



November 13, 2023

The Honorable Robin Hutcheson  
Administrator  
Federal Motor Carrier Safety Administration  
Docket Management Facility  
United States Department of Transportation  
1200 New Jersey Avenue, S.E.  
West Building, Ground Floor, Room W-12-140  
Washington, D.C. 20590-0001

RE: California Attorney General and Labor Commissioner Petition for Waiver Pursuant to 49 U.S.C. § 31141(d)

Dear Administrator Hutcheson:

Pursuant to 49 U.S.C. § 31141(d), the Attorney General of California and the California Labor Commissioner submit the following petition requesting waiver of the Federal Motor Carrier Safety Administration's orders preempting California's meal and rest break rules as applied to drivers of property-carrying and passenger-carrying commercial motor vehicles subject to the federal Hours of Service ("HOS") Rules. Docket No. FMCSA-2018-0304, 83 Fed. Reg. 67470 (Dec. 28, 2018); Docket No. FMCSA-2019-0048, 85 Fed. Reg. 3469 (Jan. 21, 2020). These orders were issued in December 2018 and January 2020, respectively. In August 2023, the Federal Motor Carrier Safety Administration ("FMCSA") published a notice informing the public that it will consider petitions under 49 U.S.C. § 31141(d) for waiver of both preemption orders. 88 Fed. Reg. 55111 (Aug. 14, 2023). Granting this waiver petition is consistent with the public interest and the safe operation of commercial motor vehicles.

## I. Background

### Petitioners

Rob Bonta is the Attorney General of the State of California and is the chief law officer of the State. Cal. Const., art. V, § 13. The Attorney General is empowered by the California Constitution to take whatever action is necessary to ensure that the laws of the State are uniformly and adequately enforced. *Id.* Lilia García-Brower is the California Labor Commissioner and heads the Division of Labor Standards Enforcement and is the state official authorized to enforce the California Labor Code and Industrial Welfare Commission ("IWC") meal and rest break requirements at issue. *See Tidewater Marine Western, Inc. v. Bradshaw*, 927 P.2d 296, 298 (Cal. 1996) (noting the "Division of Labor Standards Enforcement (DLSE), headed by . . . [the] Labor Commissioner is the state agency empowered to enforce California's

labor laws, including IWC wage orders.”) (citing Cal. Lab. Code §§ 21, 61, 95, 98-98.7, 1193.5).<sup>1</sup>

### **Procedural History**

On December 21, 2018, the FMCSA determined that California’s meal and rest break (“MRB”) rules, as applied to property-carrying commercial motor vehicle (“CMV”) drivers subject to the HOS regulations, are preempted under 49 U.S.C. § 31141. Docket No. FMCSA–2018–0304, 83 Fed. Reg. at 67470. On January 13, 2020, the FMCSA determined that California’s MRB rules as applied to passenger-carrying CMV drivers subject to the HOS regulations are also preempted under 49 U.S.C. § 31141. Docket No. FMCSA–2019–0048, 85 Fed. Reg. at 3469. In each case, the State filed comment letters opposing a preemption determination.

The State subsequently filed petitions for review of each preemption determination in the Ninth Circuit. *Int’l Bhd. of Teamsters, Loc. 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021); *California ex rel. Bonta v. Fed. Motor Carrier Safety Admin.*, No. 20-70706 (9th Cir. Mar. 13, 2020). In January 2021, the Ninth Circuit denied the State’s petition for review of the FMCSA’s determination as to cargo-carrying CMV drivers. *Int’l Bhd. of Teamsters*, 986 F.3d at 858. In October 2023, after the FMCSA notified the court of the Agency’s intention to consider petitions for waiver, the Ninth Circuit stayed the State’s petition requesting review of the FMCSA’s determination as to passenger-carrying CMV drivers until December 2023. *California ex rel. Bonta v. Fed. Motor Carrier Safety Admin.*, No. 20–70706 (9th Cir. Oct. 10, 2023).

On August 14, 2023, the FMCSA issued notice that it will consider petitions under 49 U.S.C. § 31141(d) for waiver of both preemption orders. 88 Fed. Reg. at 55111. Section 49 U.S.C. § 31141(d) provides that a “person (including a State) may petition the Secretary for a waiver of a decision of the Secretary that a State law or regulation may not be enforced under this section[.]” It further provides that the “Secretary shall grant the waiver, as expeditiously as possible, if the person demonstrates to the satisfaction of the Secretary that the waiver is consistent with the public interest and the safe operation of commercial motor vehicles.” In its notice, the FMCSA encouraged petitioners to “include arguments that do not depend on the conclusion that the Agency’s preemption determinations were erroneous.” 88 Fed. Reg. at 55112. The notice instead requests petitioners address:

1. Whether and to what extent enforcement of a State’s meal and rest break laws with respect to intrastate property-carrying and passenger-carrying CMV drivers has impacted the health and safety of drivers;
2. Whether enforcement of State meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will exacerbate the existing truck parking shortages and result in more trucks parking on the side of the road, whether any such effect will burden interstate commerce or create additional

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<sup>1</sup> Petitioners are referred to collectively as the “State.”

dangers to drivers and the public, and whether the applicant intends to take any actions to mitigate or address any such effect; and

3. Whether enforcement of a State's meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will dissuade carriers from operating in that State, whether any such effect will weaken the resiliency of the national supply chain, and whether the applicant intends to take any actions to mitigate or address any such effect.

*Id.*

As set forth more fully below, the State requests the FMCSA grant its petition for waiver of the Agency's determinations that California's MRB rules are preempted as to drivers of property-carrying and passenger-carrying motor vehicles subject to the HOS rules. Given the strong link between driver fatigue and increased traffic accidents, California's MRB rules protect bus and truck drivers, as well as the public, by affording drivers the opportunity to take breaks before they are overly fatigued. In addition, publicly available data coupled with the flexibility of the MRB rules suggest that their enforcement likely has not and will not exacerbate the truck parking shortage or negatively impact interstate commerce. On the contrary, state freight statistics suggest that the trucking industry in California has generally remained robust without regard to enforcement of the MRB rules. Further, the State continues to implement projects to address its truck parking shortage. For these reasons, a waiver is "consistent with the public interest and the safe operation of commercial motor vehicles" and should be granted "as expeditiously as possible." 49 U.S.C. § 31141(d).

## II. Legal Background

### **California's Meal and Rest Period Laws and Regulations**

In California, "[m]eal and rest periods have long been viewed as part of the remedial worker protection framework. . . . Concerned with the health and welfare of employees, the IWC issued wage orders mandating the provision of meal and rest periods in 1916 and 1932, respectively." *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 291 (Cal. 2007). The meal and rest break regulations are part of California's comprehensive regulations governing wages, hours and working conditions and apply to employers in many industries.

The state meal and rest period requirements at issue herein are found at California Labor Code sections 226.7 and 512, and sections 11 and 12 of IWC Order 9-2001 (the IWC order governing the transportation industry).<sup>2</sup> Labor Code section 226.7(b) states, in relevant part: "An

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<sup>2</sup> The IWC is the state agency empowered to formulate wage orders governing employment in California. *See Murphy*, 155 P.3d at 289 n.4. The IWC has issued 17 separate wage orders on an industry-wide or occupation-wide basis, which together cover all employers and employees in California. *See Martinez v. Combs*, 231 P.3d 259, 273 (Cal. 2010). Specific employers and employees are subject to the various provisions governing wages, hours, and working conditions under the terms of the applicable wage order. *Id.* The "transportation industry," the subject of Order 9-2001, is defined to include "any ...

employer shall not require an employee to work during a meal or rest . . . period mandated pursuant to an applicable statute, or applicable regulation . . . or order of the Industrial Welfare Commission.” Section 226.7(c) provides: “If an employer fails to provide an employee a meal or rest . . . period in accordance with a state law, including but not limited to, an applicable statute or applicable regulation . . . or 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 workday that the meal or rest . . . period is not provided.”

Labor Code section 512(a) addresses meal periods, and provides:

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 the mutual consent of 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 employee only if the first meal period was not waived.

However, commercial drivers covered by collective bargaining agreements that, among other statutorily enumerated criteria, contain express provisions for meal periods and that provide for final and binding arbitration of disputes concerning the application of those meal period provisions, are not subject to the meal period requirement set out at section 512(a). *See* Cal. Labor Code § 512(e), (f)(2).

Section 11 of IWC Order 9-2001 also addresses meal periods, and provides, in relevant part:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employer and the employee.

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business or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations in connection therewith; and also includes storing or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles.” Cal. Indus. Welfare Comm’n, Order No. 9-2001 § 2(P). All 17 of the IWC’s industry and occupational wage orders contain meal period requirements, and 16 of the 17 wage orders contain rest period requirements, like those contained in Order 9-2001. Cal. Code Regs., tit. 8, §§ 11010-11170. The wage orders, which are “accorded the same dignity as statutes,” are entitled to “extraordinary deference, both in upholding their validity and in enforcing their specific terms.” *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 527 (Cal. 2012) (quoting *Martinez*, 231 P.3d at 275).

(B) An employer may not employ an employee for a work period of more than ten (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.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an ‘on-duty’ meal period and counted as time worked. An ‘on-duty’ meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job meal period is agreed to. The written agreement shall state the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the meal period is not provided.

Section 12 of IWC Order 9-2001 addresses rest periods, and provides, in relevant part:

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof, However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the rest period is not provided.

The Labor Commissioner is authorized, under the IWC orders to grant an employer request for an exemption from rest period requirements, if “after due investigation, it is found that the enforcement of [the rest period requirements] would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer.” Cal. Indus. Welfare Comm’n, Order No. 9-2001 § 17.

In *Brinker Restaurant Corporation v. Superior Court*, 273 P.3d 513 (Cal. 2012), the California Supreme Court construed the meal and rest period requirements set out at Labor Code

sections 226.7 and 512 and IWC Wage Order 5-2001.<sup>3</sup> The California Supreme Court concluded that an employer has the following obligations:

When someone is suffered or permitted to work – i.e., employed – for five hours, an employer is put to a choice: it must (1) afford an off duty meal period; (2) consent to a mutually agreed-upon waiver if one hour or less will end the shift; or (3) obtain written agreement to an on-duty meal period if circumstances permit. Failure to do one of these will render the employer liable for premium pay.

*Id* at 536.

With respect to the timing of meal periods, the court rejected the contention that the wage order imposed a requirement for a “rolling five hour meal period,” under which a second meal period must be provided no later than five hours after the prior meal period has concluded. *Id.* at 537-38. Instead, the court explained, “absent 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 the employee’s 10th hour of work . . . . Wage Order 5 does not impose additional timing requirements.” *Id.* at 537.

The California Supreme Court also rejected the contention that an employer has a duty to “police” its employees to ensure that the employee ceases work during the meal period:

An employer’s duty . . . is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. . . .

On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer’s obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay[.]

*Id.* at 536-37.

Turning to California’s rest period requirements, *Brinker* held that employees working shifts from three and one-half to six hours in length are entitled to one ten minute rest period,

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<sup>3</sup> IWC Order 5-2001 governs the “public housekeeping industry,” which includes restaurants, bars, hotels, motels, apartment houses, office buildings, hospitals, nursing homes and residential care facilities, child care facilities, private schools, colleges and universities that provide board or lodging, and businesses that provide cleaning or maintenance services for such residential or commercial facilities. Cal. Indus. Welfare Comm’n, Order No. 9-2001 § 2(P). In large part, Order 5’s provisions for meal periods (at section 11 of the wage order) and rest periods (at section 12 of the wage order) mirror those of Order 9-2001.

those working shifts of more than six hours up to ten hours are entitled to two, ten minute rest periods for a total of 20 minutes rest time, and those working shifts of more than ten hours up to 14 hours are entitled to three, ten minute rest periods for a total of 30 minutes rest time. *Id.* at 529. The court acknowledged the flexibility allowed under the wage order as to the timing of rest periods, stating that the “only constraint on timing is that the 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 periods in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible.” *Id.* at 530.

In *Augustus v. ABM Security Services, Inc.*, 385 P.3d 823, 826 (Cal. 2016), the California Supreme Court held that during these required rest periods, “employers must relieve their employees of all duty and relinquish any control over how employees spend their break time.” The court acknowledged, however, that “[s]everal options nonetheless remain available to employers who find it especially burdensome to relieve their employees of all duties during rest periods,” including replacing an interrupted rest break with another, in non-routine, emergency situations, paying the premium pay set forth in Wage Order 4, subdivision 12(B) and Labor Code section 226.7 for a missed rest break, or seeking an exemption from the duty-free rest break requirement from the Labor Commissioner’s Office.<sup>4</sup> *Id.* at 834, n.12, n.14.

### **The Federal Hours of Service Rules**

The federal HOS regulations were promulgated pursuant to 49 U.S.C. § 31136, which authorizes the Secretary of the Department of Transportation, to prescribe “minimum safety standards for commercial motor vehicles.” *Id.* at § 31136(a). Regulations adopted under this statute are for the purpose of ensuring, *inter alia*, that “the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely,” and “the operation of the commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.” *Id.* These federal minimum standards were intended to complement state regulation, as evidenced by the Congressional directive that “[b]efore prescribing regulations under this section, the Secretary shall consider, to the extent practicable and consistent with the purposes of this chapter . . . State laws and regulations on commercial motor vehicle safety, to minimize their unnecessary preemption.” *Id.* at § 31136(c)(2)(B).

The U.S. Department of Transportation’s HOS rules are found at 49 C.F.R. Part 395. Under the rules, drivers of property-carrying commercial motor vehicles may not start a work shift without first taking ten consecutive hours off duty; may only drive during a period of 14 consecutive hours after coming on duty following ten consecutive hours off duty; and may not drive after the end of the 14 consecutive hour period without first taking ten consecutive hours off duty. 49 C.F.R. §§ 395.3(a)(1), (2). A driver may only drive a total of 11 hours during the

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<sup>4</sup> IWC Order 4-2001, the applicable wage order in *Augustus*, is an occupational order that applies to employees employed in a wide-range of “professional, technical, clerical, mechanical and similar occupations,” whose employers are not covered by an applicable industry order. Order 4- 2001, section 2(O); see *Harris Feeding Co. v. Dep’t of Indus. Rels.*, 273 Cal. Rptr. 598 (Ct. App. 1990). Section 12(A) and (B) of Order 4-2001, setting out the rest period requirements for that wage order, is identical to Section 12(A) and (B) of Order 9-2001.

14-hour period during which driving is permitted. *Id.* at § 395.3(a)(3). Moreover, except for drivers who qualify for a “short-haul exception” found at § 395.1(e), “driving is not permitted 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.” *Id.* at § 395.3(a)(3).<sup>5</sup> This “30-minute interruption in driving status,” does not mandate off-duty status, as the requirement may be satisfied through “on-duty not driving time.” *Id.*

Under 49 C.F.R. § 395.5, drivers of passenger-carrying commercial vehicles are prohibited from driving more than ten hours following eight consecutive hours off duty, or for any period after having been on duty 15 hours following eight consecutive hours off duty. 49 C.F.R. § 395.5(a).

Finally, under the regulations, drivers of both property-carrying and passenger carrying vehicles are not permitted to operate a motor vehicle, and a motor carrier is prohibited from requiring or permitting a driver to operate a motor vehicle, “while the driver’s ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, so as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.” 49 C.F.R. § 392.3.

### III. Request for Waiver

#### **The Ongoing Enforcement of California’s MRB Rules with Respect to Intrastate CMV Drivers Provides those Drivers with Substantial Health and Safety Benefits.**

The FMCSA’s preemption determinations apply only to CMV drivers covered by the federal HOS Rules, i.e., CMV drivers engaged in interstate commerce within the meaning of the Federal Motor Carrier Act. *See* 49 C.F.R. § 390.5 (providing for definitions of interstate and intrastate commerce). These preemption determinations thus have no effect on California’s enforcement of its MRB Rules as to intrastate property-carrying and passenger-carrying CMV drivers. For these intrastate drivers, the State’s MRB Rules continue to serve their intended “remedial worker protection” purpose, rooted in concerns for the “health and welfare of employees,” starting with the Industrial Welfare Commission’s adoption of meal break requirements in 1916 and rest break requirements in 1932. *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 291 (Cal. 2007).

As detailed below, the health and safety benefits of the MRB rules for CMV drivers include, *inter alia*, providing drivers with adequate time to rest before they become overly fatigued, thus preventing serious accidents, reducing work-related stress and improving performance. Waiver of the FMCSA’s property-carrying and passenger-carrying CMV

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<sup>5</sup> The short-haul exception generally applies to property-carrying drivers who do not operate beyond a 100 air-mile radius of their normal work reporting location; who return to the work reporting location and are released from work within 12 consecutive hours; who have at least 10 consecutive hours off duty separating each 12 hours on duty; who do not exceed 11 hours of driving time following the 10 consecutive hours off duty; and when the motor carrier employing the driver maintains certain specified time records. 49 C.F.R. § 395.1(e)(1)(i)-(v).



preemption determinations would allow these much-needed benefits to extend to interstate CMV drivers in California, leading to increased safety on our state's roads.

***The MRB Rules Promote Worker and Public Safety by Providing Drivers with the Opportunity to Rest Before They Are Overly Fatigued, thus Decreasing the Likelihood of Fatigue Related Accidents.***

The purpose of the MRB Rules, and the enactment in 2000 of required premium pay for MRB violations, is tied to the promotion of employee safety. As highlighted by the California Supreme Court, “[e]mployees may suffer ‘noneconomic injuries’ when they are forced to work through break periods, like ‘greater risk[s] of work-related accidents and increased stress,’” as evidenced by “[n]umerous studies [that] have linked long work hours to increased rates of accident and injury.” *Ferra v. Loews Hollywood Hotel, LLC*, 489 P.3d 1166, 1177 (Cal. 2021) (quoting *Murphy*, 155 P.3d at 284).<sup>6</sup>

In the trucking and bussing industries, work-related accidents due to lack of adequate breaks can have severe consequences for drivers, passengers, and the public. In 2021 alone, there were a total of 523,796 reported accidents involving large trucks in the United States, resulting in 154,993 persons injured and 5,788 fatalities. Nat. Highway Traffic Safety Admin., U.S. Dep’t of Transp., *Traffic Safety Facts: 2021 Data 2* (2023). California saw 341 fatalities related to large bus or truck crashes in 2016 and 383 fatalities in 2017. Fed. Motor Carrier Safety Admin., U.S. Dep’t of Transp., *2019 Pocket Guide to Large Truck and Bus Statistics* 37 (2020). In 2019, after the FMCSA preempted the MRB rules as to cargo-carrying trucks, this increased to 429 fatalities in large bus or truck crashes. Fed. Motor Carrier Safety Admin., U.S. Dep’t of Transp., *2022 Pocket Guide to Large Truck and Bus Statistics* 36 (2022).

***Fatigued Driving Increases the Likelihood of Serious Accidents Putting Drivers and the Public at Risk.***

Trucking accident statistics make clear that driving while fatigued remains a grave hazard in an already high-risk industry. For instance, in a 2019 handbook, the California Department of Motor Vehicles noted that at least 15 percent of all heavy truck accidents involve fatigue. Cal. Dep’t of Motor Vehicles, *California Commercial Driver Handbook* 2-29 (2019), <https://bit.ly/46PcXmq> [hereinafter *Cal. DMV Handbook*]. Citing a National Transportation

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<sup>6</sup> A recent article in the scientific journal *Healthcare*, citing several academic studies, set out the benefits that flow from rest breaks during the workday:

In addition to improving psychological well-being, rest breaks were also found to improve attention in monotonous tasks, to improve performance, to reduce the risk of work-related injuries, to reduce musculoskeletal symptoms, both in computer work and manual labor, and to reduce the release of stress hormones during work. Therefore, we conclude that rest breaks can be effective in improving attention, performance, and various facets of physical health and well-being on a short-term basis.

Gerhard Blasche et al., *Individual Determinants of Rest Break Behavior in Occupational Settings*, 9 *Healthcare* 1330, p. 2 (2021), <https://bit.ly/3Ql8JMv>.

Safety Board (“NTSB”) report, the Handbook indicates that “drowsy driving was probably the cause of more than half of accidents leading to a truck driver’s death,” and according to the National Highway Traffic Safety Administration (“NHTSA”), “[f]or each truck driver fatality, another three or four people are killed.”<sup>7</sup>

Fatigue is especially deadly in the trucking and bussing industries as it impairs the skills necessary to the safe operation of CMVs. For instance, in a report by the National Institute for Occupational Safety and Health (“NIOSH”), it was noted that “[s]afe vehicle operation requires sustained vigilance, excellent judgment, and quick reactions, particularly during heavy traffic or poor driving conditions. Gregory M. Saltzman & Michael H. Belzer, *Truck Driver Occupational Safety and Health: 2003 Conference Report and Selective Literature Review*, xii (2007), <https://bit.ly/3tLDiDf> [hereinafter *NIOSH Report*]. Fatigue impairs all of these abilities, endangering not only truck drivers, but also other motorists who share the road with them.” *Id.* The report notes that 25% of surveyed long-haul truck drivers acknowledged falling asleep at the wheel during their last year of driving. *Id.* at 47.<sup>8</sup> Drivers in the motor coach industry face similar problems, as evidenced by findings in a study commissioned by the FMCSA: “crash incidence increases in a non-linear fashion (e.g., exponentially) with increasing driving time or time-on-duty, a key risk factor for fatigue.” Gregory Belenky et al., *Expert Panel Report: Fatigue and Motorcoach/Bus Driver Safety* 7 (2013), <https://bit.ly/46K6JUJ>. Notably, drivers may not be able to recognize the impact of fatigue until it is too late. Nat’l Transp. Safety Bd., *NTSB 2017-2018 Most Wanted List of Transportation Improvements: Reduce Fatigue Related Accidents* 1 (2017), <https://bit.ly/3QDKeLH> (noting that the “consequences of fatigue on human performance can be subtle” and “[d]rivers may not recognize the effects of fatigue until it is too late.”).

***Given the Severe Consequences of Fatigued Driving, Industry Experts Recommend Breaks to Reduce Accidents and Protect Drivers.***

Studies have established the correlation between scheduled breaks and reduced accident rates. For example, two studies published in the *Journal of Safety Research* found that increasing the number of rest breaks or a break’s duration helps to reduce crash risk; and statistically, that taking one, two or three rest breaks during a ten hour shift can reduce the likelihood of a crash by 68%, 83% and 85%, respectively. Chen Chen & Yuanchang Xie, *The Impacts of Multiple Rest Break Periods on Commercial Truck Drivers’ Crash Risk*, 48 *J. Safety Rsch.* 87 (2014); Chen

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<sup>7</sup> *Id.*; see also Guang X. Chen et al., Ctrs for Disease Control & Prevention, *National Survey of Long-Haul Truck Drivers: Injury and Safety* 1-2 (2015), <https://bit.ly/40e5quW> (finding that stemming to a large degree from fatigued driving in 2004 truck driver deaths accounted for 15% of all fatal occupational injuries in the United States); 76 Fed. Reg. 81134 (Dec. 27, 2011) (referencing the Large Truck Causation Study which “reported that 13% of CMV drivers were considered to have been fatigued at time of their crash.”).

<sup>8</sup> See also Chen Chen & Yuanchang Xie, *Modeling the Safety Impacts of Driving Hours and Rest Breaks on Truck Drivers Considering the Dependent Covariates*, 51 *J. Safety Rsch.* 57 (2014), <https://bit.ly/46QKCMK> (concluding that commercial truck drivers’ safety performance can deteriorate easily due to fatigue caused by long driving hours and irregular work schedules); see also *Cal. DMV Handbook* at 2-29 (“commercial drivers, especially long-haul drivers ... [are] at increased risk of having a fall-asleep accident”).

Chen & Yuanchang Xie, *Modeling the Safety Impacts of Driving Hours and Rest Breaks on Truck Drivers Considering the Dependent Covariates*, 51 J. Safety Rsch. 57 (2014).

Likewise, in a report published by NIOSH, “[r]est periods or scheduled naps within shifts” were proposed as “countermeasure[s] to address driver fatigue.” *NIOSH Report* at 69. Similarly, an expert panel studying the bussing industry proposed to “incorporate forced breaks from the driving schedule into regulation.... If breaks were a requirement in the regulations for hours of service, passengers and/or industry could not intimidate drivers when they are required by law to take a break.” *Id.* at 11. The FMCSA itself recognized the connection between driver break time and increased safety when it explained, in promulgating the HOS prohibition on driving more than eight hours without a 30-minute break: “[t]he goal of this rulemaking is to reduce excessively long work hours that increase both the risk of fatigue-related crashes and long-term health problems for drivers.” 76 Fed. Reg. 81134 (Dec. 27, 2011). On an FMCSA webpage entitled “CMV Driving Tips – Driver Fatigue,” the agency notes that “extended work hours” are a cause of driver fatigue. Fed. Motor Carrier Safety Admin., *CMV Driving Tips - Driver Fatigue*, <https://bit.ly/3s47UzD> (last visited Nov. 13, 2023). Among the recommendations made by the FMCSA, commercial drivers are urged to “take a nap when feeling drowsy or less alert,” and that to be effective “[n]aps should last for a minimum of 10 minutes.” *Id.*

Similarly, California’s Department of Motor Vehicles Commercial Driver Handbook identifies “driving long distances without proper rest breaks” as an accident risk factor and warns of the importance of “maintaining alertness while driving.” *Cal. DMV Handbook* at 2-29–30. To maintain alertness, the manual urges commercial drivers to “take periodic breaks – about every 100 miles or 2 hours during long trips.” *Id.* The exact same cautionary language and recommendation for periodic breaks every two hours during long trips is found in CMV driver’s manuals issued by numerous other states.<sup>9</sup>

California’s MRB rules, though applicable to all industries and occupations, align closely with the recommendations made by state agencies and empirical studies regarding breaks for CMV drivers. The HOS rules do not provide such protections. The prohibition against fatigued driving in the HOS rules is only triggered by a driver’s recognition of his or her own safety-impairing fatigue, and the driver’s willingness to incur likely employer displeasure by taking an unscheduled break. Alternatively, California’s MRB rules promote alert driving and prevent fatigued driving by compelling and incentivizing employers to make regular breaks available to drivers. The MRB rules enable fatigued drivers to take off-duty time without risking their employers’ ire, while protecting themselves and others driving on California’s roads and highways. California’s worker protective MRB requirements provide these tangible health and safety benefits to intrastate CMV drivers and should be extended to interstate drivers.

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<sup>9</sup> See, e.g., Fla. Dep’t of Highway Safety & Motor Vehicles, *Florida Commercial Driver License Manual* 2-25–26 (2022), <https://bit.ly/3s25jWX>; Tex. Dep’t of Pub. Safety, *Texas Commercial Motor Vehicle Drivers Handbook* 2-25–26 (2019), <https://bit.ly/3sfMO11>; Mich. Sec’y of State, *Michigan Commercial Driver License Manual* 43-44 (2022), <https://bit.ly/3Mh2AiY>; Md. Dep’t of Transp., *Commercial Driver License Manual* 2-25–26 (2017), <https://bit.ly/3s9AwY9>.

**Enforcement of California’s MRB Rules as to Interstate CMV Drivers Will Not Contribute to the Truck Parking Shortage**

In its 2018 and 2020 preemption determinations, the FMCSA asserted that California’s enforcement of the MRB rules could exacerbate the problem of CMV drivers parking at unsafe locations due to the nationwide shortage of adequate CMV parking. *See* 85 Fed. Reg. 3469, 3476 (Jan. 21, 2020); 83 Fed. Reg. 67470, 67475-77 (Dec. 28, 2018). The Agency concluded this could present a safety hazard to drivers, bus passengers and other highway users. 85 Fed. Reg. at 3476; 83 Fed. Reg. 67476. However, the FMCSA failed to consider the flexibility inherent in the MRB Rules that would obviate the need for CMV drivers to park in ways that impair safety or require additional CMV parking. Further, statistics made available since the Agency’s preemption decision in December 2018 support the conclusion that the MRB rules have not demonstrably worsened the State’s truck parking shortage.

***The MRB Rules Do Not Require Parking at Fixed Times or When Parking Is Not Available Such that Additional Truck Parking is Not Necessary to Comply with the Rules.***

Unlike the federal HOS rules, California’s MRB rules do not mandate parking at fixed times. When drivers are unable to find suitable parking, California’s MRB rules offer drivers and employers various options. As detailed below, in these instances, drivers may take a break earlier or later in their shift; where permitted, take an on-duty meal break; or, in non-routine, emergency instances when duty-free rest breaks are not possible, the employer may pay an extra hour of wages for the missed break. Given these options, the MRB rules are adaptable to the realities of the dynamic conditions of the trucking and bussing industries, including the availability of safe parking.

The California Supreme Court has interpreted the MRB Rules to allow employers flexibility in their timing in the provision of mandated breaks. In *Brinker*, 273 P.3d at 537, the court held with respect to meal periods that “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 the employee’s 10th hour of work. . . . Wage Order 5 does not impose additional timing requirements.”<sup>10</sup> And as to rest periods, the court held that although they should be scheduled in the middle of work periods “insofar as practicable,” employers could “deviate from that preferred course where practical considerations render it infeasible.” *Id.* at 530.

The court in *Brinker* also rejected the contention that an employer has a duty to “police” its employees to ensure that the employee ceases work during the meal period. To wit, it noted:

An employer’s duty . . . is an obligation to provide a meal period to its employees.

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<sup>10</sup> IWC Order 5-200, at issue in *Brinker*, governs the “public housekeeping industry.” 8 Cal. Code Regs. § 11050 (IWC Order 5-2001) § 2(P). As relevant here, Order 5’s provisions for meal periods (see section 11 of the wage order) and rest periods (at section 12 of the wage order) mirror those of Order 9-2001, which is applicable to truck and bus drivers.

[The] employer satisfies this obligation if it relieves employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. . . . On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay[.]

*Id.* at 536-37.

Further, when off-duty breaks are not feasible, there are several ways an employer may comply with the rules. Regarding meal breaks, employers and workers may agree in writing to an on-duty meal period when the nature of the work prevents an employee from being relieved of all duty. Cal. Indus. Welfare Comm'n, Order No. 9-2001 § 10(C). An employee may revoke an agreement for an on-duty meal period, but the revocation must be in writing. *Id.* Moreover, in instances where a duty-free rest period is not possible due to "irregular or unexpected circumstances," the California Supreme Court has held that the employer may provide another rest period within the shift "to replace the one that was interrupted or pay the premium pay set forth in Wage Order 4, subdivision 12(B) and [Labor Code] section 226.7." *Augustus v. ABM Security Service, Inc.* 385 P.3d 823, 834, n.14 (Cal. 2016).<sup>11</sup> If an employer is routinely unable to provide a duty-free rest period, it may seek an exemption from the Labor Commissioner's Office. *See, e.g.,* Cal. Indus. Welfare Comm'n, Order No. 9-2001 § 17 (providing that the Labor Commissioner may grant an exemption if "after due investigation, it is found that the enforcement of [the rest period requirements] would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer.").

Given these options, it is difficult to conjure a scenario in which compliance with the MRB rules would increase the need for truck parking, thus potentially exacerbating the current shortage. Drivers already need to park numerous times throughout their shifts. For instance, bus drivers' routes already include multiple stops per shift. 85 Fed. Reg. at 3475-76. Under the HOS rules, property-carrying drivers are already required to take a thirty-minute break from driving once they have driven for eight hours. 49 C.F.R. § 395.3(a)(3)(ii). Both truck and bus drivers must stop when too fatigued to drive. *Id.* at § 392.3. Drivers also often have to park at the beginning and end points of every trip, e.g., when they arrive at their customer's facility, an intermodal facility (rail yard, seaport, airport), or at a border crossing for staging purposes. *See, e.g.,* Cal. Dep't of Transp., *California Statewide Truck Parking Study 3* (2022) [hereinafter *Cal. Truck Parking Study*]. The MRB rules permit employers and drivers to create a break schedule that overlaps with existing HOS requirements and pre-scheduled stops. The MRB rules also permit employers and drivers to take breaks in a manner that takes into account available safe

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<sup>11</sup> While the court cautioned that premium pay in lieu of an off-duty break "should be the exception rather than the rule" and that employers should not "pervasively interrupt scheduled work periods," it remains permissible to pay the premium wage in "irregular or unexpected circumstances" where a duty-free rest break is not possible. *Augustus*, 385 P.3d 823 at n.14

parking and driver and passenger needs. Given this flexibility, compliance with the MRB rules does not necessitate additional truck parking, nor does it promote unsafe parking.

***Available Statistics and Studies Suggest That Enforcement of California's MRB Rules Has Not Impacted the State's Truck Parking Shortage.***

While studies have found a lack of truck parking across the United States, California's truck parking shortage is not identifiably worse than states without similar MRB rules. A comprehensive 2015 national truck parking study found a majority of states, both those with and without MRB rules, to have insufficient truck parking. Off. of Freight Mgmt. and Operations, U.S. Dep't of Transp., *Jason's Law Truck Parking Survey Results and Comparative Analysis* 78 (2015) [hereinafter *Jason's Law Report 2015*]. As detailed in the study, two separate surveys of truck drivers from the Owner Operator Independent Drivers Association and the American Trucking Association found that California ranked ninth and seventh, respectively, in truck drivers' assessments of states with the worst parking conditions. *Id.* at 38. Those same survey groups both independently ranked New Jersey, New York, and Illinois as the three most difficult to find parking in. *Id.*<sup>12</sup> None of those three states have comprehensive meal and rest break laws on par with California's.<sup>13</sup>

A 2019 follow-up study found similar results, with most states reporting truck parking shortages and drivers reporting challenges in every state and region. Off. of Freight Mgmt. and Operations, U.S. Dep't of Transp., *Jason's Law Commercial Motor Vehicle Parking Survey and Comparative Assessment* 4 (2020) [hereinafter *Jason's Law Report 2020*].<sup>14</sup> Strikingly, five states without meal and rest break provisions comparable to California's were cited in the 2019 study more frequently as having parking shortages worse than California despite generally having more truck parking. *Id.* at 15 (identifying New York, New Jersey, Pennsylvania, Illinois and Georgia as the five most frequently cited states where drivers have difficulty finding parking).<sup>15</sup>

Not surprisingly, these reports generally found truck parking shortages to correlate to states that contain the busiest trucking routes and major freight generating areas, not necessarily

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<sup>12</sup> A smaller sample of 249 non-driving truck dispatchers belonging to the American Trucking Association found that California was the worst state to find parking in. *Jason's Law Report 2015* at 34. However, the percentage of respondents who identified California (42%) as the most difficult to park in was statistically similar to the percentage for Pennsylvania (38%) and New York (37%), neither of which have comprehensive meal and rest break laws. *Id.* at 34-35.

<sup>13</sup> New Jersey does not require meal or rest breaks. See N.J. Dep't of Lab., Wage and Hour Compliance FAQs (for Employers), <https://bit.ly/46Np6lu>. New York and Illinois do not mandate rest breaks for all workers. See N.Y. Dep't of Lab., *Meal and Rest Periods Frequently Asked Questions*, <https://bit.ly/3QyTiBr>; Ill. Dep't of Lab., ODRISA Amendment Updates Effective January 1, 2023, <https://bit.ly/47yYtax>.

<sup>14</sup> A comprehensive report containing specific data from the Jason's Law 2019 survey of truck parking was not published. Instead, a slide deck summarizing major findings was shared publicly in 2020. Specific supporting data from the survey is not publicly available.

<sup>15</sup> Neither Pennsylvania nor Georgia mandate that employers provide meal or rest breaks for all employees. See Pa. Dep't of Lab. & Indus., *General Wage and Hour Questions*, <https://bit.ly/45NiGrF>; Ga. Dep't of Lab., *Breaks and Meals*, <https://bit.ly/45Os6mD>. See also Footnote 13, *supra*.



states that have their own MRB rules. *See Jason's Law Report 2015* at 53 (finding that “[m]ajor corridors with significant truck traffic are corridors with...the most challenges.”); *Jason's Law Report 2020* at 11 (noting that “states with the highest reports tend to have major freight generating areas, major ports, and intermodal facilities”); *id.* at 16 (parking “most problematic along key freight corridors”).

These findings demonstrate that truck parking shortages, which are caused and exacerbated by a multitude of factors, are not worse in states with MRB rules, including California.<sup>16</sup>

Additionally, truck parking studies suggest that CMV parking has not meaningfully improved in California since preemption of the MRB rules as to cargo-carrying drivers in December 2018. For instance, publicly available findings from the 2020 Jason's Law Survey, which relied in part on 2019 state surveys and data, found California to have a similar shortage to the shortage reported in 2014, when the MRB rules were enforceable. *See Jason's Law Report 2020* at 9 (“Current survey includes areas of shortage similar to 2014: I-95 Mid-Atlantic and north, Chicago area and California.”). Likewise, relying in large part on GPS data collected in 2019, California's Truck Parking Study, published in 2022, found a persistent shortage of truck parking within the state. *See Cal. Truck Parking Study* 17 (finding a shortage of at least 3,400 spaces within the state with nearly all parking facilities near or over capacity at “peak parking hours” between 12 a.m. and 1 a.m.).<sup>17</sup> These findings suggest that elimination of the rules thus far has not measurably improved California's truck parking shortage.

While lack of truck parking remains a serious problem in California and the country as a whole, available information and statistics suggest that MRB rules have not meaningfully contributed to the shortage.

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<sup>16</sup> Both Jason's Law Reports found a number of issues unrelated to meal and rest breaks to be impacting and exacerbating truck parking shortages, including delivery windows and schedules, adverse weather conditions, staging needs, planning and zoning challenges to building additional parking, growth of truck traffic, and regulations on land use. *Jason's Law Report 2015* at viii, 5-6; *Jason's Law Report 2020* at 13.

<sup>17</sup> Notably, the California Truck Parking Study found that truck parking demand is typically highest overnight and the vast majority of the truck parking shortages in California occur during peak parking hours (i.e. between 12 a.m. and 1 a.m.) when facilities are often at or over capacity. *Cal. Truck Parking Study* at 13; *see also Jason's Law Report 2015* at 66 (finding that most parking facilities report being at full capacity primarily during nighttime hours.) These are the hours when many drivers are likely searching for parking to accommodate periods of rest longer than the 10 or 30-minute breaks required by the MRB rules. *See, e.g., Cal. Truck Parking Study* at 13 (“other locations only fill up once drivers stop for a long break, typically overnight.”); *see also Jason's Law Report 2015* at 66 (noting that “competition for parking spaces is highest during the early evening to overnight time periods as most drivers rest during these periods.”). While there is a need for additional data gathering on the type of parking (i.e. longer or shorter term) needed at various times of the day, the data suggests that much of the truck parking shortage is likely driven in large part by the need for longer-term parking; such that elimination of the MRB rules, which require parking in ten or 30-minute increments, will not improve the shortage.

***State and Federal Initiatives Are Underway to Address Truck Parking Shortages.***

Since the FMCSA preempted California's MRB rules as to cargo-carrying trucks in 2018, California and the federal government have taken significant steps to improve truck parking.

In 2022, California published its first of a kind comprehensive report on truck parking. *See generally Cal. Truck Parking Study*. This in-depth study provides concrete strategies and next steps to improve truck parking within the state while increasing freight competitiveness. *Id.* at 5, 28, 43, app. D (Truck Parking Strategies and Implementation Plan). Since publication of the study, California has initiated truck parking expansion projects. *See e.g.* Cal. Dep't of Transp., *Northbound Weed Rest Area Truck Parking Project on Interstate 5*, <https://bit.ly/3FVeyv4> (last visited Nov. 13, 2023).

California also continues to develop a multistate truck parking availability system on I-10 funded in part by the Federal Highway Administration's Advanced Transportation and Congestion Management Technologies Deployment Program. *Cal. Truck Parking Study*, app. D at 61; *see also* I-10 Connects, <https://bit.ly/478UVEU> (last visited Nov. 13, 2023). This system will provide information on available parking sites, distances, and the number of available spots at each site via mobile application and dynamic signs along the highway to help drivers to make better-informed decisions about where to park. *Cal. Truck Parking Study*, app. D at 18-19. It will cover six California sites and 234 miles of the interstate within California. It is expected to launch in 2024. Overview of TPAS, <https://bit.ly/40gYZYk> (last visited Nov. 13, 2023). Truck parking studies have emphasized the importance of truck parking notification systems to help drivers avoid unsafe parking or continuing to drive while fatigued. *See, e.g., Jason's Law Report 2020* at 13; *Jason's Law Report 2015* at vii (noting the trucking industry would like to "improve real-time information about parking availability."); *id.* at 4 (indicating much needs to be done to "communicate to drivers where parking is available"). In conjunction with the flexibility of the MRB rules, this system will help drivers to schedule breaks when safe parking that meets their needs is available.

At the federal level, in 2022, the U.S. Department of Transportation announced that expanding truck parking was a priority for the federal government. Press Release, U.S. Dep't of Transp., Biden-Harris Administration Brings Together Trucking Community to Help Expand Truck Parking (Sept. 30, 2022) (available at <https://bit.ly/3S2zPuc>). In September 2023, the FMCSA announced more than \$80 million in grant awards for truck parking projects. Press Release, U.S. Dep't of Transp., Biden-Harris Administration Announces More Than \$80 Million in Grants to Improve Highway Safety, Including Better Access to Truck Parking, (Sept. 13, 2023) (available at <https://bit.ly/48likFh>). These "High Priority Grants include a 65% increase in funding for truck parking projects over the preceding year." *Id.* Additionally, the Truck Parking Safety Improvement Act, which was approved by the House Committee on Transportation and Infrastructure in May 2023, aims to provide \$755 million in competitive grant funding over three years to expand truck parking capacity from 2024 to 2026. Press Release, American Trucking Associations, ATA Applauds Bipartisan, Bicameral Truck Parking Legislation (Mar. 29, 2023) (available at <https://bit.ly/3MoS89c>). It is expected that these state and federal projects will improve truck parking throughout the state and nation.



## **Enforcement of the MRB Rules Has Not Impacted the National Supply Chain**

The FMCSA previously determined that California’s MRB rules unreasonably burdened interstate commerce. 85 Fed. Reg. 3479 (Jan. 21, 2020); 83 Fed. Reg. 67480 (Dec. 28, 2018). The burdens cited by the FMCSA to varying degrees in both decisions include: the need to relieve drivers of all duties during breaks, the existence of differing state break requirements, and purported “decreased productivity, administrative burden, and costs.” 85 Fed. Reg. at 3479-80; 83 Fed. Reg. at 67478, 67480. As outlined below, however, available statistics suggest that the MRB rules have not impacted interstate commerce in California. Further, the Agency failed to properly account for the flexibility inherent in California’s MRB rules that minimizes impacts on operations and productivity.

### ***Available Statistics and Reports Suggest Enforcement of the MRB Rules Has Not Burdened Interstate Commerce.***

A survey of publicly available data, research, and statistics supports California’s position that its MRB rules have not disrupted the movement of freight through California or otherwise weakened the resiliency of the national supply chain. To the contrary, business conducted in California has remained critical to interstate commerce regardless of the enforcement of the MRB rules. Since 2001, when California adopted the premium pay remedy for violations of MRB rules, to present, the State has remained a thriving hub for freight movement.

Freight statistics indicate that the transport of goods by trucks through California generally increased from 2001 to 2018 (the time the MRB rules were enforceable). Data in the Federal Highway Administration’s Freight Analysis Framework (“FAF”) show a growth in the transport of goods by trucks in California between 2002 and 2007 and 2012 and 2018 (when the MRB rules were enforceable for cargo-carrying CMV drivers).<sup>18</sup> For instance, the total tons of freight moved through California and interstate freight (i.e. freight with an origin or destination in a state other than California) increased from 2002 to 2007, and again from 2012 to 2018.<sup>19</sup> The tons of cargo moved by truck within and in and out of California also increased during these periods. *Id.* This growth was comparable to, and in some instances more than, other states. *Id.* Freight Analysis Framework data from 2019, after the MRB rules were preempted as to cargo-carrying CMVs, show slight decreases in total tons of freight and interstate freight moved by truck in California.<sup>20</sup> *Id.*

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<sup>18</sup> Between 2001 and 2018, FAF data was published for the years 2002, 2007, 2012, 2017, and 2018. The data indicates a drop in total tons of cargo transported in interstate commerce and by truck from 2007 to 2012. This is likely largely the result of the 2008 recession. California’s decrease generally tracks with other states’ statistics in these years.

<sup>19</sup> See Fed. Highway Admin., U.S. Dep’t of Transp., *Freight Analysis Framework 5.5.1 State Summary Tables 2012, 2017, 2018*. Complete FAF 5.5.1 (tables from 1997 onwards can be downloaded at <https://bit.ly/3ZIWvRW> or viewed online at <https://bit.ly/40bEH2d>. To filter the data in the online visualization tool to display only truck freight, click the red truck icon in the upper left corner of the webpage, click the “metric” dropdown box in the upper right and select “tons,” then use the “year” dropdown box in the upper right to select which year to view).

<sup>20</sup> Post-pandemic FAF data for California generally tracks with national and other state trends. It has not been included here given all of the complicating supply chain issues triggered by the pandemic.

Further, California’s Freight Mobility Plans, published in 2014 and 2020 and based on FAF data from years prior to preemption, found trucking to be the predominant form of transport of goods into and out of the state when the MRB rules were enforceable. Cal. State Transp. Agency & Cal. Dep’t of Transp., *California Freight Mobility Plan* 144-45 (2014) [hereinafter *2014 Cal. Freight Mobility Plan*]; Cal. State Transp. Agency & Cal. Dep’t of Transp., *California Freight Mobility Plan 2020* 158 (2020) [hereinafter *2020 Cal. Freight Mobility Plan*]. For example, in 2012, more than 80 percent of the freight that was shipped out of California to elsewhere in the U.S.—as measured by weight—was on trucks, including both goods produced in California and imported goods shipped to other locations. *2014 Cal. Freight Mobility Plan* at 144-45.<sup>21</sup> Both Plans predicted significant growth of freight movement within and through California and forecasted trucking to remain the predominate mode of transportation for freight moved in and out of California.<sup>22</sup>

While growth of the trucking industry is tied to numerous complex factors, these findings and statistics indicate that freight movement by truck within California overall increased while the MRB rules were enforceable and suggest that trucking has remained a robust industry within the State without regard to the enforceability of the MRB rules.

Like other states and the nation as a whole, California has not been immune to supply chain problems. However, presently available data, reporting, and studies generally point to a constellation of issues impacting timely delivery of goods, none of which directly implicate state MRB rules.

Identified contributors to supply chain disruption include congestion on major highways and at key ports, shifts in supply and demand, driver detention time, and driver shortages among others. *See, e.g.*, Catie Edmondson, ‘*What Does a Trucker Look Like? It’s Changing, Amid a Big Shortage*, N.Y. Times (July 28, 2018), <https://bit.ly/46OoqSX> (finding a nationwide shortage of truck drivers to be “causing a bottleneck of goods that is delaying deliveries”); *see also* Madeleine Ngo & Ana Swanson, *The Biggest Kink in America’s Supply Chain: Not Enough Truckers*, N.Y. Times (Nov. 9, 2021), <https://bit.ly/3S3cdWh> (noting, “[t]ruck drivers have been in short supply for years, but a wave of retirements combined with those simply quitting for less stressful jobs is exacerbating the supply chain crisis in the United States.”); Dan McCool, *Are supply chains stuck in detention?*, MIT News (Apr. 25, 2022), <https://bit.ly/3FjtnY2> (finding that truck drivers spend an average of six-and-a-half hours per day on the road, losing much of their remaining legal drive time due to detention at warehouses);<sup>23</sup> *2014 Cal. Freight Mobility Plan* at

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<sup>21</sup> Similarly, California’s 2020 Freight Mobility Plan found that by weight, trucks transported the largest amount of goods into, within, and out of the *2020 Cal. Freight Mobility Plan* at 158.

<sup>22</sup> *See, e.g.*, *2014 Cal. Freight Mobility Plan* at 139 (predicting total California domestic mode shipments to increase over 160 percent by weight and 250 percent by value by the year 2040); *2020 Cal. Freight Mobility Plan* at 158 (forecasting trucking to remain the principal mode of transportation for freight through 2045); *see also 2014 Cal. Freight Mobility Plan* at 59 (finding that the Freight Analysis Framework data and forecasts strongly indicate that freight moved on trucks is expected to increase for the foreseeable future).

<sup>23</sup> The FMCSA recently announced plans to further study the impact of driver detention time on driver safety and operations. Approximately 80 carriers and 2,500 CMV drivers will be selected to

127 (noting productivity lost due to pre-pandemic congestion); Daniel Funke, *Fact check: California trucking regulations aren't to blame for cargo backlog*, USA Today (Oct. 18, 2021, 4:09 PM), <https://bit.ly/48WRjOE> (industry expert noting low wages and new shipping trends resulting from COVID the causes of cargo backlog, not California-specific regulations). These findings coupled with the freight movement data above indicate that enforcement of the MRB rules has likely not contributed to supply chain disruption.

***The Flexibility of the MRB Rules Minimizes Any Potential Impact on Operations and Productivity.***

The flexibility of the MRB rules allows employers to schedule breaks in a manner that minimizes any interference with ongoing operations and productivity. If it is not feasible to provide a duty-free meal or rest break, an employer has various options to ensure compliance with the law. As described above, an employer may schedule breaks under the MRB rules to take into account already-required HOS breaks, other necessary stops, and driver and passenger needs. *See* pages 12-14. If a driver cannot take an off-duty meal period on a regular basis due to the need to attend to potential passenger needs, protect cargo or for other legitimate reasons, the employer may enter into a written agreement with the driver for an on-duty meal period or seek an exemption from the duty-free rest period requirement from the Labor Commissioner.

In comments submitted to the FMCSA, industry commenters asserted that the costs of complying with the MRB rules would be “staggering” and compliance “could wreak havoc on bus route system and increase ... productivity loss.” 85 Fed. Reg. at 3478, 3480. However, prior to the FMCSA’s preemption of the MRB rules as to passenger and cargo-carrying CMVs, trucking and bussing companies managed to comply with the longstanding MRB rules. Companies may already incur higher costs for doing business in California due to a host of state regulations and employment laws, including provision of higher minimum wages and tonnage limits. There is no tangible evidence that a company’s choice not to do business in California due to state regulations has weakened the national supply chain. Freight movement statistics within California during the time the MRB rules were enforceable belie any argument that the MRB rules have significantly hampered trucking operations or productivity such that interstate commerce has been burdened. *See* pages 17-18.<sup>24</sup>

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provide data in the study. The research will be used to inform strategies that may be used to mitigate driver detention time. 88 Fed. Reg. 58060 (Aug. 24, 2023).

<sup>24</sup> Refuting the bussing industry’s own self-reported representations that the MRB rules have impeded their ability to conduct business within California is challenging given the paucity of publicly available state specific data. For instance, the Federal Highway Administration provides bus registrations by state, but does not indicate if and how many of the registered busses are operating in interstate commerce. *See* Off. of Highway Pol’y Info., U.S. Dep’t of Transp., Highway Statistics 2021, <https://bit.ly/3S2zWpC> (last visited Nov. 13, 2023). Neither the ABA’s Motorcoach Census nor the FMCSA’s Pocket Guide to Large Bus and Truck Statistics include state specific statistics. *See generally* Am. Bus Ass’n, *Motorcoach Census: A Study of the Size and Activity of the Motorcoach Industry in the United States and Canada in 2020* (2022), <https://bit.ly/45SG9HV>; Fed. Motor Carrier Safety Admin., U.S. Dept. of Transp., *2022 Pocket Guide to Large Truck and Bus Statistics* (2022), <https://bit.ly/3tAc5DE>.

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Similarly, the fact that other states have differing MRB rules a company must comply with in addition to California's does not amount to a burden on interstate commerce. Complying with varying state rules is simply the cost of doing business in more than one geographic area. Again, trucking and bussing companies managed to comply with the MRB rules of California prior to 2019 and 2020, while steadily increasing the amount of freight moved into and out of the state.

In sum, the lack of evidence demonstrating actual burdens imposed by the MRB rules, coupled with freight movement statistics in the State, and the fact that companies asserting these burdens managed to operate in California prior to preemption, supports the proposition that enforcement of the MRB rules have not burdened interstate commerce or impacted the national supply chain.

### III. Conclusion

For all of the reasons set forth above, pursuant to 49 U.S.C. § 31141(d), the State urges the FMCSA to grant its petition for waiver of its determinations that California's MRB rules are preempted as to drivers of property-carrying and passenger-carrying commercial motor vehicles subject to the federal HOS Rules. The State's MRB rules provide substantial health and safety benefits to drivers and the public and there is no tangible evidence that their enforcement has weakened the national supply chain.

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Sincerely,



ROB BONTA  
California Attorney General



LILIA GARCÍA-BROWER  
California Labor Commissioner