slope. A wage law, which essentially increases the price of labor, impacts a motor carrier's prices, routes, or services in a tenuous way. *See Mendonca*, 152 F.3d at 1189. If the cost of labor goes up, then prices, routes, and services are more expensive. In the instant case, however, the impact is not derived from the increased cost of labor and is not tenuous. Rather, the impact is derived from the imposition of substantive restrictions upon the breaks taken by motor carrier drivers and drivers' helpers, which binds the motor carriers to a set of routes, services, schedules, origins, and destinations that it otherwise would not be bound to—thereby interfering with the competitive market forces in the industry. It is this kind of interference Congress sought to avoid with the preemption clause that specifically prohibits state regulation related to prices, routes, and services.

The Court is confident that this decision does not force future courts down a slippery slope. The M & RB laws at issue here are significantly more connected to the routes and services of a motor carrier than laws that merely impact the cost of labor. The laws restrict Penske's routes and services in a way that is binding. As such, the Court finds these laws are "related to" the motor carrier's prices, routes, or services, and thus preempted by the FAAA Act.

C. No Exception to the FAAA Act Applies

Plaintiffs argue that even if the M & RB laws fall within the same sphere as the FAAA Act and would otherwise be preempted by it, they come within the safety exception of the Act. However, the kinds of general public health concerns that are (or may be)

involved in the California M & RB laws are not within the scope of the motor vehicle safety exception. *See Rowe*, 552 U.S. at 374, 128 S.Ct. 989.

Section 14501(c)(2)(A) lists several matters that are not covered by the preemptive scope of the FAAA Act. It states that the preemption clause does not:

> restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C § 14501(c)(2)(A). As the Supreme Court has explained, these exceptions contain no reference to public health, instead specifically pointing to motor vehicle safety. *Rowe*, 552 U.S. at 374, 128 S.Ct. 989. "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." *Am. Trucking Assoc. v. City of Los Angeles*, 559 F.3d 1046, 1054 (9th Cir.2009).

While Congress has not established a bright line rule for determining what qualifies as a motor vehicle safety regulation, some courts' rulings can give the Court guidance on this issue. *Id.* For example, regulation of tow truck services has been found to be within the safety exception because those regulations were "designed to make the towing and removal of vehicles safer." *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir.2000), *abrogated on other grounds by City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536

U.S. 424, 431–32, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). However, the Supreme Court has held that a Maine law which regulated cigarette delivery had a direct effect on prices and services and was not a regulation of safety. *Rowe*, 552 U.S. at 334, 128 S.Ct. 999.

The M & RB laws fall somewhere between these two examples. Plaintiffs correctly point out that these labor laws are general in nature but that they have a direct connection to worker health and safety. (Pl.'s Opp'n 22.) Plaintiffs cite a California court's determination that "[e]mployees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor." *Murphy v. Kenneth Cole Prod., Inc.*, 40 Cal.4th 1094, 56 Cal.Rptr.3d 880, 155 P.3d 284 (2007). When applied to workers in the motor carrier industry, this could combine to create the impression that the laws regulate motor vehicle safety. The safety of employees working long hours without breaks is an issue of unquestionable importance to employees operating dangerous motor vehicles. However, although the public health concerns addressed by the M & RB laws are certainly serious, they are not directly connected to motor vehicle safety. If the Court were to hold them directly connected, then any law impacting the health and safety of an employee would fall within the motor vehicle safety exception simply because the employee is the driver of a potentially dangerous motor vehicle. Indeed, "[i]t is not enough to say that the provision might enhance efficiency, or reduce some kind of negative health effects. The narrow question ... is whether the provision is intended to be, and is,

genuinely responsive to motor vehicle safety." *American Trucking*, 559 F.3d at 1054. Plaintiffs have not provided any evidence that the M & RB laws were intended to be responsive to motor vehicle safety, rather than to general public health concerns. Such a broadly sweeping exception as Plaintiffs suggest cannot be reconciled with the text and purpose of the FAAA Act, and with Congressional intent.[7]

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[7] Oddly, evidence proffered by Plaintiffs belies applying the safety exception here. As stated above, the Court granted Plaintiffs' request for judicial notice of the FMCSA's determination that it did not have authority to hear a petition for preemption of the Cali-fornia M & RB laws by the hours of service requirements promulgated by the FMCSA. 73 Fed.Reg. 79204–01 (Dec. 24, 2008). However, the Court is puzzled by this request. The agency's determination that it did not have the authority to hear the petition rested entirely upon its conclusion that the petition did not satisfy the threshold requirement under 49 U.S.C. § 31141(c) because the provisions are not "laws and regulations on commercial motor vehicle safety," but rather laws applied generally to California employers. Plaintiffs clarified at oral argument that they offered the agency's de-termination in support of their argument that the M & RB laws are laws of general applicability that are not intended to be a subterfuge to impact routes and services of a motor carrier. While the Court does not find it should give the FMCSA's interpretation of the scope of its power under 49 U.S.C. § 31141 *Chevron* deference in the Court's analysis of the scope of a different statute (the FAAA Act), the Court notes the inconsistency inherent in Plaintiffs' arguments. Whether the laws are "related to" prices, routes, or services is a different question from whether they are "laws on commercial motor vehicle safety." In addition, Plaintiffs appear to have overlooked the implications of the FMCSA's determination upon its own argument that the safety exception should apply to bar preemption by the FAAA Act. Thus, Plaintiff's use of the agency's determination misses the mark in terms of impacting the Court's preemption analysis, and it also directly contradicts

Accordingly, the Court finds the motor vehicle safety exception to the FAAA Act's preemptive scope does not apply here.

D. Doctrine of Judicial Estoppel Does Not Operate to Bar Preemption

Finally, Plaintiffs assert that Penske is barred from arguing the M & RB laws are preempted because they violated the laws by garnering wages without providing the requisite breaks, and without paying the statutory penalty. (Pl.'s Opp'n 27–28.) Because they violated the laws, they never felt the impact as a result of compliance with the laws. This inconsistency, they argue, should end the Court's inquiry here because it is barred by judicial estoppel.

The Court finds judicial estoppel does not apply. "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir.2001). In determining whether to invoke judicial estoppel, courts consider three factors: "(1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position, and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'" *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir.2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750–51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).

Plaintiff's argument regarding the application of the safety exception.

None of these three factors is met here. First, and most importantly, a party is certainly permitted to argue both that it has not broken a law and, in the alternative, that the law does not apply to it because the laws is preempted. These two positions are not inconsistent. Second, Penske has not persuaded the Court of its "earlier position" that it fully complied with all meal and rest period obligations, as the Court has not reached the merits of those claims in this case. Nor did the Court rely upon the evidence Penske provided regarding the impact on prices of compliance in ruling on this motion. Third, Penske derives no unfair advantage, and Plaintiffs sustain no unfair detriment, as a result of Penske being allowed to advance their preemption argument, as Penske has not been allowed to "change positions according to the exigencies of the moment," but has advanced two alternative arguments in its own defense.

CONCLUSION

For the reasons stated, the Court finds the claims derived from California's meal and rest break laws preempted by federal law. Accordingly, the Court GRANTS Defendant's motion for partial summary judgment, and DENIES Plaintiffs' motions to strike and evidentiary objections.

IT IS SO ORDERED.

FILED
Sep 30 2014
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICKEY LEE DILTS; RAY RIOS; and DONNY DUSHAJ, on behalf of themselves and all others similarly situated, Plaintiffs - Appellants, v. PENSKE LOGISTICS, LLC; and PENSKE TRUCK LEASING CO., L.P., a Delaware corporation, Defendants - Appellees.	No. 12-55705 D.C. No. 3:08-cv-00318-CAB-BLM ORDER

Before: KOZINSKI, Chief Judge, GRABER, Circuit Judge, and ZOUHARY,* District Judge.

Appellees' motion for stay of the mandate is GRANTED. Fed. R. App. P. 41(d). The mandate is ordered stayed for ninety days from the filing date of this order pending the filing of a petition for writ of certiorari in the United States Supreme Court. In the

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation

event that the petition for writ of certiorari is timely filed, the stay shall continue until final disposition by the Supreme Court.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICKEY LEE DILTS, RAY RIOS, and DONNY DUSHAJ, on behalf of themselves and all others similarly situated, Plaintiffs, vs. PENSKE LOGISTICS, LLC, PENSKE TRUCK LEASING CO., L.P., a Delaware corporation, and DOES 1 through 125, inclusive, Defendants.	)	Case No. **08 CV 0318 JLS/BLM** **DECLARATION OF EDWARD J. KITT IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Edward J. Kitt, being first duly sworn upon his oath, declares the following:

1. I am employed by Defendant, Penske Logistics, LLC ("Penske"), as Vice President of the South Central Area, and my business address is 3900 N. Mannheim Road, Franklin Park, Illinois 60131. I submit this Declaration in support of Penske's Motion for Partial Summary Judgment. Unless otherwise indicated, the following facts are based upon my

personal knowledge, and, if called as a witness in this proceeding, I would be competent to testify to same.

2. I have been employed by Penske since 2005 and have worked in various roles for Penske, including General Manager, Vice President of Global Warehousing, and Senior Vice President of Operations. Unless otherwise noted, the information provided is based on the time period between October of 2005 and the date of this Declaration.

3. Penske is one of the nation's leading providers of logistical and supply chain management services to the shipping public, which includes providing the for-hire transportation of freight by commercial motor vehicle pursuant to authority granted by the Federal Motor Carrier Safety Administration ("FMCSA"). In fact, Penske is a global provider of logistics, transportation, and distribution services, operating more than 400 locations and a 4,000-vehicle fleet serving customers throughout North America, South America, Europe, and Asia. Within the continental United States, Penske operates a fleet of approximately 2,500 vehicles and provides for-hire transportation services on an interstate basis from Penske facilities, as well as customer-owned warehouse and distribution facilities, located in almost all of the 48 contiguous states.

4. Until it lost the last of its transportation business under the California contract with Whirlpool to other motor carriers, Penske provided both transportation services and warehouse management services to Whirlpool in California. The operations were conducted out of Whirlpool's two Regional Distribution Center warehouses ("RDCs") in Stockton and Perris (formerly Ontario), California, and their associated Local Distribution Centers ("LDCs") plus

five additional LDCs located in Fresno, Oxnard, San Diego, Windsor, and Hayward, California.

5. At the RDCs, Penske provided both warehouse management and transportation services. Whirlpool, based upon customer orders and sales forecasts, caused appliances to be manufactured outside California and then delivered by third-party motor carriers to the RDCs for distribution to customers at a variety of locations – including retailers, single-family homes, new construction sites, and apartment/condominium complexes – throughout California. Penske warehouse employees inventoried the appliances at the RDC warehouses and then loaded the appliances onto straight trucks or tractor-trailer combinations for delivery by Penske drivers and installers (or third-party motor carriers) or for delivery to an LDC (both Penske and non-Penske operated) for redistribution and ultimate delivery. The appliances were sent out for delivery to Whirlpool's customers in California within as little as 24 hours or, as an overall average, within 45 days of arriving at the RDCs from out of state.

6. Whirlpool's LDC locations, on the other hand, did not have any warehouse facilities. At the LDCs, Whirlpool's appliances were brought in from the RDCs and redistributed for delivery to California customers by Penske drivers and installers using Penske-owned trucks or by third-party motor carriers.

7. In October of 2007, Whirlpool put its contract out to bid, and, as a result of competitive pricing in the marketplace, Penske lost 63% of the Whirlpool transportation business (that relating to the former Ontario facility) in February of 2008. Later, Penske lost the rest of the Whirlpool transportation business too, and, as of June 1, 2009, Penske continues to employ

and manage warehouse employees and clerical staff associated with Whirlpool's RDC operations, but Penske no longer employs any drivers for Whirlpool in California and no installers in California at all.

8. Nationwide, Penske employs over 2,000 truck drivers who reside in virtually every state and provide interstate driving services throughout the country. As such, Penske and its drivers are required to comply with what are known as the hours of service ("HOS") Regulations promulgated and enforced by the FMCSA, which include an obligation for drivers to record their HOS (i.e., work) each day on Driver's Daily Logs regardless of whether they actually perform any on-duty work in a particular day. The work is recorded because the HOS Regulations establish the maximum number of hours drivers may work in a day and in a week, including time spent operating commercial motor vehicles as well as all time spent performing other on-duty, non-driving work carried out on the motor carrier's behalf. On-duty work performed while not driving includes, but is not limited to, time spent at a facility or terminal waiting to be loaded, unloaded, or dispatched; pre-trip and post-trip inspections of commercial motor vehicles; fueling, servicing, or conditioning of a commercial motor vehicle; loading or unloading, or assisting in or preparing for the loading or unloading of the vehicle; completing paperwork and attending at company meetings; time spent complying with drug testing obligations; all non-driving time spent in or upon a commercial motor vehicle except time spent resting in a sleeper berth; and any other work performed on the motor carrier's behalf.

9. The HOS Regulations do not require that drivers take a meal or rest break during their on-duty shift. Instead, the HOS Regulations afford drivers

essentially unfettered discretion as to when to drive and when to take breaks as business and circumstances require – subject to the following limitations imposed upon drivers who (like those who served Penske's California Whirlpool account) operate within a 100-mile radius of a normal work-reporting location to which they return each day:

- The driver may not drive after the 12th consecutive hour of coming on duty – a limitation that is not extended by any off-duty breaks taken within that time period – and must then take 10 consecutive hours off duty.
- Within the 12 consecutive hours on duty, the driver may spend only 11 hours actually driving.
- The driver may not drive beyond his 60th hour on duty over the course of a 7-day period or beyond his 70th hour on duty over the course of an 8-day period.

In other locations around the country some Penske drivers do not operate within a 100-mile radius of a normal work-reporting location, in which case the HOS Regulations apply in the same fashion except that the work day is limited to 14 hours instead of 12.

10. Within such parameters, absent application of any state laws or regulations dictating when breaks must be taken, Penske and its drivers are afforded maximum flexibility in structuring and scheduling their activities. By way of example only, under the HOS Regulations,

- A driver can plan on a rest or meal break during a fuel stop at a familiar facility with favorable prices ten minutes down the road

whether he has been on duty for 3, 4, or 5 hours or five minutes more.

- Penske can confidently schedule a delivery window with its customer for 4 to 6 hours into the driver's work day knowing he has the flexibility to stop for meal and rest breaks along the way or, if traffic or weather conditions threaten on-time delivery, can postpone a break temporarily and take it later at the receiver's facility.
- If delayed by dock congestion when making a delivery, the driver can use the time waiting to unload at a receiver's facility to fix a meal or take a rest break in his vehicle so that, when he is finished unloading, he can continue to the next stop on the schedule without needing a break.
- After the last delivery at the end of a work day, the driver – at his option – may stop for a meal break at a location of his choice at a time of his choosing or use the time to navigate an unexpected traffic jam or detour and still make it back to his work-reporting location within the 12-hour work day permitted by the HOS Regulations.

11. As I understand the California meal and rest break rules Plaintiffs seek to impose upon Penske, those rules would not only require two 30-minute meal breaks and three 10-minute rest breaks for a total break time of 1 hour and 30 minutes during the course of a 12-hour work day, but also dictate *when* the meal and rest breaks must be taken by the driver. As a result, application of the California meal and rest break rules would deny Penske and their drivers the type of

flexibility and efficiencies reviewed in the paragraph above.

12. Moreover, regardless of a rigid "time clock," drivers of straight trucks and tractor-trailers cannot simply stop and take an off-duty break at a pre-appointed time wherever they might be. Instead, in deciding where and when to take a break, drivers of heavy tractor-trailers must take into account a wide variety of safety-related considerations including their own physical well-being and that of other drivers on the road; weather conditions existing at the time; traffic and roadway conditions; the nature of the commodities being hauled; the size and weight of the load; and all manner of motor vehicle safety laws applicable to the areas in which they are traveling. By way of example, attached as *Exhibit 1* is a fact sheet printed from the California Environmental Protection Agency Air Resources Board website (www.arb.ca.gov/msprog/truck-idling/factsheet.pdf) identifying a California regulation that prohibits idling of trucks for more than five minutes at a time, with fines ranging from $300 to $1,000 per day.

13. In addition, finding a safe and legal space to park a straight truck or tractor-trailer combination has become an increasingly difficult challenge for commercial motor vehicle drivers. Most states, including California, do not simply permit truck drivers to pull their trucks over to the side of the highway/freeway (or on an exit or entrance ramp) to take a break, and the shortage of commercial vehicle parking facilities in various parts of the country is well known. In fact, in a 2007 report to the Transportation Research Board Annual Meeting, a copy of which is attached here to as *Exhibit 2*, researchers identified California as being first in the nation in the shortage of

overall private and public commercial vehicle parking, indicating that demand exceeded capacity at all public rest areas and at 88% of private truck stops on the 34 corridors in California bearing the highest volumes of truck travel. Also, due to the current economic downturn, several states including California are closing rest areas due to lack of funding. For these reasons and those noted in the paragraph above, the meal and rest breaks required by the California rules, in practical application, will inevitably force a driver to alter his or her normal routes.

14. Also in practical application, the California rules will divert the driver from his or her work for periods of time much longer than that contemplated by the rules. In order to be fully relieved of duty during the break, a driver operating a vehicle at the appointed time would be required to find an appropriate place at which to exit the highway, locate a stopping place that safely and lawfully accommodates his or her vehicle, park and shut down the equipment – all before the break could even begin – and then repeat the reverse process over again when the break is completed. Each of the five required breaks, therefore, will take significantly more time than the 30-minute meal period and 10-minute rest break contemplated by California's rules. In fact, the time needed to *prepare for and return from* the required break might even exceed the time spent on the break itself.

15. Requiring drivers to make as many as five stops at the times and places dictated by the California meal and rest break rules would also significantly affect Penske's business in at least the following ways described below.

16. First, because the fuel efficiency of a commercial motor vehicle is reduced during the starting and

stopping of the vehicle, the more stops the vehicle makes, the more fuel it will burn. Fuel costs would therefore increase due to the increased number of stops and also due to the additional mileage incurred while the driver is diverted from his route.

17. Second, equipment maintenance costs would increase because start-and-stop driving causes more wear and tear on the vehicle's starters.

18. Third, labor costs for support personnel would increase due to the need to hire additional workers if, as Plaintiffs contend, Penske was obligated to monitor and ensure that each driver took each of his required breaks at the appointed times each day.

19. Fourth, requiring additional duty-free time of at least 1 hour and 30 minutes during the course of a 12-hour work day would unquestionably reduce the amount of productive work time allowable to drivers under the HOS Regulations and, in turn, reduce the amount and level of service Penske could offer its customers without increasing its workforce and equipment. Many customers (just as Whirlpool did) impose established appointment times during which drivers must arrive at their facility, and if Penske misses a delivery window it can be charged a late-arrival penalty. Moreover, as a logistics and supply chain manager, Penske not only performs truck transportation, but also integrates its customers' supply chain technologies, synchronizes their inbound and outbound traffic flows, coordinates with their suppliers, and models and manages their distribution networks so that the transportation service provided is conducted in an efficient, timely, and volume-sufficient basis designed to meet the customers' needs. The reduction in on-duty driver time required by the California rules would undoubtedly require an increase

in workforce and equipment to maintain this level of timely, coordinated, and efficient service.

20. Application of the California meal and rest break rules would thus in almost every circumstance put Penske in a "catch-22" predicament and would, in my experience, likely cause Penske to lose business and result in a reduction in its service. On the one hand, Penske could incur the costs necessary to increase workforce and equipment so as to maintain its same level of service and raise its rates accordingly, but trucking and third-party logistics services are a very competitive business in this day and age, and in light of the current downturn in the economy in particular, customers are simply unwilling or unable to pay higher transportation rates. On the other hand, to avoid operating at a loss, Penske could reduce the level of service it provides and/or limit the routes it services, but that too would likely result in an increase to rates for other service due to the loss of business volume, which in turn would likely result in a loss of business and a further reduction in service, thus creating a spiraling adverse effect upon the prices, services, and routing Penske can offer.

21. Of course, that same impact on prices, routes, and service would be multiplied if any other state sought to enforce meal or rest break laws similar to California's against Penske in other parts of the country. Furthermore, if those other states' laws imposed *different* break requirements, merely determining *which* state's law would apply to any particular interstate driver at any particular time while simultaneously juggling customer scheduling demands and compliance with the HOS Regulations would be so fraught with uncertainty and logistical complications as

to alter Penske's routes and services further and unquestionably increase costs and pricing as well.

I affirm under penalties of perjury of the applicable federal and state laws that the foregoing representations are true and correct.

Dated May 9, 2011

Respectfully submitted,

s/ Edward J. Kitt

Edward J. Kitt

[Exhibits to Declaration of Edward J. Kitt omitted.]

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICKEY LEE DILTS, RAY RIOS, and DONNY DUSHAJ, on behalf of themselves and all others similarly situated, Plaintiffs, vs. PENSKE LOGISTICS, LLC, PENSKE TRUCK LEASING CO., L.P., a Delaware corporation, and DOES 1 through 125, inclusive, Defendants.	)	Case No. **08 CV 0318 JLS/BLM** **DECLARATION OF RAY RUSSELL IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

I, Ray Russell, being first duly sworn upon his oath, declares the following:

1. I am employed by Defendant, Penske Logistics, LLC ("Penske"), as Area Vice President for the Great Lakes Division. I submit this Declaration in support of Penske's Motion for Partial Summary Judgment. Unless otherwise indicated, the following facts are based upon my personal knowledge, and, if called as a witness in this proceeding, I would be competent to testify to same.

2. I have been employed by Penske for 36 years. In my position, one of my regular responsibilities is to supervise and direct the "engineering" of the labor (drivers and helpers) and equipment (straight trucks and tractor-trailers) necessary to serve Penske customer requirements, the assessment of the costs associated with those necessary resources, and the determination of the most competitive pricing Penske can offer the customer based upon the costs so assessed plus an acceptable profit margin. With respect to the tasks performed specifically for purposes of this declaration, I am fully familiar with the services, costs, and pricing associated with Penske's former provision of both transportation services and warehouse management services to Whirlpool in California for the time period beginning January 16, 2004 and ending May 31, 2009. That familiarity was gained during my position as Senior Vice President for the Benton Harbor Region from 2004-2010, during which time I was closely associated with the Whirlpool account on Penske's behalf.

3. During the time Penske served the Whirlpool account in California, I was involved in Penske's pricing proposals when Whirlpool put the account up for bid several times. The Whirlpool account is a good example in this regard of just how competitive trucking and third-party logistics services have become in recent years and the resulting downward impact upon pricing and profit margins because, the last time the Whirlpool account was put up for bid, Penske lost the transportation component of its California contract with Whirlpool to another motor carrier.

4. In preparing this declaration, I was asked to assess the impact on Penske's resources, costs, and

pricing if the California meal and rest break rules had been applied to Penske and its drivers and helpers while providing services to Whirlpool out of its Ontario, California facility in order to ensure the drivers and helpers took the required meal and rest breaks. The first step in any such assessment is to "engineer" the labor and equipment needed to meet the customer's requirements for the transportation of freight by commercial motor vehicle and the provision of related logistical and supply chain management services. This requires an assessment of the volume and type of freight to be hauled, distances to be traveled, all of the customer's special requirements and accessorial services needed, and Penske's necessary compliance with the hours of service ("HOS") regulations of the Federal Motor Carrier Safety Administration of the U.S. Department of Transportation and then determining in a customized fashion what labor and equipment must be offered to meet the customer's needs.

5. In performing the analysis requested for this declaration, Penske personnel working under my direction engineered the labor and equipment that would have been needed to meet Whirlpool's requirements out of the Ontario facility if drivers had been required to take an duty-free 30-minute meal break for every 5 hours of work and an duty-free 10-minute rest break for every 4 hours of work or a major fraction thereof during the course of a 12-hour work day. We also conservatively estimated that 5 minutes would be needed to prepare for each break and an additional 5 minutes would be needed to return from each break even though more time for such activity would likely be required in most circumstances.

6. In performing our engineering analysis, we utilized actual transportation and installation services performed for the Whirlpool Ontario facility during the week of July 25-30, 2005. Evaluating Whirlpool's requirements for that facility, the July 25-30, 2005 timeframe was a typical work week representative of the entire time period during which it was served by Penske. Specific Whirlpool requirements taken into account included not just the amount of freight hauled and the number of transportation movements required, but also all additional Whirlpool requirements such as, for example,

- Whirlpool's imposition of scheduled appointment times for delivery and installation of appliances at residences and the driver's associated need for the assistance of a helper;
- The obligation to schedule deliveries at new construction sites by no later than 3:30 p.m. because the construction site supervisors (who are not employees of Penske) would no longer be onsite after that time to take delivery;
- Delivery windows established by retailers;
- Required time for unloading and waiting time associated therewith; and
- The Whirlpool-imposed obligation to make deliveries on the promised date and not to hold them over to the next day due to equipment shortages.

Taking all such relevant customer requirements into account, when the California meal and rest break requirements were factored in, we discovered during our analysis that the existing driver and helper

workforce employed by Penske during the time period examined could not perform all of the services required – primarily because they would have been compelled to violate the HOS regulations promulgated and enforced by the Federal Motor Carrier Safety Administration.

7. A report summarizing our engineering analysis is attached as *Exhibit 1*. As shown therein, in order to have performed the same services provided to the Whirlpool Ontario facility during the week of July 25-30, 2005 while ensuring drivers and helpers were provided with the duty-free meal and rest breaks required by California's rules, Penske would have been required to add five drivers and two helpers to its workforce. Also, the addition of five tractors and three trailers to Penske's existing fleet would have been required.

8. In my opinion, these are only the minimum number of additions to workforce and equipment that would have been necessary to ensure compliance with the California rules because (a) a change in the "mix" of residential versus business deliveries in any given week would have required a greater number of appliance installations and thus the hiring of up to three additional temporary helpers; (b) as noted above, we did not allow for a more realistic amount of time drivers would need to prepare for and return from required breaks by traveling to and from safe and legal spaces to park their tractor-trailer combinations; and (c) we also did not account for the hiring of additional personnel who would have been needed if, as Plaintiffs contend, Penske had been required to monitor and ensure that each driver and helper took each of his or her required breaks at the appointed times each day.

9. A summary of the cost determination resulting from the engineering analysis is attached hereto as *Exhibit 2*. This too was prepared under my direction, generally employing cost information from the year 2007, which is the median point in time during which Penske served the Whirlpool account between January 16, 2004 and May 31, 2009. As shown by the summary, we determined that the additional five drivers, two helpers, five tractors, and three trailers identified by the engineering analysis would have increased Penske's costs, annualized, by at least $437,495.

10. This is unquestionably a conservative figure because the cost analysis does not account for increased mileage and related fuel expense associated with drivers' traveling to and from locations at which tractor-trailer combinations could be safely and legally parked for purposes of taking the duty-free breaks required by the California rules. The cost analysis also does not account for the following additional expense items associated with application of the California meal and rest break rules:

- Decreased fuel efficiency due to more frequent starting and stopping of the vehicles and the resulting increase in fuel costs;
- Increased equipment maintenance costs due to wear and tear on the vehicles' starters resulting from start-and-stop driving; and
- Increased labor costs for the additional helpers and support personnel identified in paragraph 7 above.

11. Based upon the conservative additional cost figure of $437,495 alone, and allowing for the management fee covering the overhead and profit

margin associated with the Whirlpool account, Penske would have been required to increase its annual pricing to Whirlpool for service to the Ontario facility by 3.4%.

I affirm under penalties of perjury of the applicable state and federal laws that the foregoing representations are true.

Dated 5/9/2011

Respectfully submitted,

s/ Ray Russell
Ray Russell

[Exhibits to Declaration of Ray Russell omitted.]

49 U.S.C. App. § 1302 (1988)

§ 1302. Consideration of matters in public interest by Board

(a) Factors for interstate, overseas, and foreign air transportation

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

* * *

(4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital, taking account, nevertheless, of material differences, if any, which may exist between interstate and overseas air transportation, on the one hand, and foreign air transportation, on the other.

* * *

49 U.S.C. App. § 1305 (1988)

§ 1305. Federal preemption

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

* * *

49 U.S.C. § 14501

§ 14501. Federal authority over intrastate transportation

* * *

(c) MOTOR CARRIERS OF PROPERTY.—

(1) GENERAL RULE.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more 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 (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) MATTERS NOT COVERED.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

* * *

Cal. Lab. Code § 226.7

226.7. (a) As used in this section, "recovery period" means a cooldown period afforded an employee to prevent heat illness.

(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

(c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

(d) This section shall not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Commission.

Cal. Lab. Code § 512

512. (a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

* * *

Cal. Code Regs. tit. 8, § 11090(12)(A)

§ 11090. Order Regulating Wages, Hours, and Working Conditions in the Transportation Industry.

* * *

12. Rest Periods

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

* * *