No. 13-55507

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

JAMES COLE,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

CRST VAN EXPEDITED, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
For the Central District of California
Case No. 5:08-cv-01570-VAP-OP

APPELLEE'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellee, CRST Van Expedited, Inc., pursuant to Fed. R. App. P. 26.1(a), submits the following statement of its corporate interests and affiliations as follows:

1. CRST Van Expedited, Inc. is a wholly owned subsidiary of CRST International, Inc., which is a privately held corporation.

2. No publicly held corporation owns stock in CRST Van Expedited, Inc. or CRST International, Inc.

Respectfully submitted,

/s/ James H. Hanson
James H. Hanson

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I. INTRODUCTION

The Federal Aviation Administration Authorization Act of 1994 (the "FAAAA"), 49 U.S.C. § 14501(c), preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." The U.S. Supreme court recently affirmed that the FAAAA preempts state laws that "relate to a price, route or service," even if they do so indirectly. *Dan's City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769, 1778 (2013). California's meal and rest break laws require employers to provide employees five separate breaks at specified intervals during a twelve-hour period. The district court correctly determined that these laws are preempted as applied to motor carriers like CRST Van Expedited, Inc. ("CRST") because any rule that requires a motor carrier to interrupt its transportation of property at specified intervals throughout the day so that truck drivers can take duty-free breaks in suitable locations necessarily "relates to" the property transportation services the carrier provides its shipping customers and the routes it uses to provide those services.

The district court's conclusion was not simply an exercise in elementary logic (although the district court's logic is unassailable). It was driven by the history and purpose of the FAAAA and by the Supreme Court's landmark cases interpreting the FAAAA's preemption provision. None of the contrary arguments made by Appellant, James Cole ("Cole"), compels a different conclusion.

Cole's argument largely skirts the issue of the impact of California's meal and rest break laws on motor carrier routes and services and instead focuses on his thesis that the preemptive scope of the FAAAA, and its applicability to what Cole refers to as laws of "general applicability," are open questions that must be resolved in light of an asserted "presumption against preemption." No such presumption applies here, and these are not open questions. The Supreme Court rejected Cole's argument that the FAAAA applies narrowly to economic regulations like price controls in *Rowe v. N.H. Motor Transport Assn.*, 552 U.S. 364 (2008), and decisions almost too numerous to mention affirm that the FAAAA's preemption provision reaches so-called laws of "general applicability." Likewise not up for debate is the existence of Cole's proffered "health and safety," "wage and hour law," and "police power" exceptions to FAAAA preemption, all of which are foreclosed by *Rowe* and other cases.

The simple question here is whether California's meal and rest break laws impermissibly affect the property transportation services motor carriers provide or the routes they use to provide those services. The answer is unquestionably yes. If state law requires motor carriers to interrupt their property transportation services five times each day at specified intervals to provide breaks, the carriers must necessarily alter the services they would otherwise provide and the routes they would otherwise use. And if one state can impose its own unique restrictions on

motor carrier routes and services, the other 49 can as well. Indeed, numerous states have already enacted different meal and rest break laws. California's meal and rest break laws are accordingly part of the very patchwork of inconsistent state regulations that impose an "'unreasonabl[e] burden'" on "'free trade, interstate commerce, and American consumers,'" which Congress sought to bar when it enacted the FAAAA's preemption provision. *See Dan's City*, 133 S.Ct. at 1775 (quoting *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 440 (2002)).

Cole suggests that the Supreme Court's 2013 decision in *Dan's City* alters the analysis. It does not. In *Dan's City*, the Supreme Court reached the unremarkable and syllogistic conclusion that state law claims arising from the storage of a towed vehicle after transportation of the vehicle was complete were not "related to" the service of a motor carrier "with respect to the transportation of property." The Supreme Court's emphasis of the "with respect to the transportation of property" qualifier in *Dan's City* only bolsters the district court's decision here. Unlike the state law claim at issue in *Dan's City*, which related to the *post-transportation* storage of towed vehicles, California's meal and rest break laws directly affect a motor carrier's transportation services and routes *during the carrier's transportation of property*. In other words, California's meal and rest

break laws are preempted by the FAAAA for the very reason that the state law at issue in *Dan's City* was not.

Cole's final argument – that California's meal and rest break laws are saved from preemption by the FAAAA's motor vehicle safety exception – is just as meritless as his other contentions. The exception applies to motor vehicle safety regulations that are intended to be, and in fact are, responsive to motor vehicle safety. While California's meal and rest break laws may promote the health and welfare of workers in general, there is no support for Cole's attempted transformation of the rules into motor vehicle safety regulations. Indeed, it was for this reason that the Federal Motor Carrier Safety Administration ("FMCSA") refused to consider whether these laws were preempted. 73 Fed. Reg. at 79205-79206 (finding that California meal and rest break laws were not directed at motor vehicle safety and therefore were not within the FMCSA's jurisdiction to determine whether they were preempted). And even if there were, the rules are not responsive to motor vehicle safety because, as Cole notes, while employers must provide breaks, employees do not have to take them. An optional "motor vehicle safety" law simply does not qualify for the exception.

The district court correctly determined that California's meal and rest break laws are preempted by the FAAAA. Its ruling should be affirmed.

II. JURISDICTIONAL STATEMENT

Pursuant to Circuit Rule 28-2.2, CRST agrees with Cole's Jurisdictional Statement.

III. STATEMENT OF THE ISSUES

Restated, the issues on appeal are as follows:

First, the 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 the transportation of property." 49 U.S.C. § 14501(c)(1). To comply with California's meal and rest break laws, a motor carrier of property must interrupt its transportation of property at specified intervals throughout the day to allow truck drivers the opportunity to take breaks not contemplated by federal law after finding a suitable break location. Did the district court correctly determine that these requirements "relate to" a motor carrier's services, routes (and, by extension, prices) and that California's meal and rest break laws are therefore preempted as to motor carriers like CRST?

Second, the FAAAA does not "restrict the safety regulatory authority of a state with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). The exception applies to state motor vehicle safety regulations that are actually responsive to motor vehicle safety. Did the district court correctly determine that the FAAAA's motor vehicle safety exception is inapplicable where California's meal and rest

break rules are not motor vehicle safety regulations and do not respond to motor vehicle safety issues?

IV. STATEMENT OF THE CASE

A. Cole's Meal and Rest Break Claims

On October 6, 2008, Cole, a CRST truck driver, filed his state-court complaint claiming CRST failed to provide him and similarly situated CRST truck drivers with meal and rest breaks in violation of California's meal and rest break laws, Cal. Lab. Code §§ 226.7 and 512 and Industrial Welfare Commission ("IWC") Order No. 9-2001 Regulating Wages, Hours and Working Conditions in the Transportation Industry ("Wage Order No. 9") (codified at Cal. Code Regs. tit. 8, § 11090). *Appellee's Supplemental Excerpts of Record* ("SER") at 59-79. After removal, Cole amended his pleadings, but his meal and rest break claims have remained central to the case. *Appellant's Excerpts of Record* ("ER") at 35-55.

Cole's allegations are expressly premised on the rigid, segmented break schedule imposed by California's meal and rest break laws. Specifically, in the operative Second Amended Complaint, Cole alleged that CRST violated California's meal and rest break laws by failing to provide employee truck drivers "rest periods of at least ten minutes per four hours worked or major fraction thereof" and by requiring drivers "to work at least five hours without a meal period and/or work in excess of ten hours per day without being provided a second meal

period." *ER* at 36 (lines 19-21 and 26-28). Cole took the position below that CRST was affirmatively obligated to schedule and track these breaks and that, by failing to do so, "CRST simply ignored the law." *SER* at 49-50. Cole sought to recover penalties for CRST's alleged break law violations under Cal. Lab. Code § 226.7(b), which mandates that, for each work day in which an employer fails to provide a required 30-minute meal or 10-minute rest break, "the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation."[1] *ER* at 47-48, 55 (Second Amended Compl., ¶¶ 39-45, Prayer at ¶ 10). The district court eventually certified five subclasses of CRST drivers, including a rest period class and meal period class. *ER* at 22-23.

B. CRST's Motion for Judgment on the Pleadings

On July 23, 2012, CRST filed its Motion for Judgment on the Pleadings seeking judgment against Cole on his meal and rest break claims under Fed. R. Civ. P. 12(c) because California's meal and rest break laws are expressly preempted by the FAAAA. *SER* at 25-27. Cole argued the preemption issue was not ripe for determination because "preemption analysis under the FAAAA requires a detailed factual inquiry that is not suitable for a judgment on the

[1] As the California Supreme Court explained in *Kirby v. Immoos Fire Prot., Inc.*, 274 P.3d 1160, 1168 (Cal. 2012), Cole's claim under Cal. Lab. Code § 226.7 is "not an action brought for nonpayment of wages," but rather "an action brought for non-provision of meal or rest breaks," the "remedy" for which is the one additional hour of pay owed as damages for the meal or rest break violation.

pleadings." *SER* at 6. Cole therefore argued CRST's motion should be denied because CRST "utterly failed to submit one piece of competent admissible evidence" and made "conclusion[s] of law unsupported by any evidence," and because Cole "ha[d] not been afforded an opportunity to conduct discovery" on the issue. *SER* at 7.

Cole further argued that "the strong presumption against preemption," coupled with the lack of evidence, compelled a denial of CRST's motion. *SER* at 9. Finally, Cole argued CRST failed to demonstrate that the break laws are sufficiently related to motor carriers' prices, routes or services (*SER* at 18-22) and that, regardless, the break laws fall within the safety exception to FAAAA preemption. *SER* at 11-13.

C. The District Court's Decision

Recognizing the Supreme Court decision in *Rowe v. New Hampshire*, 552 U.S. 364, 370 (2008), governed its analysis, the district court ruled California's meal and rest break laws are expressly preempted by the FAAAA because they "affect a carrier's routes, services, and prices" by "limiting . . . carriers to a smaller set of possible routes," "dictating when services may *not* be performed," and by "effectively regulating the frequency and scheduling of transportation." *ER* at 27. The court also found California's meal and rest break laws affected carriers' prices "by virtue of the laws[‘] effect on routes and services." *Id.*

Noting that it is "the imposition of substantive standards upon a motor carrier's routes and services that implicates preemption," the court rejected Cole's contention that CRST's motion was not ripe for determination. *Id*. at 28-29. The district court found that "[e]vidence outside the pleadings . . . is not necessary to determine whether the Meal and Rest Break Laws have an impact on prices, routes, or services" and that "'no factual analysis is required to decide the question of preemption.'" *Id*. at 28 (quoting *Dilts v. Penske*, 819 F. Supp. 2d 1109, 1119 (S.D. Cal. 2011)).

The court also ruled the FAAAA's motor vehicle safety exception under 49 U.S.C. § 14501(c)(2)(A) does not apply. The court acknowledged that the break laws "have a 'direct connection to worker health and safety'" but concluded that the "'kinds of general public health concerns that are (or may be) involved in the California Meal and Rest Break Laws are not within the scope of the motor vehicle safety exception' because these concerns 'are not directly connected to motor vehicle safety.'" *Id*. at 29 (quoting *Dilts*, 819 F. Supp. 2d at 1122-23). "To hold otherwise," the court found, "would allow the motor vehicle safety exception to swallow the preemption section of the rule." *Id*.

Finally, the district court rejected Cole's argument that California's meal and rest break laws are exempt from preemption as wage laws like the prevailing wage law this Court found not preempted in *Californians for Safe & Competitive Dump*

Truck Transp. v. Mendonca, 152 F.3d 1184 (9th Cir. 1998). The district court easily dispatched this contention, noting that the California Supreme Court's decision in *Kirby* foreclosed any suggestion that California's meal and rest break laws "should be classified as 'wage laws,'" and relying on another district court's preemption decision for the proposition that the "'wage cases are fundamentally distinguishable from those involving meal and rest break laws for purposes of FAAAA preemption.'" *Id.* at 29-30 (quoting *Esquivel v. Vistar Corp.*, 2012 WL 516094, at *5 (C.D. Cal. Feb. 8, 2012)).

V. STATEMENT OF THE FACTS

The district court based its decision on the pleadings. As noted above, Cole alleged that CRST violated California's meal and rest break laws by failing to provide him and members of the certified meal and rest break classes with "rest periods of at least ten minutes per four hours worked or major fraction thereof" and by requiring him and class members "to work at least five hours without a meal period and/or work in excess of ten hours per day without being provided a second meal period." *ER* at 36 (lines 19-21 and 26-28). While the district court found "no factual analysis is required to decide the question of preemption," *ER* at 28, its ruling was informed by the following self-evident and uncontroversial propositions.

First, California's meal and rest break rules "dictat[e] when services may not be performed," "increase[e] the time it takes to complete a delivery," and "effectively regulat[e] the frequency and scheduling of transportation." *ER* at 27. Second, the break laws would necessarily "limit carriers to a smaller set of possible routes" because "[d]rivers must select routes that allow for the logistical requirements of stopping and breaking." *Id*.

Cole characterizes the district court's acknowledgment of these propositions as the improper adoption of unsupported assumptions. These are not assumptions, they are conclusions flowing from Cole's allegations, the law upon which those allegations were based, and simple common sense. The district court was entitled to recognize that (1) but for California's meal and rest break rules, a truck driver would not be required to cease operations (including the transportation of property) and deviate from his route at specified intervals five times during a 12-hour period, (2) a truck driver cannot take a 10-minute duty-free rest break or a 30-minute duty-free meal break unless the driver takes his or her truck off the road (i.e., the route the driver is on), finds an appropriate place to park, and stops all work for the specified time, thereby interrupting the transportation of property, and (3) to do so, the driver must utilize a route that allows for such stops. *See, e.g.*, *Aguirre v. Genesis Logistics*, 2012 U.S. Dist. LEXIS 186132 (C.D. Cal. Nov. 5, 2012) (finding California's meal and rest break claims FAAAA-preempted at the

pleading stage); *Campbell v. Vitran Express, Inc.*, 2012 WL 2317233 (C.D. Cal. June 8, 2012) (same).

VI. SUMMARY OF THE ARGUMENT

The FAAAA, 49 U.S.C. § 14501(c), preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." California's meal and rest break laws require employers to provide employees five separate breaks at specified intervals during a 12-hour period. For motor carrier employers like CRST, this means employee truck drivers must be able to take their vehicles off the road, find a parking location that will accommodate a large truck, and rest or eat without any work-duties at each of the five specified intervals and for the specified duration.

Compliance with these rules would directly affect a motor carrier's property transportation services by dictating when those services may be provided and when they must be suspended, and by limiting the time within which the services can be performed (and thus, limiting the amount of services that can be performed). Compliance also affects a carrier's routes because drivers must confine their travels to routes affording the opportunity to take the five specified daily breaks. These effects on services and routes mandate a finding of FAAAA preemption, as numerous district courts have determined.

In light of the numerous decisions adverse to his position, it is not surprising that Cole largely ignores the applicable FAAAA preemption test. Instead, Cole advocates for (1) narrowing established FAAAA preemption law based on a so-called "presumption against preemption" that would constrain FAAAA preemption to what Cole describes as "economic regulation" and (2) imposing various new open-ended extra-statutory preemption exceptions (for laws of general applicability, police power regulations, wage and hour laws, and others). Numerous cases have rejected Cole's favored reading of the FAAAA. No presumption against preemption applies here. The FAAAA applies broadly to *all* laws that directly or indirectly relate to a motor carrier's prices, routes, and services. The FAAAA is therefore not limited to economic regulation. And there are no extra-statutory exceptions for police power regulations or wage and hour laws.

At the end of the day, the test for preemption is that set out in the text of the statute itself as interpreted in cases like *Rowe*, *Morales*, and, most recently, *Dan's City*. Cole's primary argument pertinent to this standard is that California's meal and rest break laws are not as mandatory as his claims below might suggest, and instead afford enough flexibility to avoid impacting a motor carrier's services and routes. Cole is wrong. An employer simply has no flexibility to avoid complying with California's break rules. Those rules impact the services and routes of motor

carriers in the same way as the many other state laws held preempted by the FAAAA. And there is no basis for application of the FAAAA's motor vehicle safety exception here.

VII. ARGUMENT

A. The FAAAA broadly preempts state laws relating to the prices, routes, and services of a motor carrier with respect to the carrier's transportation of property.

Cole's theory that FAAAA preemption applies narrowly to economic regulation, and not to laws of "general applicability," is completely at odds with the language of the statute, the FAAAA's extensive and well-documented history, and the many notable decisions affirming that the broad scope of FAAAA preemption.

1. Congress enacted the FAAAA's preemption provision to broadly exempt motor carriers from inefficient and inconsistent state regulation.

The FAAAA forbids states from enacting or enforcing any 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). This facially broad provision was enacted in 1994 to eliminate the "patchwork" of burdensome state regulations affecting the trucking industry. To achieve that goal, Congress purposefully incorporated the broad preemptive language of the earlier-enacted Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), as interpreted by the Supreme Court in

Morales v. Trans World Airlines, 504 U.S. 374 (1992). *See* H.R. Conf. Rep. No. 103-677 at 83; 86 (1994), reprinted in 1994 U.S.C.C.A.N. 1715 ("the conferees do not intend to alter the broad preemption interpretation adopted … in *Morales*").

Congress enacted the ADA and its broad preemption provision in 1978, after deciding "maximum reliance on competitive market forces" would best further "efficiency, innovation, and low prices" in the airline industry. *Morales*, 504 U.S. at 378. Two years later, Congress began deregulating the interstate trucking industry though passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, and eventually enacted the FAAAA in 1994 after finding that "the regulation of intrastate transportation of property by the States" "imposed an unreasonable burden on interstate commerce," "impeded the free flow of trade, traffic, and transportation of interstate commerce," and "placed an unreasonable cost on the American consumers." Pub. L. No. 103-305, Title VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994). According to Congress, state regulation of trucking "causes significant inefficiencies" and "increased costs" and "inhibit[s] . . . innovation and technology." H.R. Conf. Rep. No. 103-677 at 87 (1994, reprinted in 1994 U.S.C.C.A.N. 1715, 1759. Moreover, despite deregulatory efforts at the federal level, Congress found "[t]he sheer diversity of [state] regulatory schemes [remained] a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Id*.

To eliminate this "patchwork" of state regulations burdening the efficient interstate transportation system it sought to foster, Congress added the ADA's preemption language to the FAAAA, with the intention to incorporate "the broad preemption interpretation adopted by the Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83. As the Supreme Court explained in *Rowe*, "Congress' overarching goal" in enacting the ADA and FAAAA preemption provisions was to "help[] assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices' as well as 'variety' and 'quality.'" *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378). The Supreme Court accordingly explained in *Rowe* that the FAAAA preempts *all* state laws that affect motor carrier prices, routes, or services, even if the effects are "only indirect," and not "tenuous, remote, or peripheral." *Rowe*, 552 U.S. at 370, 375. Again, in *Dan's City*, the Supreme Court reaffirmed that the FAAAA preempts even state laws that "indirectly" relate to a motor carrier's "prices, routes and services." 133 S.Ct. at 1778. This Court has also recognized that "[t]here can be no doubt that when Congress adopted the FAAAA Act, it intended to broadly preempt state laws that were 'related to a price, route or service' of a motor carrier." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009) ("ATA I").

2. No "presumption against preemption" applies.

Despite this legislative history, and despite the Supreme Court's unambiguous recognition of the breadth of FAAAA preemption, Cole claims that the FAAAA's reach is circumscribed by an unwritten "presumption against preemption." *See Appellants' Br.* at 25-28. Cole is wrong. As this Court has recognized, "[t]he so-called presumption against preemption stems from the Supreme Court's admonition 'that statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, *except when a statutory purpose to the contrary is evident*.'" *Brown v. United Airlines*, 720 F.3d 60, 68 (9th Cir. 2013) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993) (emphasis added)). A contrary statutory purpose is plainly evident with respect to the FAAAA, as the legislative history above demonstrates. *See id.* ("With respect to the ADA, such a purpose is apparent and the presumption against preemption does not apply.").

Moreover, no presumption against preemption applies when, as here, "the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Brown*, 720 F.3d at 68. This is the case here, where Congress has exclusively regulated the interstate transportation of property for more than a century. *See Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 110 (1914) (noting that "the subject of interstate

transportation of property has been regulated by Federal law to the exclusion of the power of the states to control in such respect by their own policy or legislation."). This likely explains why the Supreme Court made no mention of a presumption against preemption in *Rowe*, even though Maine advocated for it in that case. *See Br. for Pet'r* at 25, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (No. 06-457), 2007 WL 2428380 (Aug. 23, 2007).[2]

3. The FAAAA's preemption provision is not limited to "economic regulation."

Rowe could not be more explicit in rebuking Cole's suggestion that California's break laws survive preemption because the FAAAA narrowly targets only "economic" or traditional public utility-like regulation by the states. *See Appellant's Br.* at 28-35. *Rowe* rejected that very argument in striking down Maine's tobacco law, rejecting the notion that "Congress' primary concern was . . . with state 'economic' regulation" and decisively pointing out that Congress declined to insert the term "economic" into its operative language "despite having at one time considered doing so." 552 U.S. at 374 (citing S.R. No. 95-631, p. 171

[2] In any case, the provenance of the so-called presumption is questionable. Writing for the four-member dissent in *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008), Justice Thomas observed that since 1992, most Supreme Court decisions have refrained from invoking the presumption in the context of express preemption cases (citing *Rowe* as an example) and further noted that the sporadic invocation of the presumption tends to appear in *dicta* or produce "fractured" decisions from the Court. *Id.* at 98-103 (Thomas, J., dissenting). In other words, whatever its application, the presumption against preemption cannot alter Congress's express preemptive intent as reflected in the language of the statute.

(1978)). This was hardly surprising given the Supreme Court's previously expressed view in *Morales* that limiting ADA preemption to laws "actually prescribing" rates, routes, or services or targeting only air carriers specifically would "simply read[ ] the words 'relating to' out of the statute" and create "an utterly irrational loophole." 504 U.S. at 385-86.

Indeed, neither the consumer-fraud statutes struck down in *Morales* nor the Maine tobacco law deemed preempted in *Rowe* had anything to do with the sort of "economic" regulation to which Cole thinks the FAAAA's preemption provision is exclusively aimed. It is hardly remarkable, therefore, that numerous cases have struck down as ADA- or FAAAA-preempted a wide variety of state laws having nothing to do with traditional public utility-like controls.[3] Other pre-*Rowe* cases cited by Cole, which otherwise decided claims completely different from those here, are effectively overruled by *Rowe* to the extent they suggest the sort of

[3] *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (consumer fraud and deceptive business practices act claims ADA-preempted); *In re Korean Air Lines Co.*, 642 F.3d 685 (9th Cir. 2011) (California unfair competition law claim ADA-preempted); *Data Mfg., Inc. v. United Parcel Service, Inc.*, 557 F.3d 849 (8th Cir. 2009) (common law billing practice claims FAAAA-preempted); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004) (tort claim for deep leg thrombosis injury ADA-preempted); *Chavis Van & Storage of Myrtle Beach, Inc. v. United Van Lines, LLC*, 2012 WL 47469 (E.D. Mo. Jan. 9, 2012) (common law fraud-related claims FAAAA-preempted); *Missing Link Jewelers, Inc. v. United Parcel Service, Inc.*, 2009 WL 5065682 (N.D. Ill. Dec. 16, 2009) (application of penalty-limiting statute FAAAA-preempted); *Samica Enters., LLC v. Mail Boxes Etc. USA, Inc.*, 637 F. Supp. 2d 712 (C.D. Cal. 2008) (implied covenant of good faith claim FAAAA-preempted); *A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239 (S.D.N.Y. 2004) (trade secret and unfair competition claims ADA-preempted).

"economic" regulation constraint *Rowe* rejects.[4] Indeed, none of the claims at issue in *Dan's City* or *Rowe* purported to require economic regulation or to directly regulate a motor carrier. Had the FAAAA's preemptive scope been limited to laws of economic regulation, the Supreme Court in *Rowe* and *Dan's City* would surely have availed itself of a narrower holding by finding against preemption on this more limited basis.[5] But, as the Supreme Court cautioned in *Rowe* and *Dan's City*, laws having indirect impact on prices, routes, and services (i.e., laws of general application) are within the preemptive scope of the FAAAA.

4. There is no exception for "generally applicable laws," wage laws, or laws purportedly relating to state "police powers."

A state statute need not be specifically directed at the trucking or airline industry to be preempted by the FAAAA or ADA. For example, based on *Rowe*, both the Eighth Circuit and a federal court in Illinois held that state law challenges to UPS's billing practices, as applied to its re-billing and late-payment fees, were preempted by the FAAAA. *Data Mfg.*, 557 F.3d at 852; *Missing Link Jewelers*, 2009 WL 5065682, at *2.

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[4] *See, e.g.*, *Appellant's Br.* at 32 (citing *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (foodservice related tort claim not ADA preempted); *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998) (defamation claim not ADA preempted)).

[5] Had the Supreme Court's holding in *Dan's City* been so broad and simple, the opinion would have been less than a paragraph long – "The New Hampshire statute and common law at issue do not single out motor carriers; they are therefore, not preempted."

There is no shortage of similar cases striking down generally applicable laws that likewise did not target either the motor carrier or the airline industry are almost too numerous to mention. *See, e.g.*, *Wolens*, 513 U.S. 219 (consumer fraud and deceptive practices act claims ADA-preempted); *Korean Air Lines*, 642 F.3d 685 (ADA preempted state anti-trust claims against airline); *Witty*, 366 F.3d 380 (ADA preempted state tort claims that airline seats caused deep vein thrombosis injuries); *Chavis*, 2012 WL 47469 (common law fraud-related claims FAAAA-preempted); *Samica*, 637 F. Supp. 2d 712 (implied covenant of good faith claim FAAAA-preempted); *A.I.B. Express*, 358 F. Supp. 2d at 251-52 (ADA preempted trade secrets and unfair competition claims as applied to FedEx).

And numerous decisions reject Cole's suggestion that state employment and wage and hour laws are treated differently under the FAAAA's preemption provision. For example, in *Difiore v. Am. Airlines, Inc.*, 646 F.3d 81, 89-90 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 761 (2011), the First Circuit declared an employee's "tips law" wage claim ADA-preempted. In doing so, the court cast its lot with numerous other courts in holding to the view that even generally applicable state laws relating to the protection of workers' wages and workplace rights are not immune to Congress's wide-ranging preemptive strike. *See Mitchell v. U.S. Airways, Inc.*, 2012 WL 2856108 (D. Mass. July 12, 2012) (employee retaliation claims ADA-preempted); *Nat'l Fed'n. of the Blind v. United Airlines,*

Inc., 2011 WL 1544524 (N.D. Cal. Apr. 25, 2011) (California disability law claim ADA-preempted); *Travers v. Jetblue Airways Corp*., 2009 WL 2242391 (D. Mass. July 23, 2009) ("tips law" wage claim ADA-preempted); *Brown v. United Air Lines, Inc*., 656 F. Supp. 2d 244 (D. Mass. 2009) ("tips law" wage claim ADA-preempted); *Blackwell v. SkyWest Airlines, Inc*., 2008 WL 5103195 (S.D. Cal. Dec. 3, 2008) (California break rule claims ADA-preempted). These cases, along with *Penske* and its progeny, demonstrate that claims based on California's generally applicable break laws are not immune from preemption under the FAAAA.

There is likewise no "police power" exception to FAAAA preemption. Congress considered traditional areas in which the States might exercise regulatory authority over carriers and explicitly enumerated in the text of the FAAAA the areas not subject to preemption: motor vehicle safety, route controls for specified purposes, insurance requirements, the transportation of household goods, and the prices of towing services. *See* 49 U.S.C. 14501(c)(2). When Congress creates statutory exceptions, courts have no authority to create others. *See United States v. Johnson*, 529 U.S. 53, 58 (2000) (Congress limited the statutory exceptions to the ones set forth). Simply put, there is no room for an extra-statutory, judicially-created "police power" exception (or any other such exception) to the express terms of the FAAAA's preemption provision.

Post-*Rowe* cases like *Difiore* thus rightly reject the sort of "police power" exception Cole advances and acknowledge state interests, "[h]owever traditional the area," must give way to Congress's express preemptive strike if they are "related to" price, routes, or service as the FAAAA commands. 646 F.3d at 81, 87; *see also Brown v. United Air Lines, Inc.*, 656 F. Supp. 2d at 252 ("*Rowe* stands for the proposition that courts should not imply broad exceptions to the preemption provision for areas of traditional concern").

Indeed, as the lower court affirmed by *Rowe* persuasively explained, "[a]n exclusion from preemption for police-power enactments would surely 'swallow the rule of preemption,' as most state laws are enacted pursuant to this authority." *New Hampshire Motor Trans. Ass'n v. Rowe*, 448 F.3d 66, 76 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (internal citations omitted). In the end, therefore, Cole's speculation that Congress might have contemplated a "police power" or "wage and hour" exception to FAAAA preemption is irrelevant; Congress adopted no such exceptions. *Rowe* teaches that one need only read the statute itself and, finding no "police power" exception stated in its saving clause, conclude that no such exception exists.

5. *Dan's City* did not alter the Supreme Court's FAAAA preemption test.

Cole contends the Supreme Court's recent decision in *Dan's City*, 133 S. Ct. 1769 "forecloses preemption and compels reversal here" because it "makes clear

that the FAAAA expressly preempts only 'state trucking regulation.'" *Appellant's Br*. at 1, 21, 37. Cole misinterprets *Dan's City*.

In *Dan's City*, the plaintiff sued a towing company, Dan's City, alleging the company disposed of his car without complying with a state statute governing disposal of abandoned vehicles and, in the process, violated the New Hampshire Consumer Protection Act (a law of general application) as well as Dan's City's statutory and common-law duties as bailee to exercise reasonable care while in possession of a bailor's property (a law of general application). *Dan's City*, 133 S. Ct. at 1775. The New Hampshire Supreme Court rejected Dan's City's argument that the plaintiff's claims were preempted by the FAAAA, and the U.S. Supreme Court affirmed. *Id*. at 1775.

The Supreme Court first noted "it is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property.'" *Id*. The court proceeded to analyze the latter requirement – that the law must concern a motor carrier's "transportation of property" – by looking to the following definition of "transportation" provided in Title 49 of the U.S. Code: "Transportation" includes "services related to th[e] movement" of property, "including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property." *Id*. at

1778-79; 49 U.S.C. § 13102(23)(B). The Court concluded that the plaintiff's state law claims were not preempted because they were not "related to the *movement* of his car." *Dan's City*, 133 S. Ct. at 1779. Plaintiff instead sought redress "only for conduct subsequent to 'transportation,' conduct occurring after the car ceased moving and was stored." *Id*. The Court therefore concluded that the storage of the plaintiff's car after completing the towing job did "not involve 'transportation' within the meaning of the federal Act." *Id*.

Thus, the unremarkable holding in *Dan's City* that the post-transportation storage of a vehicle does not relate to the transportation of the vehicle in no way suggests that FAAAA preemption applies only to "state trucking regulation." Indeed, the laws at issue in that case had nothing to do with state trucking regulation, yet the Supreme Court never suggested that its analysis should end on that basis. Rather, the Supreme Court simply affirmed that any state law will be held preempted if the law directly or indirectly (1) relates to the price, route, or service of a motor carrier and (2) does so "with respect to the transportation of property." *See id*. at 1778-79; *see also Helde v. Knight Transp., Inc*., 2013 WL 5588310, --- F. Supp. 2d ---- (W.D. Wash. Oct. 9, 2013) ("The Supreme Court recently made clear that the FAAAA preempts the enforcement of state laws only if the law relates to the "price, route, or service" of a motor carrier *and* concerns the carrier's "transportation of property.") (emphasis supplied).

Cole's reading of *Dan's City* was recently rejected in *Ortega v. J.B. Hunt Transp., Inc.*, 2013 WL 5933889, at *8 (C.D. Cal. Oct. 2, 2013), where the court stated that, "the Supreme Court did not indicate claims must explicitly relate to the transportation of property, and the Court is unwilling to infer that limitation." The First Circuit recently had little difficulty rejecting a similarly unjustified attempt to expand *Dan's City* beyond its plain terms:

> Grasping at straws, the plaintiffs next suggest that the Supreme Court's recent decision in *Dan's City* . . . somehow changed the landscape and reshaped preemption doctrine to favor their position. This suggestion represents a triumph of hope over reason. The Supreme Court decided *Dan's City*—a case that implicated the preemption provision in the FAAAA, 49 U.S.C. § 14501(c)(1)—on a nuanced reading of the "related to" preemption component. The Court in no way retreated from existing precedent but, rather, reiterated and cited with approval a representative sampling of its earlier decisions.

See Brown, 720 F.3d at 71.

Here, for the reasons discussed below, the California break laws indisputably "concern . . . motor carrier[s'] 'transportation of property.'"

B. California's meal and rest break rules significantly affect motor carrier routes and services with respect to the movement of property.

As the Supreme Court recently noted in *Dan's City*, the phrase "related to" in the FAAAA's preemption clause "embraces state laws 'having a connection with or reference to' carrier 'rates, routes, or services.'" 133 S.Ct. at 1778 (quoting *Rowe*, 552 U.S. at 370, *Morales*, 504 U.S. at 384). The Court reiterated its holding

in *Morales* that the "'ordinary meaning of ... [the] words ['related to'] is a broad one,'" and that the "ADA's use of those words 'expresses a broad preemptive purpose.'" *Id*. (quoting *Morales*, 504 U.S. at 383). While the Court noted that "the breadth of the words 'related to' does not mean the sky is the limit," the Court reaffirmed that as long as a state law's connection to a motor carrier's prices, routes, or services is not only "'tenuous, remote, or peripheral,'" the state law will be preempted, even if the connection is "indirect." *Id*. (quoting *Rowe*, 552 U.S. at 370, 371, *Morales*, 504 U.S. at 384, 390). Here, the connection between California's meal and rest break rules and CRST's transportation of property becomes *direct* as soon as those rules are applied to CRST. The FAAAA accordingly preempts those rules.[6] Numerous courts have reached the same conclusion.[7]

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[6] The impact of those rules also becomes direct as soon as they are applied to any motor carrier, and those rules are therefore preempted as to all motor carriers as soon as they are preempted as to one motor carrier. *See New Hampshire Motor Trans. Ass'n,* 448 F.3d at 72, *affirmed*, 552 U.S. 364 (2008).

[7] *See Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109, 1119-20 (S.D. Cal. 2011); *Parker v. Dean*, 2013 WL 7083269 (C.D. Cal. Oct. 15, 2013); *Burnham v. Ruan Transp*., 2013 WL 4564496 (C.D. Cal. Aug. 16, 2013); *Aguirre v. Genesis Logistics*, 2012 U.S. Dist. LEXIS 186132 (C.D. Cal. Nov. 5, 2012); *Jasper v. C.R. England, Inc*., 2012 WL 7051321 (C.D. Cal. Aug. 30, 2012); *Campbell*, 2012 WL 2317233; *Aguiar v. California Sierra Express, Inc*., 2012 WL 1593202 (E.D. Cal. May 4, 2012); *Esquivel*, 2012 WL 516094. CRST recognizes that two Northern District decisions have held otherwise (*Mendez v. R&L Carriers, Inc*., 2012 WL 5868973, (N.D. Cal. Nov. 19, 2012); *Brown v. Wal-Mart Stores, Inc*., 2013 WL 1701581 (N.D. Cal. Apr. 18, 2013)), but those cases have been criticized as wrongly decided, in part due to their failure to recognize the effect of the

1. California's break rules are not optional, flexible, or waivable in any meaningful respect.

In his Complaint, Cole alleged that CRST violated California law by failing to provide him and members of the meal and rest break classes with the meal and rest breaks required by California law. *ER* at 47-48. He even claimed that CRST was obligated to schedule breaks for drivers and monitor the taking of the breaks. *SER* at 49. Now, to avoid preemption, he argues that California's meal and rest break rules are actually optional, waivable, and flexible enough to avoid any impermissible impact on a motor carrier's services, routes, and prices. *See Appellant's Br*. at 21-22, 43-48. Cole is wrong.

Under Cal. Lab. Code § 512(a), backed up by Section 11 of Wage Order No. 9, "[a]n 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" and likewise "may not employ an employee for a work period of more than 10 hours per day without providing . . . a second meal period of not less than 30 minutes." As the California Supreme Court explained in *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 536 (Cal. 2012), employers must provide a first meal break "no later than the start of an employee's sixth hour of work" and a second "after no more than 10 hours of work." *Id*. at 537-38. During those breaks,

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California Supreme Court's decision in *Kirby*. *See Parker*, 2013 WL 7083269 at *9; *Burnham*, 2013 WL 4564496, at *5.

employers "must afford employees uninterrupted half-hour periods in which they are relieved of any duty or employer control and are free to come and go as they please." *Id.* at 354. "[A] meal period's duty-free nature [is] its defining characteristic, and the employer is required to "relieve[] its employees of all duty, relinquish[] control over their activities and permit[] them a reasonable opportunity to take an uninterrupted 30-minute break, and [it may] not impede or discourage them from doing so." *Id.* at 533.

California's rest break rules are similarly rigid. Under Wage Order No. 9, § 12(A), violations of which are prohibited by Cal. Lab. Code § 226.7(a), employers must authorize and permit all employees to take rest breaks "at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof" unless the employee's total daily work time is less than three and one-half hours. In other words, employees are entitled to "10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." *Brinker*, 273 P.3d at 529. And, "insofar as practicable," rest breaks are to be taken "in the middle of each work period." Wage Order No. 9, § 12(A).

Thus, the California meal and rest break laws that form the basis of Cole's meal and rest break claims require employers to provide five separate breaks totaling at least 90 minutes during a 12-hour period, and to provide them at defined

intervals: one ten-minute rest break within the first four hours, a 30-minute meal break within the first five hours, another ten-minute rest break within the second four-hour period, a second 30-minute meal break between the fifth and tenth hour, and another ten-minute rest break within the third four-hour period. For motor carrier employers like CRST, this means employee truck drivers must be able to take their vehicles off the road, find a parking location that will accommodate a large truck, and rest or eat without any work-duties at each of the five specified intervals and for the specified duration. *See Ortega v. J.B. Hunt Transp., Inc.*, 2013 WL 5933889, at *6 (C.D. Cal. Oct. 2, 2013).

Contrary to Cole's suggestion, *see Appellant's Br.* at 43-46, California's break requirements may not simply be waived off whenever they are inconvenient.[8] Wage Order No. 9 provides for no waiver of the rest break requirements at all, and Cole neglects to fully describe the very limited circumstances under which a duty-free meal break may be waived. Under Wage Order No. 9, § 11(C), an on-duty meal period may be waived (1) "*only* when the nature of the work prevents an employee from being relieved of *all* duty," (2) only when the parties have agreed in advance to an on-the-job paid meal period by written agreement, and (3) only then if the written agreement permits the employee "to revoke the agreement at *any* time." (emphasis supplied); *see also* Cal. Lab.

[8] That suggestion, of course, is inherently inconsistent with Cole's later contention that taking a break is vital to worker safety.

Code § 512(a) (prohibiting waiver of the second meal break in a 12-hour-or-more work day if the first meal break was waived). There is nothing "flexible" about securing a written waiver conditioned upon such narrow circumstances – let alone one that is revocable "at any time," which makes any option for an on-duty meal break meaningless in practice and effect.[9] *See also Esquivel,* 2012 WL 516094 at *6 (on-duty breaks permitted only when off-duty breaks are "virtually impossible" due to the nature of the work). Furthermore, the second meal break in a 12-hour-or-more work day is not waivable at all if the first meal break was waived. Cal. Lab. Code § 512(a).

Moreover, Cole simply misstates the law when he contends, based on 2004 case citing a DLSE memorandum, that an employer "may choose not to provide its employees with meal periods" and instead pay the employee premium pay, "so that the 'meal and rest period premium pay operates in exactly the same way as overtime premium pay.'" *Appellant's Br.* at 46. The California Supreme Court squarely and conclusively rejected this proposition in *Kirby v. Immoos Fire*

[9] Furthermore, commercial motor vehicle drivers are generally not engaged in the type of work that prevents him or her from being relieved of all duty. In fact, the FMCSA has specifically stated that a driver can record meal stops as off-duty time for purposes of the Hours of Service ("HOS") Regulations promulgated by the FMCSA at 49 C.F.R. §§ 395.1, *et seq.* *Regulatory Guidance for the Federal Motor Carrier Safety Regulations*, 62 Fed. Reg. 16370, 16422 (April 4, 1997). Because a driver can be relieved of all duty for meals under the HOS Regulations, therefore, the driver must be afforded off-duty meal periods under California's break rules.

Protection, Inc., 274 P.3d 1160 (Cal. 2012), which confirmed the premium pay requirement is the remedy for a break law violation, not an "alternative" to the break requirement itself. As *Kirby* explains, Cal. Lab. Code § 226.7 "does *not* give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay," and paying an extra hour of premium pay "does *not* excuse a section 226.7 violation." *Id*. at 1256 (emphasis in original and supplied);[10] *see also Parker v. Dean,* 2013 WL 7083269, at *9 ("According to California's Supreme Court, however, 'section 226.7 does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay.").[11] Thus, as Cole has alleged throughout this case, employers are required to provide the breaks called for under California law.

All that notwithstanding, no amount of "flexibility" built into the break laws can change the fact that to take a California-mandated meal or rest break, a driver must maneuver his or her vehicle off the highway (i.e., off its route), up or down an exit ramp (a different route), and along other roads (more different routes) leading to a safe and legal place at which to park, cease all operations – and then

[10] Conspicuously absent from Cole's brief is any reference to, much less any discussion of, the California Supreme Court's decision in *Kirby*.

[11] As such, just paying the drivers the premium pay instead of providing a meal break would expose motor carriers to significant civil penalties. *See* Cal. Labor Code § 2699.5 (identifying Cal. Labor Code § 226.7 as a Labor Code provision that, if violated, subjects an employer to civil penalties).

reverse the route-altering process over again when the break is completed. It is of course true that not every driver may always be behind the wheel when a break period arises. But not even Cole can credibly claim that *no* truck will *ever* be on the road when "no later than the start of [his] sixth hour of work" or "after no more than 10 hours of work" the driver's first or second meal break entitlement arises, *Brinker*, 273 P.3d at 537-38, or that *no* driver would ever exit the highway for a 10-minute rest break "three and one-half to six hours" into his work day, or "six hours . . . to 10 hours" later, or "10 . . . to 14 hours" later again. *Id*. at 529.

2. The break laws impose direct regulatory control over motor carrier services.

Since *Morales*, it has been well established that, in preempting state laws "relating to" service, Congress did not mean only to forbid states from "actually *prescribing*" service. 504 U.S. at 385 (such an interpretation "reads the words 'relating to' out of the statute") (emphasis supplied). Rather, it is more than enough for preemption if "the effect of the regulation is that carriers will have to offer . . . services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Rowe*, 552 U.S. at 372. The California break laws have *exactly* that preempted service-determining effect for several reasons.

a. Motor carriers provide services within the parameters set by the HOS Regulations.

To understand why this is so, it is critical to first recognize that motor carriers provide their transportation services within the work-time parameters set out in the HOS Regulations, which impose driver work hour rules that apply uniformly throughout the United States. Those rules generally prohibit drivers from driving their trucks after 14 consecutive hours of coming on duty (a limitation *not* extended by any off-duty breaks taken during the day), restrict driving time to 11 hours during that 14-hour period,[12] and require 10 hours off duty before driving can begin again. 49 C.F.R. § 395.3(a). Moreover, as a result of a regulatory change effective July 1, 2013, the HOS Regulations now incorporate a single 30-minute break pursuant to 49 C.F.R. § 395.3(a)(3)(ii), which forbids driving "if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes." This rule "allows truckers to drive if they have had a break of at least 30 minutes, at a time of their choosing, sometime within the previous 8 hours," thus affording "[d]rivers . . . great flexibility in

[12] Drivers perform numerous work activities, aside from driving, that are defined as "on-duty" time, including time spent waiting to be loaded, unloaded, or dispatched at any terminal or facility; performing pre-trip and post-trip vehicle inspections; fueling, servicing, or conditioning their vehicles; complying with drug-testing requirements; and all time spent performing any other work in the service of the motor carrier. 49 C.F.R. § 395.2 (defining "on-duty" time).

deciding when to take a break." *Hours of Service of Drivers*, 76 Fed. Reg. 81134, 81136 (Dec. 27, 2011).[13]

These requirements seek to preserve, to the greatest extent safely possible, the operational and scheduling flexibility of motor carriers,[14] something crucial "in a business requiring fluctuating hours of employment," *cf. Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48 (1943). Under the HOS Regulations, drivers have essentially unfettered discretion as to when to drive and when to take breaks as business and circumstances require. *See Hours of Service of Drivers*, 68 Fed. Reg. 22,456, 22, 466 (Apr. 28, 2003) ("[D]rivers are free … to take rest breaks at any time."). Thus, absent application of California's break laws, the property

[13] The five-stop, one-hour and 30-minute duty-free break requirements of California law inescapably conflict with the federal rule providing for a single 30-minute break with such built-in flexibility on timing and are therefore preempted by the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, which "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211, 6 L.Ed. 23 (1894)).

[14] *See 2007 HOS Interim Final Rule*, 72 Fed. Reg. at 71248 (FMCSA reissuance of 2005 version of HOS Regulations attributed to "the 2005 rule ha[ving] maintained highway safety outcomes while enhancing operational flexibility for the motor carrier industry"); 71249 (declaring that a "failure to issue [the rule] could inflict a loss of scheduling flexibility on the industry and ultimately raise the cost of highway transportation"); 71256 (noting that a provision of the HOS Regulations "gives drivers … operational flexibility in planning their trips"); *2005 HOS Final Rule*, 70 Fed. Reg. at 50010 (FMCSA's addition of an 11th hour of driving time to the HOS Regulations "has increased industry productivity through increased flexibility without impacting safety…").

transportation services presently offered by motor carriers reflects "'maximum reliance on competitive market forces'" in accordance with the FAAAA's "deregulatory and pre-emption related objectives." *Rowe*, 552 U.S. at 371.

b. California's break laws require carriers to alter their transportation services.

In contrast to the flexibility afforded under the HOS Regulations, California's meal and rest break rules mandate off-duty 30-minute meal breaks every five hours and 10-minute rest periods every four hours and thus dictate the exact number of breaks required, the length of time a break must last, and when each break must be taken. To comply with the additional break requirements imposed by California law, motor carriers would necessarily have to "offer . . . services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Rowe*, 552 U.S. at 372.

First, by requiring employees to be fully relieved of all duty and to *stop working* at specified intervals for set periods of time throughout the day, the break laws command that *no* service may be performed during those times. With respect to meal breaks specifically, the "duty-free nature" of the break is "its defining characteristic," requiring "uninterrupted half-hour periods" in which employees "are relieved of any duty or employer control and are free to come and go as they please." *Brinker*, 273 P.3d at 533-34. Dictating when *no transportation* service may be provided (and when it may thereafter resume) is directly and substantively

"connected to" service, thus making the break rules' preempted impact self-evident, as the district court and other courts have found. *See ER* at 27; *see also California Dump Truck Owners Ass'n v. Nichols*, 2012 WL 273162 at *8 (E.D. Cal. Jan. 30, 2012) (distinguishing an FAAAA-challenged environmental regulation from the California break laws because the break laws "mandate[ ] that drivers *stop* at particular intervals throughout the day" and "[d]uring those intervals *no services* [can] be provided") (emphasis in original and supplied).

This first command of the break laws – the *forbidding* of service – is in and of itself sufficient to support the district court's FAAAA preemption finding. That the break laws stop service in its tracks is enough to end the inquiry because, as *Rowe* said, "[i]f federal law preempts state regulation of the details of . . . a program that primarily *promotes* carriage, it must pre-empt state regulation of the essential details . . . of the carriage itself." *Rowe*, 552 U.S. at 373 (citing *Wolens*, 513 U.S. at 22-28). Surely, *when* (and when *not*) to provide service is just as much an "essential detail" of motor carriage as the *type* of service Maine was FAAAA forbidden from regulating in *Rowe*.

Second, the break laws' insistence upon when and exactly for how long carriers provide breaks for their employees "affect services by effectively regulating the frequency and scheduling of transportation," *ER* at 27, and therefore cannot help but "relate to" customer service. As one court has acknowledged,

there is "no reason to conclude [a carrier] could feasibly comply with California's meal break laws *without* altering . . . services." *Esquivel*, 2012 WL 516094 at *6 (emphasis supplied). Cole proved that point below by insisting that CRST was obligated to schedule the required breaks for drivers. *SRE* [ECF No. 60-1, p. 16]. Thus, Cole's allegations in this case establish that CRST would have to schedule its property transportation services around California-dictated breaks even if the *frequency* of customer deliveries is reduced, which is unquestionably a "related to-service" impact the FAAAA forbids. *See Charas*, 160 F.3d at 1265 ("'service' . . . refers to the frequency and scheduling of transportation").

Third, it is an indisputable function of basic math that, "[w]hen employees must stop and take breaks, it takes longer to drive the same distance." *Campbell*, 2012 WL 2317233 at *4. Longer drive times necessarily mean "increasing the time it takes to complete a delivery," and thus also necessarily mean *less* service on the whole, as the district court concluded. *ER* at 27; *see also, e.g., Aguirre, 2012 U.S. Dist. LEXIS 186132, at *20*. These conclusions are beyond challenge, as a state law that demands that a motor carrier provide *less* transportation service is likewise necessarily a law that has a direct "connection with" service.

As a consequence, California's meal and rest break rules are preempted because, under the FAAAA, the timing of motor carrier service (subject to the federal HOS Regulations) is to be decided by motor carriers and their customers

based upon how best to serve the needs of the market, not by California's "direct substitution of its own governmental commands." *Rowe*, 552 U.S. at 372.

3. The break laws also impact motor carrier routes.

The California break rules, as applied to motor carriers, go even further than the service-impacting tobacco law struck down in *Rowe* because they are also inextricably linked to motor carrier routes as well. Understandably, Cole makes no effort to address what is perhaps the single-most important, incontrovertible fact in this case – that every driver sitting behind the wheel of a commercial motor vehicle when a pre-appointed California break time arises must *depart* from the route he is traveling to take the off-duty break period California law demands. The very command of the break laws as applied to truck drivers thus necessarily proves they are "related to" motor carrier routes.

No amount of preplanning allows a truck driver to pull over to the side of the road, exit onto any seemingly convenient street, or park anywhere at will for a break. Instead, in deciding where and when to take any break, all professional truck drivers must account for – if nothing else – every motor vehicle safety law or regulation applicable to the area in which they are traveling, not to mention weather conditions, their own personal comfort and safety, and the safety of others

traveling upon the roadways.[15] Thus, as courts have found, duty-free breaks that must be scheduled around motor carrier service are "related to" routes because they impact the types and lengths of routes that are feasible by "limiting the carriers to a smaller set of possible routes," *ER* at 14, essentially compelling carriers to "only use routes that are amenable to . . . scheduled breaks" and requiring drivers to "select routes that allow for the logistical requirements of stopping and breaking" as California law commands. *Id.*; *Campbell*, 2012 WL 2317233 at *4; *Cf. Tillison v. Gregoire*, 424 F.3d 1093, 1100 (9th Cir. 2005) (law requiring public officials to authorize a public impound in writing made it "inconvenient" for public officials to request towing service, but "did not hinder the routes a tow truck operator may take" while traveling to the impound yard).

Cole argues that California's break laws are not preempted because they do not bind carriers "to a *particular* price, route, or service." *Appellant's Br.* at 38-40.

[15] For example, California prohibits certain trucks from idling for more than 5 minutes at a time. Cal. Code Regs. tit. 13, § 2485; *see also* 49 C.F.R. § 392.14 (imposing a duty on commercial motor vehicle operators to use "extreme caution" when hazardous weather conditions exist); 49 C.F.R. §§ 397.7; 397.69 (restricting the parking of and authorizing local restrictions on the routing of vehicles carrying hazardous materials); Cal. Veh. Code § 21718(a) (prohibiting stopping on the freeway except under limited circumstances, such as when a vehicle becomes disabled); Cal. Veh. Code §§ 22500; 22502 (restricting locations at which vehicles may be parked); Cal. Veh. Code § 22505 (authorizing state authorities to prohibit the stopping or parking of vehicles exceeding six feet in height in areas that would be "dangerous to those using the highway"); Cal. Veh. Code §§ 22507.5; 35701 (permitting local authorities to impose weight restrictions upon the parking – or use – of commercial vehicles on designated roadways).

That phrasing, employed first in *Air Transp. Ass'n of Am. v. City & County of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001) is inapplicable because *Air Transport* was an ERISA case, the statement was not important to the outcome of the either decision, and it is at odds with *Morales*, which ruled that the ADA's preemptive scope is *not* limited to only laws "actually prescribing" routes and services. 504 U.S. at 385.

It is in any event doubtful this Court intended to use the word "particular" in the rigid fashion suggested by Cole. Without the benefit of *Rowe*, the *Air Transp.* court relied on ERISA preemption cases holding that preemption applies only to state laws that "compel or bind an ERISA plan administrator to a particular course of action with respect to the ERISA plan." 266 F.3d at 1071. Binding a carrier to a "particular course of action" with respect to routes (forcing trucks to alter routes, for example) is a far cry from binding a truck to a "particular route" (such as limiting travel to only the Pacific Coast Highway), yet both state law compulsions should be equally FAAAA-preempted:

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

Dilts, 819 F. Supp. 2d at 1118-19; *see also Esquivel*, 2012 WL 516094 at *4 (same).

4. California's meal and rest break rules affect services and routes "with respect to the transportation of property."

There is no question that California's meal and rest break laws, when applied to motor carriers like CRST, are necessarily "related to" the services the motor carriers provide "with respect to the transportation of property." *Dan's City*, 133 S.Ct. at 1778 (quoting 49 C.F.R. § 14501(c)(1)). Unlike the state law claim at issue in *Dan's City*, which related to the *post-transportation* storage of towed vehicles, California's meal and rest break laws affect a motor carrier's transportation services and routes *during the carrier's transportation of property*. In other words, California's meal and rest break laws are preempted by the FAAAA for the very reason that the state law at issue in *Dan's City* was not.

5. Application of California's meal and rest break rules to motor carriers would result in the inefficient regulatory patchwork Congress outlawed in the FAAAA.

Cole fails to recognize that a major purpose of the FAAAA is to prevent a patchwork of state laws that interfere with the operations of interstate motor carriers. *Rowe*, 552 U.S. at 373. If one state is permitted to interfere with such choices, then other states would be permitted to do the same, leading to just the sort of "patchwork of state service-determining laws, rules and regulations" completely inconsistent with Congress's goal for uniformly unregulated competition across the nation and forbidden by the FAAAA. *Id.*; *Dilts*, 819 F. Supp. 2d at 1120 ("The key . . . is that to allow California to insist exactly when

and for exactly how long carriers provide breaks for their employees would allow other States to do the same, and to do so differently."); *Equivel*, 2012 WL 516094, at *4 (same). Such a forbidden "patchwork" is just where California-like break laws lead because they dictate *when* motor carrier services may (and may not) be provided, *which* of the otherwise available routes motor carrier trucks may travel upon, and potentially *how* motor carrier prices are to be determined.

Cole dismisses this argument, contending that there is no need to preempt California's meal and rest break rules because they will have no "anticompetitive effect" as between motor carriers and are therefore not the kind of regulations Congress sought to proscribe. First, as the express statements in the legislative history demonstrate, Congress was not merely interested in promoting competition between carriers. Congress was primarily interested in relieving *all carriers* from the burdens of inconsistent and inefficient state regulations affecting their services, routes, and prices, thus leaving to the motor carrier its decisions on prices, routes, and services for its customers to the competitive marketplace. The laws struck down in *Rowe* and *Morales*, both of which were equally applicable state-wide to all carriers alike, would have flunked that test too, and indeed, if Cole's newly fashioned "competitive advantage" test were the rule, the only state laws subject to preemption would be laws prescribing service, route, or price constraints on a selective carrier-by-carrier basis. There is no authority for such a myopic view of

Congress's purpose. Rather, as Congress put it, the purpose was to ensure that all service, route, and pricing options each motor carrier offers its customers "will be dictated by the marketplace" – "not by an artificial regulatory structure" limiting or restricting those options. H.R. Conf. Rep. No. 103-677 at 88.

Second, this Court rejected a similar argument on the basis of *Rowe* in *Korean Airlines* when, in a similar vein, proponents of a price-fixing claim argued its promotion of competition saved it from an ADA preemption fate:

> It is *immaterial* that the state laws do not interfere with the purposes of the federal statute or that they might be consistent with promoting competition and deregulation. The Supreme Court has rejected this argument.

642 F.3d at 697 (emphasis supplied) (citing *Rowe*, 552 U.S. at 370) ("it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulation") and *Morales*, 504 U.S. at 386 (state and federal law consistency "is beside the point," and "[n]othing in [the ADA] suggests that its 'relating to' pre-emption is limited to inconsistent state regulation")).

Finally, even if the policy underlying the FAAAA were relevant to the preemption analysis, Cole in any event misunderstands the competition-related objectives Congress sought to promote through the ADA/FAAAA legislation. The issue is not, as Cole frames it, whether one motor carrier competing for a customer would gain a "competitive advantage" over another if each plays by the same set of break rules California commands. When Congress passed the ADA "to end federal

regulation of the airline industry and to encourage 'reliance on competitive market forces,'" its intent was "to prevent States from filling [the] regulatory void and using state law to interfere with 'market forces.'" *Travers*, 2009 WL 2242391 at *2 (quoting *Morales*, 504 U.S. at 378). Likewise, and as even better explained in *Rowe*, Congress's purpose under the FAAAA was to leave the trucking industry's service, route, and pricing decisions, "to the competitive marketplace," 552 U.S. at 364, thus forbidding "a State's direct substitution of its own governmental commands for 'competitive market forces' in determining . . . the services that motor carriers will provide." *Id*. at 372. In short, "'agreements freely made, based on needs perceived by the contracting parties at the time,'" – i.e., market-driven choices, not state-law commands – should decide how and when motor carriers provide services, which routes they employ, and what prices they will charge. *Wolens*, 513 U.S. at 230 (agreeing with the United States as *amicus curiae* that enforcement of such agreements is essential to the stability and efficiency of the market and "key to sensible construction of the ADA"). Indeed, as noted earlier, none of the claims at issue in *Dan's City* purported to prescribe economic regulation. Had the FAAAA's preemptive scope been limited to such laws (i.e., laws of economic regulation), the Supreme Court surely would have found against preemption in both *Dan's City* and in *Rowe* on this basis. But it did not.

Here, through its break laws, the State of California, rather than the competitive marketplace, dictates routes and services motor carriers can provide. As such, California's break laws as applied to motor carriers contravene Congress's intent to leave the trucking industry's service, route, and pricing decisions to the competitive marketplace.

Even if the relevant inquiry, as Cole frames it, were whether one motor carrier would gain a "competitive advantage" over another if each plays by the same set of break rules California commands, that segment of the analysis would still favor preemption because, as at least two district courts have recognized, application of California's meal and rest break rules to interstate motor carriers would favor carriers operating in California using drivers not covered by California's meal and rest break laws. *See Parker v. Dean Transportation, Inc.*, 2013 WL 7083269, at *8 (C.D. Cal. Oct. 15, 2013) ("The [rest break] restrictions would also unavoidably impact prices and hinder the full extent of competitive market forces within the industry: Defendant . . . would be at a disadvantage to carriers located near but yet outside of California."); *Ortega*, 2013 WL 5933889, at *6 ("[T]he regulations undoubtedly put California-based motor carriers at a disadvantage as compared with out-of-state carriers who provide services in California.").

If California is permitted such regulation, the floodgates would open for like-minded, yet different, additional regulation from other states too. It would be hard to imagine a better example of "patchwork" regulatory impact if motor carriers were required to modify their delivery schedules for each customer according to the particular nuances of each state's break laws depending on every driver's geographic location at any given time – all the while simultaneously juggling compliance with the HOS Regulations as well.[16] The break laws,

[16] In fact, the development of an inconsistent patchwork body of state meal and rest break law is not simply a matter of speculation. At least seven states, in addition to California, have specific laws requiring paid rest periods, and at least 17 states, in addition to California, have specific laws requiring meal periods for employees. *See* Conn. Gen. Stat. Ann. § 31-51ii; Del. Code Ann. tit. 19, § 707; IL ST CH 820 § 140/3; Ky. Rev. Stat. Ann. § 337.365; Ky. Rev. Stat. Ann. § 337.355; Mass. Gen. Laws Ann. ch. 149, § 100; Me. Rev. Stat. Ann. tit. 26, § 601; Minn. Stat. Ann. § 177.254; Minn. Stat. Ann. § 177.253 ; Neb. Rev. Stat. § 48-212; Nev. Rev. Stat. Ann. § 608.019; N.H. Rev. Stat. Ann. § 275:30-a; N.Y. Lab. Law § 162; Or. Admin. R. 839-020-0050; R.I. Gen. Laws § 28-3-14; Tenn. Code Ann. § 50-2-103; Wash. Admin. Code 296-126-092; Vt. Stat. Ann. tit. 21 § 304; W. Va. Code Ann. § 21-3-10a; Md. Code Ann. Lab. & Empl. § 3-710. These laws vary significantly from state-to-state. While California's rest break requirements include a 10-minute paid break, other states, for example, have differing requirements. Illinois requires a 15-minute paid break, Minnesota requires "adequate" rest breaks, and Vermont requires "reasonable opportunities" for rest breaks. *Id*. Examples of various meal break requirements include California's 30-minute meal period to commence within the first five hours of work, Illinois' requirement of a 20-minute meal break, Minnesota's requirement of "sufficient" time for meals, New York's various requirements, Rhode Island's requirement of a 20-minute mealtime, Vermont's requirement of "reasonable opportunities" for a meal, and West Virginia's requirement of a 20-minute meal period. *Id*. The states also vary in their requirements for when the meal period must be provided. *Id*.

therefore, are just the kind of state-mandated service regulation the FAAAA preempts.

6. There will be no "parade of horribles."

Cole asks this Court to believe that if California's meal and rest break laws are preempted, virtually all laws applicable to motor carriers will be preempted as well, including everything from private property rights against trespass to environmental laws and everything in between. Cole forgets, however, that the Supreme Court has crafted adequate limiting principles that are routinely employed to effectively protect against the circumstance Cole fears. Specifically, as noted in *Dan's City*, laws that only have a "'tenuous, remote, or peripheral,'" connection with prices, routes, or services are not preempted. 133 S.Ct. at 1778 (quoting *Rowe*, 552 U.S. at 370, 371, *Morales*, 504 U.S. at 384, 390). Application of this guidance will preclude an overly broad application of FAAAA preemption. *See California Dump Truck Owners*, 2012 WL 273162 at *8 (cautiously distinguishing between the break laws' "no service" mandate and the non-preempted environmental law claim advanced); *cf. Fitz-Gerald v. SkyWest Airlines, Inc.*, 65 Cal. Rptr. 3d 913, 921-922 (Cal. Ct. App. 2007) (three-sentence analysis rejecting ADA preemption of minimum wage claims and break law claims considered as if they were one and the same). Cole's remaining examples of laws that might be preempted (e.g., speeding) are already expressly excepted from FAAAA

preemption because, unlike the break laws, they actually regulate motor vehicle safety.

C. The FAAAA's safety exception does not apply.

Cole's "safety" argument does not save the break rules from preemption. The language at issue is the FAAAA's limited saving clause in which Congress decided the FAAAA should not "restrict the safety regulatory authority of a State *with respect to motor vehicles*." 49 U.S.C. § 14501(c)(2)(A) (emphasis supplied). Cole, after attempting to read a "police power" exception *into* the FAAAA's saving clause, now seeks to read the words "with respect to motor vehicles" right *out* of it.

This Court has rightly described the preemption exception under 49 U.S.C. § 14501(c)(2)(A) as applicable only to state regulation that is "intended to be, and is, genuinely responsive to *motor vehicle* safety." *ATA I*, 559 F.3d at 1055 (emphasis supplied) (relying upon *City of Columbus*, 536 U.S. at 442). First and foremost, the excepted regulation must be "with respect to motor vehicles," meaning the exception does not "preserve the state's authority over safety issues generally" and instead very specifically "addresses *the regulation of motor vehicles*." *United Parcel Serv., Inc. v. Flores- Galarza*, 385 F.3d 9, 13-14 (1st Cir. 2004) (emphasis supplied), *cited with approval in ATA I,* 559 F.3d at 1054. The break laws do not meet that threshold requirement.

There is nothing in Cal. Lab. Code §§ 226.7; 512 – applicable as they are to the generic "employer" and its employees – that "addresses the regulation of motor vehicles" in any way. *United Parcel Serv.*, 385 F.3d at 14. In this respect, the decision in *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284 (Cal. 2007), does nothing to support Cole's position. The generalized notion of "safety" expressed in *Murphy* advanced the court's view of the break laws as a "remedial worker protection framework" "[c]oncerned with the health and welfare of employees" generally, *id.* at 291, but *Murphy* of course says nothing about whether the break rules were intended to be and are in fact genuinely responsive to *motor vehicle safety*. Nor could it, given that (to use Cole's own words) the break laws are "generally applicable laws" that "impose background conditions under which all employers must conduct business," *Appellants' Br.* at 40, many of which never employ workers who sit behind the wheel of any vehicle. That the IWC's wage orders apply the meal and rest break requirements equally to beauticians and barbers in the personal service industry, workers in the canning and freezing industry, and technical and clerical workers alike (among untold numbers of other California workers) is sufficient in and of itself to rebut any notion that the break laws were ever intended to have any remote connection to motor vehicle safety.

Cal. Code Regs. tit. 8, §§ 11020; 11030; 11040; *see also generally* Cal Code Regs. tit. 8, §§ 11010-11170.[17]

The 17 IWC wage orders all prescribe the same meal and rest break rules. The fact that Wage Order No. 9 applies to the "transportation industry" does not show that the break laws in this single wage order were intended to address motor vehicle regulation at all, let alone commercial motor vehicle safety. Moreover, Wage Order No. 9 applies not just to motor carriers, but also to "rail," "air," and "water" carriers too, whether they operate motor vehicles or not. *Wage Order No. 9*, § 2(N). And it also applies to all transportation workers other than administrative, executive, or professional personnel – *not* just to drivers – including warehouse workers and those who clean vehicles. *Wage Order No. 9*,§§ 1(A); 2(N). So, whatever vehicle safety arguments the IWC may have considered in adding previously-exempted public transit drivers into the mix in 2004[18] – an exemption in and of itself inconsistent with an order supposedly aimed at motor vehicle safety – Wage Order No. 9 itself evidences nothing other than the same general purpose to promote the health and welfare of all break law-covered

[17] Cole, in arguing the various wage orders simply evidence "mixed motives" under *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 405 (9th Cir. 2001) ("ATA II"), stretch the Court's meaning of that phrase beyond recognition. The laws in question in *ATA II* (and in *Tillison*, 424 F.3d 1093, too) took direct aim *only* at motor vehicle operation itself – not at virtually every commercial activity in the state, some of which might just happen to use a motor vehicle.

[18] *See Appellants' Brief* at 49-50.

workers whether they push a broom, carry a food tray, or operate nothing other than a pen or pencil all day.

It is not surprising, therefore, that the *Cardenas* case upon which Cole otherwise relies could find no evidence in the break laws' legislative history even "suggesting that the *purpose* of the laws was to promote motor vehicle safety." *Cardenas v. McLane Foodservices*, 796 F. Supp. 2d 1246, 1257 (C.D. Cal. 2011). It is likewise no surprise that the FMCSA, in the petition for administrative preemption upon which Cole also otherwise relies, found the break laws could not in any way be viewed as regulations "on commercial motor vehicle safety" because they "are not even unique to transportation." 73 Fed. Reg. at 79205-79206.[19]

[19] Cole further alleges the Statement as to the Basis for Amendment to Sections 2, 11 and 12 of Wage Order No. 9 Regarding Employees in the Transportation Industry ("Amendment Statement"), which recounts the process by which an amendment that made public employees subject to Wage Order No. 9 was passed, demonstrates that Wage Order No. 9 specifically addresses safety with respect to motor vehicles. Contrary to Cole's implication, however, the IWC did not state the exemption of publicly-employed drivers "resulted in conditions that [were] detrimental to the health and safety of workers and of the public" or that the lack of breaks "create[d] a public safety hazard due to driver fatigue" that put the "lives and safety of school children and . . . disabled riders" as risk, nor did it specifically or explicitly adopt or rely on this testimony in deciding to extend the meal and rest break laws contained within Wage Order No. 9 to public employees. *See Amendment Statement*, at 1, 2. The Amendment Statement merely recounts the process by which the amendment was passed, including testimony presented therein "urg[ing] . . . the IWC consider" the statements above. *Id*. at 1-10. In fact, the Amendment Statement actually suggests motor vehicle safety was not a concern of the IWC in enacting the amendment. At the conclusion of a hearing on

Even assuming *arguendo* that California's meal and rest break requirements may have been in some measure motivated by motor vehicle safety concerns, they are not *responsive* to any such concerns. Whatever the connection between rest breaks and fatigue-related safety risk, the break requirements actually implemented by California cannot effectively respond to it because they merely require an employer to provide *an opportunity* for employees to take a break; they do not require employers to ensure that employees actually take a break. *See Brinker*, 273 P.3d at 520-21.

In light of this reality, Cole's contention that California's break requirements respond to a genuine concern about motor carrier safety defies reason. If California had actually implemented its break requirements in the belief that they were necessary to ameliorate unsafe driving conditions, the requirements could only meaningfully respond to that concern if drivers were *required* to take them (like the mandatory 30-minute break that went into effect under the federal regulations on July 1, 2013). Combined with the express terms of the Labor Code, the only reasonable conclusion is that California's break requirements are a worker

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the proposed amendment, the IWC chairman suggested the matter be continued and asked that, for the next meeting, both sides provide information regarding, *inter alia*, "the issue of public safety as it might be affected by the exclusion of public drivers from meal and rest period requirements." *Amendment Statement* at 3. At the next meeting, however, "neither side . . . presented facts or statistics regarding the public safety issue," *id*., and the issue was not addressed thereafter. *Id*. at 3-10.

health and welfare measure (which any given worker can therefore waive at risk only to him or herself), not a motor vehicle safety measure.

Thus, the break laws are responsive only to "general public health concerns" and are therefore not saved from FAAAA preemption. *ER* at 29 (quoting *Dilts*, 819 F. Supp. 2d at 1122-23). Consistent with the rule that a preemption law's saving clause cannot be construed to destroy the law itself, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 748 (2011), the point made in *ATA I* is accordingly dispositive here: "[E]ven if some kind of general public health concerns are (or may be) involved . . . that alone does not bring [state] regulation within the ambit of the motor vehicle safety exception" – otherwise, "the exception would swallow the preemption section itself or, at the very least, cut a very wide swath through it." *ATA I*, 559 F.3d at 1054, cited in *Cardenas*, 796 F. Supp. 2d at 1258; *see also ER* 29 ("To hold otherwise would allow the motor vehicle safety exemption to swallow the preemption section of the rule"). Because the break laws are not in any sense imposed as safety regulation "with respect to motor vehicles," the FAAAA's motor vehicle safety exception does not apply.

VIII. CONCLUSION

For the reasons discussed above, the district court correctly held that California's meal and rest break laws are preempted by the FAAAA. The district court's decision should be affirmed.

Dated: February 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,796 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: February 3, 2014

/s/ James H. Hanson
James H. Hanson

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2014, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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