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September 24, 2018

The Honorable Raymond P. Martinez, Administrator
Federal Motor Carrier Safety Administration
United States Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Petition for Determination That California Meal and Rest Break Rules for Commercial Motor Vehicle Drivers Are Preempted Under 49 U.S.C. 31141

Dear Administrator Martinez:

American Trucking Associations, Inc. (ATA) hereby petitions the Federal Motor Carrier Safety Administration (FMCSA) for a determination that the meal and rest break requirements of California law are preempted under 49 U.S.C. 31141, insofar as they are applied to commercial motor vehicle drivers whose hours of service are within the jurisdiction of the U.S. Department of Transportation (DOT).

ATA is the national association of the trucking industry, comprising motor carriers, State trucking associations, and national trucking conferences, and created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 1,800 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA and its members thus have a strong interest in preserving the regulatory uniformity that Congress has determined is appropriate for the safe operation of commercial motor vehicles, 49 U.S.C. 31131(b)(2), and in ensuring that DOT protects that uniformity by exercising the oversight authority Congress assigned to it in Section 31141.

I. Background

A. California's Meal and Rest Break Rules

Under California law, within the transportation industry,

> [a]n employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, 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.

Cal. Lab. Code § 512(a). *See also* Industrial Wage Commission (IWC) Wage Order No. 9 § 11(A)–(B), *codified at* Cal. Code Regs. Tit. 8, § 11090 (Wage Order 9) (establishing break rules "in the transportation industry"). Ordinarily, the employee must be "relieved of all duty" for the period, unless "the nature of the work prevents an employee from being relieved of all duty," and the employee enters into a written agreement to remain on duty, which he or she may revoke at any time. Wage Order 9 § 11(C).

California law also provides that, within the transportation industry,

> [e]very 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 (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

Wage Order 9 § 12(A).

In short, California generally requires employers in the transportation industry to provide employees with an off-duty 30-minute break for every five hours worked, before the end of each five-hour period; and a ten-minute off-duty break for every four hour period (or "major fraction thereof," *i.e.*, period greater than two hours), in the middle of each such period if possible. Commercial drivers covered by collective bargaining agreements that meet certain statutorily enumerated criteria, however, are not subject to the meal period requirement. Cal. Lab. Code § 512(e), (f)(2).

B. Agency Determinations Regarding State Laws and Regulations on Commercial Motor Vehicle Safety

Congress has instructed the Secretary of Transportation to "review State laws and regulations on commercial motor vehicle safety," and to make a number of determinations that are dispositive of whether they may be enforced. 49 U.S.C. 31141(c), (a). In relevant part, if the Secretary determines that the State law or regulation at issue is "additional to or more stringent" than a regulation prescribed

by the Secretary under 49 U.S.C. 31136, it may not be enforced if the Secretary further determines any of the following: "(A) the State law or regulation has no safety benefit; (B) the State law or regulation is incompatible with the regulation prescribed by the Secretary; or (C) enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce." 49 U.S.C. 31141 (c)(1), (c)(4).

The Secretary has delegated the authority established in Section 31141 to the Administrator of FMCSA. 49 C.F.R. § 1.87(f). Review under Section 31141 may be commenced "on the Secretary's own initiative or on petition of an interested person." 49 U.S.C. 31141(g). "[P]reemption under § 31141 is a legal determination reserved to the judgment of the Agency," *Article 19—A of the State of New York's Vehicle and Traffic Law*, 78 Fed. Reg. 56,267, 56,268 (Sept. 12, 2013). *See also, e.g.*, *Alabama Metal Coil Securement Act; Petition for Determination of Preemption*, 76 Fed. Reg. 72,495, 72,496 (Nov. 23, 2011) (same). Thus, the Administrator's consideration of a petition for a preemption determination under Section 31141 does not require the Agency to solicit public comment. *Id.*

II. Reasons for Granting the Petition

A. California's Meal and Rest Break Rules, as Applied to Commercial Drivers Working in Interstate Commerce, Are Rules on Commercial Motor Vehicle Safety Subject to Review Under Section 31141.

The threshold question in a Section 31141 analysis, following the language of the statute, is whether the provisions at issue are "law[s] or regulation[s] on commercial motor vehicle safety." 49 U.S.C. 31141(c)(1). To be sure, in response to a petition for preemption of these same break rules nearly a decade ago, the Agency concluded that they were *not* laws or regulations on commercial motor vehicle safety and that, therefore, they did not fall within the scope of the power Congress granted to the Secretary in Section 31141. *See 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).

The Agency rested its conclusion on two grounds. First, the Agency observed that the petitioners "provide[d] no evidence that these breaks undermine safety." 73 Fed. Reg. at 79205 n.3. Second, it concluded that the meal and rest break rules at issue were not "on commercial motor vehicle safety" for purposes of Section 31141 because they "cover far more than the trucking industry," and "are not even unique to transportation." *Id.* at 79205.

Those conclusions do not compel the same result here. On the first point, this petition—unlike the 2008 petition—provides abundant evidence that State break rules like California's significantly undermine safety. *See* pages 6–11, *infra*. On the second point, as we explain immediately below, the Agency's 2008 interpretation of

the language of 31141 was, respectfully, wrong as a matter of statutory interpretation, and the Agency should take this opportunity to correct it.

1. The Agency took the position in 2008 that the State meal and rest break rules at issue cannot be regulation "on commercial motor vehicle safety" for purposes of Section 31141 because they "cover far more than the trucking industry." 73 Fed. Reg. at 79205. But nothing in the language Congress employed in Section 31141 suggests that it applies only to State laws or regulations that cover the trucking industry alone, or that it categorically excludes laws that also affect other industries. By elevating form over substance in this manner, the Agency "creat[ed] an utterly irrational loophole," because when it comes to federal preemption of State law, "there is little reason why state impairment of [a] federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Morales v. TWA*, 504 U.S. 374, 386 (1992).

a. On the contrary, both the text of Section 31141 and its structural relationship with other statutory provisions make it clear that Congress's intent was broader than the construction the Agency gave it in 2008. DOT itself long ago recognized that in Section 208 of the Motor Carrier Safety Act of 1984—where Congress first established the review now codified, as amended, at 49 U.S.C. 31141—Congress "authorized the Secretary to preempt State laws and regulations *affecting* commercial motor vehicle safety which were found to be *inconsistent with Federal laws and regulations*." *Motor Carrier Safety Assistance Program*, 57 Fed. Reg. 13572, 13573 (April 16, 1992) (emphasis added).

b. More to the point, the 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) (emphasis added). And Section 31141 itself instructs the Agency to compare State laws and regulations "on commercial motor vehicle safety" with rules promulgated under Section 31136. 49 U.S.C. 31141(c)(1)(A). It follows that State laws and regulations covering the same ground as federal regulations promulgated under Section 31136 are *precisely* what Congress had in mind when it enacted Section 31141.

And that is the case here: Section 31136 is the statutory authority under which FMCSA has promulgated, among other things, the hours of service (HOS) regulations that govern commercial motor vehicle drivers' working time. *See Hours of Service of Drivers*, 78 Fed. Reg. 81134, 81141 (Dec. 27, 2011). In particular, it is the authority under which the Agency began to affirmatively include specific break requirements for commercial drivers in the hours of service rule it promulgated in 2011. *Ibid.* The federal break rule is unquestionably a rule "on commercial motor vehicle safety" under Section 31136, and is part of the baseline against which Congress instructed the Agency to compare State rules under Section 31141. Insofar as a State's break rules apply to drivers that are within the Agency's HOS jurisdiction, then, they are within the scope of the review Congress established in Section 31141.

c. By tying the scope of the Secretary's review directly to the scope of the Secretary's authority to regulate the trucking industry in this way, Congress provided a clear, well-defined framework for determining whether a state law or regulation is subject to Section 31141. This approach ensures that a state law or regulation that interferes with the regulatory harmony Congress sought to establish will not escape review simply because, as a formal matter, the interference occurs by virtue of a "particularized application of a general statute."

At the same time, it ensures that the scope of review under Section 31141 is carefully limited. In 2008, the Agency rejected the contention that Section 31141 gives it the "power to preempt any state law or regulation that regulates or *affects* any matters within the agency's broad Congressional grant of authority," because such an approach to 31141 would extend its reach expansively. 73 Fed. Reg. at 79,206 (emphasis added). As the Agency observed at the time, "it is conceivable that high State taxes and emission controls could affect a motor carrier's financial ability to maintain compliance with the …. FMCSRs." *Ibid.* The Agency doubted, however, that it had "the authority to preempt State tax or environmental laws." *Ibid.*

But by construing Section 31141's scope as congruent with that of Section 31136, the Agency would ensure that review under 31141 would *not* extend to anything that merely *affects* matters within the Agency's regulatory authority. Rather, it would extend, as Congress intended, only to state laws or regulations that actually regulate in the sphere in which the Agency is empowered to regulate under 31136. State tax or environmental laws would *not* fall within the scope of Section 31141 under this approach, because Section 31136 does not give the Secretary the authority to promulgate tax or environmental regulations. But because Section 31136 *does* give the Secretary the authority to promulgate regulations governing the hours and breaks of commercial drivers working in interstate commerce, State laws or regulations that do the same are within the scope of review under Section 31141.

2. The Agency's 2008 interpretation is also inconsistent with Congress's finding that "uniform commercial motor vehicle safety measures … would reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations." 49 U.S.C. 31131(b)(2). Indeed, because imposition of California's break rules on commercial drivers constitutes a serious threat to highway safety—as we explain below, by specifying breaks at arbitrary times rather than when they are most needed, and by ironically making it more difficult for drivers to find safe places to park when they need to rest—continuing to interpret Section 31141 as the Agency did in 2008 would interfere with the "the assignment and maintenance of safety as the [Agency's] highest priority," and would frustrate "the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation." 49 U.S.C. 113(b).

a. Under California rules, motor carriers are required to make a far greater number of breaks available to a driver than the federal HOS rules require, with far

less flexibility than the federal rules allow. Under the federal rules, most drivers are prohibited from driving if they have gone eight hours without a 30-minute off-duty or sleeper-berth break. 49 C.F.R. § 395.3(a)(3)(ii). In addition, drivers must be provided with breaks any time they feel fatigued or otherwise unable to safely drive. 49 C.F.R. § 392.3. Taken together, the federal rules require that drivers take at least one half-hour break every eight hours, but within the bounds of that single constraint drivers have the flexibility to take breaks *when they need them*, based on their assessment of their fatigue levels, attentiveness, and other relevant circumstances that vary from day to day and driver to driver.

California's meal and rest break rules impose a far more elaborate set of one-size-fits-all constraints, and reduce flexibility accordingly.[1] To illustrate, take the example of a driver who starts her day at 7 a.m. and, operating solely under the constraints of

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[1] To be sure, the California rules permit on-duty, as opposed to off-duty, 30-minute meal breaks, when "the nature of the work prevents an employee from being relieved of all duty," *and* the employee enters into a written agreement that he or she may revoke at any time. Wage Order 9 § 11(C). As a practical matter, though, this does not mitigate the inflexibility of meal break requirement: in most cases, the nature of truck driving does *not* prevent employees from being relieved of all duty—as evidenced by the fact that the federal rules *require* most drivers to be relieved of duty for a single 30-minute break—and even where it does, the employee's ability to unilaterally revoke an agreement to take an on-duty break would render such an agreement unreliable. The California rules also, in theory, permit exceptions to the 10-minute off-duty rest period rule, but only at the discretion of the State's Division of Labor Standards Enforcement. Wage Order 9 § 17. The discretionary nature of such an exemption, as well its revocability, and the fact-intensive inquiry necessary to evaluate an exemption request in the first place, mean that it, too, fails to build significant flexibility into the rule, as a different DOT agency—the Pipeline and Hazardous Materials Safety Administration—recently recognized in a related context. *See Hazardous Materials: California Meal and Rest Break Requirements*, 83 Fed. Reg. 47,962, 47,968 (Sept. 21, 2018) (concluding that "the mere possibility of obtaining relief from California's requirement, particularly since such relief is within the discretion of the State" renders it of little value in terms of operational flexibility).

In addition, the California Supreme Court has held that California's meal break rule requires an employer to "relieve[] its employees of all duty, relinquish[] control over their activities and permit[] them a reasonable opportunity to take an uninterrupted 30-minute break, and … not impede or discourage them from doing so," but does not require them to "police meal breaks and ensure no work thereafter is performed." *Brinker Restaurant Corp. v. Sup. Ct.*, 273 P.3d 513, 537 (Cal. 2012). The same is true of California's 10-minute rest break rule. *See* Cal. Lab. Code § 226.7(b) ("[a]n employer *shall not require an employee to work during a meal or rest or recovery period* mandated pursuant to an … order of the [IWC]" (emphasis added)). In principle, this might appear to loosen the constraints of the California break rules, but again, as a practical matter, it does not. In order to relieve drivers of all duty and relinquish control over their activities—without discouraging them from making use of break opportunities—a motor carrier would at a minimum have to build the breaks into a driver's day on the assumption that they will be taken, and plan a driver's workload and routes accordingly. Failure to do so—that is, failure to adhere to the constraints of the California rules as an operational matter—would expose a carrier to allegations that it had not offered drivers "[b]ona fide relief from duty." *Ibid.* In light of that exposure, which has materialized in a massive wave of class-action litigation against the trucking industry over the course of the last decade premised on alleged violations of California's break rules, some carriers go so far as to not just *relieve* their drivers of duty at the times appointed by the California rules, but to attempt to *force* them off-duty, even if they wish to continue working, as a prophylactic measure against litigation risk and potentially ruinous liability.

the federal HOS rules, would finish her work at 5 p.m.—a ten-hour day. Such a driver has the flexibility under the federal rules to take a single break *any time* between 9 a.m. and 3 p.m.—and might well choose to take that break around, say, 2 p.m., knowing that she often feels some fatigue at that point in the day. Of course, if on a particular day she felt fatigued at noon, she could take an earlier break without further disrupting her work day.

California's rules, by contrast, would require her carrier to provide her with a 10-minute break as close as practicable to 9 a.m., a 30-minute break some time before noon, another 10-minute break as close as practicable to 1 p.m., and another 30-minute break some time before 5 p.m. And while those breaks may *nominally* be 10 and 30 minutes long, as a practical matter they will typically be far longer—unless they coincide with a scheduled stop, a commercial driver's break will also entail significant time to pull off the highway, find a safe place to park, and shut down and secure the equipment, as well as time to start up and get back on the highway at the conclusion of the break.

The detrimental effect on safety is twofold. *First*, taking multiple breaks at arbitrary intervals when they aren't needed is a strong disincentive to taking breaks when they *are* needed. To return to the example of the driver above, should she feel her usual fatigue around 2 p.m., she may be inclined to forgo the opportunity to take yet another break at that time, when she has already been provided with three breaks under the California rules. As another DOT agency recently put it, "California's rigid rules … require drivers to take breaks within tightly specified intervals, rather than allowing drivers to use their judgment." *Hazardous Materials: California Meal and Rest Break Requirements*, 83 Fed. Reg. 47,961, 47,966 (Sept. 21, 2018). The layering of State break rules like California's on top of the federal HOS rules thus interferes with the latter's flexibility to the detriment of driver well-being and highway safety. *Second*, by consuming significant amounts of what would otherwise be productive time permitted under the federal HOS rules, the California rules extend a driver's day significantly. In the example above, using the highly conservative estimate of five minutes on either end of a break to find parking and return to the highway, the California rules would take 80 minutes of productive time out of the driver's day (three additional breaks totaling 50 minutes, and 30 minutes of "overhead"). This would mean extending her day an hour and twenty minutes to accomplish the same amount of work—which in turn would trigger yet *another* 10-minute break under California rules as the day extended into a "major fraction" of an additional four-hour period. Taking all this into account, the driver's day would now end at 6:40 p.m., rather than 5:00 p.m. That, in turn, would mean a longer duty period, with any attendant elevated risks of fatigued driving in those marginal hours, and an arbitrarily shorter—and potentially less restorative—extended off-duty period.

In sum, any imposition of arbitrary State break rules like California's will inevitably disrupt the flexible HOS framework that the Agency has deemed

appropriate to the needs of highway safety, with palpable negative impacts "on commercial motor vehicle safety."

b. By arbitrarily forcing trucks off the road more frequently, State rules like California's also contribute to a critical shortage of truck parking, with serious safety implications. The shortage of available truck parking has been a challenge for the industry for decades, and continues to grow more serious. As far back as 1996, research sponsored by the Federal Highway Administration (FHWA) found a shortage of some 52,700 truck parking spaces on the interstate highway system. Trucking Research Institute, Apogee Research, Inc., and Wilbur Smith Assocs., *Commercial Driver Rest and Parking Requirements: Making Space for Safety* 20 (May 1996), *available at* https://www.fhwa.dot.gov/publications/research/safety/commercial.pdf. All indications are that the problem has only gotten more serious in the intervening years. *See, e.g.*, FHWA, *Commercial Motor Vehicle Parking Shortage* 10 (May 2012) (concluding that widespread and acute truck parking shortages will be exacerbated by anticipated growth in truck movements), *available at* https://ops.fhwa.dot.gov/freight/documents/cmvrptcgr/cmvrptcgr052012.pdf.

Of course, the truck parking shortage is not just an issue of convenience for commercial drivers and motor carriers. As Congress has recognized on multiple occasions, it is a crucial safety issue as well. In 1998, for example, as part of the Transportation Equity Act for the 21st Century (TEA-21), Congress instructed DOT to "conduct a study to determine the location and quantity of parking facilities … that could be used by motor carriers to comply with Federal hours of service rules." P.L. 105-78 § 4027. That study, completed in 2002, documented shortages of truck parking nationwide. *See* S. Fleger *et al.*, *Study of Adequacy of Commercial Truck Parking Facilities—Technical Report* (March 2002), *available at* https://www.fhwa.dot.gov/publications/research/safety/01158/01158.pdf. In 2005, as part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Congress established a truck parking pilot program to help fund construction of truck parking to produce "positive effects on highway safety." P.L. 109-59 § 1305(b)(4)(C).

Most recently, in 2012 Congress enacted "Jason's Law"[2] as part of the Moving Ahead for Progress in the 21st Century Act (MAP-21), recognizing that "it is a national priority to address … the shortage of long-term parking for commercial motor vehicles on the National Highway System to improve the safety of motorized and non-motorized users and for commercial motor vehicle operators." P.L. 112-141

[2] Jason's Law was named in honor of Jason Rivenburg, a commercial driver who, on March 4, 2009, was forced by lack of available parking to remain overnight at an abandoned gas station, where he was murdered in his sleep. *See* Federal Highway Administration, *Jason's Law Truck Parking Survey Results and Comparative Analysis* 1 (Aug. 2015), *available at* https://ops.fhwa.dot.gov/freight/infrastructure/truck_parking/jasons_law/truckparkingsurvey/jasons_law.pdf.

§ 1401(a).[3] Jason's Law required DOT to survey the States "to evaluate the[ir] capability … to provide adequate parking and rest facilities for commercial motor vehicles" and to periodically update the survey. *Id.* § 1401(c).

That report, which FHWA issued in 2015, concluded that

> [t]ruck parking shortages are a national safety concern. An inadequate supply of truck parking spaces can result in two negative consequences: first, tired truck drivers may continue to drive because they have difficulty finding a place to park for rest and, second, truck drivers may choose to park at unsafe locations, such as on the shoulder of the road, exit ramps, or vacant lots, if they are unable to locate official, available parking."

Federal Highway Administration, *Jason's Law Truck Parking Survey Results and Comparative Analysis* 1–2 (Aug. 2015) (Jason's Law Report), *available at* https://ops.fhwa.dot.gov/freight/infrastructure/truck_parking/jasons_law/truckparkingsurvey/jasons_law.pdf. FHWA found that "[m]ore than 75 percent of truck drivers … reported regularly experiencing problems with finding safe parking locations when rest was needed," and that a staggering "[n]inety percent reported struggling to find safe and available parking during night hours." *Id.* at viii; Nearly 80% of drivers reported that they have difficulty finding parking at least once per week. *Id.* at 66. *See also* C. Boris et al., *Managing Critical Truck Parking Case Study—Real World Insights from Truck Parking Diaries* 16 (2016) (finding that 83.9% of surveyed drivers park in an unauthorized location at least once each week, and nearly half—48.7%—three or more times per week), *available at* http://atri-online.org/wp-content/uploads/2016/12/ATRI-Truck-Parking-Case-Study-Insights-12-2016.pdf.

California has long ranked among the worst in the nation in terms of the truck parking shortage. In a 49-state parking space survey conducted in 2000, California had the highest ratio of demand to supply of commercial vehicle parking along interstates and other high-volume national network routes. Fleger *et al.*, *supra*, at 33 Table 17. *See also* C. Rodier *et al.*, *Commercial Vehicle Parking in California: Exploratory Evaluation of the Problem and Solutions (California PATH Research Report UCB-ITS-PRR-2010-4)* 4 (Mar. 2010) ("[r]ecent truck parking demand estimates in California indicate that demand exceeds capacity at all public rest areas and at 88 percent of private truck stops on the 34 corridors in California with the highest volumes of truck travel"), *available at* https://itspubs.ucdavis.edu/wp-content/themes/ucdavis/pubs/download_pdf.php?id=1481. And a report prepared last year for the Federal Highway Administration and the Oregon Department of Transportation

[3] MAP-21 also continued the truck parking funding begun in SAFETEA-LU, making activities previously eligible for funds under the prior act's pilot program instead eligible under the National Highway Performance Program, the Surface Transportation Program, and the Highway Safety Improvement Program. *See* P.L. 112-141 §§ 1108(a)(23), 1112(a), 1116(b)(8), 1401(b)(2).

noted that the safety hazard of the truck parking shortage in Oregon "increases closer to the California border," where "more crashes are occurring," likely as "a result of encountering troubles finding safe and adequate parking in Southern Oregon." *See* S. Hernandez & J. Anderson, *Truck Parking: An Emerging Safety Hazard to Highway Users* 135 (July 2017). In other words, the truck parking shortage that California's break requirements exacerbate appears not to be confined within California's borders—which would be a serious enough problem—but may produce spillover effects across state lines.

This acute shortage is a pressing highway safety issue. For one thing, when a driver needs to find parking because he or she is becoming fatigued, a parking shortage will potentially mean more time behind the wheel in a fatigued state, looking for a place to rest. While the exact magnitude of the role fatigue plays in highway crashes is a matter of some debate, there is no question that fatigued driving is a serious safety issue, and that an increasing parking shortage will exacerbate it. For example, in a 2016 survey of drivers by the Washington State Department of Transportation, more than 60% of drivers reported that at least three times per week they drive while fatigued because they are unable to find adequate parking when they need to rest. *WSDOT Truck Parking Survey* 2 (Aug. 2016), *available at* http://www.wsdot.wa.gov/NR/rdonlyres/D2A7680F-ED90-47D9-AD13-4965D6D6BD84/114207/TruckParkingSurvey2016_web2.pdf.

For another, a shortage of safe, authorized parking spaces inevitably means that drivers will have to resort to unsafe, unauthorized locations—such as shoulders and ramps—where they present a serious hazard to other highway users. That drivers will be forced by parking shortages to resort to such unsafe measures is no mere speculation: As many as 94% of State motor carrier safety officials surveyed for FHWA's Jason's Law Report identified locations used by commercial drivers for unofficial or illegal parking. Jason's Law Report at 60. Of those locations, over three quarters were highway ramps or shoulders, *id.* at 61, and the vast majority of unofficial parking happened at night or in the early morning hours, *id.* at 62.

We are confident that FMCSA—the agency charged with overseeing the safety of commercial motor vehicles on the nation's highways—will appreciate the fact that commercial vehicles parked on shoulders or entry and exit ramps at night are acutely dangerous. Even during the day, "[v]ehicles parked on the shoulders … are a serious potential hazard to other motorists because they are fixed objects within the roadway cross-section that are unprotected by a barrier or horizontal buffer area." Jason's Law Report at 7. And day or night, "[w]hen trucks park on shoulders or ramps …, maneuvering in and out of traffic … poses safety risks to the truck driver and other vehicles due to the mix of higher speed traffic and the slower speeds of the trucks in and out of these areas." *Ibid.* Unsurprising, then, that a 2015 Virginia study found that fully one quarter of truck-related crashes in major traffic corridors occurred on entrance and exit ramps. *VDOT Virginia Truck Parking Study* 43 (July 2015),

available at http://www.virginiadot.org/projects/resources/VirginiaTruckParking Study_FinalReport_July2015.pdf.

In short, inadequate truck parking will often mean that drivers face a choice between driving while fatigued or parking where their vehicles will present a hazard for other motorists. That is a choice no driver should have to face, and it makes aggressive efforts to mitigate the parking shortage a matter of urgency, as Congress has recognized.

By the same token, anything that arbitrarily *exacerbates* the parking shortage is a similarly urgent safety matter. And this is precisely what the State meal and rest break rules at issue here do, for the simple reason that any increase in the time commercial drivers spend on arbitrary breaks, and the frequency with which they take them, entails a proportionate increase in the demand for scarce parking. For the Agency to nevertheless characterize state break rules as anything other than "on commercial motor vehicle safety" would be a gross dereliction of its duty to exercise its authority over highway safety as its "highest priority," 49 U.S.C. 113(b), and over State rules that operate to its detriment.

B. California's Meal and Rest Break Rules Are Preempted Because They Have No Safety Benefit, Are Incompatible with Federal Regulations, and Unreasonably Burden Interstate Commerce.

1. Section 31141 next instructs the Agency to decide whether the State law or regulation at issue "has the same effect as a regulation prescribed by the Secretary under section 31136," "is less stringent than such regulation," or "is additional to or more stringent than such regulation. 49 U.S.C. 31141 (c)(1). Here, the California rules are unquestionably "additional to or more stringent than such regulation." As explained above, whereas carriers can meet the federal HOS rules by requiring drivers to take a single, flexible 30-minute break during a duty period, the California rules require carriers to provide several additional, inflexible breaks during the course of a given work period.

2. In the case of State laws or regulations that are additional to or more stringent than the federal rules, the statute prohibits their enforcement if the Agency determines that *any* of the following are true: (a) they "have no safety benefit;" (b) they are "incompatible" with DOT regulations; or (c) their enforcement "would cause an unreasonable burden on interstate commerce." 49 U.S.C. 31141(c)(4). California's meal and rest breaks, as applied to commercial drivers who work in interstate commerce, fail under all three standards.

a. As explained in detail above, California's rules work to the *detriment* of the level of safety provided by the federal HOS rules, by interfering with the flexibility that encourages drivers to take breaks when they most need them, and by making it harder for drivers to find safe places to do so. To be preempted under Section 31141(c),

a State rule need only have "no safety benefit." The negative safety impact of California's rules, as applied to drivers within the Agency's jurisdiction, more than meets this criterion.

b. The California rules are also incompatible with federal HOS rules. In the regulations it adopted "[t]o provide guidelines for a continuous regulatory review of State laws and regulations," 49 C.F.R. § 355.1(b), the Agency has defined "[c]ompatible or compatibility" to mean, in relevant part, "that State laws and regulations applicable to interstate commerce … are *identical to* the FMCSRs … or *have the same effect* as the FMCSRs," *id.* at § 355.5 (emphases added). The California break rules cannot meet this standard: they are indisputably not "identical to" the federal break rule, and their effect, as discussed above, is far different.

c. Finally, California's rules impose an immense burden on interstate commerce that, especially in the absence of any countervailing benefit, cannot be regarded as reasonable. The California rules entail an enormous loss in driver productivity by requiring carriers to provide far more off-duty time within a driver's duty window than the Agency has deemed necessary under the federal rules. By adding, at a conservative estimate, 80 minutes of additional non-productive time to a ten-hour day beyond the requirements of the federal HOS rules in the example above, the California rules would arbitrarily decrease that driver's productivity by more than 13%. Given the crucial role of the trucking industry in moving the materials and goods that are the lifeblood of the national economy, such a productivity reduction is a massive burden on interstate commerce. *See, e.g.*, American Trucking Associations, *American Trucking Trends 2017* 5 (2017) (In 2016, trucks carried 70.6% of primary shipment domestic tonnage, accounting for 79.8% of the nation's primary shipment freight bill).

Even focusing on California alone, the State's large share of the national economy, and the outsize role of its ports in interstate commerce, would be more than enough to represent an unreasonable burden on interstate commerce. *See* Port of Oakland Seaport, *Facts and Figures*, *available at* http://www.oaklandseaport.com/performance/facts-figures/ ("California's three major container ports carry approximately 50% of the nation's total container cargo volume"). But Section 31141 does not limit the Agency to looking only to the State whose rules are the subject of a preemption determination: rather, the Agency "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). In other words, the Agency should consider not just the effect on interstate commerce of California's rules, but what the cumulative effect would be if *all* States implemented similar rules. Needless to say, the proliferation of rules like California's in other states, applied to commercial drivers working in interstate commerce, would increase the associated freight productivity loss enormously, and would represent an even larger burden on interstate commerce.

III. Conclusion

The Agency should grant the petition, and issue an order declaring that California's meal and rest break rules, as applied to drivers subject to DOT's jurisdiction to regulate hours of service, do not meet the standards set forth in 49 U.S.C. 31141 and therefor may not be enforced.

Respectfully submitted,

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