CASE NO. 18-73488 [CONSOLIDATED WITH 19-70323, 19-70329, 19-70413]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 2785 and EVERARDO LUNA,
Petitioners,
v.
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION,
Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
CASE NO. FMSCA-2018-0304

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber submits this brief to assist this Court in understanding the broader perspective of employers on the issues presented. The outcome of this proceeding has the potential to impact any businesses that employ commercial motor vehicle drivers in California, and that seek in good faith to compensate their employees properly and to set employment policies without incurring unexpected liability for meal and rest break premiums under California law. The Chamber, as

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[1] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all Petitioners, Intervenor William B. Trescott, and Respondents Federal Motor Carrier Safety Administration and U.S. Department of Transportation.

Pursuant to Federal Rule of Appellate Procedure 29, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

an organization devoted to advancing the interests of commerce, is well positioned to address the importance of following settled norms and fairly addressing the interplay of State and federal laws governing breaks for commercial motor vehicle drivers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 2011, the federal Hours of Service Rules ("HOS Rules") promulgated by the Federal Motor Carrier Safety Administration have regulated rest breaks for commercial motor vehicle drivers, mandating a 30-minute rest break within the first 8 hours of a long-haul driver's shift and establishing additional fatigue prevention procedures for all drivers. California has adopted meal and rest break rules ("MRB Rules") that go much further, mandating a 30-minute meal break every five hours worked as well as additional 10-minute rest breaks for every four hours worked. In 2018, exercising its express statutory authority to do so, the FMCSA found that the California MRB Rules are preempted by federal law. Petitioners seek to set aside this determination, but they cannot meet their burden to demonstrate that the determination was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Unable to meet this standard, Petitioners resort to attacking the FMCSA for failing to account for the "presumption against preemption." But that presumption, as the Supreme Court held in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), has no application where Congress has set forth an express preemption provision, as it has here in 49 U.S.C. § 31141. Contrary to Petitioners' contentions, this Court has refused to apply the presumption against preemption in express-preemption cases in the wake of *Puerto Rico*.

In any event, no presumption can overcome the plain meaning of the preemption provision here. The FMCSA correctly concluded that California's MRB Rules are regulations "on commercial motor vehicle safety." Petitioners' narrow reading of the preemption provision fails to account for ordinary usage of the phrase "on," particularly when describing laws and regulations. Moreover, statutory context and structure make clear that Congress created a statutory scheme in which the Secretary has authority to "prescribe regulations on commercial motor vehicle safety," 49 U.S.C. § 31136(a), while also "review[ing] State laws and regulations on commercial motor vehicle safety" to determine whether they are preempted. *Id.* § 31141(c)(1). Congress thus allowed the agency to review any State regulations covering the same subject matter as the regulations adopted pursuant to section 31136.

Petitioners repeatedly emphasize that the MRB Rules are regulations of "general applicability" that apply to many types of employees other than commercial motor vehicle drivers. But the FMCSA properly found that these rules were preempted on an "as-applied" basis—that is, "to drivers of property-carrying [commercial motor vehicles] subject to the FMCSA's hours of service regulations." 83 Fed. Reg. 67,470, 67,470 (Dec. 28, 2018). This Court's precedents demonstrate that federal law can preempt generally applicable State laws "as applied" to particular persons or particular circumstances. *See, e.g.*,

Oregon Coast Scenic Railroad, LLC v. Oregon Department of State Lands (Oregon Coast), 841 F.3d 1069, 1077 (9th Cir. 2016). So too here: the FMCSA narrowly tailored its preemption determination to cover only those drivers subject to its HOS Rules. That the determination is limited to the FMCSA's purview does not undermine, but instead confirms, its validity.

In a final effort to circumvent the effect of the FMCSA determination, Petitioners argue that private plaintiffs still should be able to obtain and then enforce judgments under the California MRB Rules for conduct that predates the determination. As the federal statute makes clear, once the MRB Rules were found to be preempted, they became void, and courts cannot properly enforce them. This does not present a retroactivity problem – it is merely the natural consequence of a preemption determination that, per the clear language of the federal statute, prevents States from enforcing these rules.

ARGUMENT

I. The presumption against preemption is inapplicable to express preemption provisions.

As a threshold matter, Petitioners seek to stack the deck by relying heavily on a presumption against preemption (Ly Br. 44-47; Local 2785 Br. 13-16), while contending that the agency "did not even *consider*" such a presumption. (Ly Br. 46.) But the FMCSA correctly concluded that the presumption against preemption "does not apply" where, as here, Congress has enacted an express preemption

provision. 83 Fed. Reg. at 67,473. Indeed, it makes no sense to impose a presumption against what Congress has expressly authorized. The express preemption provision sets forth the scope of the agency's preemptive authority, and leaves no doubt that Congress intended to preempt State law within that scope.

The Supreme Court applied this principle in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016). In *Puerto Rico*, the Court "focus[ed] on the plain wording" of an express preemption provision in the federal Bankruptcy Code and refused to apply the presumption against preemption. *Id.* at 1946. The Court explained that where a federal "statute 'contains an express pre-emption clause,' we 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.'" *Id*. (quoting *Chamber of Commerce of United States v. Whiting*, 563 U.S. 582, 594 (2011)). Relying on the plain text of the express preemption provision, the Court held that federal law preempted Puerto Rico's debt-recovery plan for public utilities. *Id.* at 1942-43, 1949. Neither the majority nor the dissent considered a presumption against preemption.

This Court, too, has made clear that the presumption against preemption is inapplicable to express preemption provisions. *See Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016). Petitioners do not acknowledge this Court's

decision in *Atay*, which relied on *Puerto Rico* to conclude that courts must focus on the "plain wording" of an express preemption provision and that no presumption applies to such provisions:

> [F]ederal preemption may be either express or implied. Where the intent of a statutory provision that speaks expressly to the question of preemption is at issue, "*we 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."

Id. (emphasis supplied) (quoting *Puerto Rico*, 136 S. Ct. at 1946). After announcing this clear rule, this Court held that the express preemption provision of the federal Plant Protection Act applied to certain plants, but not others—without applying a presumption against preemption. *Id.* at 701-03. *Puerto Rico* and *Atay* mean what they say: The presumption against preemption is inapplicable to express preemption provisions.

In addition to ignoring this Court's decision in *Atay*, Petitioners make several unavailing attempts to distinguish *Puerto Rico*. First, Petitioners contend that "the law preempted by the FMCSA, unlike in *Puerto Rico*, concerns an area of traditional state regulation." (Ly Br. 47; *see also* Local 2785 Br. 14-16.) But nothing in *Puerto Rico* limits the reach of the relevant holding to the bankruptcy context, nor does it supply a basis to conclude that the Court abrogated the presumption against preemption only with respect to certain State laws. Nor would such a limitation make sense: As the Supreme Court explained, a court's task is to

interpret the "the plain wording of the [preemption] clause." *Puerto Rico*, 136 S. Ct. at 1946. *Puerto Rico*'s holding rests on the principle that congressional text is supreme, and that the courts should effectuate it as written. Nothing about that principle is affected by the type of State regulation that is being displaced.

In any event, Petitioners are wrong to suggest that the regulation of municipalities in *Puerto Rico* is not a traditional area of State regulation. States have long "possess[ed] plenary control over their municipalities, particularly in fiscal matters." *Puerto Rico*, 136 S. Ct. at 1952 (Sotomayor, J., dissenting). Indeed, "Congress did not enter the field of municipal bankruptcy until 1933." *Id.* at 1944 (majority). In light of "States' powers to manage their own affairs," Congress "tailored the federal municipal bankruptcy laws to preserve the States' reserved powers over their municipalities." *Id.* at 1944; *see also* 11 U.S.C. § 903. Thus, contrary to Petitioners' contention, *Puerto Rico* did involve a traditional area of state authority – and yet the Court in *Puerto Rico* did not apply a presumption against preemption.

Any attempt to apply a different rule in the context of areas of traditional State regulation "is not only unworkable but is also inconsistent with established principles of federalism." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985). Because the States had vast powers before the ratification of the Constitution, nearly any law can be understood as relating to an area of traditional

State regulation—depending on the level of generality with which it is stated. For example, regulation of the federal government's nuclear arsenal was not a traditional state power, but such regulation would aim to protect the citizenry, which was a traditional state power. The phrase "police power" was "long abandoned as a mere tautology" precisely because "[i]t is difficult to identify any state law that has come before us" that could not be characterized as relating to the States' historic police powers to protect health, safety, and welfare. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 365-66 (2008) (Kennedy, J., dissenting). In short, any exception to standard interpretive principles based on areas of traditional State regulation would either swallow the rule or rely on unworkable and arbitrary distinctions.

Petitioners further attempt to distinguish *Puerto Rico* on the basis that the present case "involves a rare kind of preemption provision in which Congress delegated preemption authority to the agency but did not itself expressly preempt state law." (Ly Br. 47.) In fact, the provision here is not rare – for instance, pursuant to the Hazardous Materials Transportation Act, the Pipeline and Hazardous Materials Safety Administration (by delegation from the Secretary of Transportation) is authorized to issue a "decision on whether the [State] requirement is preempted" under various statutory criteria. 49 U.S.C. § 5125(d); *see also* 49 C.F.R. §§ 107.201 - 107.227. In any event, the language at issue here

concerns a threshold requirement that "[t]he Secretary shall review State laws and regulations on commercial motor vehicle safety." 49 U.S.C. § 31141(c). Regardless of whether Congress delegated authority to the Secretary to preempt those State laws and regulations, the meaning of "on commercial motor vehicle safety"—like any other language enacted by Congress—should be determined using traditional tools of statutory interpretation. That the Secretary, rather than Congress, ultimately issues the preemption determination is a distinction without a difference, as it is well settled that "[f]ederal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Fidelity Fed. Savings and Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153–54 (1982).

Petitioners mistakenly claim that "this Court has repeatedly applied the presumption in express-preemption cases after *Puerto Rico*." (Ly Br. 47.) But as discussed above, this Court squarely addressed this issue in *Atay*. And the cases upon which Petitioners rely do not advance their argument.

Petitioners' reliance on *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 666 (9th Cir. 2019), an ERISA preemption case, is misplaced. In *Gobeille v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936, 943 (2016)—which was cited by

this Court in *Depot*—the Supreme Court disavowed a presumption against preemption in the ERISA context, explaining that the scope of preemption rests on normal tools of statutory construction. *Id.* The Court explained that "[t]he Court *in the past*" applied a presumption against preemption, but ERISA "'contemplated the pre-emption of substantial areas of traditional state regulation.'" *Id.* at 946 (emphasis added) (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 330 (1997)). Recognizing that "'[p]re-emption claims turn on Congress's intent,'" *id.* at 946 (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)), the Court concluded that "[a]ny presumption against pre-emption, whatever its force in other instances, cannot validate a state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose in the way this state law does," *id.*

Petitioners also cite *Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017), which states in dicta that a court "assume[s] '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.'" *Id.* at 1146 (citation omitted). But this Court's analysis turned on the ordinary meaning of the express preemption provision, not on a presumption against preemption. Indeed, its statement about historic police powers is immediately

preceded by this Court's statement – consistent with *Puerto Rico* – that "[w]here the federal statute contains an express preemption clause," the court's role is to "determine the substance and scope of the clause." *Id*. And that is precisely what this Court did. It held: "*Based on the ordinary meaning* of [the express preemption provision] and the plain language and purpose of the [federal statute], we hold that [California's law] is not expressly preempted." *Id.* (emphasis added).

Petitioners find no more solace in *Arellano v. Clark County Collection Service, LLC*, 875 F.3d 1213, 1216 (9th Cir. 2017), which they quote for the proposition that this Court "read[s] even express preemption provisions narrowly." (Ly Br. 47.) That statement is obviously dicta; the issue on appeal was whether *conflict* preemption principles applied, even though the federal statute did not speak directly to the State law at issue. 875 F.3d at 1218. Moreover, Petitioners take this Court's language out of context. The full sentence reads: "Although we read even express preemption provisions narrowly, a state cannot avoid compliance with a federal regime 'merely by relying upon a connection to an area of traditional state regulation.'" *Id.* at 1216 (citation omitted). Hence, *Arellano* actually confirms that California's MRB Rules cannot escape preemption merely because they address an area of traditional state concern.

For all the foregoing reasons, this Court should reject Petitioners' invitation to apply a presumption against preemption in this case.

II. California's MRB Rules, as applied to commercial drivers, are rules on commercial motor vehicle safety which the Administrator has properly determined to be preempted by federal law.

In any event, no presumption could justify Petitioners' proposed "interpretation," as it is contrary to the statute's plain meaning, structure, and purpose. Petitioners argue that because California's MRB rules are rules of "general applicability" that apply not only to drivers of commercial motor vehicles but also to other workers, the MRB Rules cannot be rules "on commercial motor vehicle safety." From this, they argue the Administrator is powerless to determine that the MRB Rules are preempted by federal law – no matter how directly they conflict with the federal HOS rules governing breaks for drivers of commercial motor vehicles. (*See, e.g.*, Ly Br. 1.) Petitioners' argument is flawed for at least two reasons. First, they misunderstand the reach of the phrase "on commercial motor vehicle safety." Second, their argument overlooks the well-settled rule that State laws of general applicability can be preempted on an "as applied" basis – i.e., to the extent they apply in a manner that conflicts with federal law. The Administrator was therefore well within his Congressionally granted authority to determine that California's MRB Rules are preempted as applied to those drivers of commercial motor vehicles who are subject to the federal HOS Rules.

A. California's MRB Rules are regulations "on commercial motor vehicle safety," and hence subject to preemption by the Administrator.

Traditional tools of statutory interpretation make clear that California's MRB Rules are laws "on commercial motor vehicle safety" within the meaning of the express preemption provision. 49 U.S.C. § 31141; *see also* Respondents' Br. 22-28. Petitioners advance a narrow reading of "on," but the ordinary understanding of this term often conveys a broader meaning, particularly when describing laws and regulations. For example, courts may describe a wide range of laws that indirectly burden speech as "laws on speech." A licensing requirement may be a "[c]ontent-neutral regulation[] on speech," even if it "place[s] only incidental burdens on speech." *Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014) (invalidating licensing requirement for city tour guides).

The context and structure of the statute make clear that Congress intended for the Secretary, in applying the preemption provision, to carefully consider the relationship between State laws and federal regulations promulgated pursuant to section 31136. Congress directed the Secretary to "prescribe regulations on commercial motor vehicle safety," 49 U.S.C. § 31136(a), while also providing that "[t]he Secretary shall review State laws and regulations" covering that very topic—that is, "State laws and regulations on commercial motor vehicle safety," *id.* § 31141(c)(1). And Congress required the Secretary to compare those State laws

to "regulation[s] prescribed by the Secretary under section 31136." *Id.* § 31141(c)(1)(A). Congress thus allowed the agency to review under section 31141 any State regulations covering the same subject matter as the HOS Rules. Put differently, if the FMCSA has the ability to regulate breaks for commercial motor vehicle drivers, it has the ability to preempt State regulations in the same sphere.

Petitioners do not dispute that the HOS Rules are a valid exercise of the agency's statutory authority under section 31136. Instead, they advance the untenable position that even though the federal break rules for commercial drivers *are* rules on commercial motor vehicle safety, California's break rules, insofar as they apply to such drivers, *are not*. That argument ignores the scheme that Congress enacted, which depends on section 31141 and 31136 working in tandem to promote a workable system of laws governing commercial motor vehicle safety. Under Petitioners' view that the FMCSA can never preempt generally applicable laws, States would have free license to evade preemption simply by applying laws to broader subjects.

Petitioners argue that if the phrase "on commercial motor vehicle safety" is read to include all laws that indirectly affect safety, this "would impose onerous reporting and preclearance requirements on states and the Secretary." (Ly Br. 38). But such determinations are limited to State regulations that cover the same topics

as the HOS Rules and that apply to commercial motor vehicle drivers in interstate commerce. These laws are hardly so voluminous as to overwhelm the agency, and there has been no flood in the eleven months since the December 2018 determination. Even if there were more requests, it is up to Congress to change the law – it is not for courts to disregard the existing statute, which authorizes the FMCSA to consider petitions and determine when the HOS Rules preempt State laws.

Petitioners repeatedly note that in 2008, the FMCSA determined that the MRB Rules were not regulations "on commercial motor vehicle safety." In light of the agency's change in position, Petitioners suggest that this Court should view the FMCSA's 2018 determination with skepticism. But an agency is not bound forever by its determination of an issue – it is free to change its view, even where there has been no intervening change of fact or law. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (although the agency "must show that there are good reasons for the new policy ... it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one."). Federal courts honor and follow revised agency positions so long as they provide a "reasoned analysis for the change." *Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

That is all the more true where there *has* been an intervening change, which is precisely the situation here. The FMCSA issued its 2008 statement well before the federal HOS Rules were amended to include the very rest period provisions that the FMCSA has found incompatible with California law. The process of revising the HOS regulations did not begin until 2010, and it ended in 2011, when the Administration added three provisions to the existing rules—including a provision for rest periods that generally requires a rest period within the first eight hours of a work shift, subject to pertinent exemptions for short-haul drivers. *See American Trucking Associations, Inc. v. Federal Motor Carrier Safety Admin.* 724 F.3d 243, 245-46 (D.C. Cir. 2013) (describing history of rules). Therefore, "[p]rior to the 2011 revisions, the Federal HOS regulations contained no provisions requiring a mandatory rest period." 83 Fed. Reg. at 67,474. This rest period is a critical aspect of the FMSCA's preemption analysis. *See, e.g.*, *id.* at 67,478 ("Not only do the MRB Rules require employers to provide CMV drivers with more rest breaks than the Federal HOS regulations, the timing requirements for rest periods under the MRB Rules provide less flexibility than the Federal HOS regulations."). The agency correctly concluded that "intervening events" further support the FMSCA's changed position. *Id.* at 67,474.

Finally, to the extent that Petitioners argue that California's meal and rest period laws concern general "employee[] health and welfare" as distinct from

commercial motor vehicle safety (Ly Br. 48), they are mistaken. In comments to the petition for a determination of preemption, the California Labor Commissioner "acknowledged that the MRB Rules improve driver and public safety stating, 'It is beyond doubt that California's meal and rest period requirements promote driver and public safety.'" 83 Fed. Reg. at 67,474. Doubling down on these comments, the California Labor Commissioner's amicus brief here emphasizes the safety goal of California's MRB rules: "the MRB Rules in fact do have safety benefits.... The incentives provided by the MRB Rules to have drivers exercise their meal and rest breaks provide substantial safety benefits in relation to the requirements of the HOS Regulations." (Cal. Labor Comm'r. Br. 32.)

The State of Washington is also in agreement, with respect to its very similar break requirements. The amicus brief from the State's Attorney General squarely acknowledges that the purpose of Washington's similar meal and rest break rules, as they apply to commercial drivers, is to promote driver safety. In the State's own words: "The State of Washington is committed to all employees receiving the meal and rest break protections *necessary for their health and safety*—including Washington-based truck drivers." (Washington Am. Br. 1; *see also id* at 2 ("The State of Washington has a strong public safety interest in ensuring that truck drivers in Washington receive breaks so that they are not endangering themselves and others by driving while fatigued.")). The States have simply made different

policy judgments concerning how to promote safety – which is exactly why their rules are preempted.

B. Rules of general application, such as California's MRB rules, can be preempted on an "as-applied" basis.

In light of Petitioners' refrain that the MRB Rules are "laws 'of general applicability'" (Ly Br. 1), it is important to note that the FMCSA did not determine that the MRB Rules are preempted as a general matter. Rather, the agency made an "as-applied" preemption determination: It concluded that the MRB Rules are preempted only "insofar as the provisions at issue apply to drivers of property-carrying [commercial motor vehicles] subject to the FMCSA's hours of service regulations." 83 Fed. Reg. at 67,470.

This Court's case law demonstrates that State laws of general applicability, such as California's MRB rules, can be preempted on an "as-applied" basis – that is, to the extent they apply to particular persons or in particular ways that conflict with federal law. That provides further confirmation that the Government's interpretation of the preemption clause accords with ordinary preemption principles, whereas Petitioners would read the statute, contrary to its text, to create a senseless and anomalous result.

Previously, this Court characterized as an "open issue" whether federal law can "preempt state law on an 'as applied' basis, that is, whether it is proper to find that federal law preempts a state regulatory scheme sometimes but not at other

times, or that a federal law can preempt state law when applied to certain parties, but not to others." *Cal. Tow Truck Ass'n v. City of San Francisco*, 693 F.3d 847, 865 (9th Cir. 2012) (suggesting the question was open because the parties failed to address it); *see also Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 648 n.2 (9th Cir. 2014).

More recently, however, this Court answered that question by expressly recognizing the validity of as-applied preemption. For example, in *Oregon Coast Scenic Railroad, LLC v. Oregon Department of State Lands*, 841 F.3d 1069, this Court considered a railroad's preemption challenge to an Oregon environmental statute, which required that persons apply for a permit before removing material within certain waters. 841 F.3d at 1077. The State of Oregon had sent a cease and desist letter to the railroad, arguing that its repair work violated the environmental law. The railroad filed suit in federal court, arguing that the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101 *et seq*., preempted the environmental law as applied to the railroad's repair work. Even though Oregon's environmental law reached well beyond rail transportation, this Court held that "the State's [environmental] law is preempted by the ICCTA *as applied to* the repair work in this case." 841 F.3d at 1077 (emphasis added).

Likewise, in *Puente Arizona v. Arpaio*, 821 F.3d 1098 (9th Cir. 2016), this Court considered whether Arizona's employment-related identity theft laws were

preempted by the federal Immigration Reform and Control Act ("IRCA"), which regulates the employment of unauthorized aliens. This Court rejected plaintiff's argument that the Arizona law was facially preempted under conflict-preemption principles, but emphasized that plaintiff's as-applied challenge remained open for further proceedings. Observing that "the identity theft laws are textually neutral—that is, they apply to unauthorized aliens, authorized aliens, and U.S. citizens alike," this Court explained that one could not determine whether "the identity theft laws undermine federal immigration policy by looking at the text itself." *Id.* at 1105. Rather, "[o]nly when studying certain applications of the laws do immigration conflicts arise." *Id.* This Court thus noted that "[t]he question of which applications of the laws are preempted is properly left for the district court." *Id.* at 1105 & n.7. Thus, once again, this Court expressly recognized that a State statute can be enjoined as to certain applications, while remaining in effect as to others. So too, here, California's MRB Rules can be preempted as to certain persons (commercial motor vehicle drivers) while remaining in effect as to persons not subject to the federal HOS Rules. *See also Del Real, LLC v. Harris*, 636 F. App'x. 956, 956 (9th Cir. 2016) ("*as applied to meat and poultry products*, California's nonfunctional slack fill provisions, Cal. Bus. & Prof. Code §§ 12606(b), 12606.2(c), are expressly preempted by the Federal Meat Inspection Act … and the Poultry Products Inspection Act") (emphasis supplied).

It is not novel to conclude that California's MRB rules are preempted insofar as they apply to drivers subject to the FMCSA's oversight – and not to other employees, such as garment workers, who are not. Indeed, California's Wage Order 9 itself carves out, from the State's overtime requirements, "employees whose hours of service are regulated by" the federal HOS rules. Cal. Indus. Welfare Comm'n Order No. 9-2001 (Wage Order 9), § 3(L)(1), *available at* https://www.dir.ca.gov/IWC/WageOrderIndustries.htm. This carve-out demonstrates that Wage Order 9 itself recognizes that its worker protections can apply to some workers without applying to others (those subject to the federal rules). That Wage Order 9 does not have a similar carve-out from the meal and rest break rules is not surprising, since those provisions of Wage Order 9 were adopted in 2002, but the federal HOS rules did not address breaks until 2011.

In sum, this Court should uphold the FMSCA's determination that the MRB Rules are preempted as applied to drivers of property-carrying commercial motor vehicles subject to federal HOS rules.

III. The FMCSA determination prevents State and federal courts from enforcing the preempted laws, including as to antecedent conduct.

Petitioners also argue that the FMCSA's preemption determination cannot apply "retroactively" to antecedent conduct or pending litigation. (Ly. Br. 49-52.) They frame their argument as a challenge to a legal opinion that the FMCSA issued in March 2019, several months after the agency published the preemption

determination. (Ly Br. 49-52.) In that opinion, the Office of the Chief Counsel stated that "an FMCSA preemption decision under Section 31141 precludes courts from granting relief pursuant to the preempted State law or regulation at any time following issuance of the decision," regardless of when the underlying conduct occurred or when the suit was filed. (ER231.) Petitioners argue that "[t]he FMCSA's attempt to retroactively preempt California's meal-and-rest break rules" violates "the 'presumption against retroactivity.'" (Ly Br. 49.) The Government argues that this legal opinion is not properly before the Court. (Respondents' Br. 58.) But if this Court considers this argument, it should rule that Petitioners are wrong on the merits. The FMCSA's legal opinion does nothing more than explain the natural consequence of any preemption determination by the agency: A State "may no longer enforce" the preempted rules—including in pending litigation. 83 Fed. Reg. at 67,480; *see also* 49 U.S.C. § 31114(a).

As the Office of the Chief Counsel explained, a preempted State law is "without effect." (ER229 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992))); *see also Cipollone*, 505 U.S. at 516 ("Thus, since our decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that state law that conflicts with federal law is 'without effect.'"). And here, Congress expressly contemplated that when the FMCSA issues a preemption determination, "[a] State may not enforce" the State law or regulation at issue. 49

U.S.C. § 31114(a). A law that is preempted under this provision is thus void, or "without effect," *Cipollone*, 505 U.S. at 516. Indeed, the accompanying FMCSA regulation provides that "no State shall have in effect *or* enforce" any preempted State law or regulation. 49 C.F.R. § 355.25 (emphasis added). Accordingly, in the preemption determination at issue here, the agency concluded that "California *may no longer enforce* the MRB Rules with respect to drivers of property-carrying [commercial motor vehicles] subject to FMCSA's HOS rules." 83 Fed. Reg. at 67,480 (emphasis added). This does not present a retroactivity problem – it is merely the natural consequence of a preemption determination that, per the clear language of the federal statute, prevents States from enforcing these rules.

There can be little question that any judgment in pending litigation that raises claims based on California's MRB Rules would constitute prohibited enforcement of those rules. Indeed, since the FMCSA issued its preemption decision, three district courts have concluded that plaintiffs may not enforce California's MRB Rules in pending litigation, including as to antecedent conduct. *See Ayala v. U.S Xpress Enterprises, Inc.*, No. EDCV 16-137-GW(KKx), 2019 WL 1986760, at *2-3 (C.D. Cal. May 2, 2019) (rejecting plaintiff's argument that the FMCSA's determination is impermissibly retroactive and explaining that "[t]he Court *currently* has no authority to enforce the regulations under which Plaintiff brings his first cause of action") (emphasis original); *Robinson v. the Chefs'*

Warehouse, Inc., No. 15-cv-05421-RS, 2019 WL 4278926, at *4 (N.D. Cal. Sept. 10, 2019) ("Although *Ayala* is not binding authority, its conclusions appear sound and fully applicable here."); *Henry v. Central Freight Lines, Inc.*, No. 2:16-cv-00280-JAM-EFB, 2019 WL 2465330, at *4 (E.D. Cal. June 13, 2019) (granting summary judgment because "unless and until the Ninth Circuit determines otherwise, this Court will follow the FMCSA Preemption Order and will not enforce the preempted provisions"). These courts had little difficulty applying the familiar principle that a preempted State law is simply "without effect." *Cippollone*, 505 U.S. at 516. Assuming this Court reaches the issue, it should come to the same conclusion here.

CONCLUSION

For these reasons, the petition for review should be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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