**No. 12-55705**

# In the 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., LP,
*Defendants-Appellees*.

On Appeal from the United States District Court
for the Southern District of California

## BRIEF FOR APPELLANTS

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## INTRODUCTION

For nearly a century, California has required employers to comply with laws governing wages, hours, and working conditions, including limits on the number of hours employees may be forced to work continuously without breaks for meals or rest. The district court concluded that those limits no longer apply to the broad range of employers categorized as "motor carriers" under federal law. According to the district court, Congress trumped California's longstanding state meal-and-rest-break protections eighteen years ago when it enacted the Federal Aviation Administration Authorization Act (FAAAA), preempting state laws related to motor carriers' "price[s], route[s], or service[s]."

But the FAAAA is an economic deregulation measure, designed to ensure parity between the airline and trucking industries by removing anticompetitive tariffs and barriers to entry. It does not immunize motor carriers from the background state laws under which all industries operate, much less fundamental workplace protections. Neither the Supreme Court nor this Court has ever concluded that generally applicable employment laws are preempted by the FAAAA or its forerunner, the Airline Deregulation Act. To the contrary, because wage-and-hour laws are traditionally a matter of state concern, they are presumed to escape preemption unless Congress's intent to the contrary is unmistakably clear.

This Court has already held that Congress had no such intent. Despite evidence that California's prevailing wage law increased motor carriers' prices by 25% and caused them to adjust their routes, this Court held that the law is not preempted by the FAAAA because (1) its effect on prices, routes, or services is "no more than indirect, remote, and tenuous," (2) it does not interfere with competition, and (3) it does not fall within the "field of laws" that Congress intended to preempt. *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998).

The district court's sweeping decision not only departs from *Mendonca*, but radically expands the bounds of FAAAA preemption. Its core rationale is that state meal-and-rest-break laws are preempted because they may increase the amount of time and cost necessary to get from Point A to Point B. But state laws forbidding trespassing, setting speed limits, requiring vehicles to stop at tolls and weigh stations, and setting environmental and emissions standards, to name just a few examples, have the same kind of effect but have nothing to do with the purposes of the FAAAA's preemption regime.

The district court also went past the point at which the relevant federal regulators are willing to draw the preemption line. The Federal Motor Carrier Safety Administration's hours-of-service rules (which the defendants contended below *impliedly* preempt state meal-and-rest break laws) in fact make clear that

States retain their traditional authority in this field. *Hours of Service of Drivers*, 76 Fed. Reg. 81,134, 81,183 (Dec. 27, 2011) ("[T]his rule would not have a substantial direct effect on States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation."). And in 2008, the agency refused to accept the "far-reaching" argument that California's meal-and-rest-break laws could be preempted on the grounds that they "prevent carriers from maximizing their employees' driving and on duty time." *Notice of Rejection of Petition for Preemption*, 73 Fed. Reg. 79,204, 79,206 (Dec. 24, 2008). "The meal and rest break rules," the agency explained, "are simply one part of California's comprehensive regulations governing wages, hours, and working conditions"—regulations the agency has "for decades" required motor carriers to follow. *Id.*

## JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1332(d)(2), 1441(b), and 1453 because this is a class action in which the proposed class includes at least 100 members, the matter in controversy exceeds $5,000,000, exclusive of interests and costs, and the plaintiffs and defendants are citizens of different States. (RE 160-65 (notice of removal); RE 169-86 (complaint)).

This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal arises from the judgment entered by the district court under Federal Rule of Civil Procedure 54(b) on March 22, 2012. (RE 1-2). That judgment finally disposed of

the plaintiffs' state-law claims relating to meal and rest periods. The plaintiffs' notice of appeal (RE 83-84) was timely filed under Federal Rule of Appellate Procedure 4(a)(1)(A) on April 18, 2012.

## STATEMENT OF THE ISSUES

The Federal Aviation Administration Authorization Act of 1994 (FAAAA) provides, as a "[g]eneral rule," 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). The Act further provides that this general rule "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). The issues presented are:

1. Does the FAAAA preempt California's generally applicable requirements, embodied in the California Labor Code and Industrial Welfare Commission orders, that employers provide their workers with meal and rest breaks?

2. Are California's meal-and-rest-break requirements, as applied to motor carriers, saved from preemption because they fall within "the safety regulatory authority of [the] State"?

## STATEMENT OF THE CASE

### A. California's Wage-and-Hour Laws

"For the better part of a century, California law has guaranteed to employees wage and hour protection, including meal and rest periods intended to ameliorate the consequences of long hours." *Brinker Rest. Corp v. Superior Court*, 273 P.3d 513, 520 (Cal. 2012).

**1. History.** In the first three decades of the twentieth century, public concern over dangerous and exploitative industrial working conditions led to a wave of state legislation intended to protect employees' health and welfare. *See* Joseph G. Rayback, *A History of American Labor* 260-72 (1966); David Neumark & William L. Wascher, *Minimum Wages* 11-12 (2008). During this period, nearly every State enacted or strengthened these laws—setting minimum and maximum hours, imposing child-labor prohibitions, and establishing specialized administrative bodies. Elizabeth Brandeis, *Labor Legislation*, *in* 3 *History of Labor in the United States* 399-402 (John R. Commons, ed., 1935). Despite *Lochner v. New York*, 198 U.S. 45 (1905), which notoriously struck down a New York law limiting the hours that bakery employees could be forced to work, the constitutionality of wage-and-hour protections became firmly established during the New Deal. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the [State] has necessarily a wide field of discretion in order that there

may be suitable protection of health and safety … [and] wholesome conditions of work and freedom from oppression.").

In California, modern worker protection legislation began in 1913, when the Legislature established the Industrial Welfare Commission (IWC), charged with protection of workers' "comfort, health, safety, and welfare," *Indus. Welfare Comm'n v. Superior Court*, 613 P.2d 579, 596-97 (Cal. 1980), and the authority to "fix[] for each industry minimum wages, maximum hours of work, and conditions of labor." *Brinker*, 273 P.3d at 527. The State's rules on rest and meal periods were issued in 1916 and 1932, respectively, and "have long been viewed as part of the remedial worker protection framework." *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 291 (Cal. 2007). Over the past century, the Legislature also has enacted statutes directly regulating wages, hours, and working conditions, so that the field is "governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC." *Brinker*, 273 P.3d at 527. The wage orders cover the full spectrum of industries, from manufacturing to motion pictures. Transportation workers are covered by IWC Order 9.[1]

**2. Current Law on Meal and Rest Breaks.** Today, "[s]tate law obligates employers to afford their nonexempt employees meal periods and rest

[1] *See* http://www.dir.ca.gov/IWC/WageOrders2005/IWCArticle9.html.

periods during the workday." *Brinker*, 273 P.3d at 521. Section 226.7(a) of the California Labor Code prohibits an employer from requiring an employee "to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." Section 512 of the California Labor Code prescribes meal periods, while the various wage orders prescribe both meal and rest periods. Although the meal-and-rest-period rules apply to specific industries through separate wage orders, they are virtually identical across industries. *See* Cal. Code Regs., tit. 8, §§ 11010–11170. Employees are permitted a meal break of 30 minutes for each five-hour work period, subject to waivers under certain circumstances, and a rest break of 10 minutes for every four-hour work period or "major fraction thereof." *Id.*

**a. *Flexibility*.** Employers have substantial flexibility in determining when to allow their employees to take meal and rest breaks. Where "the nature of the work prevents an employee from being relieved of all duty," employers and employees may waive the right to an off-duty meal period. IWC Order 9, Section 11. In these circumstances, the period "shall be considered an 'on duty' meal period and counted as time worked." *Id.* In the absence of a waiver, "section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." *Brinker*, 273 P.3d at 537. The law imposes no additional timing

requirements. *Id.* Similarly, rest periods need not be taken at precise times, nor must they be taken before or after the meal period. *Id* at 530. The California Supreme Court has explained that "[t]he only constraint on timing is that rest breaks must fall in the middle of work periods 'insofar as practicable.' Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible." *Id.* "What will suffice may vary from industry to industry." *Id.* at 537.

**b. *Payment of Premium Wages in Lieu of Breaks*.** Employers who fail to provide meal and rest breaks must "pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Cal. Labor Code § 226.7. This "additional hour of pay" is not a penalty, but a "premium wage," like overtime pay. *Murphy*, 155 P.3d at 289-97. As the California Division of Labor Standards Enforcement (DLSE) has explained, an employer "may choose not to provide its employees with meal and rest periods, in which case [it] must simply pay the premium"—and in this respect, the "meal and rest period premium pay operates in exactly the same way as overtime premium pay."[2] *See Murphy*, 155 P.3d at 293 ("Under the amended version of section 226.7, an employee is entitled to the additional hour of pay

[2] Mem. of DLSE at 10, in *Dunbar Armored, Inc. v. Rea*, No. 04-CV-0602 (S.D. Cal. May 12, 2004).

immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime.").

The DLSE advises employees who have been denied meal and rest breaks that they "are to be paid one hour of pay" for each workday that the period is not provided. If the employer "fails to pay the additional one-hour's pay," the employee may file a wage claim with the DLSE.[3] The California Chamber of Commerce similarly advises employers that if a meal or rest break "is not given," the employer "owe[s] the employee one hour of pay, "which . . . must [be] include[d] in the next paycheck."[4] *See Murphy*, 155 P.3d at 293.

## B. Federal Regulation and Deregulation of Airlines and Trucking

**1. The Era of Classical Regulation (1935-1978).** For much of the twentieth century, the American transportation industry was subject to extensive public-utility-like regulation by the federal government. This regulation was deemed necessary to stabilize the industry during the Depression and to prevent

[3] California Division of Labor Standards Enforcement, Frequently Asked Questions: Meal Periods (3/7/08), *available* at http://www.dir.ca.gov/dlse/FAQ_MealPeriods.htm; Frequently Asked Questions: Rest Periods (3/4/2011), *available at* http://www.dir.ca.gov/dlse/FAQ_RestPeriods.htm.

[4] California Chamber of Commerce, Meal and Rest Breaks, *available at* http://www.calchamber.com/california-employment-law/pages/meal-and-rest-breaks.aspx.

the destructive effects of "excessive competition." Stephen Breyer, *Regulation and Its Reform* 229, 245 (1982).

Federal regulation of the trucking industry began as part of the New Deal in 1935, when Congress granted the Interstate Commerce Commission (ICC) authority to regulate market entry, access to trucking routes, and minimum, maximum, and actual rates. *See* Motor Carrier Act, 49 Stat. 543 (1935), 49 U.S.C. §10101-11916. The ICC used this authority to "establish a system of tight entry control." Gregory Chow, "U.S. and Canadian Trucking Policy," in Kenneth Button and David Pitfield, eds., *Transport Deregulation* (1991). Applicants for new operating licenses had to show that their entry was consistent with public convenience and necessity. "Established competitors would almost always protest new entry or expansion of route authority and were generally successful," and "[c]ollusion of competitors was allowed in the form of rate bureaus." James Peoples, ed., *Regulatory Reform* 17 (1998). The result was a regulatory scheme that greatly "restricted competition in the burgeoning trucking industry." *Id.; see generally* Breyer, *Regulation and Its Reform*, at 222-239 (detailing anticompetitive effects of price and entry regulation in the trucking industry between 1935 and 1980).

Similar regulation of the airline industry began in 1937, when Congress granted the Civil Aeronautics Board authority to regulate airline market entry, fares, and routes. *See* Civil Aeronautics Act, Ch. 706, 52 Stat. 973, *superseded by*

Federal Aviation Act of 1958, Pub. L. 85–726, 72 Stat. 731 (1958). As with trucking, by the 1970's, airfare controls eventually resulted in "high prices and overcapacity," and route controls had "effectively closed the [airline] industry to newcomers," insulating incumbent airlines from competition and weakening their incentives to perform efficiently. Breyer, *Regulation and Its Reform* at 200, 205-06.

**2. Economic Deregulation and Preemption (1978-1994).** In response to these problems, Congress enacted the Airline Deregulation Act of 1978 (ADA). Pub. L. No. 95-504, 92 Stat. 1704 (1978). The ADA replaced federal economic regulation of the airline industry with a policy of "maximum reliance on competitive market forces." ADA § 3(a), 92 Stat. 1706. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992), and to "prevent conflicts and inconsistent regulation[]," H.R. Rep. No. 1211, 95th Cong., 2d Sess. 15 (1978), the ADA also preempted state laws "relating to the rates, routes, or services" of any air carrier. 49 U.S.C. § 1305(a)(1).

Two years later, in 1980, Congress withdrew federal economic regulation of trucking prices and routes, but failed to simultaneously preempt state regulation of the same subject matter. *See* Motor Carrier Act of 1980 (MCA). 94 Stat. 793. As a result, by 1994, 41 jurisdictions regulated, "in varying degrees, intrastate prices, routes, and services of motor carriers." H.R. Conf. Rep. 103-677, at 86 (1994).

"Typical forms of regulation include[d] entry controls, tariff filing and price regulation, and types of commodities carried." *Id.* Congress found that these state regulations often benefitted the trucking industry to the detriment of consumers. State price controls ensured that prices were "kept high enough to cover all costs" and "not so low as to be predatory," *id.* at 87 (internal quotation marks omitted), and entry controls "often serve[d] to protect carriers, while restricting new applicants from directly competing for any given route and type of trucking business." *Id.* Congress was also particularly concerned that the States' public-utility approach to regulation disadvantaged motor carriers (like UPS) who faced competitors organized as air carriers (like Federal Express) that were immune from state regulation under the ADA. *See id.* (citing *Fed. Express Corp. v. Cal. Public Utils Comm'n*, 936 F.2d 1075 (9th Cir. 1991)).

To remedy these problems, Congress enacted § 601(c) of the Federal Aviation Authorization Act of 1994 (FAAAA). Pub. L. No. 103-305, 108 Stat. 1569, 49 U.S.C. § 14501. Using language nearly identical to the ADA, § 601 preempts state laws "related to a price, route, or service of any motor carrier … with respect to the transportation of property." *Id.* Congress thus sought to extend to motor carriers "the identical intrastate preemption" of state laws that applied to air carriers under the ADA. H.R. Conf. Rep. 103-677, at 83 (citing § 105(a), 49 U.S.C. App. 1305(a)(1), of the Federal Aviation Act).

The FAAAA, however, also contains express limits on the scope of federal preemption. Most significantly, the FAAAA "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2). The Act likewise does not restrict the States' authority to control trucking routes based on vehicle size, weight, and cargo; to impose certain insurance, liability, and standard transportation rules; or to regulate intrastate transportation of household goods and certain aspects of tow-truck operations. 49 U.S.C. § 14501(c)(2), (c)(3). Through these exceptions, Congress made clear that state authority in these traditional areas of regulation was "unchanged, since State regulation in those areas is not a price, route or service and thus is unaffected." H.R. Conf. Rep. 103-677, at 84 (1994). The "list [was] not intended to be inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." *Id.*

### C. The Federal Motor Carrier Safety Administration's Rejection of Penske's Preemption Petition

In 2008, a group of commercial carriers including Penske petitioned FMCSA to preempt California's meal-and-rest-break laws and regulations "as applied to drivers of commercial motor vehicles." *Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers; Rejection for Failure to Meet Threshold Requirement*, 73 Fed Reg. 79,204 (December 24, 2008). They invoked the Secretary of Transportation's authority to void state laws on

commercial motor vehicle safety that have "no safety benefit," are "incompatible" with federal regulations, or would cause an "unreasonable burden on interstate commerce." *See* 49 U.S.C. § 31141.

Echoing the arguments in this litigation, Penske and its co-petitioners contended that "they should be free to schedule drivers to work … without regard to individual state requirements." 73 Fed. Reg. 79,205 (quoting petition). They claimed, as here, that state meal-and-rest-break laws interfere with the efficiency of their operations "by mandating when meal breaks must be taken," requiring drivers to be "fully relieved of duty" and imposing "more stringent limitations" than FMCSA's hours-of-service regulations. *Id.*

FMCSA rejected the preemption petition, concluding that California's meal-and-rest-break rules are not laws or regulations "on commercial motor vehicle safety" for purposes of 49 U.S.C. § 31141, but are instead "simply one part of California's comprehensive regulations governing wages, hours, and working conditions." *Id.* at 79,206. The statute, the agency concluded, "does not allow the preemption" of state laws "merely because they have some effect" on motor carriers' operations. *Id.*

FMCSA did not stop at the threshold step, but also went on to criticize petitioners' "far-reaching" argument that general state-law worker protections could be preempted on the ground that they "prevent carriers from maximizing

their employees' driving and on-duty time." *Id.* That logic, FMCSA explained, could lead to the preemption of "any number of state laws"—such as tax or environmental laws—that might "affect a motor carrier's ability to maintain compliance" with the agency's regulations. *Id.* FMCSA further reaffirmed that it has "for decades required carriers and drivers to comply with all of the laws, ordinances, and regulations of the jurisdiction where they operate"—including state wage-and-hour protections. *Id.; see* 49 C.F.R. § 392.2 ("Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated.").

### D. Facts and Proceedings Below

**1.** Penske Logistics provides warehouse, distribution, and inventory-management services to various businesses throughout California. (RE 4). Between 2004 and 2009, plaintiffs-appellants Mickey Dilts, Ray Rios, and Donny Dushaj were employed by Penske, working out of the company's Ontario, California facility and assigned to its Whirpool account. They typically worked shifts exceeding ten hours, delivering large Whirlpool kitchen appliances (dishwashers, refrigerators, ovens) to customers at their homes and businesses and then installing them on site. Hourly workers assigned to the Whirpool account were classified as either "drivers/installers" (like Dilts) who hold commercial driver's licenses, or "installers" (like Rios and Dushaj), who generally do not hold such licenses but

assist in the unloading and installation of appliances. (RE 4-5). The plaintiffs are not long-haul truckers. Their work took place exclusively within California—not far from the Ontario facility—and much of it consisted of installing heavy appliances.

**2.** In 2008, Dilts, Rios, and Dushaj filed a putative class action in state court, alleging that Penske had violated state law by failing to provide meals and rest breaks, pay overtime, reimburse business expenses, and pay wages due to its drivers and installers. (RE 5). Penske responded that it was subject to—and complying with—California's meal-and-rest-break rules throughout the relevant time period.

Because Penske "expected" its workers to take meal breaks, the company employed "a systematic policy of automatically deducting 30-minutes of work time [to account for those] daily meal periods." (RE 4, 64). "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." (RE 5). Penske "provided no means for the employee to override the 'auto-deduction' for any day that a meal period was not provided." (RE 64) In addition, Penske created "an environment that uniformly discouraged [employees] from taking meal and rest breaks. Because many [drivers and installers] regularly work[d] overtime hours, the common impact of the 'auto-deduction' was magnified because it result[ed] in the direct loss of 'premium' or 'overtime' wages." (*Id.*) Employees could not indicate that they had

not taken a meal break and Penske never paid a premium wage for a missed break. (RE 77). "Moreover there seems to be no debate that [Penske's] policies did not account for the statutorily mandated second meal break." (*Id.*).

After Penske removed the case from state to federal court, the district court certified a class of 349 delivery drivers and installers who worked for Penske in California and were assigned to the Whirlpool account. (RE 4, 62-82). Penske then moved for summary judgment on the meal-and-rest-break claims, arguing that they are expressly preempted by the FAAAA and impliedly preempted by FMCSA's hours-of-service regulations. (DN 6).[5]

**3.** The district court granted partial summary judgment as to plaintiffs' claims under California's meal-and-rest-break laws, holding that the FAAAA preempts those laws because they are "related to" motor carrier prices, routes, and services. (RE 19).

In the court's view, "no factual analysis [was] required to decide this question of preemption" and the court therefore did not consider the evidence

[5] Because the court decided the case on the basis of express preemption, it declined to reach Penske's implied-preemption argument based on the hours-of-service rule. (RE 6). In any event, "FMCSA has determined this rule would not have a substantial direct effect on States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation." *Hours of Service of Drivers*, 76 Fed. Reg. 81,134, 81,183 (Dec. 27, 2011); *see also* 75 Fed Reg. 82,170, 82,195 (Dec. 29, 2010) (same).

proffered by Penske. (RE 15-16).[6] The district court interpreted California law as imposing "fairly rigid" timing requirements on motor carriers, dictating "exactly when" and "for exactly how long" drivers must take breaks throughout the workday, thereby preventing drivers from taking "any route that does not offer adequate locations for stopping, or by forcing them to take shorter or fewer routes." (RE 14-15). The court cited no California authority for its interpretation of the laws' timing requirements and no evidence that any of the routes Penske used to deliver Whirpool appliances from its Ontario facility—or any California route, for that matter—lacked "adequate locations for stopping" within a five-hour period.

The district court also concluded that that the meal-and-rest-break laws have a "significant impact on Penske's services" because compliance would "reduce the amount of on-duty work time allowable to drivers," and thereby reduce the number of deliveries each driver can make daily. (RE 14). The court cited no evidence that Penske could not make up for any reduction in on-duty time by hiring additional drivers or installers. To the contrary, the court concluded that the

[6] Penske attempted to rely on declarations by two of its employees, speculating about the potential impact of California law. The plaintiffs raised evidentiary objections to these declarations, moved to strike them, and requested additional discovery in the event that the Court decided to admit them (RE 6). The district court denied the motion to strike and the objections as moot, concluding that the two declarations "were not necessary to resolve the instant motion." (RE 16).

effects on routes and services "contribute to a significant impact upon prices" precisely *because* Penske would have to bear "the cost of additional drivers." (RE 15).

The court next sought to distinguish this Court's decision in *Mendonca*, 152 F.3d 1184, reasoning that the meal-and-rest-break laws are distinct from the "wage statutes" at issue in *Mendonca* because they "require off-duty breaks for employees at certain times and of certain lengths" and they "are not simply wage laws which require employers to pay employees a certain wage and thus indirectly affect the prices of a service." (RE 16-17).

Finally, the court held that the meal-and-rest-break laws are not saved from preemption as laws enacted under California's "safety regulatory authority … with respect to motor vehicles." 49 U.S.C. § 14501(c)(2). Despite the California Supreme Court's recognition that one justification for the laws is the fact that "[e]mployees denied their rest and meal periods face greater risk of work-related accidents," the court concluded that the laws are responsive only to "general public health concerns." (RE 20).

## STANDARD OF REVIEW

This Court "review[s] a district court's decision regarding federal preemption de novo" and "review[s] the district court's interpretation and construction of the FAAAA de novo." *Tillison v. Gregoire*, 424 F.3d 1093, 1098 (9th Cir. 2005). A proponent of preemption "bears the burden of proof on its

preemption defense," *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n.6 (9th Cir. 1995), and also "bears a considerable burden of overcoming the starting presumption that Congress did not intend to supplant state law." *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,* 520 U.S. 806, 814 (1997) (internal quotation marks omitted).

## SUMMARY OF ARGUMENT

**I. A.** State law is presumed to escape preemption absent unmistakably clear evidence that Congress so intended. Because States are powerless to fix preemption mistakes, insisting that Congress speak clearly safeguards federalism and ensures that preemption is a product of legislative choice, not judicial lawmaking. Here, the presumption against preemption is at its height given the States' broad police powers in the area of wages, hours, and working conditions.

**B**. Congress's purpose in enacting the FAAAA was not to preempt state worker protections, but to ensure competition in the trucking industry. Congress wanted to eliminate certain anticompetitive regulations—like entry controls and tariffs. That California's meal-and-rest-break laws have *no* effect on competition is sufficient, in itself, to warrant reversal of the district court's decision. Given the prominent battles over preemption of wage-and-hour law in the trucking industry immediately preceding the FAAAA's enactment, the lack of any evidence that Congress intended to preempt those laws is akin to the dog that didn't bark.

**C.** The district court's decision is foreclosed by this Court's ruling in *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998), which held that California's prevailing wage law is not preempted by the FAAAA because its effect on prices, routes, or services is "no more than indirect, remote, and tenuous," it does not interfere with competition, and it does not fall within the "field of laws" that Congress intended to preempt. As in *Mendonca*, California's meal-and-rest-break laws may cause motor carriers to adjust their routes or services, but they do not bind motor carriers to any *particular* route or service. Extending preemption further—to generally applicable state laws that increase the time or cost for a motor carrier to get from Point A to Point B—has no coherent stopping point. Congress did not intend to sweep so far.

**D.** Even if the district court's analysis of *federal* law were entirely correct, its flawed account of *state* law requires reversal. The district court's preemption analysis hinged on its understanding that California has established a "fairly rigid" regulatory scheme that dictates "exactly when" employers must provide breaks. But the California Supreme Court has made clear that that is not so, and that a critical feature of California's meal-and-rest-break laws is their flexibility. Beyond this misreading of state law, the district court's analysis was further infected by its reliance on faulty assumptions about the state law's actual effects.

**II.** In any event, California's meal-and-rest-break laws, as applied to the transportation industry, fall within the state's safety regulatory authority with respect to motor vehicles—a sphere that the FAAAA expressly saves from preemption. The Industrial Welfare Commission, the Legislature, and the courts have all affirmed that breaks promote safety—especially enhanced motor vehicle safety by reducing driver fatigue—and scientific studies demonstrate that breaks substantially reduce the risk of accidents involving truck drivers.

## ARGUMENT

### I. THE FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT DOES NOT PREEMPT CALIFORNIA'S MEAL-AND-REST BREAK RULES.

Enacted "to prevent States from undermining federal deregulation of interstate trucking," *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 395 (9th Cir. 2011), the Federal Aviation Administration Authorization Act establishes the "[g]eneral rule" 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).

Because this provision tracks the Airline Deregulation Act and because both statutes share with ERISA the key term "related to," the Supreme Court has held that preemption extends to state laws "having a connection with, or reference to" motor carriers' prices, routes, or services—a formulation derived from ERISA

jurisprudence. *Rowe N.H. Motor Transport Ass'n*, 552 U.S. 364, 370 (2008) (emphasis removed) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). Preemption under the FAAAA may also occur when state law has a "'significant impact' related to Congress' deregulatory and pre-emption related objectives." *Id.* at 371. On the other hand, if "a state law's effect on price, route or service is 'too tenuous, remote, or peripheral,' then the state law is not preempted." *Air Transp. Ass'n of Am. v. City & Cnty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001) (quoting *Morales*, 504 U.S. at 390).

As many courts have observed, neither the key statutory term—"related to"—nor the many judge-made tests devised to unpack it—"connection with," "reference to," "significant impact," and "tenuous, remote, or peripheral,"—are easy to grasp. The Supreme Court has described "related to" as a "frustrating" phrase that cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." *N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 656 (1995). And no less a committed textualist than Justice Scalia has candidly observed that "applying the 'relate to' provision according to its terms" is "a project doomed to failure" because "everything is related to everything else." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). Rather than employ an "uncritical literalism," then, courts ultimately

"must go beyond the unhelpful text" and "look instead to the objectives of the [federal] statute as a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656.

The FAAAA's objective was to prevent States from inhibiting competition by imposing their own regulation of motor carriers' prices, routes, and services in the wake of federal deregulation. Nothing in its text, structure, or history suggests that it was ever intended to preempt generally applicable state-law wage-and-hour protections. To the contrary, this Court has already held that California's wage-and-hour laws are not "related to" motor carrier prices, routes or services within the meaning of the FAAAA because their effect is "no more than indirect, remote, and tenuous." *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (upholding prevailing wage law against preemption challenge). The district court's decision not only flouts *Mendonca*, but extends the FAAAA's preemptive scope far beyond what Congress envisioned. It infringes on the States' traditional authority to protect the health and welfare of its workers without furthering Congress's goal of eliminating barriers to competition in the transportation industry. It should be reversed.

### A. Penske Bears a Heavy Burden to Overcome the Presumption That Congress Did Not Intend to Displace State Worker Protections.

"In *all* pre-emption cases"—and "particularly in those in which Congress has 'legislated in a field which the States have traditionally occupied'"—courts must "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis added; internal alterations and quotation marks omitted). "This is especially true in the area of employment law." *Ventress v. Japan Airlines*, 603 F.3d 676, 682 (9th Cir. 2010). Because "the establishment of labor standards falls within the traditional police power of the State," the Supreme Court has emphasized that "pre-emption should not be lightly inferred in this area." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987). "States possess broad authority under their police powers to regulate the employment relationship to protect workers" through "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). Even where federal statutes broadly preempt state law relating to labor relations, the Supreme Court has historically been reluctant to extend preemption to the field of "wages, hours, or working conditions." *Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 6 (1943). What Justice Jackson said of the Railway

Labor Act and the National Labor Relations Act may be even more apt here: Because "State laws have long regulated a great variety of [working] conditions in transportation," and because the "national interest" expressed by the FAAAA "is not primarily in working conditions as such," "it cannot be that the minimum requirements laid down by state authority are all set aside." *Id.* at 6-7.

In cases rejecting claims that California's prevailing wage law is preempted by ERISA and the FAAAA, respectively, both the Supreme Court and this Court have emphasized the importance of this presumption against preemption in the wage-and-hour context. *See Dillingham*, 519 U.S. at 331, 334 ("We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort."); *Mendonca*, 152 F.3d at 1186 (stressing the "absence of any positive indication in the legislative history that Congress intended preemption in this area of traditional state power" (emphasis removed)). And, more generally, both courts have regularly adhered to the presumption in cases involving the FAAAA. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 438 (2002); *California Tow Truck Ass'n v. City and Cnty. of San Francisco*, No. 11-15040, __ F.3d __, 2012 WL 3641744, at *8 (9th Cir. Aug. 27, 2012); *Tillison v. Gregoire*, 424 F.3d 1093, 1098 (9th Cir. 2005); *see also Rowe*, 552 U.S. at 375 (FAAAA does not preempt "state public health regulation: for instance, state regulation that

broadly prohibits certain forms of conduct and affects, say, truckdrivers" incidentally).

This presumption against preemption is critical not only "because the States are independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), but also because a "state is powerless to remove the ill effects of [the court's] decision," *Beveridge v. Lewis*, 939 F.2d 859, 863 (9th Cir.1991) (quoting *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943)). On the other hand, "Congress," if it so chooses, can always "act so unequivocally as to make clear that it intends no regulation except its own." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947); *see generally* Betsy Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 627 (1997) ("[R]equiring that Congress speak clearly will help ensure that its decision to preempt is the product of a deliberate policy choice," not judicial lawmaking); Bradford Clark, S*eparation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1425 (2001) (presumption against preemption "safeguard[s] federalism" and "ensure[s] that courts do not displace state law in the name of a command Congress did not actually enact into law").

For all of these reasons, "a finding of federal preemption is disfavored." *Dupnik v. United States*, 848 F.2d 1476, 1480 (9th Cir. 1988). Even if Penske's reading of the FAAAA were "plausible"—"indeed, even if its alternative were just as

plausible"—this Court "would nevertheless have a duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

### B. Congress's Purpose Was to Ensure Competition in the Trucking Industry, Not to Trump Wage-and-Hour Laws.

Not only is worker protection historically within the province of state law and thus presumptively saved from preemption, it is also quite remote from Congress's purpose in enacting the FAAAA.

**1.** "[T]he purpose of Congress," of course, "is the ultimate touchstone in every pre-emption case." *Wyeth*, 555 U.S. at 565 (2009) (quoting *Lohr*, 518 U.S. at 485). Particularly where the text is opaque, as it is here, "[u]nderstanding the objective of this legislation is critical to interpreting the extent of its preemption." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc). That is because courts look to the "objectives" of the statute "as a guide to the scope of the state law that Congress understood would survive." *Dillingham*, 519 U.S. at 325. "In order to identify the 'purpose of Congress,'" in preemption cases, it is often "appropriate to … review the history" of the relevant federal regulatory scheme. *Wyeth*, 555 U.S. at 565.

The history here unambiguously tells us that Congress's purpose in enacting the FAAAA was to ensure free competition within the transportation industry. Congress accomplished that goal by eliminating certain specific forms of anticompetitive state economic regulation, thereby creating parity between the

airlines and motor carriers. *See AGG Enters. v. Washington Cnty.*, 281 F.3d 1324, 1329 (9th Cir. 2002) (explaining that "the major purpose of the FAAAA preemption clause was to 'level the playing field between air carriers on the one hand and motor carriers on the other with respect to intrastate economic trucking regulation.'"); H.R. Conf. Rep. 103-677, at 82-83 (describing this as "[t]he central purpose of this legislation").

To that end, Congress modeled the FAAAA's preemption provision on the 1978 Airline Deregulation Act, which had sought to foster "maximum reliance on competitive market forces" and "ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. In the Conference Report accompanying the FAAAA, Congress specifically described the sort of state regulation of motor carriers' rates, routes, and services that it had in mind: "Typical forms of regulation include entry controls, tariff filing and price regulation, and types of commodities carried." H.R. Conf. Rep. 103-677, at 86 (1994). The Report explained that 41 states had these kinds of trucking regulations to varying degrees. *Id.* Congress was concerned that "[s]trict entry controls often serve to protect carriers, while restricting new applicants from directly competing for any given route and type of trucking business." *Id.* Roughly half the States also had strict price regulation of trucking prices. "Such regulation," the Conference Report explained, "is usually designed to ensure not that prices are kept low, but

that they are kept high enough to cover all costs and are not so low as to be predatory. Price regulation also involves filing of tariffs and long intervals for approval to change prices." *Id.* at 87. (internal quotation marks omitted).

By all accounts, the impetus for the FAAAA was this Court's decision in *Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991). *See* H.R. Conf. Rep. 103-677, at 87. There, Federal Express brought a successful ADA preemption challenge to California's regulation of its trucking operations—"regulation of rates, of discounts and promotional pricing, of claims, of overcharges, of bills of lading and freight bills, and its imposition of fees"—on the ground that it was an air carrier exempt from state regulation. *Id.* at 1078-79. In the wake of that decision, Congress was concerned that package delivery companies organized as "motor carriers" (like UPS) would remain subject to strict economic regulation, whereas companies organized as "air carriers" (like Federal Express) would be free of heavy-handed state regulation, leading to a severe competitive imbalance. H.R. Conf. Rep. 103-677, at 87.

At the time of the FAAAA's enactment, then, everyone understood that the preemption provision closely tracked Congress's purpose of eliminating specific types of anticompetitive economic regulation of trucking. As President Clinton explained in his signing statement, "[s]tate regulation preempted under this provision takes the form of controls on who can enter the trucking industry within

a State, what they can carry and where they can carry it, and whether competitors can sit down and arrange among themselves how much to charge shippers and consumers." President William J. Clinton, *Statement on Signing the Federal Aviation Administration Authorization Act of 1994*, 2 Pub. Papers 1494 (Aug. 23, 1994).

**2.** The district court concluded that California's meal-and-rest-break laws "interfere with competitive market forces within the … industry." (RE 15). It is hard to fathom what the district court could have meant. Unlike the entry controls, price regulations, tariffs, or other public-utility-like regulations with which Congress was concerned in 1994, the meal-and-rest break rules cannot have an anticompetitive effect. Another motor carrier competing for the Whirpool delivery contract in California could gain no competitive advantage over the other by virtue of the rules (unless one firm seeks an illegitimate advantage by uniformly deducting pay for breaks not actually provided or taken, as Penske did here). As the Second Circuit observed in the context of discrimination law, "[p]ermitting full operation of [the State's] law will not affect competition between airlines—the primary concern underlying the ADA. Unlike the regulation of marketing practices at issue in *Morales* or the regulation of frequent flyer programs at issue in *Wolens*, whether an airline discriminates on the basis of age (or race or sex) has little or nothing to do with competition." *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77, 84 (2d Cir. 1997) (citing *Morales*, 504 U.S. 374; *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 221 (1995)).

Like the discrimination and prevailing wage laws, the meal-and-rest-break rules do not "frustrate[] the purpose of deregulation by acutely interfering with their forces of competition." *Mendonca*, 152 F.3d at 1189 (emphasis removed); *see also Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998) ("[T]he proper inquiry is whether [the state law] frustrates deregulation by interfering with competition through public utility-style regulation."). That fact alone is sufficient to dispose of Penske's preemption argument because "Congress intended to preempt *only* state laws and lawsuits that would adversely affect the economic deregulation of … and the forces of competition within the … industry." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc) (emphasis added).

**3.** Whereas Congress was very clear about the public-utility-like regulations it sought to preempt, there is no evidence that Congress intended to free the transportation industry of fundamental protections guaranteed to workers in all industries. California's meal-and-rest-break requirements have been on the books since 1916, and, for more than three decades, have coexisted with the federal transportation deregulation laws, beginning in 1979 with the ADA. That "long history … adds force to the basic presumption against pre-emption." *Bates*, 544 U.S. at 449 ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.");

*Wyeth*, 555 U.S. at 574 ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the [statute's] history."); *see also Air Transport*, 266 F.3d at 1075 n.2 ("Notably, the Airlines have lived with [the challenged nondiscrimination provisions] for 20 years without claiming those provisions were preempted by the ADA."). A reading "resulting in pre-emption of traditionally state-regulated substantive law in those areas where [the federal statute] has nothing to say would be," to put it mildly, "unsettling." *Dillingham*, 519 U.S. at 330 (rejecting preemption of California wage law); *see also Taj Mahal Travel*, 164 F.3d at 194 ("Such a massive change from pre-existing policy would hardly be imposed without specific statutory language.").

Congress's silence on the issue is especially striking given the contentious battles over wage-and-hour laws in the trucking industry, including events that would have been fresh in the minds of industry lobbyists, union officials, federal regulators, and lawmakers. Just a few years before the FAAAA's enactment, for example, the Ninth Circuit rejected a federal preemption challenge to state overtime laws by motor carriers, who argued that the laws were trumped by the Motor Carrier Act of 1980, the law that first deregulated the trucking industry. *See Agsalud v. Pony Express Courier Corp. of Am.*, 833 F.2d 809 (9th Cir. 1987); *see also Pettis Moving Co. v. Roberts*, 784 F.2d 439 (2d Cir. 1986) (rejecting similar challenge); *Cent.*

*Delivery Serv. v. Burch*, 486 F.2d 1399 (4th Cir. 1973) (same); *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258 (D.C. Cir. 1972) (same). And the California Supreme Court, remarking on the "tortuous litigation history [that] prevented the implementation of the majority of IWC wage orders in recent years," rejected a broad-based series of challenges to the wage orders, including meal-and-rest-break requirements, brought by several employer groups, including the California Trucking Association. *See Indus. Welfare Com. v. Superior Court*, 613 P.2d 579, 583 (1980) (rejecting arguments that, among other things, the National Labor Relations Act preempted the state rules); *see also California Mfrs. Assn. v. Industrial Welfare Comm'n*, 167 Cal. Rptr. 203, 215 (Cal. App. 1980) (same).

Despite the prominence of the fight over wage-and-hour laws in the industry, the FAAAA's legislative history contains no evidence that motor carriers sought—or that Congress even considered—preemption for generally applicable labor laws. "[T]hat Congress did not even consider the issue readily disposes of any argument that Congress unmistakably intended" to preempt worker protections generally, *Tafflin v. Levitt*, 493 U.S. 455, 462 (1990), let alone century-old protections "intended to ameliorate the consequences of long hours." *Brinker*, 273 P.3d at 520; *see also Lohr*, 518 U.S. at 491 (plurality) (it would have been "spectacularly odd" for Congress to create broad immunity from traditional state-law rights without "even … hint[ing]" at that outcome); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251

(1984) (where "there is no indication that Congress even seriously considered precluding" a state-law claim, "[i]t is difficult to believe that Congress would, without comment," do so). In sum, "this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,'" that Congress would have spoken far more clearly if it had intended such a sweeping result. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004) (quoting *Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987)).

### C. Meal-and-Rest Break Laws Have a Remote Relationship to Motor Carrier Deregulation and Do Not Bind Motor Carriers To Any Particular Prices, Routes, or Services.

As the foregoing discussion demonstrates, the FAAAA was designed to supplant state laws significantly affecting competition and was never intended to preempt California's preexisting meal-and-rest-break laws. Proper application of the various judge-made tests developed under the FAAAA, ADA, and ERISA yields the same result.

For starters, the state law at issue here neither "reference[s]" motor carrier prices, routes, and services nor imposes a "'significant impact' related to Congress' deregulatory and pre-emption related objectives." *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 384, 390). The state law was not "written with the [trucking] industry in mind," but rather "is a broad law applying to hundreds of different industries." *Air Transport Ass'n*, 266 F.3d at 1072. Like other labor and

employment laws, the meal-and-rest-break rules prescribe background rules that structure the legal options for all businesses operating within the State. Their only requirement is that employers not force their employees to work what California considers to be dangerously or unfairly long hours without allowing them time to stop and eat or take a rest break (and even then, as detailed in Part I.D, *infra*, California provides employers with substantial flexibility).

Courts have repeatedly held that such generally applicable prohibitions within a State's police powers have "too tenuous, remote, and peripheral" a connection with carrier prices, routes, and services to be preempted by the FAAAA or the ADA. Thus, federal law does not immunize motor carriers from criminal prohibitions on gambling, prostitution, or obscenity, or from public health regulation generally. *Morales,* 504 U.S. at 390; *Rowe*, 552 U.S. at 375; *Wolens*, 513 U.S. at 228-29. Nor does it exempt them from state civil rights laws forbidding employment discrimination on the basis of race, sexual orientation, or other protected grounds. *Air Transport Ass'n*, 266 F.3d at 1072 (discrimination in distribution of benefits to domestic partners); *Wellons v. Nw. Airlines, Inc.*, 165 F.3d 493, 496 (6th Cir. 1999) (race discrimination); *Abdu-Brisson*, 128 F.3d at 86 (age discrimination); *Aloha Islandair Inc. v. Tseu*, 128 F.3d 1301, 1303 (9th Cir. 1997) (disability discrimination).

More specifically, this Court has held that the field of generally applicable state wage-and-hour law is not preempted by the FAAAA. In *Mendonca*, 152 F.3d at 1189, a group of motor carriers argued that California's prevailing wage law—which requires public contractors to pay workers the prevailing wage—was preempted because it "directly affect[ed]" their prices, routes, and services. Echoing the claims made by Penske here, the group argued that the California law, among other things, "increase[d] its prices by 25%" and "compel[led] it to re-direct and re-route equipment." *Id.* This Court had no difficulty concluding that preemption was lacking. *First*, although the law was "in a certain sense 'related to'" the group's prices, routes, and services, "the effect [was] no more than indirect, remote, and tenuous," and hence insufficient for preemption. *Id. Second*, there was no indication that the law interfered "with the forces of competition." *Id. Third*, the state law did not fall into the "field of laws" that Congress intended to preempt. *Id.*[7]

[7] Until the district court's decision, courts repeatedly rejected claims that California's break laws are preempted by the FAAAA and the ADA, either as a matter of law or for lack of evidence. *See, e.g., Cardenas v. McLane Foodservices*, 796 F. Supp. 2d 1246, 1254-56 (C.D. Cal. 2011); *Marine v. Interstate Distributor Co.*, RG07358277 (Cal. Super. Ct., Alameda Mar. 3, 2011) (RE 129-131); *Cemex Wage Cases*, J.C.C.P. CJC-07-4520 (Cal. Super. Ct., S.F. Feb 19, 2010) (RE 125-27); *Morrison v. Knight Transp., Inc.*, No. 228016 (Cal. Super. Ct., Tulare, Sept. 28, 2009) (RE 133-134); *Iniguez v. Evergreen Aviation Ground Logistics Enter., Inc.*, No. CV 07-7181 (C.D. Cal. Sept. 11, 2009) (RE 97-113); *Kastanos v. Cent. Concrete Supply Co.*, No. HG07-319366 (Cal. Super. Ct., Alamada Sept. 10, 2009) (RE 115-122); *Fitz-Gerald v. SkyWest Airlines*, 155 Cal. App. 4th 411, 423 & n.7 (Cal. Ct. App. 2007); *Dunbar Armored v. Rea*, No. 04-CV-0602 (S.D. Cal. July 8, 2004) (RE 136-147); *Bustillos v. Bimbo Bakeries USA Inc.*, 2009 WL 1765783 (N.D. Cal. June 19, 2009).

*Mendonca*'s holding and reasoning apply with full force here and foreclose a finding of preemption. The district court tried to distinguish *Mendonca*, reasoning that the meal-and-rest-break rules, unlike the prevailing wage law, "establish requirements [that] substantively impact a motor carrier's routes and services." (RE 17). But *Mendonca* found no preemption despite the motor carrier's insistence that the state wage law caused it to adjust its routes—indeed that the law "compel[led] it to re-direct and re-route equipment." 152 F.3d at 1189. That is precisely the argument Penske puts forward here.

The district court's preemption analysis relied exclusively on a test formulated by this Court for "borderline cases" under the ADA and adapted "[b]y analogy" from ERISA cases. *Air Transport*, 266 F.3d at 1072. That test asks whether the state law in question "binds the air carrier to a particular price, route or service and thereby interferes with competitive market forces within the air carrier industry." *Id.* But the meal-and-rest-break laws do no such thing, as the district court effectively acknowledged. The district court reasoned that, although "the laws *do not* strictly bind Penske's drivers to one particular route," they have "the same effect" because they "bind[] motor carriers to a smaller set of possible routes." (RE 14 (emphasis added)). The court further reasoned that the laws have a "significant impact on Penske's services" because they "reduce the amount of on-duty work time allowable to drivers" and ultimately "reduce the amount and level

of service Penske can offer its customers *without increasing its workforce and investment in equipment.*" *Id.* (emphasis added).

Despite its insistence to the contrary, the district court's reasoning thus boils down to the proposition that a state law may be preempted to the extent that it increases a motor carriers' time or cost in getting from Point A to Point B. The fact that Penske may squeeze fewer hours out of its drivers by withholding the required breaks, or make less profit by withholding premium pay, does not mean that Penske must take any *particular* route or offer any *particular* service. *Air Transport*, 266 F.3d at 1074 ("The question is not whether the Ordinance compels or binds them into not discriminating; the question is whether the Ordinance compels or binds them to *a particular* price, route or service." (emphasis added)). Unlike the law held preempted in *Rowe*—which, among other things, imposed civil liability on motor carriers who failed to inspect shipments to discover whether they contained tobacco and forbade tobacco shipments under certain circumstances—the state laws at issue here do not effectively "require carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer)," nor do they "freeze into place services that carriers might prefer to discontinue in the future." 552 U.S. at 372; *see also Morales*, 504 U.S. at 391 (state-law guidelines that tell air carriers how to advertise their airfares are preempted); *Wolens*, 513 U.S. at 228 (state fraud laws that "guide and police" air carriers'

marketing of frequent flier programs are preempted); *Difiore v. Am. Airlines*, 646 F.3d 81 (1st Cir. 2011) (state law that allows juries to dictate how air carriers advertise and receive payment for their luggage-checking services is preempted).

Instead, like many generally applicable laws, the meal-and-rest break laws impose background conditions under which all employers must conduct business. California law leaves motor carriers entirely free to decide what routes and services to offer. If motor carriers choose to offer a certain service or route, they, like any other business, will have to hire a sufficient number of employees to staff that service or route—and, no doubt, the wage-and-hour laws will affect the cost of that decision and whether it makes business sense for the motor carrier to carry it out. The only thing they cannot do is force employees to work long hours without the opportunity to take sufficient breaks. "To be sure, [Penske] may choose to adjust its routes, or slightly modify its services in the ways it has suggested. But just because [Penske] may make changes to its routes does not necessarily mean that California's break laws have more than an 'indirect, remote, or tenuous effect' on these decisions." *Cardenas v. McLane Foodservices*, 796 F. Supp. 2d 1246, 1254-56 (C.D. Cal. 2011). Indeed, any generally applicable regulation increases the costs to the regulated industry and cannot be recouped in full by the industry unless demand for the product or service is perfectly inelastic.

The district court's reasoning expands preemption beyond any coherent stopping point. Although the district court denied that its ruling would drag the law "down a slippery slope," (RE 18), Penske conceded at oral argument below that, under its theory, a state law prescribing maximum hours for all workers would be preempted. (RE 30) ("If California were to adopt a law that said, everybody can only work eight hours in day, that … would be preempted because it would affect the services and the routes that a carrier provides to its customers."). This means that, in Penske's view, preemption would swallow the type of state law invalidated in *Lochner v. New York*, 198 U.S. 45 (1905).

Indeed, if a state law can be preempted because it increases the time necessary to get between Point A and Point B—in the district court's words, where it "bind[s] motor carriers to a smaller set of possible routes"—than any number of legitimate, generally applicable state laws would likewise be preempted. The common law of property would give way because it prevents motor carriers from taking routes that entail trespassing. Environmental regulations would be at risk. *See Cal. Dump Truck Owners Ass'n v. Nichols*, 2012 WL 273162, at *8 (E.D. Cal. Jan. 27, 2012) (industry group, relying on decision below, argued that clean-air regulation was preempted because it would "force carriers to choose to employ different routes"); *Notice of rejection of petition for preemption*, 73 Fed. Reg. 79,206 (noting that Penske's argument would entail preemption of state emission controls). Under this

logic, even speed limits and laws requiring trucks to stop at weigh stations would be preempted because they impose substantive restrictions on routes. Yet it is clear that Congress did not intend to sweep so far. *See* 49 U.S.C. 14501(c)(2) (exempting safety laws and weight restrictions, among others); H.R. Conf. Rep. 103-667, at 84 (1994) (explaining that the exemptions are subjects that do not relate to prices, routes, and services *in the first place*, and that the list is "not intended to be all inclusive").

* * *

Ultimately, any connection that meal-and-rest-break rules might have with the regulation of motor carrier prices, routes, and services is too remote, peripheral, and tenuous to require preemption under the FAAAA. "If the rule was otherwise, any string of contingencies [would be] sufficient to establish a connection with price, route or service, [and] there [would] be no end to … preemption." *Fitz-Gerald*, 65 Cal. Rptr. 3d at 921-22 (rejecting claim that ADA preempts meal-and-rest breaks laws). "[F]or all practical purposes pre-emption would never run its course, for 'really, universally, relations stop nowhere.'" *Travelers*, 514 U.S. at 655 (quoting Henry James, *Roderick Hudson* (1907)). A court cannot "hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort." *Dillingham*, 519 U.S. at 334.

### D. The District Court's Decision Rests on a Flawed Understanding of State Law.

The district court's decision cannot be reconciled with the FAAAA's text, structure, purpose, or history. But even if the district court's account of *federal* law were entirely correct, reversal is nonetheless warranted because the district court's preemption analysis hinges on a flawed understanding of *state* law. The analysis is further infected by a series of speculative and unsupported assumptions about the state law's actual effects.

**1. Flexibility With Respect to Timing and Circumstances.** The "key" to the district court's preemption analysis was its understanding that California "insist[s] exactly when" employers must provide breaks. (RE 15). On that understanding, the court emphasized in both its oral tentative ruling and written opinion that California's meal-and-rest-break laws are "fairly rigid." (RE 14, RE 26).

But the district court got the state law wrong. The California laws at issue are far from "rigid" and do not dictate "exactly when" employers must provide meal and rest breaks. Just this year, in *Brinker*, 273 P.3d 513, the California Supreme Court made clear that the meal-and-rest-break laws afford employers substantial flexibility, with respect to both timing and practicality. *Brinker* held that rest periods need not be taken at precise times, nor must they be taken before or after the meal period. *Id* at 530. "The *only* constraint on timing," the court

explained, "is that rest breaks must fall in the middle of work periods 'insofar as practicable.' Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period"—not a terribly onerous requirement in the first place—and "*may deviate from that preferred course where practical considerations render it infeasible*." *Id.* (emphasis added). "Shorter or longer shifts and other factors that render such scheduling impracticable may alter this general rule." *Id.* at 531.

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

**2. Whether Drivers Must Be Forced to Take Breaks.** The district court's decision also hinged on its understanding that California law "*force[s]* drivers to alter their routes daily while seeking out an appropriate place to exit the highway." (RE 14). The court apparently accepted the hyperbolic contention in

Penske's summary-judgment motion that "California's rules *command* a driver to stop driving for an off-duty 30-minute meal break five hours into his work day *even if he finds himself on a mountain pass in a blinding snowstorm*." (ECF No. 87, at 30) (emphasis added).

Nonsense. Just as California law does not require operating room nurses to shirk their duties mid-surgery and grab a meal, or security guards on night duty to leave their posts unguarded, it does not require truck drivers to throw caution to the wind and halt their vehicles on mountain passes during snowstorms. If the law were otherwise, it would place impossible burdens on every industry—not just the trucking industry. As already discussed above, the break requirement is flexible and adaptable to industry circumstances and may be waived entirely where appropriate. And while the employer has a duty to provide breaks, the employee is "at liberty to use the meal period for whatever purpose he or she desires." *Brinker,* 273 P.3d at 520-21. The employee is thus free to keep working. *Id.*

**3. Whether Additional Pay Constitutes a Penalty**. Finally, the district court mischaracterized the law's premium-pay requirement, which requires the employer to "pay the employee one additional hour of pay for each work that day the meal or rest period is not provided." Calif. Labor Code § 226.7. According to the district court, this additional hour of pay, although "framed" by the plaintiffs as a "wage," is really a "penalty." (RE 16 (stating that "[t]hese 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*") (emphasis added)).

The California Supreme Court has held the opposite. "The statute's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage intended to compensate employees, not a penalty." *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 297 (2007) (citation omitted). The state regulatory agency in charge of enforcing the law, the Division of Labor Standards Enforcement, has explained that an employer "may choose not to provide its employees with meal and rest periods, in which case [it] must simply pay the premium"—so that the "meal and rest period premium pay operates in exactly the same way as overtime premium pay." Mem. of DLSE at 10, in *Dunbar Armored, Inc. v. Rea*, No. 04-CV-0602 (S.D. Cal. May 12, 2004). This case is a useful illustration: Penske had a practice of deducting pay for full 30-minute meal breaks regardless of whether they were taken or completed and provided no mechanism for restoring improperly docked time. If the plaintiffs are successful here, Penske will have to pay those wrongfully withheld wages.

**4. Unsupported Assumptions.** In addition to its faulty understanding of state law, the district court's preemption analysis relied on a series of speculative and unsupported factual assumptions. Indeed, the district court eschewed any

reliance on evidence, asserting that "no factual analysis is required to decide this question of preemption." (RE 15). But given the substantial flexibility actually afforded employers under California law, it is far from obvious that compliance with state law would cause Penske to adjust its prices, routes, or services at all. A number of factors could affect this question, including the amount of time Penske employees spend driving; the average length of their routes, in terms of both hours and miles; the number of rest and refueling locations on California highways and streets; and the amount of time that Penske employees spend at warehouses or other locations where breaks could be taken.

The district court cited no evidence that any of the routes used by Penske drivers to deliver Whirpool appliances from its Ontario facility—routes that were entirely within California and confined to a limited regional distribution area—lacked "adequate locations for stopping" within a five-hour period. (RE 14). That conclusion defies common sense. *See Cardenas*, 796 F. Supp. 2d at 1255-56 & n.4 (rejecting, as "unconvincing and overly speculative," evidence put forward to show that California's meal-and-rest break laws had a significant impact on truck drivers' routes). Nor did the district court consider whether Penske could maintain the same level of service while complying with the meal-and-rest-break laws by scheduling breaks at times when employees are not in transit or by hiring more employees. That these options might be more costly does not mean that the meal-

and-rest-break laws are preempted. *See Mendonca*, 152 F.3d at 1189; *Air Transport Ass'n*, 266 F.3d at 1073-74. Because preemption is a "demanding defense," the district court erred in concluding that California's longstanding worker protections were preempted "absent clear evidence"—or any evidence, for that matter—concerning the state law's actual effects. *See Wyeth*, 555 U.S. at 571.

## II. IN ANY EVENT, CALIFORNIA'S MEAL-AND-REST-BREAK LAWS, AS APPLIED TO THE TRANSPORTATION INDUSTRY, ARE GENUINELY RESPONSIVE TO MOTOR VEHICLE SAFETY AND THEREFORE SAVED FROM PREEMPTION.

Congress emphasized the FAAAA's limited preemptive effect by expressly preserving the States' authority to regulate in areas falling within their traditional police powers. *See* 49 U.S.C. § 14501(c)(2). First among the traditional areas of state authority expressly preserved by the FAAAA is "the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A). Even if the California meal-and-rest-break laws were otherwise preempted by the FAAAA, they would be saved from preemption under this provision.

To fall within § 14501(c)(2)'s "safety exception," a law must be "genuinely responsive to safety concerns." *Ours Garage*, 536 U.S. at 442. This Court requires a two-part inquiry to determine whether a regulation satisfies the "genuinely responsive" standard. *Cal. Tow Truck Ass'n v. City & Cnty. of San Francisco*, __ F.3d __, No. 11-15040, 2012 WL 3641744, at *9 (9th Cir. Aug. 27, 2012). "First, courts consider available legislative or regulatory intent—ask whether safety relating to

motor vehicles was truly a concern. Second, courts assess the nexus between the provision at issue and the safety concern—ask whether the regulation sufficiently 'responds to' the concern." *Id.* Both elements are satisfied here.

**1. Safety Was Truly a Concern.** The first part of the test requires courts to examine the language and history of the statute or regulation for "expressions of legislative intent" demonstrating that "safety relating to motor vehicles was truly a concern." *Id.* at *10. Such expressions of intent are readily identifiable in the history of California's meal-and-rest-break rules.

In its most recent transportation industry wage order, the IWC linked meal and rest breaks with a need to enhance motor vehicle safety by reducing driver fatigue. The Commission's order responded to a petition asserting that the exemption of publicly employed drivers from the break requirements "resulted in conditions that [were] detrimental to the health and safety of workers and of the public." IWC, *Statement as to the Basis for Amendment to Sections 2, 11 and 12 of Wage Order No. 9 Regarding Employees in the Transportation Industry* 1 (2004).[8] In its statement explaining the basis for its decision to extend the requirements to public workers, the commission cited testimony that the lack of breaks "create[d] a public safety

[8] available at http://www.dir.ca.gov/iwc/Stementastothebasis_WageOrder9.doc.

hazard due to driver fatigue" that put the "lives and safety of school children and … disabled riders" at risk. *Id.* at 2; *see* IWC Wage Order 9-2004, § 12.[9]

The IWC's reliance on safety as the basis for meal-and-rest-break requirements is not new. "From its earliest days, the commission's regulatory orders have contained numerous provisions aimed directly at preserving and promoting the health and safety of employees within its jurisdiction." *Indus. Welfare Com. v. Superior Court*, 613 P.2d 579, 596 (Cal. 1980). Indeed, "health and safety considerations (rather than purely economic injuries) are what motivated the IWC to adopt mandatory meal and rest periods in the first place." *Murphy*, 155 P.3d at 296; *see also Brinker*, 273 P.3d at 520 (noting that meal and rest periods are "intended to ameliorate the consequences of long hours").

In addition to the IWC, California's Legislature and courts have also affirmed the importance of meal and rest periods to safety. In codifying the IWC's meal-break rules in 1999, the Legislature relied on studies "link[ing] long work hours to increased rates of accident and injury." Eight Hour Day Restoration and Workplace Flexibility Act, 1999 Cal. Stat., ch. 134 (A.B. 60), § 6 (codified at Cal. Lab. Code § 512). And the California Supreme Court explained the purpose of the rules by citing studies demonstrating that "[e]mployees denied their rest and meal

[9] available at http://www.dir.ca.gov/iwc/WageOrders2006/iwcarticle9.html.

periods face greater risk of work-related accidents." *Murphy*, 155 P.3d at 296 (citing studies including Tucker et al., *Rest Breaks and Accident Risk*, The Lancet 680 (2003)).

Despite these statements of purpose, the district court concluded that the meal-and-rest-break laws fall outside the FAAAA's safety exception because the breaks also apply to other industries and thus relate to general public health concerns rather than motor vehicle safety in particular. (RE 20). But IWC Order 9 is specific to the transportation industry, and the order's administrative history demonstrates that the commission promulgated the order based in part on specific concerns about driver fatigue and motor vehicle safety. That other IWC orders apply to different industries and respond to other types of public health concerns is irrelevant. As this Court's decisions make clear, "[t]he presence of such mixed motives … does not preclude the application of the safety exception, provided the State's safety motives are not pre-textual." *Am. Trucking Assn's.*, 660 F.3d at 405; *see also Tillison*, 424 F.3d at 1102-03 (holding that a state towing statute fell under the motor vehicle safety exemption even though it was primarily enacted to provide consumer protection).

Indeed, the evidence of California's concern with motor vehicle safety far exceeds what this Court has demanded in other cases. In *Tillison*, for example, this Court held that a Washington law regulating nonconsensual towing fell within the motor vehicle safety exception even though the legislature "did not expressly state a

public safety purpose for enacting [the] legislation." 424 F.3d at 1102. The Court reasoned that because Washington's law was "practically identical" to other state laws enacted for safety reasons, it was "reasonable to conclude" the legislature "had public safety in mind" when it passed the law. *Id.* at 1102-03. No such inference is necessary here, where the state agency, legislature, and courts have each expressly stated the law's safety goals.

**2. California's Meal-and-Rest-Break Laws Respond to the State's Safety Concern.** The second prong of this Court's test asks "whether there is a 'logical' or 'genuine' connection between the regulation and the safety justification, or, instead, whether the purported safety justification is a pretext for undue economic regulation." *Cal. Tow Truck Ass'n*, __ F.3d at __, 2012 WL 3641744, at *9.

Here, the connection between driver rest breaks and safety is more than just "logical"—it is demonstrated empirically by scientific studies. Surveying the available evidence, the FMCSA found in 2011 that "[w]orking long daily and weekly hours on a continuing basis is associated with chronic fatigue, a high risk of crashes, and a number of serious chronic health conditions." *Hours of Service of Drivers*, 76 Fed. Reg. 81,134, 81,136 (2011). Moreover, the agency concluded that "breaks alleviate fatigue and fatigue-related performance degradation," and thus that "the risk of accidents falls substantially after a break." *Id.*

The major role that fatigue plays in truck crashes is well recognized. *See Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations*, 65 Fed. Reg. 25,540, 25,545-46 (2000). A 2006 FMCSA survey revealed that about 48% of truck drivers said they had fallen asleep while driving in the previous year, 45% said they sometimes or often had trouble staying awake, and 65% reported that they often or sometimes felt drowsy while driving. *Hours of Service of Drivers*, 75 Fed. Reg. 82,170, 82,177 (2010). A National Transportation Safety Board study found that 31% of fatal crashes it investigated were attributable to driver fatigue—making fatigue the *single most common* cause of large-truck crashes. NTSB, *Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-to-the-Driver Heavy Truck Crashes*, Vol. 1 at vi (1990), *available at http://www.ntsb.gov/safety/safetystudies/SS9001.htm*.

Research also shows that "breaks during work can counteract fatigue and reduce the risk of crashes." 75 Fed. Reg. at 82,180. A 2011 study using video cameras and data recorders to monitor truck drivers in the course of their daily work found that breaks reduced "safety-critical events"—including driver error and lane deviations—by between 30 and 50 percent in the hour after the break. 76 Fed. Reg. at 81,134. Other studies based on driver logs and driving simulators reached similar conclusions. *Id.* After surveying this data, and similar data from other industries, FMCSA concluded that breaks "provide very substantial crash reduction benefits." *Id.* at 81,137.

Far from being a "pretext for undue economic regulation," California's meal-and-rest-break laws are thus directly responsive to compelling evidence that "working continuously without a break is neither safe nor healthy." 75 Fed. Reg. at 82,180. The breaks fall within the core of the State's regulatory authority to protect the health and safety of its citizens.

## CONCLUSION

Because the provisions of the California Labor Code and Wage Orders requiring employee meal and rest breaks are not preempted by the Federal Aviation Administration Authorization Act of 1994, the judgment below should be reversed.

Respectfully submitted,

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# STATUTORY APPENDIX

## 49 U.S.C. § 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;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

## California Labor Code § 226.7
## Mandated meal or rest periods; requirement to work prohibited

(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of

pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

**California Labor Code § 512:**
**Meal periods; requirements; order permitting meal period after six hours of work; exceptions; remedies under collective bargaining agreement**

(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.

(b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

## STATEMENT OF RELATED CASES

This case is related to *Brandon Campbell v. Vitran Express*, No. 12-56250, an appeal docketed in this Court on September 9, 2012. Both cases present the same legal issues. There, the United States District Court for the Central District of California—following the district court's decision in this case—held that the Federal Aviation Administration Authorization Act preempts California's generally applicable requirements that employers provide their workers with meal and rest breaks. *See Campbell v. Vitran*, Case No. CV 11-05029-RGK (SHx) (C.D. Cal. June 8, 2012) (ECF No. 50). No briefs have been filed in the *Campbell* appeal thus far.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)**

I hereby certify that my word processing program, Microsoft Word, counted 12,662 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

*/s/ Deepak Gupta*
_____
Deepak Gupta

September 10, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on September 10, 2012, I electronically filed the Brief for Appellants Mickey Lee Dilts, et al., with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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