CASE NO. _____

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. XAVIER BECERRA AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, and THE LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION,

Respondent.

Petition for Review under 49 U.S.C. § 31141 of Determination by Federal Motor Carrier Safety Administration, Docket No. FMCSA-2019-0048

PETITION FOR REVIEW

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Petitioners THE PEOPLE OF THE STATE OF CALIFORNIA and THE LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA hereby petition this Court for review of the Order and Determination of Preemption issued by the Respondent FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION ("FMCSA"), Docket No. FMCSA-2019-0048, on January 13, 2020, a copy of which is attached hereto as Exhibit A. This petition is filed pursuant to 49 U.S.C. section 31141(f). Petitioners ask that the Court review and reverse the Determination in its entirety.

Petitioners are adversely affected by this Determination and have a substantial interest in securing its reversal. Petitioners include two state officials statutorily authorized to enforce California's laws, including minimum labor standards and meal and rest break laws and regulations. In carrying out these responsibilities, Petitioners filed a joint Comment with the FMCSA, attached hereto as Exhibit B, opposing a determination of preemption. Absent the relief sought by this Petition, California's meal and rest period requirements will be unenforceable as to those motor carriers of passengers subject to the FMCSA Determination.

Dated: March 12, 2020

Respectfully Submitted,

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Dated: March 12, 2020

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EXHIBIT A

DEPARTMENT OF TRANSPORTATION **[4910-EX-P]**

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019-0048]

California's Meal and Rest Break Rules for Drivers of Passenger-Carrying Commercial Motor Vehicles; Petition for Determination of Preemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Order; Grant of Petition for Determination of Preemption.

SUMMARY: The FMCSA grants the petition submitted by the American Bus Association (ABA) requesting a determination that the State of California's Meal and Rest Break rules (MRB rules) are preempted under 49 U.S.C. 31141 as applied to passenger-carrying commercial motor vehicle drivers subject to FMCSA's hours of service regulations. Federal law provides for preemption of State laws on commercial motor vehicle safety that are additional to or more stringent than Federal regulations if they (1) have no safety benefit; (2) are incompatible with Federal regulations; or (3) would cause an unreasonable burden on interstate commerce. The FMCSA has determined that California's MRB rules are laws on commercial motor vehicle (CMV) safety, that they are more stringent than the Agency's hours of service regulations, that they have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, that they are incompatible with the Federal hours of service regulations, and that they cause an unreasonable burden on interstate commerce. The California MRB rules, therefore, are preempted under 49 U.S.C. 31141(c).

FOR FURTHER INFORMATION CONTACT: Charles J. Fromm, Deputy Chief Counsel, Office of the Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, (202) 493-0349; email Charles.Fromm@dot.gov.

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at http://www.regulations.gov.

Docket: For access to the docket to read background documents or comments, go to http://www.regulations.gov or Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year.

Privacy Act: Anyone may search the FDMS for all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the Federal Register on December 29, 2010. 75 FR 82132.

Background

On January 10, 2019, ABA petitioned FMCSA to preempt California statutes and rules requiring employers to give their employees meal and rest breaks during the work day, as applied to drivers of passenger-carrying CMVs subject to FMCSA's hours of service (HOS) regulations. For the reasons set forth below, FMCSA grants the petition.

California Meal and Rest Break Rules

Section 512, Meal periods, of the California Labor Code reads, in part, as follows:

"(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."

Section 516 of the California Labor Code reads, in relevant in part, as follows:

"(a) Except as provided in Section 512, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers."

Section 226.7 of the California Labor Code reads, in relevant part, as follows:

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

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

Section 11090 of Article 9 (Transport Industry) of Group 2 (Industry and Occupation Orders) of Chapter 5 (Industrial Welfare Commission) of Division 1 (Department of Industrial Relations) of Title 8 (Industrial Relations) of the California Code of Regulations, is entitled "Order Regulating Wages, Hours, and Working Conditions in the Transportation Industry" [hereafter: "8 CCR section 11090" or "section 11090."[1] Section 11090(11). Meal Periods, reads as follows:

"(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."

"(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 paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time."

[1] California Industrial Welfare Commission Order No. 9-2001 is identical to 8 CCR Section 11090.

"(D) If an employer fails to provide an employee 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."

"(E) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated."

Section 11090(12). Rest Periods, reads as follows:

"(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 an employee 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."

Although section 11090(3)(L) provides that "[t]he provisions of this section are not applicable to employees whose hours of service are regulated by: (1) The United States Department of Transportation, Code of Federal Regulations, Title 49, sections 395.1 to 395.13, Hours of Service of Drivers," the California courts have interpreted the word "section" to refer only to section 11090(3), which regulates "hours and days of work," not to all of section 11090,

including meal and rest breaks in section 11090(11) and (12). *See Cicairos v. Summit Logistics, Inc.*, 133 Cal App.4th 949 (2006).

Federal Preemption Under the Motor Carrier Safety Act of 1984

Section 31141 of title 49, United States Code, a provision of the Motor Carrier Safety Act of 1984 (the 1984 Act), 49 U.S.C. Chap. 311, Subchap. III, prohibits States from enforcing a law or regulation on CMV safety that the Secretary of Transportation (Secretary) has determined to be preempted. To determine whether a State law or regulation is preempted, the Secretary must decide whether a State law or regulation: (1) has the same effect as a regulation prescribed under 49 U.S.C. 31136, which is the authority for much of the Federal Motor Carrier Safety Regulations; (2) is less stringent than such a regulation; or (3) is additional to or more stringent than such a regulation. 49 U.S.C. 31141(c)(1). If the Secretary determines that a State law or regulation has the same effect as a regulation based on section 31136, it may be enforced. 49 U.S.C. 31141(c)(2). A State law or regulation that is less stringent may not be enforced. 49 U.S.C. 31141(c)(3). And a State law or regulation the Secretary determines to be additional to or more stringent than a regulation based on section 31136 may be enforced unless the Secretary decides that the State law or regulation (1) has no safety benefit; (2) is incompatible with the regulation prescribed by the Secretary; or (3) would cause an unreasonable burden on interstate commerce. 49 U.S.C. 31141(c)(4). To determine whether a State law or regulation will cause an unreasonable burden on interstate commerce, the Secretary may consider the cumulative effect that the State's law or regulation and all similar laws and regulations of other States will have on interstate commerce. 49 U.S.C. 31141(c)(5). The Secretary need only find that one of the conditions set forth at paragraph (c)(4) exists to preempt the State provision(s) at issue. The Secretary may review a State law or regulation on her own initiative, or on the petition of an

interested person. 49 U.S.C. 31141(g). The Secretary's authority under section 31141 is delegated to FMCSA Administrator by 49 C.F.R. 1.87(f).

Federal Motor Carrier Safety Regulations (FMCSRs) Concerning HOS for Drivers of Passenger-Carrying CMVs, Fatigue, and Coercion

For drivers operating a passenger-carrying CMV in interstate commerce, the Federal HOS rules allow up to 10 hours of driving time following 8 consecutive hours off duty, and driving is prohibited after the operator has accumulated 15 hours of on-duty time.[2] 49 C.F.R. 395.5(a). The 15-hour on-duty limit is non-consecutive; therefore, any time that a driver spends off-duty does not count against the 15-hour window.[3] While the HOS rules for passenger-carrying CMVs impose limits after which driving is prohibited, they do not mandate a 30-minute rest period within the drive-time window, unlike the HOS rules for property-carrying CMVs. The HOS rules also impose weekly driving limits. In this regard, drivers are prohibited from operating a passenger-carrying CMV after having been on duty 60 hours in any 7 consecutive days, if the employing motor carrier does not operate CMVs every day of the week; or after having been on duty 70 hours in any period of 8 consecutive days, if the employing motor carrier operates CMVs every day of the week. 49 C.F.R. 395.5(b).

Additionally, the FMCSRs prohibit a driver from operating a CMV, and a motor carrier from requiring a driver to operate a CMV, while the driver is impaired by illness, fatigue, or

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[2] Subject to certain conditions, a driver who is driving a passenger-carrying CMV that is equipped with a sleeper berth, may accumulate the equivalent of 8 consecutive hours of off-duty time by taking a combination of at least 8 consecutive hours off-duty and sleeper berth time; or by taking two periods of rest in the sleeper berth. 49 C.F.R. 395.1(g)(3).

[3] "Off-duty" time is not specifically defined in the HOS rules; however, the Agency issued guidance stating that a driver may record time as off-duty provided: (1) the driver is relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo or passengers it may be carrying, and (2) during the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing. 78 FR 41852 (July 12, 2013).

other cause, such that it is unsafe for the driver to begin or continue operating the CMV. 49 C.F.R. 392.3. The FMCSRs also prohibit a motor carrier, shipper, receiver or transportation intermediary from coercing a driver to operate a CMV in violation of this and other provisions of the FMCSRs. 49 C.F.R 390.6.

The ABA Petition and Comments Received

As set forth more fully below, ABA argues that California's MRB rules are within the scope of the Secretary's preemption authority under section 31141 because they are laws "on commercial motor vehicle safety." In this regard, ABA cites the Agency's 2018 Decision finding that the MRB rules are preempted under section 31141, as applied to drivers of property-carrying CMVs subject to the HOS rules. Additionally, ABA argues that the MRB rules "undermine existing Federal fatigue management rules" and "require drivers to take breaks that might be counterproductive to safety." The ABA also contends that the MRB rules "conflict with driver attendance needs," that they are "untenable" due to inadequate parking for CMVs, and that they make it difficult to comply with the Federal regulations governing passenger service responsibility and terminal facilities. Lastly, ABA argues that "compliance costs create an unreasonable burden on interstate commerce." The ABA's petition seeks an FMCSA determination that California's MRB rules, as applied to passenger-carrying CMV drivers who are subject to the HOS rules, are preempted pursuant to 49 U.S.C. 31141 and, therefore, may not be enforced.

The FMCSA published a notice in the Federal Register on May 9, 2019, seeking public comment on whether California's MRB rules, as applied to drivers of passenger-carrying CMVs, are preempted by Federal law. 84 FR 20463. Although preemption under section 31141 is a legal determination reserved to the judgment of the Agency, FMCSA sought comment on issues raised

in ABA's petition or otherwise relevant. While the public comment period ended on June 10, 2019, the Agency accepted all public comments submitted through November 7, 2019. The Agency received 28 comments, with 20 in support of the petition and 8 in opposition.[4] The Agency considered all the comments received. They are discussed more fully below.

The Agency's Prior Decisions Regarding Preemption Under Section 31141

I. FMCSA's Decision Rejecting a Petition for a Preemption Determination.

On July 3, 2008, a group of motor carriers[5] petitioned FMCSA for a determination under 49 U.S.C. 31141(c) that: (1) the California MRB rules are regulations on CMV safety, (2) the putative State regulation imposes limitations on a driver's time that are different from and more stringent than Federal "hours of service" regulations governing the time a driver may remain on duty, and (3) that the State law should therefore be preempted. 73 FR 79204.

On December 24, 2008, the Agency denied the petition for preemption, reasoning that the MRB rules are merely one part of California's comprehensive regulation of wages, hours, and working conditions, and that they apply to employers in many other industries in addition to motor carriers. 73 FR 79204. The FMCSA concluded that the MRB rules were not regulations "on commercial motor vehicle safety" within the meaning of 49 U.S.C. 31141 because they applied broadly to all employers and not just motor carriers, and that they therefore were not

[4] A comment letter submitted by the Center for Justice and Democracy, opposing ABA's petition, was joined by 23 organizations.

[5] Affinity Logistics Corp.; Cardinal Logistics Management Corp.; C.R. England, Inc.; Diakon Logistics (Delaware), Inc.; Estenson Logistics, LLC; McLane Company, Inc.; McLane/Suneast, Inc.; Penske Logistics, LLC; Penske Truck Leasing Co., L.P.; Trimac Transportation Services (Western), Inc.; and Velocity Express, Inc.

within the scope of the Secretary's statutory authority to declare unenforceable a State motor vehicle safety regulation that is inconsistent with Federal safety requirements.[6] *Ibid.* at 79205-06.

II. FMCSA's 2018 Decision Granting Petitions to Preempt the MRB Rules

In 2018, the American Trucking Associations (ATA) and the Specialized Carriers and Rigging Association (SCRA) petitioned FMCSA to reconsider its 2008 Decision and declare California's MRB rules preempted under section 31141 insofar as they apply to drivers of CMVs subject to the Federal HOS rules. The ATA acknowledged that FMCSA had previously determined that it could not declare the California MRB rules preempted under section 31141 because they were not regulations "on commercial motor vehicle safety." The 2018 petitioners urged the Agency to revisit that determination, noting that, by its terms, the statute did not limit the Agency's preemption authority to those State laws that directly targeted the transportation industry. Rather, the appropriate question was whether the State law targeted conduct already covered by a Federal regulation designed to ensure motor vehicle safety. The 2018 petitioners also provided evidence that California's meal and rest break laws were detrimental to the safe operation of CMVs.

The FMCSA published a notice in the Federal Register seeking public comment on whether the California MRB rules should be declared preempted. 83 FR 50142 (Oct. 4, 2018). The Agency sought public comments in order to make an informed decision on issues relevant to the determination, including what effect California's rules had on interstate motor carrier

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[6] In a 2014 amicus brief in the matter of *Dilts v. Penske Logistics, LLC*, United States Court of Appeals for the Ninth Circuit, No. 12-55705 (2014), the United States explained that FMCSA continued to adhere to the view expressed in the 2008 Decision that California's MRB rules were not preempted by section 31141 because they were not laws "on commercial motor vehicle safety." 2014 WL 809150, 26-27. The Ninth Circuit made no determination whether the MRB rules were within the scope of the Secretary's preemption authority under section 31141 because that question was not before the Court. *See* 769 F.3d 637.

operations. *Ibid.* In total, FMCSA received more than 700 comments, and several letters from members of Congress.

On December 21, 2018, FMCSA issued a determination declaring the MRB rules preempted with respect to operators of property-carrying motor vehicles subject to the Federal HOS rules. 83 FR 67470. The Agency first acknowledged that it was departing from its 2008 Decision finding that the MRB rules were not laws "on commercial motor vehicle safety" because they were laws of broad applicability and not specifically directed to motor vehicle safety. *Ibid.* at 67473-74. The Agency explained that its 2008 Decision was "unnecessarily restrictive" and not supported by either the statutory language or legislative history. *Ibid.* The Agency considered the fact that language of section 31141 mirrors that of 49 U.S.C. 31136, which instructs the Secretary to "prescribe regulations on commercial motor vehicle safety." 49 U.S.C. 31136(a). The Agency explained that Congress, by tying the scope of the Secretary's preemption authority directly to the scope of the Secretary's authority to regulate the CMV industry, provided a framework for determining whether a State law or regulation is subject to section 31141. The Agency concluded that "[I]f the State law or regulation imposes requirements in an area of regulation that is already addressed by a regulation promulgated under 31136, then the State law or regulation is a regulation "on commercial motor vehicle safety." *Ibid.* at 67473. The Agency further determined that because California's MRB rules plainly regulated the same conduct as the Federal HOS regulations, they were laws "on commercial motor vehicle safety."

Having concluded that the California MRB rules were laws "on commercial motor vehicle safety," under section 31141, the Agency next determined that they are additional to or more stringent than the Federal HOS regulations. 83 FR 67474-75. The FMCSA found that the MRB rules require employers to provide property-carrying CMV drivers with more rest breaks

than the Federal HOS regulations; and allow a smaller window of driving time before a break is required. *Ibid.*

The Agency next explained that because the MRB rules are more stringent, they may be preempted if the Agency determined that that MRB rules have no safety benefit, that they are incompatible with HOS regulations, or that enforcement of the MRB rules would cause an unreasonable burden on interstate commerce. 83 FR 67475. The FMCSA found that the MRB rules provided no safety benefit beyond the Federal regulations, and that given the current shortage of available parking for CMVs, the required additional breaks adversely impacted safety because they exacerbated the problem of CMVs parking at unsafe locations. *Ibid.* at 67475-77. The Agency also determined that the MRB rules were incompatible with the Federal HOS regulations because they required employers to provide CMV drivers with more breaks, at less flexible times, than the Federal HOS regulations. *Ibid.* at 67477-78.

Lastly, the Agency determined that enforcing the MRB rules would impose an unreasonable burden on interstate commerce. 83 FR 67478-80. In this regard, the 2018 petitioners and other commenters provided information demonstrating that the MRB rules imposed significant and substantial costs stemming from decreased productivity and administrative burden. *Ibid.* at 67478-79. The Agency also considered the cumulative effect on interstate commerce of similar laws and regulations in other States. Currently 20 other States have varying applicable break rules. The Agency determined that the diversity of State regulation of meal and rest breaks for CMV drivers has resulted in a patchwork of requirements that the Agency found to be an unreasonable burden on interstate commerce. *Ibid.* at 67479-80.

Accordingly, FMCSA granted the petitions for preemption and determined that California "may no longer enforce" its meal and rest break rules with respect to drivers of property-carrying commercial motor vehicles subject to the HOS rules.

Decision

I. Section 31141 Expressly Preempts State Law Therefore the Presumption Against Preemption Does Not Apply

In their comments, the International Brotherhood of Teamsters (the Teamsters) and the American Association for Justice contend that California's MRB rules are subject to a presumption against preemption. Citing the Agency's amicus brief in *Dilts v. Penske*, the Teamsters argue that the MRB rules fall within an area of California's traditional police power and thus are subject to the presumption. The American Association of Justice argues that the presumption requires FMCSA to adopt "the reading that disfavors pre-emption" in interpreting section 31141.

The presumption against preemption is a canon of statutory interpretation employed by courts that favors reading ambiguous Federal statutes in a manner that avoids preempting State law absent clear congressional intent to do so. *See, e.g., Association des Eleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140, 1146 (9th Cir. 2017). The FMCSA acknowledges that "in all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [there] is an 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) (alterations omitted). Where, however, a provision at issue constitutes an area of traditional State regulation, "that fact alone does not 'immunize' state employment laws from preemption if Congress in fact contemplated their preemption." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir.

2014). And here there is no dispute that Congress has given FMCSA the authority to review and preempt State laws; the only questions concern the application of that authority to specific State laws. The FMCSA is aware of no authority suggesting that the presumption against preemption limits an agency's ability to interpret a statute authorizing it to preempt State laws.

In any event, when a "statute contains an express pre-emption clause, [courts] do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (quotations omitted); *see also Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016). Section 31141 expressly preempts State laws on commercial motor vehicle safety. Thus, the MRB rules are not subject to a presumption against preemption, and the question that FMCSA must answer is whether the MRB rules, as applied to drivers of passenger-carrying CMVs, should be preempted under section 31141.

II. The California MRB Rules, as Applied to Drivers of Passenger-Carrying CMVs, are Laws or Regulations "on Commercial Motor Vehicle Safety" Within the Meaning of 49 U.S.C. 31141.

The initial question in a preemption analysis under section 31141 is whether the State provisions at issue are laws or regulations "on commercial motor vehicle safety." 49 U.S.C. 31141(c)(1). In the 2008 Decision, the Agency narrowly construed section 31141 to conclude that because the MRB rules are "one part of California's comprehensive regulations governing wages, hours and working conditions," and apply to employers in many other industries in addition to motor carriers, the provisions are not regulations "on commercial motor vehicle safety," and, thus, were not within the scope of the Secretary's preemption authority. 73 FR 79204, 79206. The FMCSA reconsidered this conclusion and explained in its 2018 Decision that both the text of section 31141 and its structural relationship with other statutory provisions make

it clear that Congress's intended scope of section 31141 was broader than the construction the Agency gave it in the 2008 Decision. In this regard, the Agency explained:

> The "on commercial motor vehicle safety" language of section 31141 mirrors that of section 31136, and by tying the scope of the Secretary's preemption authority directly to the scope of the Secretary's authority to regulate the CMV industry, the Agency believes that Congress provided a framework for determining whether a State law or regulation is subject to section 31141. In other words, if the State law or regulation imposes requirements in an area of regulation that is already addressed by a regulation promulgated under 31136, then the State law or regulation is a regulation "on commercial motor vehicle safety." Because California's MRB rules impose the same types of restrictions on CMV driver duty and driving times as the FMCSA's HOS regulations, which were enacted pursuant to the Secretary's authority in section 31136, they are "regulations on commercial motor vehicle safety." Thus, the MRB rules are "State law[s] or regulation[s] on commercial motor vehicle safety," and are subject to review under section 31141. 83 FR 67470.

Consistent with the reasoning in the 2018 Decision, the Agency finds that if the State law or regulation at issue imposes requirements in an area of regulation that is within FMCSA's section 31136 regulatory authority, then the State law or regulation is a regulation "on commercial motor vehicle safety.

Regarding California's MRB rules, as applied to drivers of passenger-carrying CMVs, ABA argues that the MRB rules "require[] meal and rest breaks of fixed durations and at mandated intervals throughout the work day so as to prevent fatigue-related incidents." The ABA further contends that, "The fact that the FMCSA has promulgated regulations for commercial truck and bus drivers in 49 C.F.R. Part 395 addressing the very hours of service and break issues encompassed in the California MRB Rules underscores that the State rules are requirements 'on commercial motor vehicle safety.'" The Agency agrees. As explained above, the Federal HOS rules for passenger-carrying CMVs have long imposed drive time limits for drivers. While the HOS rules do not include a mandated 30-minute rest period, they regulate how long a driver may operate a passenger-carrying CMV before an off-duty period is required. The Federal regulations also prohibit drivers from operating CMVs when fatigued, and thus require drivers to take any

additional breaks necessary to prohibit fatigued driving, and prohibit employers from coercing drivers into operating a CMV during these required breaks. Thus, both the HOS and MRB rules impose requirements for off-duty periods. Therefore, the Agency determines that, because the HOS and MRB rules cover the same subject matter, the MRB rules, as applied to drivers of passenger-carrying CMVs, are laws on CMV safety.

California's Labor Commissioner, California's Attorney General, the American Association for Justice, the Teamsters, and other commenters who oppose ABA's petition argue that the Agency's analysis and conclusions in the 2018 Decision were incorrect and that FMCSA should revert to the legal position articulated in the 2008 Decision and in the Government's amicus brief in *Dilts v. Penske*. California's Labor Commissioner and Attorney General further contend the Agency's 2018 Decision "improperly changed the agency's position and expanded the preemptive scope of the statute" and that the MRB rules are "are employment laws of general applicability rather than regulations on commercial motor vehicles" as the Agency determined in 2008 and in its *Dilts* amicus brief. The FMCSA disagrees with this argument. As the Agency explained in the 2018 Decision, its prior position articulated in 2008 need not forever remain static. When an Agency changes course, it must provide a "reasoned analysis for the change." *See Motor Vehicle Manufacturers v. State Farm*, 463 U.S. 29, 42 (1983). The Agency's 2018 Decision acknowledged the changed interpretation of section 31141 and provided a reasoned explanation for the new interpretation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009). Similarly, this decision explains the basis for the Agency's conclusion that the MRB rules are laws on CMV safety, as applied to drivers of passenger-carrying CMVs. Irrespective of the whether the MRB rules have general applicability to employers and workers

in the State, when they are applied to CMV drivers, they govern the same conduct as the Federal HOS rules. Therefore, they are laws on CMV safety.

FMCSA's interpretation of section 31141 is consistent with the legislative history of the 1984 Act. As originally enacted, the 1984 Act granted the Agency authority to promulgate regulations "pertaining to" CMV safety, and likewise to review State laws "pertaining to" CMV safety. Pub. L. 98-554 §§ 206(a), 208(a) (originally codified at 49 U.S.C. App. 2505, 2507). Congress amended these provisions during the 1994 recodification of Title 49 of the United States Code. See Pub. L. No. 103-272 (July 5, 1994), 108 Stat. 1008. As recodified, the law allows the Agency to promulgate regulations and review State laws "on commercial motor vehicle safety," rather than "pertaining to commercial motor vehicle safety." *Compare* 49 U.S.C. app. 2505 and 49 U.S.C. app. 2507 (1984) with 49 U.S.C. § 31136 and 49 U.S.C. § 31141(c)(1) (1994). Congress made clear, however, that any changes made during their comprehensive effort to restructure and simplify Title 49 "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 103-272 §§ 1(e), 6(a). The change in wording therefore did not narrow the Agency's rulemaking authority or the scope of the State laws subject to preemption review. California's MRB rules clearly "pertain to" CMV safety as applied to drivers of passenger-carrying CMVs subject to the HOS rules, and therefore fall within the scope of section 31141. *See, e.g.*, "Pertain," Dictionary.com, https://www.dictionary.com/browse/pertain (definition 1) ("to have reference or relation; relate.").

The Agency's interpretation is also consistent with congressional purposes. Congress was concerned that a lack of uniformity between Federal and State laws on the same subject matter could impose substantial burdens on interstate truck and bus operations, and potentially hamper safety. *See, e.g.*, 1984 Cong. Rec. 28215 (Oct. 2, 1984) (statement of Sen. Packwood); *ibid.* at

28219 (statement of Sen. Danforth). Accordingly, as the Senate Report on the bill that became the 1984 Act explained, the preemption review provision was designed to ensure "as much uniformity as practicable whenever a Federal standard and a State requirement cover the same subject matter." S. Rep. 98-424 at 14 (1984). The fact that a State regulation may be broader than a Federal safety regulation and impose requirements outside the area of CMV safety does not eliminate Congress's concerns. Such laws may still be incompatible with Federal safety standards or unduly burden interstate commerce when applied to the operation of a CMV.

In their comments, the Labor Commissioner and Attorney General also argue that the Agency should not preempt the MRB rules because the "FMCSA specifically declined to regulate rest periods for drivers of passenger-carrying commercial motor vehicles and the Federal commercial motor vehicle safety regulations are only intended to be 'minimum safety standards.'" The Agency finds this argument unpersuasive. As explained above, both the MRB rules, as applied to drivers of passenger-carrying CMVs, and the Federal HOS rules limit the amount of time that a driver may work before an off-duty period is required. In comments on ABA's petition, the ATA correctly pointed out that the Agency made the affirmative decision in 2003 not to subject drivers of passenger-carrying CMVs to the same HOS rules as property-carriers because of operational considerations that distinguish bus drivers from truck drivers with respect to fatigue. *See* 68 FR 22456, 22462 (Apr. 28, 2003). Irrespective of the fact that the HOS rules for passenger-carrying CMVs do not include a provision requiring a 30-minute rest break, both the HOS and the MRB rules govern the same subject matter—how long a driver may drive before a required off-duty period. The absence of a 30-minute break provision in the HOS rules for passenger carriers does not mean that California's MRB rules are not laws on CMV safety.

As the Agency noted in the 2018 Decision, in response to the ATA and SCRA petitions regarding property-carrying CMVs, the California Labor Commissioner acknowledged that the MRB rules improve driver and public safety. Here, in response to ABA's petition, the Labor Commissioner and the Attorney General "reaffirm that California's meal and rest period requirements promote driver and public safety." These statements further demonstrate that the MRB rules are rules "on CMV safety" and, therefore, fall squarely within the scope of the Secretary's preemption authority.

III. The MRB Rules Are "Additional to or More Stringent Than" the Agency's HOS Regulations for Passenger-Carrying Vehicles Within the Meaning of Section 31141

Having concluded that the MRB rules, as applied to drivers of passenger-carrying CMVs, are laws "on commercial motor vehicle safety," under section 31141, the Agency next must decide whether the MRB rules have the same effect as, are less stringent than, or are additional to or more stringent than the Federal HOS regulations for passenger-carrying CMVs. 49 U.S.C. 31141(c)(1).

As explained above, the HOS rules prohibit a driver from operating a passenger-carrying CMV for more than 10 hours following 8 consecutive hours off duty, or for any period after having been on duty 15 hours following 8 consecutive hours off duty. 49 C.F.R. 395.5(a). The 15-hour on-duty limit is non-consecutive; therefore, any time that a driver spends off-duty does not count against the 15-hour duty window. While the HOS regulations permit drivers of passenger-carrying CMVs to take time off duty in the middle of a duty period for a rest break and extend the 15-hour window in which they may drive, the rules do not require that they do so. Conversely, not only do the MRB rules require employers to provide passenger-carrying CMV drivers with meal and rest breaks, they are required to provide them at specified intervals. Therefore, California's MRB rules are additional to or more stringent than the HOS regulations.

California's Labor Commissioner and Attorney General do not deny that the MRB rules require employers to provide for breaks during the work day while the Federal HOS regulations for passenger-carrying CMVs do not. Citing *Augustus v. ABM Security Services, Inc.*, 385 P.3d 823 (Cal. 2016), and *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284 (Cal. 2007), they argue in their comments that the MRB rules are not "additional to or more stringent than" the Agency's HOS regulations because under the MRB rules, employers may either provide the required meal and rest periods or pay additional wages. The Labor Commissioner and Attorney General assert that California law permits employers to pay higher wages as an alternative to complying with the MRB rules, and that the MRB rules therefore are not more stringent that the HOS regulations.

The Agency disagrees. As FMCSA explained in its December 2018 Decision, California law prohibits an employer from requiring an employee to work during a mandated meal or rest break, and provides for additional pay as a remedy for violating that prohibition. Cal. Labor Code 226.7(b)-(c). The California Supreme Court has held that section 226.7 "does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay," and that "an employer's provision of an additional hour of pay does not excuse a section 226.7 violation." *Kirby v. Immoos Fire Protection, Inc.*, 274 P.3d 1160, 1168 (Cal. 2012) (emphasis in original).[7] This ruling is not undercut by the two cases cited by the Labor Commissioner and Attorney General. While it is true that the California Supreme Court stated in

[7] In *Kirby*, the California Supreme Court addressed, *inter alia*, the question of whether a section 226.7 claim alleging an employer's failure to provide statutorily mandated meal and rest periods, constituted an action brought for the nonpayment of wages. *See* 274 P.3d at 1167. The Court held that it did not and explained that the premium pay "is the legal remedy for a violation … but whether or not it has been paid is irrelevant to whether section 226.7 was violated. In other words, section 226.7 does not give employers a lawful choice between providing either meal and rest breaks *or* an additional hour of pay." *Ibid.*

Augustus v. ABM Security Services, Inc. that "employers who find it especially burdensome to relieve their employees of all duties during rest periods" could provide the extra hour of pay, it emphasized that this "option[] should be the exception rather than rule, to be used" only in the context of "irregular or unexpected circumstances such as emergencies." 385 P.3d at 834 & n.14. And while the California Supreme Court in *Murphy v. Kenneth Cole Prods., Inc.* held that the extra hour of pay is "wages" for statute of limitations purposes, that ruling predated *Kirby* by six years, and is not inconsistent with *Kirby's* holding that an employer does not have a lawful choice to ignore the MRB rules. Indeed, the California Supreme Court in *Kirby* specifically noted that its decision was consistent with *Murphy*. *See Kirby*, 274 P.3d at 1168 ("[T]o say that a section 226.7 remedy is a wage ... is not to say that the *legal violation* triggering the remedy is nonpayment of wages. As explained above, the legal violation is nonprovision of meal or rest breaks...."). Accordingly, the MRB rules do not give employers the option of either complying with the requirements or providing the additional hour of pay.[8]

Employers of passenger-carrying CMV drivers complying with the minimum requirements of the HOS regulations would nevertheless be violating the MRB rules on their face. That alone is dispositive of the relevant inquiry. *See, e.g.*, S. Rep. No. 98-424, at 14 ("It is the Committee's intention that there be as much uniformity as practicable whenever a Federal standard and a State requirement cover the same subject matter. However, a State requirement and a Federal standard cover the same subject matter only when meeting the minimum criteria of

[8] Even if employers did have an option of either complying with the MRB Rules or paying additional wages, the MRB Rules would still be "additional to or more stringent than" the HOS regulations, since the MRB Rules would either: (1) require that employers provide for breaks not required by the HOS regulations; or (2) provide the remedy of additional pay not required by the HOS regulations.

the less stringent provision causes one to violate the other provision on its face."). The MRB rules therefore are "additional to or more stringent than" the HOS regulations.

IV. The MRB Rules Have No Safety Benefits that Extend Beyond Those Provided by the FMCSRs

Because the MRB rules, as applied to drivers of passenger-carrying CMVs, are more stringent than the Federal HOS regulations, they may be enforced *unless* the Agency also decides either that the MRB rules have no safety benefit, that they are incompatible with the HOS regulations, or that enforcement of the MRB rules would cause an unreasonable burden on interstate commerce. 49 U.S.C. 31141(c)(4). The Agency need only find that one of the aforementioned conditions exists to preempt the MRB rules. *Ibid.*

Section 31141 authorizes the Secretary to preempt the MRB rules if they have "no safety benefit." 49 U.S.C. 31141(c)(4)(A). Consistent with the 2018 Decision, FMCSA continues to interpret this language as applying to any State law or regulation that provides no safety benefit *beyond* the safety benefit already provided by the relevant FMCSA regulations. The statute tasks FMCSA with determining whether a State law that is more stringent than Federal law, which would otherwise undermine the Federal goal of uniformity, is nevertheless justified. There would be no point to the "safety benefit" provision if it were sufficient that the more stringent State law provides the *same* safety benefit as Federal law. A State law or regulation need not have a negative safety impact to be preempted under section 31141(c)(4)(A); although, a law or regulation with a negative safety impact could be preempted.

The ABA argues that California's MRB rules "undermine existing federal fatigue management rules." In this regard, ABA contends:

> Under the MRB rules, drivers are required to take periodic breaks at certain times regardless of whether the driver feels fatigued. At other times, when the driver might actually feel fatigued, the driver might feel obligated to continue the trip because of the delay already caused by taking the designated break under California law. FMCSA has determined that providing the driver with flexibility to determine when to take a break,

> based on the driver's own physiology, traffic congestion, weather and other factors, will encourage safer driving practices than simply mandating a break at designated intervals. The MRB Rules act counter to this FMCSA mandate and the flexibility the FMCSA rules allow.

In its comments on ABA's petition, ATA agreed, stating that "specifying multiple arbitrary breaks, even when a driver is not fatigued, makes it less likely that a driver will take a break when he or she is fatigued." The Truckload Carriers Association also noted that "flexibility will empower drivers to rest when they are feeling fatigued, regardless of how long they have been in the driver's seat that day or how far they are from their final destination." This sentiment was also echoed by other commenters, such as the Greater California Livery Association and the National Limousine Association. Additionally, the United Motorcoach Association stated, "The application of the California Meal and Rest Break rules clearly endangers passengers and the traveling public. Any suggestion that a bus or motorcoach driver can simply pull off to the side of the road and 'rest' while 50+ passengers sit patiently behind the driver is wildly mistaken."

Citing several National Transportation Safety Board (NTSB) studies, safety recommendations, and the NTSB 2019-2020 Most Wanted List addressing issues surrounding fatigue-related highway accidents, the California Labor Commissioner and Attorney General contend that the MRB rules support the public safety goal of reducing fatigue-related accidents. In addition, the Labor Commissioner and Attorney General point out that FMCSA commissioned an Evidence Report to assess and characterize the relationship between crash and fatigue in generally healthy motorcoach drivers.[9] They contend that the Evidence Report described studies that showed "that a 30-minute rest break reduced the incidence of 'safety critical events' while others showed that long-haul truck drivers who napped had a significantly lower incidence of

[9] Manila Consulting Group, Inc. Evidence Report, Fatigue and Motorcoach/Bus Driver Safety. McLean, VA: Manila Consulting Group, Inc; December 2012.

crash or near-crash." The Labor Commissioner and Attorney General added that "the timeframe for incidence of crash maps closely to the timeframe for California's meal and rest periods." They argue that because the HOS rules for passenger-carrying CMVs do not require drivers to take the same 30-minute rest period applicable to property-carrying CMVs, "FMCSA cannot conclude, as it did in the December 2018 preemption determination regarding property-carrying commercial motor vehicles, that California's meal and rest period requirements 'do not provide additional safety benefits.'" Accordingly, they conclude that "it defies logic to suggest that the safety of bus drivers and their precious human cargo is not enhanced by the State's break requirements." The Amalgamated Transit Union, the Transportation Trades Department/AFL-CIO, the Teamsters, and the American Association for Justice make similar arguments and cite publications by the NTSB and others to show that CMV drivers' safety performance can easily deteriorate due to fatigue.

The Agency disagrees that the absence of a 30-minute break requirement in the HOS rules for drivers of passenger-carrying CMVs, unlike property-carriers, renders it impossible for the Agency to find that that the MRB rules provide no safety benefit beyond the Federal regulations. The FMCSA has long recognized that there are operational differences between commercial passenger carriers and commercial freight carriers and that those differences require different fatigue management measures. In this regard, the Agency's 2003 HOS final rule did not propose any changes to the Federal HOS rules for drivers of passenger-carrying CMVs because the Agency determined that the nature of passenger-carrier operations requires a different framework for fatigue management than the HOS rules for property-carrier operations which includes more flexibility to accommodate operational challenges presented in passenger carrier transportation. 68 FR 22456, 22461 (Apr. 28, 2003). In addition, when the Agency revised the

HOS rules in 2011 to mandate a 30-minute off-duty rest period for drivers operating property-carrying CMVs, the Agency did not impose a similar requirement on drivers of passenger-carrying CMVs. 76 FR 81134, 81186. In response to a commenter who opposed different HOS rules for property- and passenger-carriers, the Agency explained, "[T]he HOS rules are not one-size-fits-all." *Ibid.* at 81165. The Agency's decision in 2011 not to impose a 30-minute rest period requirement for passenger-carrying CMVs was appropriate given the nature of bus operations, where drivers may stop and rest at times that coincide with passenger rest stops.

The ABA and several commenters have described the operational differences. In this regard, ABA points out, "In looking at a bus driver's schedule in practice, a scheduled service driver often will take multiple breaks during intermediate stops along a schedule. These will occur whenever practical, such as when all passengers disembark for a food or restroom break." Similarly, the United Motorcoach Association explains that "most charter drivers take their meals with the groups." Coach USA notes that "charter/tour drivers are able to take breaks while their passengers are out sightseeing" and further explains that "buses operating on long trips take pre-scheduled breaks for the benefit of the drivers and passengers...." Greyhound Lines (Greyhound) noted that a typical schedule would be "structured to provide the driver and passenger a safe and comfortable meal and rest stop at the approximate half-way point of the trip."

The Federal regulations establish a fatigue management framework for drivers of passenger-carrying CMVs that prohibits a driver from operating a CMV if she feels too fatigued or is otherwise unable to safely drive and that prohibits employers from coercing a driver too fatigued to operate the CMV safely to remain behind the wheel. 49 C.F.R. 392.3, 390.6. In addition, the Federal HOS rules provide for a *nonconsecutive* 15-hour duty window that gives

drivers flexibility to schedule off-duty breaks at times that accord with the passenger itinerary or travel schedule and with the driver's actual level of fatigue. 49 C.F.R. 395.5(a). The HOS rule in conjunction with FMCSRs prohibiting fatigued driving and coercion sufficiently mitigate the risk that fatigued driving would lead to crashes. Additionally, the Agency believes that this framework is appropriate because it provides the flexibility needed for passenger carrier operations while still prohibiting a driver from operating a CMV when too fatigued to safely do so. Interposing the MRB rules on top of the Agency's framework eliminates the regulatory flexibilities provided and requires the driver to stop the bus and log off duty at fixed intervals each day regardless of the driver's break schedule or actual level of fatigue. The Agency determines that the MRB rules provide no safety benefit beyond the safety benefit already provided by the Federal regulatory framework for passenger-carrying CMVs.

The Agency acknowledges the dangers of fatigued driving. However, the Labor Commissioner and the Attorney General mischaracterize one of the statements quoted from the Evidence Report. In evaluating the question "How much rest does a fatigued professional driver need to resume driving unimpaired," the Evidence Report did, in fact, state that studies found that "a 30-minute rest break reduced the incidence of 'safety critical events.'" However, that statement was made in relation to drivers of *property-carrying* CMVs. *Evidence Report: Fatigue and Motorcoach/Bus Driver Safety* at 84. With regard to passenger-carrying CMVs, the Evidence Report explained that, "No included studies assessed only motorcoach drivers or presented data in a manner that allowed us to specifically address this driver group." *Ibid.* The Agency notes that the Labor Secretary has provided no data or research to show that California's MRB rules have led to a reduction in fatigue-related crashes among passenger-carrying CMVs.

The ABA further argues that a "lack of adequate parking also makes the MRB rules untenable." In this regard, ABA cites the Agency's finding in the 2018 Decision that the increase in required stops to comply with the MRB Rules, when the driver may not be fatigued, will exacerbate the problem of property-carrying CMV drivers parking at unsafe locations. The ABA contends that "[b]us drivers face an even more difficult task than truck drivers to find a parking space and safely park the vehicle several times each day in order to comply with the California requirements while ensuring that the passengers are safely accommodated." The United Motorcoach Association explained, "[A] bus or motorcoach parked on the side of the road while a driver 'rests' poses a crash risk from traffic." The Truckload Carrier's Association stated, "While the lack of safe truck parking is already an issue at the forefront of our industry, it is conceivably even worse for buses as they are more restricted than trucks as to where they can park given that they are transporting human cargo." The National Limousine Association, Coach USA and other commenters also advanced similar arguments.

The Agency agrees that California's enforcement of the MRB rules could exacerbate the problem of CMV drivers parking at unsafe locations. The shortage of safe, authorized parking spaces for CMVs and the negative safety implication of enforcing the MRB rules is well-documented in FMCSA's 2018 Decision preempting California's MRB rules for drivers of property carrying CMVs. *See* 83 Fed. Reg. 67476-77. The Agency adopts that reasoning here. If a passenger-carrying CMV driver resorted to stopping at an unsafe location—such as a highway shoulder and ramp—to comply with the MRB rules, such an action would present a safety hazard to the passengers, the driver, and other highway users.

In sum, the MRB rules abrogate the flexibilities provided by the Federal HOS rules for passenger-carrying CMVs without an added safety benefit. Therefore, FMCSA determines that the MRB rules do not provide a safety benefit not already realized under the FMCSRs.

V. The MRB Rules are Incompatible with the Federal HOS Regulations for Passenger-Carrying CMVs

The Agency has determined that the MRB rules are "additional to or more stringent than a regulation prescribed by the Secretary under section 31136;" therefore, they must be preempted if the Agency also determines that the MRB rules are "incompatible with the regulation prescribed by the Secretary." 49 U.S.C. 31141(c)(4)(B). The 1984 Act limits the scope of the Agency's inquiry in this regard to a State law's compatibility with a regulation prescribed under section 31136. The ABA argues that the MRB rules conflict with various regulatory provisions that were not prescribed pursuant to the authority of section 31136.[10] Because the provisions cited were not prescribed pursuant to section 31136, they fall outside the scope of a section 31141 compatibility analysis. Therefore, the Agency has limited its compatibility analysis to the question of whether the MRB rules are incompatible with the HOS rules for passenger-carrying CMVs, which were prescribed pursuant to section 31136.

Regarding the MRB rules' compatibility with the HOS rules, ABA argues that "the timing requirements for meal and rest breaks under the MRB rules remove the flexibility allowed under the federal HOS regulations, thus making the MRB rules incompatible with the federal HOS regulations." Similarly, Coach USA stated, "Under the federal HOS rules applicable to

[10] The ABA cites the regulations implementing the transportation and related provisions of the Americans with Disabilities Act of 1990 at 49 C.F.R. part 37, issued pursuant to 42 U.S.C. 12101–12213 and 49 U.S.C. 322; former Interstate Commerce Commission regulations at 49 C.F.R. part 374, subpart C, issued under 49 U.S.C. 13301 and 14101; and California's regulations prohibiting idling, Cal. Code Regs., tit. 13, § 2485.

motor passenger carriers, bus drivers have the flexibility to take breaks when they need breaks, and when they can safely do so consistent with the need to monitor the bus and the passengers at all times. These federal rules have proven their worth in terms of bus safety; incompatible state regulations such as California's can only add confusion to the bus sector."

The American Association for Justice argues that FMCSA erred in applying the regulatory definition for "compatibility," found at 49 C.F.R. 355.5, in the Agency's 2018 Decision preempting the MRB rules for drivers of property carrying CMVs.[11] In this regard, the American Association for Justice states, "If only laws that are 'identical' to federal rules could meet this standard, as ATA and ABA claim, then every state law that is 'additional to or more stringent' than federal law would meet this requirement and be preempted." The California Labor Commissioner and Attorney General make a similar argument.

The Agency finds that the MRB rules, as applied to drivers of passenger-carrying CMVs, are incompatible with the Federal HOS regulations. Assuming *arguendo* that the Agency's application of the regulatory definition of "compatible" is inconsistent with Congress's intent, FMCSA need not rely on the fact that the MRB rules are not "identical to" or "have the same effect" as the HOS rules to find them incompatible. Congress's clear intent for the 1984 Act was to minimize disuniformity in the national safety regulatory regime. *See* Pub. L. 98-554, title II § 202, 203 ("The Congress finds that . . . improved, more uniform commercial motor vehicle safety measures and strengthened enforcement would reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations."); S.Rep. No.

[11] Under 49 C.F.R. 355.5, "Compatible or Compatibility means that State laws and regulations applicable to interstate commerce and to intrastate movement of hazardous materials are identical to the FMCSRs and the HMRs or have the same effect as the FMCSRs...." S*ee also* 49 C.F.R. 350.105.

98–424, at 14 ("It is the Committee's intention that there be as much uniformity as practicable whenever a federal standard and a state requirement cover the same subject matter."); *see also ibid.* at 15 ("In adopting this section, the Committee does not intend that States with innovative safety requirements that are not identical to the national norm be discouraged from seeking better ways to protect their citizens, so long as a strong safety need exists that outweighs this goal of uniformity."). As described below, the MRB rules frustrate Congress's goal of uniformity because they abrogate the flexibility that the Agency allows under the HOS rules. This fact alone renders the MRB rules incompatible.

California's MRB rules require employers to provide passenger-carrying CMV drivers with meal and rest breaks of specified duration at specific intervals. With regard to meal break timing, the California Supreme Court clarified that, in the absence of a waiver, California law "requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work. *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513, 537 (Cal. 2012). As discussed *infra*, an employer must relieve the employee of all duty and employer control during the meal break. *Ibid.* at 533. On-duty meal breaks (breaks occurring on the jobsite) are permissible under California law "only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement" the employer and employee mutually agree to an "on-the-job paid meal period." *Ibid.* California interprets the circumstances justifying on-duty meal periods very narrowly, and any agreement consenting to on-the-job breaks may be revoked by the employee at any time. *See generally Abdullah v. U.S. Security Associates, Inc.*, 731 F.3d 952, 958-60 (9th Cir. 2013). While employers do not have an affirmative obligation to ensure that the employee stops working, they do have an obligation to make reasonable efforts to ensure that the

employee can take a 30-minute uninterrupted break, free from all responsibilities. *Ibid.* at 535-37. With regard to rest period timing, the California Supreme Court explained, "Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." *Ibid.* at 529. In contrast to the required meal breaks, employers may never require their employees to remain "on call" during these mandatory rest periods. *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d at 832. In contrast, the HOS rules do not mandate breaks at specified intervals. Instead, the HOS rules allow, but do not require, drivers of passenger-carrying CMVs the flexibility to take off-duty breaks as necessary, and other provisions of the FMCSRs prohibit a driver from operating a CMV when too fatigued to safely do so.

The Labor Commissioner and the Attorney General contend that the MRB rules are not incompatible with the HOS rules because they "impose an obligation to provide required meal and rest periods or to simply provide an additional hour of pay for not providing the break (assuming an exemption has not been granted for the rest period requirement, and that there is no waiver of the meal period or agreement to an on-duty meal period)." This argument is also unavailing. As explained *supra*, in *Kirby v. Immoos Fire Protection, Inc.*, the California Supreme Court held that section 226.7 "does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay," and that "an employer's provision of an additional hour of pay does not excuse a section 226.7 violation." 274 P.3d at 1168 (emphasis in original). In addition, while California's regulations authorize the Labor Commissioner to grant an employer an exemption from the 10-minute rest break requirement, such exemptions are granted at the Labor Commissioner's discretion, and there is no provision for an exemption from

the 30-minute meal break requirement.[12] *See* Cal. Code Regs. tit. 8, 11090 (IWC Order 9-2001), subd. 17. Lastly, while the Labor Commissioner and the Attorney General mention that the meal break may be waived, it may only be waived by the mutual consent of the employer and employee, and if the employee's shift is of sufficient length to require two 30-minute meal breaks, both may not be waived. *See* Cal. Code Regs. tit. 8, 11090 (IWC Order 9-2001), subd. 11(A)-(B).

The Teamsters contend that "California's rule in no way conflicts with Federal regulations." This argument also fails. The Agency's compatibility determination is different from "conflict preemption" under the Supremacy Clause, where conflict arises when it is impossible to comply with both the State and Federal regulations. The express preemption provision in section 31141 does not require such a stringent test. In any event, California's MRB rules actively undermine Congress's goal of uniformity, as well as FMCSA's affirmative policy objectives by abrogating the flexibility that the Agency built into the HOS rules. That would be sufficient to support a finding of incompatibility even under the conflict preemption test urged by the Teamsters.

The FMCSA determines that the MRB rules, as applied to drivers of passenger-carrying CMVs, are incompatible with the Federal HOS regulations.

VI. Enforcement of the MRB Rules Would Cause an Unreasonable Burden on Interstate Commerce

The MRB rules may not be enforced if the Agency decides that enforcing them "would cause an unreasonable burden on interstate commerce." 49 U.S.C. 31141(c)(4)(C). Section

[12] The Labor Commissioner may grant an employer's exemption request if, after due investigation, it is found that the enforcement of the rest period provision would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer. *See* Cal. Code Regs. tit. 8, 11090 (IWC Order 9-2001), subd. 17.

31141 does not prohibit enforcement of a State requirement that places an incidental burden on interstate commerce, only burdens that are unreasonable.

A. Operational Burden and Costs

The ABA argues that complying with the MRB rules is operationally burdensome because the rules require that drivers be relieved of all duty during the mandated meal and rest breaks, which do not permit a driver to attend to passenger needs. The ABA also argues that complying with the MRB rules compromises operators' ability to meet passenger itinerary and scheduling requirements. The ABA further contends that the cost of complying with MRB rules unreasonably burdens interstate commerce.

In describing the operational burden caused by the MRB rules' requirement that drivers be relieved of all duty, ABA explains:

> Under the California MRB rules, when the bus driver logs off duty to take the required meal or rest breaks, the driver must be "relieved of all duty" for the break period, unless the "nature of the work prevents an employee from being relieved of all duty," and the employee enters into a revocable written agreement to remain on duty. Calif. Wage Order 9 11(C). This is simply not feasible for typical intercity bus operations. Drivers cannot leave the bus, the passengers and their baggage and other belongings for ten or 30 minutes several times each day, abdicating all responsibility for the safety or security of the passengers or property on the bus.

The ABA asserts that "during the MRB mandated 'breaks' it is unreasonable to assume that the driver may simply disavow any responsibility for the passengers, their belongings or the coach." The ABA states that while a driver may agree to waive a mandated break, the driver may rescind such an agreement at any time, thus such a waiver agreement affords no certainty to the carrier.

The ABA also argues that complying with the MRB rules compromises operators' ability to meet scheduling requirements. In this regard, ABA states, "[I]ntercity bus companies providing scheduled service typically offer interline connections with other motor carriers through the National Bus Traffic Association and also with Amtrak. They have designated and

agreed times at which the services will meet, and passengers will transfer from one carrier to another." The ABA further explains, "Charter and tour bus operators, while typically not interlining with other carriers, also have dedicated schedules and service obligations to their passengers. They frequently must meet time constraints to deliver their passengers to a scheduled athletic contest, an artistic performance, or other timed event." The ABA concludes that requiring a driver to comply with the MRB rules "while accounting for traffic, weather, passenger rest stop needs and other disruptions, makes it inconceivable that a carrier could reliably meet the requirements of these service obligations."

In addition, ABA further contends that the cost of complying with the MRB rules unreasonably burdens interstate commerce, stating, "The cost of compliance with the meal and rest break rules are staggering. Nor are these costs hypothetical." The ABA states, "Requiring additional driving time and/or drivers would change the fundamental nature of bus service. Buses would no longer offer the most affordable source of intercity passenger transportation."

Several commenting motor carriers also described the operational burdens imposed by the MRB rules. Greyhound expressed concern about the requirement that drivers be relieved of all duty during meal breaks under the MRB rules, stating, "During rest stops, Greyhound drivers are still responsible for the safety and security of the bus as well as passengers. The driver must ensure the safe de-boarding of passengers and their safe and timely re-boarding, ensure the bus remains secure, answer passenger questions, retrieve luggage if requested and respond to emergency situations." Greyhound argues, "The nature of the job prohibits a completely duty-free break in the majority of locations where the driver may stop." Greyhound states that a driver cannot be relieved of all duty during MRB rule mandated breaks without other Greyhound personnel present. Coach USA stated:

> Even during scheduled meal and rest breaks, a driver cannot safely be relieved of all duty. During a scheduled meal stop, for example, all passengers exit the vehicle, and the driver secures the bus and then begins his or her meal break. During these breaks, Coach drivers sometimes are required to address emergency passenger situations that arise, such as a passenger who needs urgent access to her insulin or another who needs to access an EpiPen left on the bus to deal with an allergic reaction. Passengers also sometimes need bus access for any number of other reasons, such as having left money needed to purchase food on the bus. If the bus is locked and secured and the driver has left the area of the bus to take a California-rule mandated off-duty break, these passengers will face real problems. Further, passengers with mobility impairments may also need attention, including assistance in boarding and de-boarding the bus. In these situations, drivers cannot ignore a passenger's urgent needs, yet could not meet those needs to the extent they are required by California regulation to be relieved of all duty.

Transportation Charter Services commented that complying with the MRB rules interferes with operational schedules and service connections. The company explained that the driver's daily itinerary is determined by the group chartering the bus and that passenger meal, rest, and view point stops are scheduled based on travel times between destinations, which do not always coincide with the break time required by the MRB rules. Other commenters including H & L Charter Co., Pacific Coachways Charter Services, Best Limousines & Transportation, Royal Coach Tours, Sierra Pacific Tours, the California Bus Association, and Classic Charter made similar arguments.

In addition, several commenters described the ways in which complying with the MRB rules compromises operators' ability to meet scheduling requirements. Coach USA explained, "Such mandated stops make it difficult, if not impossible, for bus carriers to meet schedules that passengers expect them to meet." Coach USA further stated, "Passengers depend on such schedules to make connections and timely arrive at their destinations. The California rules impair the ability of bus carriers to provide the timely and efficient service passengers expect and thus unduly burden commerce." Coach USA also said that the unpredictability of driving conditions is already a burden that bus carriers need to deal with while maintaining schedules and that "[a]dding mandatory rest and meal breaks at given hours into the mix of factors that impact

schedules will make keeping such schedules all the more difficult, burdening the ability of carriers to meet their interstate commerce obligations."

Greyhound explained that its network "is an interlocking interstate system of schedules which connect with other buses of Greyhound, other intercity bus companies, local transit, Amtrak and other modes at hundreds of locations in California and across the country." Greyhound argued that if a driver stops to take a required break, "that stop will jeopardize connections throughout the system that interstate passengers rely on." Greyhound said that it carried 769,566 interstate passengers in the last fiscal year who either started or finished their journeys at a California location. The company contends, "All of these passengers face potential disruptions to their trips because of missed connections or delayed arrivals and departures caused by the inflexibility of the MRB Rules on the one hand and the vagaries of California traffic on the other."

Mr. Thomas Miller, an airport shuttle and charter bus operator, also described administrative and operational burdens associated with complying with the MRB rules and how they affect scheduling. He explained, "California laws with respect to the 5-hour meal break rules do not work in the bus and charter operator business. Traffic is so unpredictable you cannot stay legal 100% of the time." Mr. Miller further stated, "We require our drivers to take an unpaid rest break at the airport even if the total round trip is under 5 hours. They hate it, they would rather have it at home on their split shift."

Several commenters discussed the need to have additional personnel present with the driver to attend to passenger needs or the need to undertake other measures in order to comply with the MRB rules. In this regard, the United Motorcoach Association commented that "The California MRB needlessly extends a driver's workday and … will periodically require a relief

driver to avoid exceeding driving and/or on-duty limits to accommodate the California MRB." Similarly, Greyhound stated that complying with the requirement that drivers be relieved of all duty is impracticable without other Greyhound personnel present. Coach USA stated, "Commerce would be further burdened if carriers were forced to meet the California rules by hiring two drivers.... Not only would this impose extraordinary cost burdens, but it would make much worse a driver shortage that already confronts the motor passenger carrier industry." Mr. Miller explained that his attorney advised him to consider having his drivers report for work 40 minutes earlier to account for the MRB rules mandated breaks. Other commenters such as the Greater California Livery Association and the National Limousine Association stated that complying the with MRB rules would result in a "substantial increase in driver costs" due to decreased productivity and the need for additional drivers.

The California Labor Commissioner and Attorney General dispute that enforcing the MRB rules unreasonably burdens interstate commerce. They rely on *Yoder v. Western Express, Inc.*, 181 F. Supp.3d 704 (C.D. Cal. 2015), in which a Federal district court held that application of California's wage and hour laws to a motor carrier did not violate the dormant Commerce Clause. The Labor Commissioner and the Attorney General argue that "California wage and hour laws at issue, including meal and rest break requirements, should be afforded, at minimum, significant weight in a Commerce Clause analysis." They explain that the district court in *Yoder* applied the standard set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), under which non-discriminatory State laws will generally not be found to violate the dormant Commerce Clause "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *See Yoder*, 181 F. Supp. 3d at 718 (quoting *Pike*, 397 U.S. at 142). They note that the court in *Yoder* found that "California has an indisputably legitimate public

interest in enforcing labor laws which protect its workers" and rejected the claim of the defendant, Western Express, that the burden on interstate commerce was clearly excessive in relation to California's legitimate public interest in regulating employment matters. *See Yoder*, 181 F. Supp. 3d at 720. The Labor Commissioner and the Attorney General conclude that ABA's assertions of an unreasonable burden on interstate commerce fails "in light of California's 'legitimate interest in promoting driver and public safety' which FMCSA has recognized."

The Amalgamated Transit Union contends that ABA's petition failed to "include any evidence of the costs of the MRB rules." Similarly, the Transportation Trades Department/AFL-CIO argues that "while ABA makes the claim that 'the cost of compliance with the meal and rest break rules are staggering' it provides absolutely no empirical evidence for this statement and relies entirely on conjecture." The Teamsters state that ABA "provides no empirical evidence" to support its argument related to the costs associated with MRB rule compliance. The Teamsters continue, "For decades, the motor carrier industries have presumably found a way — one that is feasible — to comply with federal laws in conjunction with state laws. While and to the extent that compliance can result in increased expenditures, this does not outweigh the safety benefits that protect drivers and passengers."

The FMCSA concludes that application of the MRB rules to passenger-carrying motor carriers unreasonably burdens interstate commerce. The Agency does not believe that the operational burdens described by ABA and the carriers are mere speculation. As ABA correctly states, the MRB rules provide that "[u]nless 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." Cal. Code Regs. tit. 8, 11090 ((IWC Order 9-2001), subd. 11(C) (emphasis added). The California Supreme Court explained that the employee must be free to leave the

premises, without any work-related responsibilities, during the entire 30-minute period. *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d at 533. Further, "[a]n '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.... that the employee may, in writing, revoke the agreement at any time." *Ibid.* Moreover, an employer may never require their employees to remain "on call" during a 10-minute rest break. *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d at 832. The Agency agrees that the requirement that a driver be relieved of all duty for a meal break or rest break at specified intervals without regard to location or passenger needs would result in significant operational burden for the motor carrier. While the MRB rules provide that an employer and employee may agree to an "on duty" meal break or to waive the meal break altogether, the employee may unilaterally rescind that agreement at any time. As ABA and most commenters have described, it would be untenable for a motor carrier transporting passengers to have the driver become unavailable to attend to passenger needs at an inopportune time and location due to an MRB-mandated off-duty break. The Agency also agrees with ABA that complying with the MRB rules presents an operational burden regarding scheduling. Under the Federal HOS rules, motor carriers and drivers have the flexibility to schedule off-duty breaks in a way the best accommodates the driver's need for rest, passenger needs, and the travel schedule; the MRB rules offer much less flexibility.

The FMCSA also concludes that the California Labor Commissioner and Attorney General do not show that there is no unreasonable burden by relying on the district court opinion in *Yoder v. Western Express*. As noted above, *Yoder* analyzed whether California's wage and hour laws violated the dormant Commerce Clause, not whether those laws were preempted under 49 U.S.C. § 31141. FMCSA acknowledges that it has suggested in the past that the test for

determining whether a State law unreasonably burdens interstate commerce under section 31141 is the same as or similar to the test for determining whether a State law violates the dormant Commerce Clause. Upon further consideration, however, FMCSA concludes that nothing in the text of section 31141 or elsewhere suggests that only unconstitutional State laws can cause an unreasonable burden on interstate commerce. In any event, even if FMCSA could only find an unreasonable burden on interstate commerce by finding that the burdens on commerce are clearly excessive in relation to putative local benefits, that standard would easily be met here. As discussed above, there is no evidence that the MRB rules provide a safety benefit beyond the benefits already provided by the Federal HOS regulations. The significant burdens identified by ABA and the carriers thus are clearly excessive.

Based on the foregoing, FMCSA concludes that the MRB rules cause an unreasonable burden on interstate commerce.

B. Cumulative Effect of the MRB Rules and Other States' Similar Laws

Section 31141 does not limit the Agency to looking only to the State whose rules are the subject of a preemption determination. The FMCSA "may consider the effect on interstate commerce of implementation of that law or regulation with the implementation of all similar laws and regulations of other States." 49 U.S.C. 31141(c)(5). To date, 20 States in addition to California regulate, in varying degrees, meal and rest break requirements, as the National Conference of State Legislators, the Center for Justice and Democracy, and the American Association for Justice have pointed out.[13] The ABA argues that "[c]omplying with each of these

[13] According to the National Conference of State Legislators and the American Association for Justice, the following States have meal and rest break laws: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, and West Virginia.

regulatory schemes absolutely presents an unreasonable burden on interstate commerce." Several other commenters have described the burden resulting from differing State meal and rest break laws. Greyhound explained, "20 other states have meal and rest break provisions.... [t]he potential applicability of these provisions could wreak havoc on Greyhound's carefully constructed interstate, interconnected route system and could pose a serious threat to the many small bus companies, who rely on their Greyhound connections to support their intercity services." The National Limousine Association and the Greater California Livery Association explained, "The proliferation of rules like California's in at least 20 other states, applied to drivers of CMVs in interstate commerce, would increase the associated productivity loss enormously and represent an even greater burden on interstate commerce." Coach USA stated that "confusion would become commonplace to meet all such break requirements as state borders are crossed." The United Motorcoach Association commented, "As passenger carrier drivers cross multiple state lines, the result can be fluctuating start/stop times resulting in sleep truncation and disruption." Other commenters, such as Transportation Charter Services, Pacific Coachways Charter Services, Best Limousine & Transportation, Royal Coach Tours, Sierra Pacific Tours, the California Bus Association, and Classic Charter stated that having to comply with the meal and rest break requirements of 20 states and the Federal HOS rules would make it impossible for them to meet planned schedules and itineraries.

In the 2018 Decision, FMCSA described the meal and rest break laws of Oregon, Nevada, and Washington and noted differences regarding when each State required a break to occur. *See* 83 FR 67470, 67479-80. The Agency determined that the diversity of State regulation of required meal and rest breaks for CMV drivers has resulted in a patchwork of requirements. *Ibid.* The Agency adopts that reasoning here.

The American Association for Justice argues that ABA failed to provide "adequate justification for singling out the laws of one state when similar arguments can be made for the laws in the other 20 states." Similarly, the Center for Justice and Democracy argues that ABA has provided "no adequate explanation for specifically singling out California law in this petition." The Agency is not persuaded by this argument. Nothing in section 31141 prohibits a petitioner from seeking a preemption determination concerning the laws of one State, even where other States have similar laws. Having concluded that the MRB rules impose significant operational burden and costs, the Agency further determines that the burden would be increased by the cumulative effect of other States' similar laws.

C. Summary

Consistent with the Agency's 2018 Decision, FMCSA acknowledges that the State of California has a legitimate interest in promoting driver and public safety. However, just as the Federal HOS rules and other provisions in the FMCSRs serve to promote that interest with respect to drivers of property-carrying CMVs, so do they serve to promote it for drivers of passenger-carrying CMVs. The Labor Commissioner and the Attorney General have stated that the local benefit of enforcing the MRB rules is driver and public safety. However, the Agency has determined that the MRB rules offer no safety benefit beyond the Federal regulations governing drive-time limits, fatigue, and coercion. The FMCSA also determines that enforcing the MRB rules results in increased operational burden and costs. In addition, the Agency finds that requiring motor carriers to comply with Federal HOS rules and also identify and adjust their operations in response to the many varying State requirements is an unreasonable burden on interstate commerce. Even where the differences between individual State regulations are slight, uniform national regulation is significantly less burdensome. The Agency finds that the burden

on interstate commerce caused by the MRB rules is clearly excessive relative to any safety benefit. The Agency therefore concludes that the MRB rules place an unreasonable burden on interstate commerce.

Preemption Decision

As described above, FMCSA concludes that: (1) the MRB rules are State laws or regulations "on commercial motor vehicle safety," to the extent they apply to drivers of passenger-carrying CMVs subject to FMCSA's HOS rules; (2) the MRB rules are additional to or more stringent than FMCSA's HOS rules; (3) the MRB rules have no safety benefit; (4) the MRB rules are incompatible with FMCSA's HOS rules; and (5) enforcement of the MRB rules would cause an unreasonable burden on interstate commerce. Accordingly, FMCSA grants ABA's petition for preemption and determines that the MRB rules are preempted pursuant to 49 U.S.C. 31141. Effective the date of this decision, California may no longer enforce the MRB rules with respect to drivers of passenger-carrying CMVs subject to FMCSA's HOS rules.

Issued under authority delegated in 49 C.F.R. 1.87 and redelegated by Notice executed on January 7, 2020, on: January 13, 2020.

Alan Hanson
Chief Counsel

EXHIBIT B

June 10, 2019

VIA FEDERAL E-RULEMAKING PORTAL
FDMS Docket No. FMCSA-2019-0048

Raymond P. Martinez, 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 Comments Opposing American Bus Association Petition for Determination of Preemption of California Meal and Rest Period Rules

Dear Administrator Martinez:

The Attorney General of California and the California Labor Commissioner's Office submit the following comments opposing the Petition filed by the American Bus Association, Inc. ("ABA") for a determination that California's meal and rest break requirements for drivers of passenger-carrying motor vehicles subject to the Federal Motor Carrier Safety Administration ("FMCSA") hours of service ("HOS") regulations are preempted under 49 U.S.C. 31141 (hereinafter referred to as "Petition"). Xavier Becerra 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*. The Labor Commissioner is the State official who has the authority to enforce the California Labor Code and Industrial Welfare Commission ("IWC") meal and rest break requirements at issue in this matter. *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).

As set forth more fully below, the FMCSA should deny the ABA's Petition for the following reasons: (1) the FMCSA's previous position that the challenged State requirements are not "laws

and regulations on commercial motor vehicle safety" within the meaning of 49 U.S.C. 31141(c), and thus, are outside the FMCSA's authority to declare state laws or regulations unenforceable, is correct and should be adhered to; (2) assuming, *arguendo*, that FMCSA has authority to determine whether the challenged State requirements are enforceable, these State requirements are not more stringent than the HOS regulations prescribed under 49 U.S.C. 31136, and thus, there is no basis for a finding that the State requirements may not be enforced; (3) assuming, *arguendo*, that FMCSA has authority to determine whether the challenged State requirements are enforceable, and determines that these requirements are more stringent than the federal HOS regulations, there is no basis for a finding that these State requirements may not be enforced, in that: (a) the State requirements have a safety benefit, and (b) the State requirements are not incompatible with the HOS regulations, and (c) enforcement of the State requirements would not cause an unreasonable burden on interstate commerce.

The FMCSA's Limited and Defined Statutory Authority to Review State Laws and Regulations

The FMCSA's delegated authority to make administrative preemption determinations concerning State laws or regulations on commercial motor vehicle safety is set forth in 49 U.S.C. 31141. Section 31141(a) provides that a State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced.[1] Under section 31141(c)(1), the Secretary is authorized to "review State laws and regulations on commercial motor vehicle safety," and to decide whether such law or regulation has the same effect as a federal regulation prescribed by the Secretary under section 31136, or is less stringent than the federal regulation, or is more stringent. State laws or regulations determined to have the same effect as such federal regulation may be enforced, those determined to be less stringent than the federal regulation may not be enforced, and those determined to be more stringent may be enforced unless the Secretary also decides that (a) the State law or regulation has no safety benefit; or (b) the State law or regulation is incompatible with the federal regulation prescribed under section 31136; or (c) enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce. 49 U.S.C. 31141(c)(2)-(4). In deciding whether a State law or regulation will cause an unreasonable burden on interstate commerce, the Secretary may consider the effect on interstate commerce of implementation of that law or regulation with the implementation of all similar laws and regulations of other States. *Id*., section 31141(c)(5).

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

[1] Likewise, 49 C.F.R. section 355.25 provides: "No State shall have in effect or enforce any State law or regulation pertaining to commercial motor vehicle safety in interstate commerce which the Administrator finds to be incompatible with the provisions of the Federal Motor Carrier Safety Regulations."

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 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).[2] Labor Code section 226.7(b) states, in relevant part: "An 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

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[2] 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 (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 … 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." IWC Order 9, section 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).

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 section 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.
>
> (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." *See, e.g.*, IWC Wage Order 9-2001, section 17.

In *Brinker*, 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.[3] 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.

Brinker, 273 P.3d 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

[3] 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. IWC Order 5-2001, section 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.

> 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 10 minute rest period, those working shifts of more than six hours up to ten hours are entitled to two 10 minute rest periods for a total of 20 minutes rest time, and those working shifts of more than 10 hours up to 14 hours are entitled to three 10 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: "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," noting that under one such option, employers could instead "pay the premium pay set forth in Wage Order 4, subdivision 12(B) and [Labor Code] section 226.7."[4] *Augustus*, 385 P.3d at 834.

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." 49 U.S.C. 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.*, section 31136(c)(2)(B).

[4] 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 Industrial Relations*, 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.

The U.S. Department of Transportation's HOS rules are found at 49 C.F.R. Part 395. Under 49 C.F.R. section 395.5, drivers of passenger-carrying commercial vehicles are prohibited from driving more than 10 hours following 8 consecutive hours off duty, or for any period after having been on duty 15 hours following 8 consecutive hours off duty. *See* 49 C.F.R. 395.5(a).

Unlike the regulations governing property-carrying vehicles, which are set out in 49 C.F.R. section 395.3, the regulations governing passenger-carrying vehicles do not mandate rest breaks. Specifically, the "rest break" provision under 49 C.F.R. section 395.3(a)(3)(ii) requires that, except for drivers who qualify for a short-haul exception, 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.[5] This requirement is absent for passenger-carrying vehicles. However, under regulations governing the driving of commercial motor vehicles, at 49 C.F.R. Part 392, no driver is 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 to or continue to operate the commercial motor vehicle." 49 C.F.R. 392.3.

The Challenged State Requirements Are Not "Laws and Regulations on Commercial Motor Vehicle Safety" Within the Meaning of 49 U.S.C. section 31141(c), and Thus, Are Outside the FMCSA's Authority to Declare State Laws or Regulations Unenforceable

Despite FMCSA's recent preemption determination with respect to property-carrying commercial motor vehicles, *see* FMCSA-2018-0304, 83 Fed. Reg. 67470 (Dec. 28, 2018), *petition for review filed*, 9th Cir. No. 19-70329 (Feb. 6, 2019), which broke with the agency's longstanding position that California's meal and rest period requirements do not constitute "laws or regulations on commercial motor vehicle safety" under 49 U.S.C. section 31141(c), the Labor Commissioner and California Attorney General maintain that the State's meal and rest period requirements are employment laws of general applicability rather than regulations on commercial motor vehicles. The 2008 FMCSA decision that denied a petition seeking a determination that the State's meal and rest period requirements are preempted was correctly decided and should be adhered to. *See* FMCSA, *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. 79204 (Dec. 24, 2008). That denial was based on the FMCSA's conclusion that the "petition does not satisfy the threshold requirement for preemption under 49 U.S.C. 31141(c) because the provisions at issue" – provisions that remain unchanged to the present – "are not 'laws and regulations on commercial

[5] Under 49 C.F.R. section 395.3, property-carrying commercial motor vehicle drivers may not start a work shift without first taking 10 consecutive hours off duty; may only drive during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty; and may not drive after the end of the 14 consecutive-hour period without first taking 10 consecutive hours off duty. 49 C.F.R. 395.3(a)(1), (2). However, a driver may only drive a total of 11 hours during the 14-hour period during which driving is permitted. *Id.*, section 395.3(a)(3).

motor vehicle safety,' but rather laws and regulations applied generally to California employers." *Id.*

The FMCSA noted in the 2008 decision that the meal and rest period requirements of IWC Order 9-2001 are not unique to the trucking industry, but apply to the entire "transportation industry" as defined in that wage order, and moreover, every one of the IWC's 16 other industry wide or occupational wage orders contain "virtually the same rules" regarding meal and rest periods. 73 Fed. Reg. at 79205. As rules of general application, they "are in no sense regulations 'on commercial motor vehicle safety,'" and thus, the FMCSA explained, it had "no authority to preempt them under 49 U.S.C. 31141." *Id.* at 79206.

In 2008, as now, the parties seeking a finding of preemption argued that the threshold for review is met because the phrase "on commercial motor vehicle safety" under section 31141 should be interpreted as applying to state laws or regulations that regulate or affect subject matter within the FMCSA's authority under 49 U.S.C. 31136. *See* 73 Fed. Reg. at 79205. FMCSA then made short work of that argument: "There is nothing in the statutory language or legislative history of 49 U.S.C. 31141 that would justify reading into it the authority to preempt State laws 'affecting' CMV safety." *Id.* at 79206. Quite the opposite, in the words of the FMCSA:

> [P]etitioners make the equally far-reaching argument that FMCSA can and should preempt the California statutes and rules on wages, hours, and working conditions which prevent carriers from maximizing their employees' driving and on-duty time. In fact, the FMCSRs have for decades required carriers and drivers to comply with all of the laws, ordinances, and regulations of the jurisdiction where they operate.

Id. (citing 49 C.F.R. 392.2).

Numerous courts have since found this FMCSA determination of no-preemption to be persuasive. *See Yoder v. Western Express, Inc.*, 181 F. Supp. 3d 704, 717 (C.D. Cal. 2015) (discussed *infra,* at p. 16); *Mendez v. R+L Carriers, Inc.*, No. C 11-2478 CW, 2012 WL 5868973, at *7-8 (N.D. Cal. Nov. 19, 2012) (holding that "California's meal and rest provisions do not impede or undermine the FMCSA's efforts to enforce any of its [HOS] regulations. The provisions are not only consistent with the FMCSA's regulations but also entirely compatible with the federal legislation that gave rise to those regulations."); *Cole v. CRST Van Expedited, Inc.*, No. EDCV 08-1750-VAP, 2010 WL 11463494, at *7-8 (E.D. Cal. Aug. 5, 2010) (holding that "California's meal and rest break laws are not an obstacle to the HOS Regulations' purpose of highway safety and driver health. . . . The State's regulations in this area are consistent with the HOS Regulations' emphasis on encouraging carriers to provide breaks so drivers can avoid fatigue and resulting accidents.").

Even when the FMCSA amended the HOS regulations in 2011, *see* FMCSA, *Hours of Service of Drivers*, 76 Fed. Reg. 81134 (Dec. 27, 2011), adding – for property-carrying commercial vehicles only – a new prohibition on driving beyond 8 consecutive hours by requiring a 30-minute off-duty or sleeper-berth break upon reaching the 8 hour limit, the FMCSA maintained its position that California's meal and rest period requirements are not laws or regulations "on

commercial vehicle safety." Amicus Brief for the United States, on behalf of the Department of Transportation and the FMCSA, filed with the U.S. Court of Appeals for the Ninth Circuit in *Dilts v. Penske Logistics, LLC,* No. 12-55705, 2014 WL 809150, at *26 (Feb. 18, 2014).)[6] Following this amendment to the HOS regulations, the FMCSA reaffirmed its position that California's meal and rest period requirements are not laws or regulations "on commercial motor vehicle safety" and thus, "not within the agency's authority under 49 U.S.C. 31141(a) and (c) to declare unenforceable state laws that impose additional or more stringent safety requirements than are imposed by federal law." *Id.* The FMCSA's analysis reached further, *id.* at *27, concluding that there is no conflict between California's requirements and federal law, and thus no basis for a court finding of preemption under the Supremacy Clause:

> A state law that is one of general applicability, and thus does not fall within the agency's statutory authority under section 31141 to displace state laws specifically directed at commercial motor vehicle safety, may nonetheless impose standards applicable to the operation of commercial motor vehicles and provision of transportation service. And if those requirements were to conflict with federal law, they would be preempted under general Supremacy Clause principles of conflict preemption, notwithstanding the agency's determination that the state law is not specifically addressed to commercial motor vehicle safety and thus is not subject to statutory preemption under 49 U.S.C. 31141. These constitutional principles do not dictate preemption here.

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[6] *Dilts v. Penske Logistics, LLC,* 769 F.3d 637 (9th Cir. 2014), held that California's meal and rest break laws are not preempted by the Federal Aviation Authorization Administration Act ("FAAAA"). This was consistent with the position argued by FMCSA in its amicus brief. *See* 2014 WL 809150 at *14-25. While acknowledging that "[t]he principal purpose of the FAAAA was 'to prevent States from undermining federal deregulation of interstate trucking' through a 'patchwork' of state regulations," the court cautioned that "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes or services" of motor carriers. *Dilts,* 769 F.3d at 644. "Such laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or re-route some equipment." *Id.* at 646 (citing *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184, 1189 (9th Cir. 1998)). The court concluded that California's meal and rest break laws "plainly are not the sorts of laws . . . that Congress intended to preempt…. They are broad laws applying to hundreds of different industries with no other forbidden connection with prices, routes and services. They are normal background rules for *all* employers doing business in the state of California." *Dilts,* 769 F.3d at 647 (internal quotation marks and citations omitted). *Dilts* further held: "[A]pplying California's meal and rest break laws to motor carriers would not contribute to an impermissible 'patchwork' of state-specific laws defeating Congress' deregulatory objectives." *Id.* The Court concluded that California's meal and rest period requirements are "analogous to a state wage law, which may differ from the wage law adopted in neighboring states but is nonetheless permissible." *Id.* at 647-48. More recently, the Seventh Circuit applied a similar analysis in concluding that there is no FAAAA preemption of Illinois wage payment laws. *See Costello v. BeavEx, Inc.* 810 F.3d 1045 (7th Cir. 2016).

In its *Dilts* amicus brief, the FMCSA considered the significance of the new requirement "that long-haul drivers may not continue to drive if more than eight hours have elapsed since their last break of at least 30 minutes. 49 C.F.R. 395.5(a)(3)." 2014 WL 809150, at *29. The FMCSA explained that "there are no federal break standards applicable to short haul drivers," and "thus, no conflict between the federal regulations and state law." *Id.*[7] The FMCSA concluded: "At bottom, the principal purpose of the federal hours of service regulation is [to] improve motor vehicle safety and driver health by reducing driver fatigue. 76 Fed. Reg. 81134-35 (2011). Those paramount objectives are not impeded by the California law." 2014 WL 809150 at *30.

The FMCSA's *Dilts* amicus brief stated that the agency's position that California's meal and rest period requirements were not preempted was "consistent with the agency's prior views and reflects the agency's considered judgment regarding the preemptive scope of the statute." 2014 WL 809150, at *32. Absent any change in California meal and rest period laws and regulations since the FMCSA's prior determination in 2008, and absent any change in the federal HOS regulations since the FMCSA's *Dilts* amicus brief in 2014 reaffirming the position it took in 2008, the FMCSA's December 2018 preemption determination that reached the opposite conclusion improperly changed the agency's position and expanded the preemptive scope of the statute, stating that "if the State law or regulation imposes requirements in an area of regulation that is already addressed by a regulation promulgated under 31136, then the State law or regulation is a regulation 'on commercial motor vehicle safety.'" 73 Fed. Reg. at 67473. This would encompass any state law that might apply to commercial motor vehicles, even if the law is not intended to regulate commercial motor vehicle safety. It would be particularly inappropriate to apply this broad view of the preemption provision to California's meal and rest period requirements – which apply to bus drivers just as they would to any other California employee – in light of the fact that the FMCSA specifically declined to regulate rest periods for drivers of passenger-carrying commercial motor vehicles and the federal commercial motor vehicle safety regulations are only intended to be "*minimum* safety standards." 49 U.S.C. 31136(a) (emphasis added).

The ABA contends that the California Labor Commissioner has "admitted" that the meal and rest period requirements "promote driver and public safety, and thus are, in fact, laws on [commercial motor vehicle] safety." Pet. at 4. The Labor Commissioner rejects this conclusory logic. Employment laws of general applicability that are designed to promote and protect worker health and safety do not constitute laws that are directed at commercial vehicle safety.

[7] Notably, there are no federal break standards for passenger-carrying commercial drivers, just as there are no federal break standards for short-haul drivers. According to the previous position of the FMCSA, there is thus no conflict with federal break-time rules.

Assuming, *Arguendo*, That FMCSA Has Authority to Determine Whether the Challenged State Requirements Are Enforceable, These State Requirements Are Not More Stringent Than the HOS Regulations Prescribed Under 49 U.S.C. 31136, and Thus, There Is No Basis For a Finding That the State Requirements May Not Be Enforced

Any comparison of the stringency of California's meal and rest break requirements with the federal HOS regulations must begin with the State's requirements as they have been construed by the State's highest court in *Brinker* and *Augustus,* cases that were respectively decided in 2012 and 2016. These cases clarified that employees and employers have significant flexibility with respect to their options for complying with these State requirements, contrary to the ABA's contention that the meal and rest break rules eliminate flexibility by "requir[ing] the driver to stop the bus and log off duty several additional times at certain intervals each day regardless of the driver's break schedule or actual level of fatigue." Pet. at 6.

As noted above, *Brinker* held: (1) there is no "rolling five hour meal period requirement;"[8] (2) the first meal period can be provided at any time prior to the end of the fifth hour of the employee's shift (and not provided at all if the shift does not go beyond six hours, and is waived by mutual consent); (3) the second meal period can be provided at any time up to the end of the 10th hour of work (and not provided at all if the shift does not go beyond 12 hours); (4) there is a mechanism under the wage orders for establishing "on-duty" meal periods; (5) even in the absence of a valid on-duty meal period, the obligation to provide an off-duty meal period does not require that employers "police" those off-duty meal periods to ensure that no work is performed by employees during the meal period, and employees are not prohibited from continuing to work during a meal period; and (6) employers may deviate from rest period timing requirements (to authorize and permit rest periods in the middle of each work period) where practical considerations make such timing infeasible. Far from what has been portrayed by ABA, the California Supreme Court has construed these break requirements in a manner that maximizes flexibility and employee choice.

More recently, the California Supreme Court announced in *Augustus*, 385 P.3d at 834, that among the "options [that] remain available to employers who find it especially burdensome to relieve their employees of all duties during rest periods," which are required to be duty-free, there is the option to "pay the premium pay set forth in [the applicable] Wage Order and section 226.7 [of the Labor Code]." Thus, beyond the flexibility allowed under *Brinker*, there is also the option of simply paying the employee the extra hour of premium pay as an alternative to providing an off-duty break. Although the Court cautioned that this option "should be the

[8] In its rejection of the motor carriers' petition in 2008, the FMCSA assumed that there was a "rolling five hour meal period requirement," and even so, reasoned that "[f]ive hour windows hardly constitute 'set times.' Petitioners provide no evidence that these breaks undermine safety." 73 Fed. Reg. at 79205 n.3. The California Supreme Court's subsequent holding, in *Brinker*, that the applicable State laws and regulations do not provide a "rolling five hour meal period requirement," represented a more flexible construction of the State requirements, and as such, serves to strengthen the FMCSA's earlier finding of no preemption.

exception rather than the rule" and that employers should not "pervasively interrupt scheduled work periods," *id.* at n.14, it nevertheless remains the law that an extra hour of pay may substitute for the break time.

Thus, as properly construed, California's break requirements do not interfere with the "flexible approach" to taking breaks that ABA describes under federal HOS rules for passenger carriers. The ABA explains that a driver "will often take multiple breaks during intermediate stops along a schedule" followed by "an off-duty break at the terminal location, before starting a different set of scheduled pick-ups/drop-offs on a new schedule, all within a cycle of a normal duty period." Pet. at 6. Indeed, because the ABA explains that passenger carrier drivers "may take time off duty in the middle of a daily duty period for a rest break" and, unlike truck drivers, "bus drivers' daily duty window is not an unbreakable 'consecutive hours' requirement," which means that bus drivers have "flexibility to set their own driving and break schedules on a daily basis," it is hard to see why California's meal and rest periods could not be accommodated. Pet. at 6. State law does not require that drivers "take periodic breaks at certain times regardless of whether the driver feels fatigued," nor does it create a disincentive to taking breaks when the driver feels fatigued because the driver "might feel obligated to continue the trip because of the delay already caused by taking the designated break under California law." Pet. at 5.

Construed in this manner, the obligation imposed on employers under California's meal and rest period enforcement scheme is an obligation to either provide required meal and rest periods, *or pay higher wages.*[9] To be sure, one of the purposes behind California's adoption of meal and rest period premium pay was to "shap[e] employer conduct" by "acting as an incentive for employers to comply" with the State's pre-existing meal and rest period requirements. *Murphy*, 155 P.3d at 294. Nonetheless, the state's high court concluded that "whatever incidental behavior-shaping purpose section 226.7 serves, the Legislature intended section 226.7 to first and foremost compensate employees[.]" *Id*.

It is thus the desire to escape the economic impact of meal and rest period premium *pay* that, at root, motivates the ABA's petition. But the obligation to pay premium wages as an alternative to providing legally compliant meal and rest periods does not make the California requirements more stringent than the HOS requirements, any more than California's state minimum wage can be said to be "more stringent" than the HOS requirements. In summary, California's break requirements, as thus construed by the state's high court, cannot be said to be more stringent that the HOS regulations, and for that reason, the FMCSA lacks statutory authority to declare California's requirements unenforceable.

[9] In *Murphy*, 155 P.3d at 288-97, the California Supreme Court held that the extra hour of pay under Labor Code section 226.7 and under the applicable IWC order meal and rest period provisions constitute "wages" under California law.

Assuming, A*rguendo*, That FMCSA Has Authority to Determine Whether the Challenged State Requirements Are Enforceable, and Determines That These Requirements Are More Stringent Than the Federal HOS Regulations, There Is No Basis For Finding That These State Requirements May Not Be Enforced, In That: (a) the State Requirements Have a Safety Benefit, and (b) the State Requirements Are Not Incompatible With the HOS Regulations, and (c) Enforcement of the State Requirements Would Not Cause an Unreasonable Burden on Interstate Commerce

(a) The State Requirements Have a Safety Benefit

The ABA appears to concede that the State meal and rest period laws have a safety benefit by stating that the California Labor Commissioner has "admitted" that the meal and rest period requirements "promote driver and public safety." Pet. at 4. However, the ABA also asserts that "California meal and rest break rules require drivers to take breaks that might be counterproductive to safety." Pet. at 5. The ABA also contends that the State meal and rest period requirements undermine the federal HOS fatigue-management rules. Pet. at 5. The ABA is unable to cite to a single court decision that lends any support to this argument. Instead, every court that has considered this argument reached the opposite conclusion, holding that California's meal and rest break requirements are consistent with the purpose of the HOS rules, and do not impede or undermine the federal rules. *See, e.g., Mendez, 2*012 WL 5868973, at *7-8; *Cole*, 2010 WL 11463494, at *7-8. The FMCSA, in its 2014 *Dilts* amicus brief, reached this exact same conclusion. There is no legal or factual basis for a finding that the meal and rest break rules are "counterproductive to safety."

The Labor Commissioner and California Attorney General reaffirm that California's meal and rest period requirements promote driver and public safety. The FMCSA understood the connection between driver break time and increased safety when it explained, in promulgating the HOS prohibition on property-carrying vehicles driving more than 8 hours without a 30-minute break: "The 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. at 81134. Moreover, although the FMCSA stated that it did "not have enough data to indicate a problem" in the passenger-carrying motorcoach industry in 2003 when it revised the HOS regulations for property-carrying commercial motor vehicles to provide drivers with "better opportunities to obtain sleep, and thereby reduce the incidence of" fatigue-related crashes, *see* FMCSA, *Hours of Service of Drivers; Driver Rest & Sleep for Safe Operations*, 68 Fed. Reg. 22456, 22462 (April 28, 2003), serious motorcoach crashes have subsequently warranted National Transportation Safety Board ("NTSB") reporting and attention.

In a 2011 special report on curbside motorcoach safety, the NTSB described "multiple serious accidents during 2011" that resulted in numerous fatalities and serious injuries. *See* NTSB, *Special Report: Report on Curbside Motorcoach Safety*, NTSB/SR-11/01 at 1 (2011), https://www.ntsb.gov/safety/safety-studies/Documents/SR1101.pdf.[10] One of the factors the

[10] "Motorcoach" is a category of passenger-carrying commercial motor vehicles defined as "a bus that measures at least 35 feet in length and has seating for 30 or more passengers on an

NTSB examined was motorcoach driver fatigue. The NTSB explained its "long history of issuing recommendations to prevent fatigue-related highway accidents, and addressing human fatigue is an issue currently on the NTSB's Most Wanted List, which represents the NTSB's advocacy priorities and is designed to increase awareness of, and support for, the most critical changes needed to reduce transportation accidents and save lives." *Id.* at 50. The NTSB analyzed the current HOS rules for passenger-carrying commercial motor vehicles, noting that "State inspectors and federal safety investigators expressed concern about the extended work hours permitted by current HOS rules for motorcoach drivers, pointing out that these work hours can lead to fatigue." *Id.* The NTSB concluded that curbside carriers have higher fatigued driving violations compared with conventional carriers, and that "[m]otorcoach driver fatigue is a continuing safety concern." *Id.* at 60-61.

In its 2017 Annual Report to Congress and the National Transportation Safety Board ("NTSB"), the U.S. Department of Transportation listed the need to "reduce fatigue-related accidents" as one of the critical safety issues on the "2017-2018 NTSB Most Wanted List." *See The U.S. Department of Transportation's Status of Actions Addressing the Safety Issue Areas on the NTSB's Most Wanted List* at 2 (June 2017), https://cms.dot.gov/sites/dot.gov/files/docs/mission/office-policy/transportation-policy/285441/2017-2018-dot-response-ntsb-most-wanted-list-final.pdf. The report noted: "Fatigue can be just as deadly in transportation as alcohol and drug impairment, and fatigued drivers and operators regularly cause accidents…. Fatigue degrades a person's ability to stay awake, alert, and attentive to the demands of controlling their vehicle safely. Drivers may not recognize the effects of fatigue until it is too late. The traveling public can unknowingly and unwillingly be placed at risk because a fatigued operator cannot safely execute his or her duty." *Id.* at 39. Among its proposed solutions to ameliorate this "serious safety issue," the report further proclaimed the need to "draw attention to company best practices that allow operators to schedule adequate off-duty time for rest[.]" *Id.* The Department of Transportation agreed with the NTSB that "fatigue is a serious safety issue." *Id.* at 40.

The NTSB's current 2019-2020 Most-Wanted-List continues to list fatigue-related accidents. *See* NTSB, *2019-2020 Wanted List Issue Areas*, https://www.ntsb.gov/safety/mwl/Pages/default.aspx. The NTSB's accompanying report on most-wanted-list-associated open safety recommendations includes two items under "Reduce Fatigue-Related Accidents" involving the FMCSA that are categorized as "Open-Unacceptable Response." NTSB, *2019-2020 MWL-Associated Open Safety Recommendations* at 18 (Dec. 11, 2018), https://www.ntsb.gov/safety/mwl/Documents/2019-20/2019-20-MWL-SafetyRecs.pdf. One is to "[e]stablish an ongoing program to monitor, evaluate, report on, and continuously improve fatigue management programs implemented by motor carriers to identify, mitigate, and continuously reduce fatigue-related risks for drivers" and another is to "[i]ncorporate scientifically based fatigue mitigation strategies into the hours-of-service regulations for passenger-carrying drivers who operate during the nighttime window of circadian low." *Id.* Particularly in light of the continued focus on

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elevated passenger deck over a baggage compartment, with integral construction designed for long-distance passenger transportation." NTSB Special Report at viii.

reducing fatigue-related accidents, California's generally-applicable meal and rest period requirements support, rather than undermine, this important public safety goal.

In addition, a report prepared for the FMCSA that reviewed available evidence on fatigue and motorcoach/bus driver safety summarized certain findings as follows: "Statistics show a clear connection between driving while fatigued or sleepy and crash in professional drivers. . . . evidence suggests that the incidence of crash increases after 5 or 6 hours of driving and continues to increase through the end of driving time at 8 to 11 hours." Manila Consulting Group, Inc., *Evidence Report: Fatigue and Motorcoach/Bus Driver Safety* at 42 (2012), https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Fatigue%20Evidence%20Report%2012-17-12_revised(1-30).pdf. This evidence-review report attempted to answer the question as to how much rest is required for a fatigued professional driver to resume driving unimpaired. *Id.* at 77. Some of the reported studies showed that a 30-minute rest break reduced the incidence of "safety critical events" while others showed that long-haul truck drivers who napped had a significantly lower incidence of crash or near-crash. *Id.* at 84. Notably, the timeframe for incidence of crash maps closely to the timeframe for California's meal and rest periods.

The ABA petition affords no consideration to these findings and recommendations of the NTSB and the FMCSA. Worse, a finding of preemption, as requested by the ABA, would leave a significant number of California drivers of passenger-carrying commercial vehicles without the legal right to *any* break during their workday, as the HOS regulations for bus drivers do not even include the requirement for a 30-minute off-duty break after 8 hours of driving to which drivers of property-carrying vehicles are entitled. *See* 49 C.F.R. 395.3(a)(3)(ii). Accordingly, the FMCSA cannot conclude, as it did in the December 2018 preemption determination regarding property-carrying commercial motor vehicles, that California's meal and rest period requirements "do not provide additional safety benefits." 83 Fed. Reg. at 67476. The FMCSA agreed with the Labor Commissioner that "drowsy driving causes crashes," explaining that this was why the agency promulgated the off-duty break requirement in the HOS regulations. *Id.* That break requirement *does not exist* in the HOS regulations for bus drivers. Therefore, it defies logic to suggest that the safety of bus drivers and their precious human cargo is not enhanced by the State's break requirements.

(b) The State Requirements Are Not Incompatible With the HOS Regulations

The ABA appears to contend that California's meal and rest break requirements are incompatible with the HOS regulations because they conflict with driver attendance needs and drivers' federal regulatory service and security requirements, and because there is a lack of adequate parking for intercity buses to take breaks. Pet. at 7-10. However, ABA's arguments fail to address the fact that the State's meal and rest break requirements, as construed by the California Supreme Court, ultimately impose an obligation to provide required meal and rest periods *or* to simply provide an additional hour of pay for not providing the break (assuming an exemption has not been granted for the rest period requirement, and that there is no waiver of the meal period or agreement to an on-duty meal period). As such, there is no incompatibility even where a driver is called upon to attend to customer needs during an otherwise off-duty break, cannot find adequate bus parking (despite the numerous roadside rest stops between most locations and

major highways in California, *see* http://quickmap.dot.ca.gov/), cannot reach a rest stop due to traffic and service requirements, or cannot use a particular rest stop due to security issues.

In the December 2018 preemption determination pertaining to property-carrying commercial motor vehicles, the FMCSA explained that it interprets compatibility to mean that the State laws and regulations must be identical to the federal HOS regulations in order to be compatible. 83 Fed. Reg. at 67477. This interpretation does not survive basic principles of statutory construction. Under 49 U.S.C. 31141(c)(1), FMCSA is not to interfere with the enforcement of state laws or regulations on commercial motor vehicle safety that are more stringent than the HOS requirements unless the state laws or regulations (a) provide no safety benefit, (b) are incompatible with the HOS regulations, or (c) would, if enforced, cause an unreasonable burden on interstate commerce. Under FMCSA's view, any state law or regulation more stringent than the HOS regulations is necessarily "incompatible," so as to make the three-part statutory test a nullity. This is contrary to the "cardinal principle of statutory construction that [an interpreter] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks and citation omitted).

(c) Enforcement of the State Requirements Would Not Cause an Unreasonable Burden on Interstate Commerce

The issue of whether California's meal and rest period requirements constitute an unreasonable burden on interstate commerce was carefully analyzed in *Yoder v. Western Express, Inc.*, 181 F. Supp. 3d 704 (C.D. Cal. 2015), with the court holding that no such burden was shown. That case involved a long-haul interstate driver who spent only a small percentage of his total worktime driving within California, time as to which plaintiff contended California wage and hour law, including meal and rest period requirements, apply. Western Express sought summary judgment on the ground that application of California wage and hour laws and regulations to plaintiff would violate the dormant Commerce Clause. The court analyzed the issue under the controlling standard set out in *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970): Absent facial discrimination against interstate commerce, the inquiry turns to whether the challenged law "regulates evenhandedly to effectuate a local legitimate public interest and [whether] its effects on interstate commerce are only incidental." If so, the law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Yoder*, 181 F. Supp. 3d at 718 (quoting *Pike*, 397 U.S. at 142).

In applying this standard, the court concluded that the California wage and hour laws at issue, including meal and rest break requirements, "should be afforded, at minimum, significant weight in a Commerce Clause analysis," that "California has an indisputably legitimate public interest in enforcing labor laws which protect its workers," and that these laws "regulate 'even-handedly' as they apply to almost all employers in the state, not just those engaged in interstate commerce." *Yoder*, 181 F. Supp. 3d at 720. The court then rejected Western's claim that the alleged burdens on its interstate operations are "clearly excessive" in relation to the legitimate public interest California has in regulating employment matters, finding that "the record shows no special circumstance suggesting that California's wage and hour laws operate as anything other than an unobjectionable exercise of the State's police power," and that "the minimal facts in the record tell us little about any significant practical burden on interstate commerce." *Id*. at 722-23.

Yoder adjudicated this issue correctly. Here, ABA's assertion of an "unreasonable burden on interstate commerce" is based on the economic interest in maximizing drivers' productive time and reference to the fact that many states regulate meal and rest break requirements, which the ABA contends increases driver costs and could impact the affordability of bus tickets for customers, without any of the analysis and consideration of the State's interest that is required under *Pike*. However, businesses operating in multiple states already contend with varying laws, such as different minimum wage rates. This is essentially the cost of doing business in more than one geographic area. In light of California's "legitimate interest in promoting driver and public safety," which FMCSA has recognized, *see* 83 Fed. Reg. at 67479, California's meal and rest break requirements should not be found to cause an unreasonable burden on interstate commerce.

Conclusion

For all of the reasons set forth above, the California Labor Commissioner and Attorney General urge the FMCSA to deny the ABA's Petition, and issue a determination that California's meal and rest period laws and regulations are not preempted by 49 U.S.C. 31141. For further information regarding this submission, please contact Miles Locker, mlocker@dir.ca.gov, 415-703-4875 or Timothy J. Kolesnikow, Timothy.Kolesnikow@doj.ca.gov, (213) 269-6181.

Respectfully submitted,

Xavier Becerra
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Miles Locker
Attorney for the California Labor Commissioner

DECLARATION OF SERVICE BY E-MAIL

Case Name: THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL, XAVIER BECERRA etc., et al. v. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

No.:

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. I am also familiar with the practice of electronic mail service of documents.

On **March 12, 2020**, I served the attached **PETITION FOR REVIEW** by transmitting a true copy via electronic mail as follows:

Charles J. Fromm, Deputy Chief Counsel,
Office of the Chief Counsel,
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue SE
Washington, DC 20590
(202) 493-0349
Email: Charles.Fromm@dot.gov

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 12, 2020**, at Los Angeles, California.

Sharon Oliver
Declarant

Signature

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