APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
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U.S. COURT OF
APPEALS

GERALDO ORTEGA; MICHAEL D. PATTON, individually and on behalf of themselves, all others similarly situated, and the general public, Plaintiffs-Appellants, v. J. B. HUNT TRANSPORT, INC., an Arkansas corporation, Defendant-Appellee.	No. 14-56034 D.C. No. 2:07-cv-08336-BRO-SH MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Beverly Reid O'Connell, District Judge, Presiding

Argued and Submitted April 4, 2017
Pasadena, California

Before: WARDLAW and CALLAHAN, Circuit Judges, and KENDALL,[**] District Judge.

Appellants Gerardo Ortega and Michael Patton (together, "Plaintiffs") filed a class action against Appellee J.B. Hunt Transport, Inc. ("J.B. Hunt"), alleging that J.B. Hunt's compensation system violated California's minimum wage, meal break, and rest break laws. The district court found that the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501 *et seq*., preempted Plaintiffs' claims. The district court granted J.B. Hunt's motion for judgment on the pleadings regarding Plaintiffs' meal and rest break claims, and then granted J.B. Hunt's motion for summary judgment on Plaintiffs' minimum wage claims. The district court determined that these laws significantly impacted J.B. Hunt's prices, routes, and services, and thus were preempted by the FAAAA. Ortega appealed these decisions. We have

[**] The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

jurisdiction pursuant to 28 U.S.C. § 1291. We vacate and remand.

1. "A district court's decision regarding preemption is reviewed de novo." *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998). A "district court's grant of summary judgment" is also reviewed de novo, *Nev. Dep't of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011), as is a decision granting judgment on the pleadings under Federal Rule of Civil Procedure 12(c), *Berg v. Popham*, 412 F.3d 1122, 1125 (9th Cir. 2005).

2. While this case was pending on appeal, we decided *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014). There, we found that California's meal and rest break laws are not "related to" prices, routes, or services, and therefore are not as a matter of law preempted by the FAAAA. *Id.* at 647–48 & n.2. The district court did not have the benefit of our decision in *Dilts*, and that decision compels the conclusion that the district court erred in granting J.B. Hunt's motion for judgment on the pleadings on Plaintiffs' meal and rest break claims.

3. The district court similarly erred in granting summary judgment in J.B. Hunt's favor on Plaintiffs' minimum wage claims. In *Mendonca*, we held that that "[w]hile [California's prevailing wage law] in a certain sense is 'related to' [the plaintiff's] prices, routes and services, . . . the effect is no more than indirect, remote, and tenuous." 152 F.3d at 1189. In *Dilts*, we reiterated that the FAAAA does

not preempt state wage laws, even if those laws differ from state to state and motor carriers must take these into account. 769 F.3d at 647–48.

VACATED AND REMANDED.

APPENDIX B

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **CV 07-08336 (BRO) (FMOx)**

Date October 2, 2013

Title Gerardo Ortega et al v. J. B. Hunt Transport, Inc. et al

Present: The Honorable **BEVERLY REID O'CONNELL, United States District Judge**

Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

Proceedings: (IN CHAMBERS)

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS [97]

Pending before the Court is Defendant J.B. Hunt Transport Inc.'s motion for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c). (Dkt. No. 97.) In this action, Plaintiffs Gerardo Ortega and Michael Patton seek to recover unpaid wages and penalties from Defendant. According to Plaintiffs, California labor law requires Defendant to provide meal and rest breaks, and failure to do so subjects Defendant to provide reimbursement to Plaintiffs, in addition to penalties. Defendant contends, however, that federal law preempts the particular California labor laws, and, accordingly, Defendant is entitled to judgment on the pleadings as to Plaintiffs' claims relating to meal and rest break requirements. For the reasons discussed below, Defendant's motion is GRANTED.

I. FACTUAL BACKGROUND

Defendant J.B. Hunt Transport Inc. is one of the largest transportation logistics companies in North America. (First Am. Compl. ("FAC") ¶ 11.) Defendant's services include transporting freight and property for customers nationwide. (Mot. 2.) Plaintiffs Gerardo Ortega and Michael Patton were formerly employed by Defendant as intermodal drivers, based out of its location in South Gate, California. (FAC ¶ 9.) Ortega also worked for Defendant as a Direct Contract Services driver. (FAC ¶ 9.)

In their complaint, Plaintiffs allege that Defendant routinely failed to provide its employee drivers with meal and paid rest periods, as required by California Labor Code sections 226.7, 512, and 516, as well as California Industrial Welfare Commission Wage Order No. 9-2001 ("Wage Order No. 9"), sections 11 and 12. (FAC ¶ 44.) Apparently, Defendant treated its driver employees as if they were exempt from the meal and rest breaks. (FAC ¶ 44.) Plaintiffs contend Defendant is incorrect in treating its employees as exempt; accordingly, they filed this action to recover penalties provided by California law for failure to provide meal and rest breaks. (FAC ¶ 45.)

On May 24, 2013, Defendant filed this motion for judgment on the pleadings. (Dkt. No. 97.) In its motion, Defendant contends California Labor Code sections 226.7, 512, and 516, as well as Wage Order No. 9, are preempted by the Federal Aviation Administration Authorization Act ("FAAAA"). (Mot. 1.) Accordingly, Defendant contends it is entitled to judgment on the pleadings with respect to Plaintiffs' claims that relate to meal and rest break requirements. (Mot. 2.)

II. LEGAL STANDARD

After the pleadings are closed but early enough not to delay trial, any party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). The standard applied to a Rule 12(c) motion is essentially similar to that applied on Rule 12(b)(6) motions; all allegations of fact by the party opposing the motion

are accepted as true and the complaint is construed in the light most favorable to them. *McGlinchey v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). However, "conclusory allegations without more are insufficient to defeat a motion [for judgment on the pleadings]." *Id.*

As with Rule 12(b)(6) motions, "[g]enerally, a district court may not consider any material beyond the pleadings[.] . . . However, material which is properly submitted as part of the complaint may be considered." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted); William W Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial ("Rutter Guide") § 9:339.1 (2005). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)) motion to dismiss[,]" or on a Rule 12(c) motion, without converting the motion into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (citing *Romani v. Sherson Lehman Hutton*, 929 F.2d 875, 879 n.3 (1st Cir. 1991)). If the documents are not physically attached to the complaint, they may be considered if their "authenticity . . . is not contested" and "the plaintiff's complaint necessarily relies" on them. *Parino v. FHP, Inc.*, 146 F.3d 699, 705–06 (9th Cir. 1998). "The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the

pleading." 5C Wright & Miller, Federal Practice & Procedure § 1363 (3d ed. 2004).

III. REQUEST FOR JUDICIAL NOTICE

In connection with Defendant's motion, Plaintiffs and Defendant have requested the Court to take judicial notice of certain facts. (Dkt. Nos. 102, 117.) Federal Rule of Evidence 201 empowers a court to take judicial notice of facts that are either "(1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Under Federal Rule of Evidence 201(b), a "judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(d); *Mullis v. U. S. Bankr. Court for Dist. of Nevada*, 828 F.2d 1385, 1388 n.9 (9th Cir.1987). According to Federal Rule of Evidence 201, the Court "*must* take judicial notice if a party requests it and supplies the court with the necessary information." Fed. R. Evid. 201(c)(2) (emphasis added). "Pursuant to Federal Rule of Evidence 201, the Court *may* take judicial notice of papers filed in other courts." *Hott v. City of San Jose*, 92 F. Supp. 2d 996, 998 (N.D. Cal. 2000). "[W]hen a court takes judicial notice of another court's opinion, it may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to

reasonable dispute over its authenticity.'" *Lee v. City of L.A.*, 250 F.3d 668, 690 (9th Cir. 2001).

A. Plaintiff's Request for Judicial Notice

In Plaintiffs' request for judicial notice, they ask the Court to notice the following facts: (1) decision of the Northern District Court of California in *Mendez v. R&L Carriers, Inc.*, No. C 11-2478, 2012 WL 5868973 (N.D. Cal. Nov. 19, 2012); (2) the decision of the United States Supreme Court in *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (May 13, 2013); (3) the decision of the United States Supreme Court in *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013); (4) House Report, Conference Report 103-677 (1994); (5) the statement of President William J. Clinton, statement on signing the Federal Aviation Administration Authorization Act of 1994, 2 Pub. Papers 1494 (Aug. 23, 1994); (6) Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers, 73 F.R. 79204-01 (December 24, 2008); (7) Department of Industrial Relations industry classifications; (8) Industrial Welfare Commission Wage Orders numbers one through seventeen; (9) the decision of the Northern District Court of California in *Brown v. Wal- Mart Transportation LLC*, No. C 08-5221, 2013 WL 1701581 (N.D. Cal. April 18, 2013); (10) order granting judgment on the pleadings in *Martin Marine v. Interstate Distributor Co.*, RG07358277 (Cal. Super. Ct. Alameda Mar. 3, 2011); (11) order on defendants' motion for summary judgment in *Cemex Wage Cases*, J.C.C.P CJC-07-4520 (Cal. Super. Ct.

S.F. Feb 19, 2010); (12) order denying motion of defendants for summary judgment and finding no federal preemption in *Russell Kastanos v. Central Concrete Supply Co.*, HG07-319366 (Cal. Super. Ct., Alameda Sep. 11, 2009). Additionally, subsequent to its request for judicial notice, Defendant filed a notice of decision in *Schwann v. Fedex Ground Package System*, No. 11-11094, 2013 WL 3353776 (D. Mass. July 3, 2013).

With respect to the court opinions, the Court takes judicial notice that those opinions exist, as well as the decisions to which those courts came. *See Lee*, 250 F.3d at 690. As for President Clinton's statement, the Court takes notice that he made the statement; however, the Court cannot accept as true the facts asserted in his statement. *See* Fed. R. Evid. 802. Likewise, the Court will take notice of the petition for preemption of California regulations on meal and rest breaks for the fact that the petition was made and denied, but the Court cannot accept as true the assertions of fact made therein. *See id.* Finally, the Court will take notice of the Department of Industrial Relations classifications, as well as the Industrial Welfare Commission wage orders.

B. Defendant's Request for Judicial Notice

In Defendant's request for judicial notice, it asks the Court to take notice of a recent decision in *Burnham v. Ruan Transportation*, No. SACV 12-0688, Docket No. 172 (C.D. Cal. August 16, 2013). In opposition to Defendant's request, Plaintiff filed a request to strike improper argument from

Defendant's request. (Dkt. No. 118). Plaintiffs do not argue the decision of which Defendant asks the Court to take notice is not properly noticeable, but they do contend Defendant makes improper arguments in its request. Accordingly, the Court will take notice of the *Burnham* decision. *See Lee*, 250 F.3d at 690. To the extent Defendant makes arguments within its request for judicial notice, the Court will not consider those arguments, and hereby strikes them from Defendant's request.

IV. DISCUSSION

In its motion, Defendant contends it is entitled to judgment on the pleadings as a matter of law. Specifically, it argues the Federal Aviation Administration Authorization Act ("FAAAA") preempts California Labor Code sections 226.7, 512, and 516, as well as Wage Order No. 9, as applied to motor carriers. Therefore, according to Defendant, it is not required to provide meal and rest breaks to its drivers, nor is it subject to any penalties for not providing them. For the reasons discussed below, the Court agrees.

It is a basic principle that federal law may preempt state law. Indeed, Article VI of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. And ever since the Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), "it has been settled that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group Inc.*, 505

U.S. 504, 516 (1992). But when deciding an issue of preemption, a district court must "start[] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516. Hence, "the ultimate touchstone" of a court's preemption analysis is congressional intent, *id.* (internal quotation marks omitted); accordingly, a court should find preemption where congressional intent is either "explicitly stated in the statute's language or is implicitly contained in its structure and purpose," *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 95 (1983). Nevertheless, a court should not find preemption based merely on "general expressions of 'national policy.'" *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).

In *English v. General Electric Co.*, 496 U.S. 72 (1990), the Supreme Court identified three ways a federal law might preempt state law: (1) by express preemption, where Congress explicitly defines the extent to which its provisions are intended to preempt state law; (2) by field preemption, where the state law in question regulates activity in a field that Congress intends the federal government to exclusively regulate; and (3) by conflict preemption, where it is impossible to comply with both state and federal law, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *English*, 496 U.S. at 78–79.

Here, Defendant asserts that Congress expressly intended the FAAAA to preempt certain

state laws (Mot. 7), and they are correct in their assertion. Indeed, 49 U.S.C. § 14501(c)(1) is unequivocal: "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service* of any motor carrier . . . *with respect to the transportation of property*." 49 U.S.C. § 14501(c)(1) (emphasis added).[1] Therefore, Defendant's motion turns on the answer to the following question: do California Labor Code sections 226.7, 512, and 516, and Wage Order No. 9, when applied to motor carriers, fall within the preemption language of § 14501(c)(1)? In the Court's view, they do indeed.

In "identify[ing] the domain expressly pre-empted" by a federal statute, a court must "focus first on the statutory language, which necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013). As the statutory language here clearly conveys, to be preempted by § 14501(c)(1), a state provision must (1) be "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 42 U.S.C.

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[1] In its entirety, the preemption section provides, "Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

§ 14501(c)(1).[2] "[T]he key phrase, obviously, is 'relating to.'" *Morales*, 504 U.S. at 383. And "[t]he ordinary meaning of ['relating to'] is a broad one . . . and the words thus express a broad pre-emptive purpose." *Id.* Therefore, for preemption, State laws need only *"a connection with, or reference to*" a motor carrier's "price, route, or service . . . with respect to the transportation of property." *See Rowe*, 552 U.S. at 370. The Supreme Court has also emphasized that "preemption may occur even if a state law's effect on [prices], routes or services is only indirect," and "it makes no difference whether a state law is consistent or inconsistent with federal regulation." *Id.* (internal quotation marks omitted). Finally, "pre-emption occurs at least where state laws have a '*significant impact*' related to Congress' *deregulatory* and *pre-emption-related* objectives," which the Court has described as "helping assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices.'" *Id.* (emphasis added). And as the Ninth Circuit has articulated, in borderline cases, "the proper inquiry is whether the provision, directly or indirectly, 'binds the . . . carrier to a particular price, route or service and thereby interferes with competitive market forces within the

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[2] The Supreme Court has interpreted this language in several different opinions. *See, e.g.*, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Dan's City Used Cars Inc. v. Pelkey*, 133 S. Ct. 1769 (May 13, 2013); *Am. Trucking Ass'ns Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (June 13, 2013); *cf. Morales v. Trans World Airlines Inc.*, 504 U.S. 374 (1992) (interpreting the precursor to § 14501(c)(1), whose application is identical).

. . . industry." *Am. Trucking Ass'ns v. City of L.A.*, 660 F.3d 384, 397 (9th Cir. 2011) *overruled on other grounds* by *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 133 S. Ct. 2096 (2013).

Having articulated the proper lens through which the Court must look for its preemption analysis, the Court will now consider those regulations: California Labor Code section 226.7(a) forbids an "employer [from] requir[ing] any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." One of the orders mandated by the Industrial Welfare Commission is Order No. 9-2001, which applies to all employers and employees in the transportation industry. The order provides, "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." Indus. Welfare Comm'n Order No. 9-2001, section 11(A), *available at* www.dir.ca.gov/IWC/WageOrders2005/IWCArticle9.html. It also requires employers to "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." *Id.* at section 12(A). Moreover, concerning the meal period, the California Supreme Court has recently concluded that a first meal period must be provided "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 Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1041

(2012). Nevertheless, the Court notes that, under Order No. 9-2001, depending on the total number of hours worked, an employee may waive a meal period. Indus. Welfare Comm'n Order No. 9-2001, section 11(B).

According to Defendant, these "California meal and rest break regulations explicitly and directly relate to how routes and services are scheduled." (Mot. 14.) Nevertheless, the Court rejects this assertion; it strikes the Court as an overstatement. Even a cursory read of the provisions would reveal that these laws do not "explicitly" mention anything about a motor carrier's route or service, nor do they "directly" relate to them. As indicated above, however, this is not dispositive: the laws might still be preempted if they have a *connection to* prices, routes, or services, *significant impact* on Congress' deregulatory and preemption-related objectives, see *Rowe*, 552 U.S. at 371, or "bind[] the . . . carrier to a particular price, route or service and thereby interfere[] with competitive market forces within the . . . industry," *Am. Trucking Ass'ns*, 660 F.3d at 397.

In its motion, Defendant also asserts the meal and rest break provisions "are substantive schedule requirements" (Mot. 6), which impact the routes a motor carrier can use (Mot. 11), as well as the prices it must charge (Mot. 12). The Court agrees. It is undeniable that, pursuant to the regulations, Defendant must provide five separate breaks during a twelve-hour period, and must strive to provide them at specific intervals: a tenminute break within

the first four hours, a thirty-minute meal break within the first five hours, then another ten-minute rest break within the second four-hour period, followed by another thirty-minute meal break between the fifth and tenth hour, and finally another ten-minute rest break within the third four-hour period. Five separate times, Defendant's drivers must be allowed to pull their trucks off the road, find a place to park, and then rest or eat without any job-related duties. Not only must the drivers be allowed to stop hauling cargo for a total of ninety minutes throughout the day, they also are forced to travel only on routes that have access to five different locations where they can find a place to park their truck throughout the workday. An eighteen-wheeled vehicle cannot simply be parked on the side of any given road. Consequently, these required meal and rest breaks certainly add a layer of complexity to a motor carrier's schedule planning, undoubtedly limit the number of routes available, and absolutely reduce the total time a driver can possibly be on the road actually hauling cargo. This impact strikes the Court as significant. Indeed, although Defendant's drivers would not be bound to a *single* route, they would certainly be bound to *fewer* routes than otherwise, absent the meal and rest break requirements. *See Am. Trucking Ass'ns*, 660 F.3d at 397. Moreover, the restrictions would also unavoidably impact prices and hinder the full extent of competitive market forces within the transportation industry: Defendant would be unable to select the most efficient routes if they did not accommodate the required breaks, could not deliver cargo as quickly as it could if not bound by the

scheduling requirements, and would be at a disadvantage to carriers located near but yet outside of California. Accordingly, the Court holds as a matter of law that California Labor Code sections 226.7, 512, and 516, and Wage Order No. 9, as applied to motor carriers, are related to a motor carrier's prices, routes, or services;[3] therefore, Plaintiff's claims that are based on those provisions are preempted under 49 U.S.C. § 14501(c)(1). For this reason, Defendant's motion is GRANTED.

In coming to this conclusion, the Court is mindful that the Supreme Court has cautioned district courts concerning the scope of preemption by the FAAAA, explaining, "the breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars*, 133 S. Ct. at 1778. Therefore, the FAAAA's preemption clause should not be read "with an 'uncritical literalism,'" nor should it be ready to "preempt state laws affecting carrier prices, routes, and services in only a *tenuous, remote, or peripheral* . . . manner." *See Dan's City Used Cars*, 133 S. Ct. at 1778 (emphasis added) (internal quotation marks

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[3] In the Court's view, Labor Code sections 226.7, 512, and 516 are not necessarily preempted apart from Industrial Welfare Commission Order No. 9-2001. Were the Industrial Welfare Commission to implement less exacting schedule requirements, then Labor Code sections, specifically 226.7 and 516, which allow for or enforce IWC orders, would not necessarily be preempted. The Court does not opine as to whether Labor Code section 512 alone would sufficiently impact Defendant's prices, routes, or services to fall within 49 U.S.C. § 14501(c)(1)'s preemption language.

omitted). But, in the Court's view, the state laws at issue here do not affect a motor carrier's prices, routes, or services in merely a tenuous, remote, or peripheral manner; they significantly impact the routes a driver may travel, and reduce the number of miles a driver may possibly travel in a single day. Furthermore, the regulations undoubtedly put California-based motor carriers at a disadvantage as compared with out-of-state carriers who provide services in California.

The Court is not alone in its holding. Defendant points to the court's decision in *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109 (S.D. Cal. 2011), whose reasoning several other courts have found persuasive.[4] (*See* Mot. 10–16.) In *Dilts*, the court held as a matter of law that California's meal and rest break laws are preempted by the FAAAA because they "significantly impact[] the routes or services of [motor] carrier's transportation." *Id.* at 1120. It explained that "[w]hile the laws do not strictly bind [the defendant's] drivers *to* one

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[4] In its motion, Defendant principally relies on the holding in *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109 (S.D. Cal. 2011). Nevertheless, Defendant also cites several other cases who also referenced the holding in *Dilts*: *Esquivel v. Vistar Corp.*, 2012 U.S. Dist. LEXIS 26686 (C.D. Cal. Feb. 8, 2012); *Aguiar v. Cal. Sierra Express Inc.*, 2012 U.S. Dist. LEXIS 63348 (E.D. Cal. May 4, 2012); *Campbell v. Vitran Express*, 2012 U.S. Dist. LEXIS 85509 (C.D. Cal. Sept. 27, 2012); *Cole v. CRST Inc.*, 2012 U.S. Dist. LEXIS 144944 (C.D. Cal. Sept. 27, 2012); *Jasper v. C.R. England Inc.*, 2012 U.S. Dist. LEXIS 186607 (C.D. Aug. 30, 2012); *Aguirre v. Genesis Logistics*, 2012 U.S. Dist. LEXIS 186132 (C.D. Cal. Nov. 5, 2012).

particular route, they have the same effect by depriving them of the ability to take any route that does not offer adequate locations for stopping, or forcing them to take shorter or fewer routes." *Id.* at 1118. The court also reasoned that California's meal and rest break laws have a significant impact on a motor carrier's *services*, which the Ninth Circuit has identified as "the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." *Id.* at 1119 (*citing Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265–66 (9th Cir. 1998)).[5] The *Dilts* court explained that this because the laws affect the "number of routes each driver[] may go on each day . . . the types of roads [the defendant's] drivers[] may take and the amount of time it takes them to reach their destination." *Id.* The Court finds this reasoning persuasive.

Plaintiffs attempts to discount the applicability of *Dilts* to this case. (*See* Opp'n 2.) They emphasize that *Dilts* was decided on a motion for summary judgment, and argue the court relied on factual evidence set forth by the parties in that case. (*Id.*) Nevertheless, the court in *Dilts* was clear: "no factual analysis [was] required to decide this question of preemption. It is . . . the imposition of substantive standards upon a motor carrier's routes

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[5] Although the Ninth Circuit was dealing with the Airline Deregulation Act in *Charas*, the preemption language is interpreted similarly in the context of the FAAAA. *See Rowe v. New Hampshire*, 552 U.S. 364, 370 (2008).

and services . . . that implicates preemption." 819 F.2d at 1120.

The Court is mindful that the Federal Motor Carrier Safety Administration has rejected a petition to preempt California's meal and rest break requirements. (*See* Pls.' RJN, Decl. Humphrey, Ex. F.) But the Federal Motor Carrier Safety Administration was without authority to preempt the regulations because they "are not regulations 'on commercial motor vehicle safety' and thus do not meet the threshold requirement for consideration under 49 U.S.C. [§] 31141." (*Id.*) In their opposition, Plaintiffs assert that the Administration's decision broadly criticized the argument that the wage and hour laws could be preempted. (Opp'n 17.) Yet, the Court has read its decision, and the Administration considered preemption specifically in the context of how the meal and rest break requirements involve motor carriers' safety. Accordingly, Plaintiffs' arguments are unpersuasive. And, in any case, the Court would not be bound by the Administration's *criticism* of the notion that the regulations at issue could be preempted by federal law.

The Court has also considered Plaintiffs' contention that the regulations are not preempted because they do not relate to the "transportation of property." (Opp'n 18–21.) Plaintiffs reference the preemption language in § 14501(c)(1): "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . *with respect to the transportation of property*." 49 U.S.C. §

14501(c)(1) (emphasis added). Recently, the Supreme Court declared, "the addition of the words 'with respect to the transportation of property' . . . 'massively limits the scope of preemption' ordered by the FAAAA." *Dan's City*, 133 S. Ct. at 1778 (quoting *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 449 (Scalia, J., dissenting)). In *Dan's City*, the plaintiff had challenged a towing company's decision to sell plaintiff's car after it had been towed and then stored for several months. *Id.* at 1778–80. The Supreme Court held that the plaintiff's "claims escape[d] preemption . . . because they [were] not 'related to' the service of a motor carrier 'with respect to the transportation of property.'" *Id.* at 1778. The Court reasoned that, although the FAAAA's definition of transportation includes storage and handling, any storage and handling must be related to the movement of property to fit within the definition. *Id.* at 1779. Because the plaintiff's car was being stored, and was no longer in transit, its storage did not bring it within the definition of "transportation" as provided in the FAAAA. *Id.* Accordingly, the Court held that the plaintiff's claims did not concern the transportation of property and were therefore not preempted by § 14501(c)(1). *Id.*

Here, the Court does not read the Supreme Court's decision in *Dan's City* to preclude preemption in this instance. It is true that Plaintiffs' claims do not explicitly relate to the transportation of property. But the Supreme Court did not indicate claims must

explicitly relate to the transportation of property, and the Court is unwilling to infer that limitation.[6] Therefore, in the Court's view, Plaintiffs' claims do relate to the transportation, or movement, of property because Plaintiffs are truck drivers who haul cargo, and they ask the Court to find Defendant in violation of laws that would affect the service of transporting property. Accordingly, the Court is not persuaded by Plaintiff's contention.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's motion for judgment on the pleadings. Accordingly, the Court will enter judgment to

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[6] The Court is mindful of the Supreme Court's footnote in *Dan's City*. *See Dan's City*, 133 S. Ct. at 1778 n.4 ("Although this statement appears in the *Ours Garage* dissent, nothing in the Court's opinion in that case is in any way inconsistent with the dissent's characterization of § 14501(c)(1)," referring to the quotation of Scalia's dissent in *City of Columbus v. Ours Garage and Wrecker Service Inc.*, 536 U.S. 424, 449 (2002): "[T]he addition of the words 'with respect to the transportation of property' . . . 'massively limits the scope of preemption' ordered by the FAAAA."). In his *Ours Garage* dissent, Justice Scalia further opined that states "remain free to enact and enforce general traffic safety laws, general restrictions on the weight of cars and trucks that may enter highways or pass over bridges, and other regulations *that do not target motor carriers* 'with respect to the transportation of property.'" 536 U.S. at 449 (emphasis added). The Court acknowledges one could infer from these words that only state laws explicitly relating to the transportation of property are preempted by the FAAAA, but the Court is unwilling to make that inference at this point.

Defendant with respect to Plaintiffs' claims that are based on California's meal and rest break laws.

IT IS SO ORDERED.

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APPENDIX C

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **CV 07-08336 (BRO) (SHx)**

Date June 3, 2014

Title Gerardo Ortega et al v. J. B. Hunt Transport, Inc. et al

Present: The Honorable **BEVERLY REID O'CONNELL, United States District Judge**

Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

Proceedings: (IN CHAMBERS)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [125]

I. INTRODUCTION

Plaintiffs Gerardo Ortega and Michael D. Patton[1] are regional and long-distance truck drivers employed by Defendant J.B. Hunt Transport Inc. Plaintiffs contend that Defendant has failed to pay them at least a minimum hourly wage for certain required job-related activities. Accordingly, they allege that Defendant is liable to them under California labor law.

Currently pending before the Court is Defendant J.B. Hunt Transport Inc.'s motion for summary judgment on all of Plaintiffs' remaining claims. (Dkt. No. 125.) According to Defendant, Plaintiffs' claims relate to the services it offers and the prices for those services, and consequently are preempted under the Federal Aviation Administration Authorization Act. For the following reasons, Defendant's motion is GRANTED.

II. BACKGROUND

A. Factual Background

Defendant J.B. Hunt Transport Inc. is one of the largest transportation logistics companies in

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[1] Ortega and Patton are class representatives for all others similarly situated.

North America. (First Am. Compl. ("FAC") ¶ 11.) It provides at least two types of services for its customers: (1) Intermodal Services; and (2) Dedicated Contract Services ("DCS").[2] (Def.'s Statement of Uncontroverted Facts ("SUF") ¶ 4; Dkt. No. 125-2.) Through its Intermodal Services, Defendant's drivers deliver freight primarily to and from railways; through its Dedicated Contract Services, Defendant's drivers deliver freight on behalf of a particular customer on a regular basis. (*Id.*) Plaintiffs Gerardo Ortega and Michael Patton were formerly employed by Defendant as Intermodal Services drivers, based out of its location in South Gate, California. (FAC ¶ 9.) Ortega also worked for Defendant as a Dedicated Contract Services driver. (FAC ¶ 9.)

Sometime during the 1990s, Defendant began to institute an Activity-Based-Pay ("ABP") compensation system. (SUF ¶ 24.) Instead of paying an hourly wage or a straight salary, Defendant's ABP system compensates drivers by allotting a rate per mile driven, in addition to other payments for specific non-driving activities, such as delivering a load of freight (a "drop"). (SUF ¶ 25.) Drivers may receive hourly pay, however, while they wait during excessive customer delays. (*Id.*) Accordingly, there are certain activities for which Defendant's drivers are not directly compensated—by hourly pay or

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[2] In their complaint, Plaintiffs refer to DCS as "Direct Contract Services," while Defendant refers to it as "Dedicated Contract Services." (*Compare* FAC ¶ 9 *with* Mot. 3.) The Court will adopt Defendant's terminology.

otherwise—such as loading and unloading freight, completing paperwork, performing inspections, or waiting for a customer.

Believing they were not compensated as required by California wage laws, Plaintiffs filed this action against Defendant. In their complaint, Plaintiffs allege that Defendant routinely fails to pay its local and regional drivers the minimum wages set by California law for all hours worked, (FAC¶¶ 2, 26–34), as well as the wage it agreed to pay, (FAC ¶¶ 35–41). In essence, Plaintiffs contend that Defendant's ABP system fails to provide at least minimum wage during portions of a driver's day, specifically, while performing certain tasks: (a) waiting in lines at intermodal terminals for periods of less than two hours; (b) performing pre- and post-trip inspections; (c) fueling vehicles; (d) waiting for dispatch to issue assignments; and (e) hooking and unhooking trailers. (*See, e.g.*, FAC ¶ 29.) They also claim that Defendant failed to furnish Plaintiffs with accurate itemized wage statements in writing. (FAC ¶¶ 49–55.)

B. Procedural Background

Plaintiffs filed their original complaint on December 27, 2007, (Dkt. No. 1), and a first amended complaint on November 17, 2008, (Dkt. No. 41). This Court stayed the case from June 19, 2009, until August 27, 2012, while a relevant case with potential ramifications on this action was appealed to the California Supreme Court. (Dkt. Nos. 66, 76.) On May 24, 2013, Defendant filed a motion for judgment

on the pleadings with respect to Plaintiffs' meal and rest break claims, which the Court granted on October 2, 2013. (Dkt. No. 124.) In its order, the Court held that the Federal Aviation Administration Authorization Act ("FAAAA") preempts California's meal and rest break laws as applied to Defendant. (Dkt. No. 124, at 7–9.) It reasoned that those laws have a significant impact on Defendant's routes, services, and prices. (*Id.*) Accordingly, the Court granted judgment on the pleadings to Defendant as to Plaintiffs' third claim.

On October 18, 2013, Defendant filed the instant motion for summary judgment. (Dkt. No. 125.) In its motion, Defendant argues that California minimum wage laws, and the courts' interpretation of those laws, forbid an employer from using an ABP compensation system. (Mot. 1.) Accordingly, Defendant contends that those laws impact the "prices, routes, and services" of a motor carrier," and are therefore preempted by the FAAAA. (*Id.*)

III. LEGAL STANDARD

Summary judgment is appropriate when, after adequate discovery, the evidence demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A disputed fact is material where its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Id.*

A court may consider the pleadings, discovery and disclosure materials, and any affidavits on file. Fed. R. Civ. P. 56(c)(2). Where the moving party's version of events differs from the non-moving party's version, a court must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The moving party may satisfy that burden by showing "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325.

Once the moving party has met its burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the non-moving party must go beyond the pleadings and identify specific facts that show a genuine issue for trial. *Id.* at 587. Only genuine disputes over facts that might affect the outcome of the suit will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248; *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (finding that the non-moving party must present specific evidence from which a reasonable jury could return a verdict in its favor). A genuine issue of material fact must be more than a scintilla of evidence, or evidence that is merely colorable or not

significantly probative. *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000).

Although a court may rely on materials in the record that neither party cited, it need only consider cited materials. Fed. R. Civ. P. 56(c)(3). Therefore, a court may properly rely on the non-moving party to specifically identify the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).

Finally, the evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise a genuine issue of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson*, 477 U.S. at 253.

IV. DISCUSSION

In their complaint, Plaintiffs allege that Defendant is violating California Labor Code sections 221–223, 1194, and 1197. (FAC ¶¶ 26–41.) In essence, these laws require an employer to pay its employees at least the designated minimum wage, and may not withhold wages, or secretly pay less than what it has agreed to pay. *See* Cal. Labor Code §§ 221–23, 1194, 1197. According to Plaintiffs, Defendant violates these provisions by "refusing to

pay hourly rates of at least the state-mandated minimum wage for time spent" doing various required, job-related activities. (FAC ¶ 29.) Although Defendant contends its "piece rate compensation system fully compensates drivers for [all] activities as part of a rate measured by the length of the routes driven," (Mot. 17; Field Decl. ¶ 8), this method of compensation has been held to be inadequate in *Armenta v. Osmose Inc.*, 135 Cal. App. 4th 314 (2005).

In *Armenta*, the California Court of Appeal held that "[t]he minimum wage standard applies to each hour worked by [an employee]." *Armenta*, 135 Cal. App. 4th at 324. In other words, "all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation." *Id.* at 323. Or to put it yet another way, even if average hourly compensation meets the minimum wage rate, an employer violates California labor law if it does not actually provide at least minimum wage for each hour worked. *See id.*

As discussed above, Defendant does not pay its drivers an hourly wage. (*See* Ashmore Decl. ¶¶ 12–13.) Instead, it pays them a certain amount for every mile they drive, in addition to lump sums for every delivery they make. (*Id.*) As a result, Defendant's drivers are not directly compensated for certain job-related activities, including loading and unloading

freight, or waiting for a customer.[3] Thus, Defendant's ABP system does not comply with California's minimum wage law, as interpreted in *Armenta*.[4]

Apparently conceding for purposes of this motion that *Armenta* is viable, Defendant contends that Plaintiffs' claims constitute "exactly the kind of state regulatory interference in the market that Congress intended to preempt" when it enacted the FAAAA. (Mot. 19–20.) In "identify[ing] the domain expressly pre-empted" by a federal statute, a court must "focus first on the statutory language, which necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013). In enacting the FAAAA, Congress intended to preempt certain state

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[3] However, if the driver must wait for a customer longer than one and a half hours, it receives hourly compensation.

[4] In its motion, Defendant briefly argues the rule in *Armenta* is an erroneous interpretation of California law, and that its "ABP [system] is a lawful piece rate compensation system that fully compensates drivers for [all] activities as part of a rate measured by the length of the routes driven." (*See* Mot. 16, 17 n.5.) Nevertheless, Defendant neither cites any case law to support its contention, nor provides any explanation as to why *Armenta* is erroneous. (*See* Mot. 17 n.5.) Instead, Defendant merely asserts that the California Supreme Court has not reviewed *Armenta*, and *Armenta*'s rule "violates federal preemption." (*Id.*) As to its first point, the Court is unaware of any legal doctrine that would require a state supreme court to review a lower court's statutory interpretation in order for it to be valid. As to its second point, it is not clear what Defendant seeks to argue. Defendant's arguments attempting to discount *Armenta* are therefore unpersuasive.

laws: "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service* of any motor carrier . . . *with respect to the transportation of property*."[5] 49 U.S.C. § 14501(c)(1) (emphasis added).[6] "[T]he key phrase, obviously, is 'relating to.'" *Morales*, 504 U.S. at 383. And "[t]he ordinary meaning of ['relating to'] is a broad one . . . and the words thus express a broad pre-emptive purpose." *Id.* Therefore, for preemption, state laws need only "*a connection with, or reference to*" a motor carrier's "price, route, or service . . . with respect to the transportation of property." *See Rowe*, 552 U.S. at 370. The Supreme Court has also emphasized that "preemption may occur even if a state law's effect on [prices], routes or services is only indirect," and "it makes no difference whether a state law is consistent or inconsistent with federal regulation." *Id.* (internal

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[5] The Supreme Court has interpreted this language in several different opinions. *See, e.g.*, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Dan's City Used Cars Inc. v. Pelkey*, 133 S. Ct. 1769 (May 13, 2013); *Am. Trucking Ass'ns Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (June 13, 2013); *cf. Morales v. Trans World Airlines Inc.*, 504 U.S. 374 (1992) (interpreting the precursor to § 14501(c)(1), whose application is identical).

[6] In its entirety, the preemption section provides, "Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

quotation marks omitted). Finally, "pre-emption occurs at least where state laws have a '*significant impact*' related to Congress' *deregulatory* and *pre-emptionrelated* objectives," which the Court has described as "helping assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices.'" *Id.* (emphasis added).

Nevertheless, the Supreme Court has recently cautioned that although the words "related to" express a "broad pre-emptive purpose," that does not mean "the sky is the limit." *Dan's City*, 133 S. Ct. at 1778. To be preempted, the effect on rates, routes, or services must be more than "tenuous, remote, or peripheral," but the Court has not specified "where, or how, 'it would be appropriate to draw the line.'" *Rowe*, 552 U.S. at 371; *see also Dan's City*, 133 S. Ct. at 1778. In borderline cases, the Ninth Circuit has directed that "the proper inquiry is whether the provision, directly or indirectly, 'binds the . . . carrier to a particular price, route or service and thereby interferes with competitive market forces within the . . . industry." *Am. Trucking Ass'ns v. City of L.A.*, 660 F.3d 384, 397 (9th Cir. 2011) *overruled on other grounds* by *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 133 S. Ct. 2096 (2013).

Here, California's minimum wage laws, upon which Plaintiffs' claims are based, are indeed "related to" Defendant's services themselves, as well as the price of those services. As a matter of logic and basic economic principles, if Defendant were forced

to change its current ABP compensation system to include hourly pay for "non-productive" activity, its labor costs would clearly be affected, and consequently so would the prices of the services it provides. Defendant provides ample evidence to support this conclusion.

In his declaration, Darren Field indicates that driver compensation is a significant portion of costs associated with its Intermodal Services, "second only to rail costs."[7] (Field Decl. ¶ 5.) Field further explains that "[o]verall increases in labor costs would necessitate either an increase in the price charged to the customer, or a discontinuation of some service offerings." (*Id.*) The same is true of Defendants DCS services. In Frank Broadstreet's declaration, he affirmed that "[d]river compensation plays a critical role in [DCS] contracts as it usually represents the largest cost component to the DCS operations." (Broadstreet Decl. ¶ 6.) Common sense instructs that any increase to driver compensation would ultimately result in increased prices as well.

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[7] Although Plaintiffs attempt to refute this in their opposition, (Opp'n 19–22), Field's declaration is uncontested. Plaintiffs point to Field's deposition testimony as evidence that after rail costs come drayage costs, not driver compensation. (*Id.*) Yet Field never testified to that in his deposition. (*See* Humphrey Decl. Ex. I, at 99–100.) Instead, he indicated that driver compensation is a component of drayage costs, which comprises 35% of total costs. (*Id.* at 96.) Therefore, it is not inconsistent to say that driver compensation is second only to rail costs—Field's declaration does not contradict his deposition testimony.

But beyond mere increases to the price of Defendant's services, altering its compensation system would also result in decreased efficiency and productivity. Under Defendant's ABP system, Drivers are compensated "on a per delivery basis." (Broadstreet Decl. ¶ 6; *see* Field Decl. ¶¶ 7–8, 11.) Again, as a matter of logic, it is readily apparent that a compensation system that rewards drivers for making deliveries to customers would incentivize drivers to make more deliveries, thus increasing efficiency and productivity. Yet Defendant also provides evidence that its ABP system in fact increases its drivers' efficiency and productivity.

Both Mr. Walker and Dr. Topel explain that changing to Defendant's ABP system increased DCS drivers' efficiency. According to Walker, the drivers' efficiency increased by an average of 8.2%, and their productivity by an average of 9.4%. (Walker Decl. ¶ 8.) According to Dr. Topel, efficiency increased by 6.4%, and productivity increased by 7%.[8] (Topel Decl.

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[8] Plaintiffs attempts to create a genuine issue by discounting Topel's report, arguing for example that he excluded "outliers" from his analysis. Nevertheless, from his report, it is clear that Dr. Topel did not simply remove "outlier" data points that would result in lower efficiency, but also removed "outlier" data that would result in higher efficiency. (*See* Topel Decl. Ex. A, at 15.) Plaintiffs also attempt to discount the relevancy of Topel's report, arguing that the sample size comprised only a small number of the overall class, and the drivers had differing job-related tasks. Nevertheless, Plaintiffs do not explain why a small sample size would not be statistically significant nonetheless, nor do they explain why differing tasks would affect the general principle of improved efficiency established by the analysis. Plaintiffs further attempt to discount the

Ex. A, at 7, 16.) Intermodal drivers also experienced improved efficiency by adopting the ABP system. Darren Field indicates that in 2001 Defendant paid Intermodal drivers an hourly rate but paid DCS drivers under the ABP system. (Field Decl. ¶ 10.) He further explains that given the favorable increased efficiency by DCS drivers, Defendant decided to test a similar pay structure on a small group of Intermodal drivers. (*Id.*) Field affirms that following its change to the ABP system "the productivity of the typical driver increased markedly. As a result, Intermodal operations in California discontinued hourly-based compensation in April 2002, and compensated drivers based on the mileage and activity-based pay system." (Field Decl. ¶ 14.) Consequently, Defendant was able to provide services to more customers, even to those it previously could not serve due to prohibitive costs and insufficient profit margins. (*Id.*) Although much of the data that would have permitted an analysis similar to that of the DCS drivers' increased efficiency was lost, Dr. Topel utilized Intermodal

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validity of Topel's findings by arguing that a person could reasonably infer increased efficiency resulted from drivers being aware they were being monitored. (Opp'n 14.) Yet, in so arguing, Plaintiffs wrest Topel's testimony and focus on only part of what he said. (*See* Humphrey Decl. Ex. K, at 115–16.) Topel explained that "the method of monitoring doesn't in any way bias the outcome of [the] study." (*Id.* at 116.) Moreover, Plaintiffs fail to explain why the Intermodal drivers also increased efficiency even though they were never monitored. As discussed below, Defendant determined the increase in efficiency based on a forensic analysis. (*See* Topel Decl. Ex. A, at 22–28.) Accordingly, Plaintiffs' arguments are unpersuasive.

driver payroll and Human Resources records to conduct an analysis. (*See* Topel Decl. Ex. A, at 22–28.) By comparing Intermodal driver payroll records from before and after the ABP system was implemented, Dr. Topel concluded that Intermodal drivers on average received 10% higher wages under the ABP system. (*See id.*) From these results, one may readily infer that Intermodal drivers also improved their efficiency under the ABP system, as under the new payment structure driver pay is directly linked to the number of deliveries made. Thus, if the Intermodal drivers' wages increased, it is reasonable to infer the increase was due to increased deliveries completed.

Accordingly, the evidence in the record demonstrates that there is no genuine issue that Defendant's ABP system allows for greater efficiency and productivity. Common sense dictates that increased efficiency and productivity enables Defendant to serve more customers at lower prices. Therefore, in the Court's view, forcing Defendant to modify its ABP payment system by providing at least minimum wage for each hour worked would affect Defendant's services and prices in more than a "tenuous, remote, or peripheral" manner. Indeed, the effect would even be significant. Moreover, such a forced change would undoubtedly disrupt "'maximum reliance on competitive market forces,' thereby [] 'efficiency, innovation, and low prices.'" *See Rowe*, 552 U.S. at 370. For these reasons, the Court holds that Plaintiffs' wage claims are preempted under the FAAAA.

Plaintiffs raise several additional arguments in opposition to the instant motion. They contend Defendant's motion should be denied because it "moves for summary judgment on an alleged theory of liability that Plaintiffs have never asserted in this case." (Opp'n 1.) True as it may be that Defendant's characterization of Plaintiffs' claims is overly broad, Plaintiffs' assertion that Defendant's motion must therefore be denied is without merit. In its motion, Defendant frames Plaintiffs' claims as an attempt to force Defendant to "pay hourly wages for all time in which drivers are under [Defendant's] control." (Mot. 1.) In their opposition, Plaintiffs argue that they "do not allege and the law does not require [Defendant] to switch from ABP to an hourly pay system, or any form of compensation scheme." (Opp'n 3.) Instead, Plaintiffs attempt to argue that Defendant simply must "include payment for those activities" "that were previously excluded" from its compensation system. (Opp'n 3.) It is not clear what exactly Plaintiffs are asserting. (*See* Opp'n 3:10–17.) It appears they are advocating that Defendant do exactly what it claims it has done all along—use a "piece rate compensation system [that] fully compensates drivers for [all] activities as part of a rate measured by the length of the routes driven." (Mot. 17; Field Decl. ¶ 8.) Nevertheless, even assuming *Armenta* does permit Defendant do use some type of piece rate compensation system, it is clear that Defendant must pay its drivers at least minimum wage for each hour worked. *See* 135 Cal. App. 4th at 323–24; *accord Cardenas v. McLane Foodservices Inc.*, 796 F. Supp. 2d 1246 (C.D. Cal. 2011) ("[T]his court finds that a piece-rate formula

that does not compensate directly for all time worked does not comply with California Labor Codes, even if, averaged out, it would pay at least minimum wage for all hours worked."). Because the entire purpose of a piece-rate or ABP compensation system is to incentivize employees to minimize certain "nonproductive" activities, forcing Defendant to provide hourly pay for those "nonproductive" activities would largely limit the incentive to improve efficiency, effectively inhibiting the ABP system's objective. Accordingly, even if Plaintiffs are correct, and Defendant could still implement some type of piece-rate compensation system, because Defendant would still have to provide hourly compensation under *Armenta*, Plaintiffs' claims are yet preempted under the FAAAA.

Plaintiffs also contend the Ninth Circuit's decision in *Mendonca* precludes a finding of preemption under the FAAAA. (*See* Opp'n 23.) In *Mendonca*, the Ninth Circuit held that, although it certainly had some effect, the effect of California's Prevailing Wage Law on public works contractors' prices, routes, and services was too "indirect, remote, and tenuous" to be preempted by the FAAAA. *Cal. for Safe & Competitive Dump Truck Trans. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998). This case is distinguishable from *Mendonca*, however. Here, forcing Defendant to change its ABP compensation system would have greater effect than in *Mendonca*. Not only would it increase the wages and therefore affect prices, but it would also reduce Defendant's efficiency and productivity, thus inhibiting Defendant's ability to effectively provide

services to its customers and therefore effectively compete in the marketplace. Accordingly, Plaintiffs' contention regarding the court's holding in *Mendonca* is unpersuasive.

V. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs' wage claims are preempted by the FAAAA. Accordingly, Defendant's motion for summary judgment on those claims is GRANTED. Defendant must submit a proposed judgment consistent with this order no later than June 16, 2014.

IT IS SO ORDERED.

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APPENDIX D

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U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALDO ORTEGA; MICHAEL D. PATTON, individually and on behalf of themselves, all others similarly situated, and the general public, Plaintiffs-Appellants, v. J. B. HUNT TRANSPORT, INC., an Arkansas corporation, Defendant-Appellee.	No. 14-56034 D.C. No. 2:07-cv-08336-BRO-SH Central District of California, Los Angeles ORDER

Before: WARDLAW and CALLAHAN, Circuit Judges, and KENDALL,* District Judge.

The panel has voted to deny J.B. Hunt Transport, Inc.'s petition for rehearing en banc, with Judge Kendall abstaining. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

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* The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

APPENDIX E

Article VI

U.S. CONST. art. VI, cl. 2 provides in relevant part:

Article VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

APPENDIX F

49 U.S.C.A. § 14501(c) provides in relevant part:

§ 14501. Federal authority over intrastate transportation

* * *

(c) Motor carriers of property.--

(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.--Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to

minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

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

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the regulation of tow truck operations performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices.–

(A) Continuation.--Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to--

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907), if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.--A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if--

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election.--Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii.--This subsection shall not apply with respect to the State of Hawaii.

(5) Limitation on statutory construction.--Nothing in this section shall be construed to prevent a State from requiring that, in the case of a

motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or
an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

* * *

APPENDIX G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICKEY LEE DILTS; RAY RIOS; and DONNY DUSHAJ, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants*, v. PENSKE LOGISTICS, LLC; and PENSKE TRUCK LEASING CO., L.P., a Delaware corporation, *Defendants-Appellees*, and DOES 1–125, inclusive, *Defendants*.	No. 12-55705 D.C. No. 3:08-cv-00318- CAB-BLM OPINION

Appeal from the United States District Court for the Southern District of California Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted March 3, 2014—Pasadena, California

Filed July 9, 2014

Before: Alex Kozinski, Chief Judge, Susan P. Graber, Circuit Judge, and Jack Zouhary,* District Judge.

Opinion by Judge Graber;
Concurrence by Judge Zouhary

SUMMARY**

Federal Preemption

The panel reversed the district court's dismissal, based on federal preemption, of claims brought by a certified class of drivers alleging violations of California's meal and rest break laws.

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that California's meal and rest break laws as applied to the motor carrier defendants were not "related to" defendants' prices, routes, or services, and therefore they were not preempted by the Federal Aviation Administration Authorization Act of 1994.

District Judge Zouhary concurred, and wrote separately to emphasize that the defendant failed to carry its burden of proof on its preemption defense.

COUNSEL

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OPINION

GRABER, Circuit Judge:

Plaintiffs, a certified class of drivers employed by Defendants Penske Logistics, LLC, and Penske Truck Leasing Co., L.P., appeal from a judgment dismissing their claims under California's meal and rest break laws. The district court held on summary judgment that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") preempts those state laws as applied to motor carriers. Reviewing de novo the interpretation and construction of the FAAAA and the question of federal preemption, *Tillison v. Gregoire*, 424 F.3d 1093, 1098 (9th Cir. 2005), we hold that the state laws at issue are not "related to" prices, routes, or services, and therefore are not preempted by the FAAAA. Accordingly, we reverse.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Mickey Lee Dilts, Ray Rios, and Donny Dushaj brought this class action against Defendants, which are motor carriers, alleging that Defendants routinely violate California's meal and rest break laws, Cal. Lab. Code §§ 226.7, 512; Cal. Code Regs. tit. 8, § 11090. Plaintiffs represent a certified class of 349 delivery drivers and installers, all of whom are assigned to the Penske Whirlpool account. Plaintiffs work exclusively on routes within the state of California, typically work more than 10 hours a day, and frequently work in pairs, with one driver and one deliverer/installer in each truck.

California law generally requires a 30-minute paid meal break for every five hours worked, Cal. Lab. Code § 512, and a paid 10-minute rest break for every four hours worked, Cal. Code Regs. tit. 8, § 11090. Plaintiffs allege that Defendants automatically program 30-minute meal breaks into employees' shifts while failing to ensure that employees actually take those breaks and that Defendants create a working environment that discourages employees from taking their meal and rest breaks.

Plaintiffs initially filed this action in state court. Defendants removed the case to federal district court under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d)(2), 1441(b), 1453. Following removal, Defendants moved for summary judgment, claiming a preemption defense. Defendants argued that the state meal and rest break laws as applied to

motor carriers are preempted under the FAAAA, which provides that "States may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Concluding that California's meal and rest break laws impose "fairly rigid" timing requirements, dictating "exactly when" and "for exactly how long" drivers must take breaks, and restricting the routes that a motor carrier may select, the district court held that California's meal and rest break laws meet the FAAAA preemption standard and granted summary judgment for Defendants. *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109, 1119–20 (S.D. Cal. 2011).[1] Plaintiffs timely appeal.

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[1] Since *Dilts* was decided, eight other California district court decisions have held that the FAAAA preempts California's meal and rest break laws, while four have held that it does not. The other cases that followed *Dilts* are: *Rodriguez v. Old Dominion Freight Line, Inc.*, No. CV13- 891DSF(RZx), 2013 WL 6184432, at *4 (C.D. Cal. Nov. 27, 2013); *Parker v. Dean Transp. Inc.*, No. CV13-02621BRO(VBKx), 2013 WL 7083269, at *9 (C.D. Cal. Oct. 15, 2013); *Ortega v. J.B. Hunt Transp., Inc.*, No. CV07-08336(BRO)(FMOx), 2013 WL 5933889, at *7 (C.D. Cal. Oct. 2, 2013); *Burnham v. Ruan Transp.*, No. SACV12-0688AG(ANx), 2013 WL 4564496, at *5 (C.D. Cal. Aug. 16, 2013); *Cole v. CRST, Inc.*, No. EDCV08-1570-VAP(OPx), 2012 WL 4479237, at *4–6 (C.D. Cal. Sept. 27, 2012); *Campbell v. Vitran Express, Inc.*, No. CV11-05029- RGK(SHx), 2012 WL 2317233, at *4 (C.D. Cal. June 8, 2012); *Aguiar v. Cal. Sierra Express, Inc.*, No. 2:11-cv-02827-JAM-GGH, 2012 WL 1593202, at *1 (E.D. Cal. May 4, 2012); *Esquivel v. Vistar Corp.*, No. 2:11-cv-07284-JHN-PJWx, 2012 WL 516094, at *4–6 (C.D. Cal. Feb. 8, 2012) (unpublished decisions); *see also Miller v. Sw. Airlines Co.*, 923 F. Supp. 2d 1206, 1212–13 (N.D. Cal. 2013) (holding California's break laws preempted under the analogous

DISCUSSION

A. California's Meal and Rest Break Laws

California Labor Code sections 226.7 and 512, and the related regulations for the transportation industry promulgated by California's Industrial Welfare Commission as California Code of Regulations title 8, section 11090, together constitute the state's meal and rest break laws.

Employers must provide a meal break of 30 minutes for an employee who works more than five hours a day, plus a second meal break of 30 minutes for an employee who works more than 10 hours a day. Cal. Lab. Code § 512(a). For employees who work no more than six hours, the meal break may be

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provision of the Airline Deregulation Act); *Helde v. Knight Transp., Inc.*, 982 F. Supp. 2d 1189, 1195–96 (W.D. Wash. 2013) (applying similar analysis to Washington's rest break provisions and holding them preempted under the FAAAA). The cases holding that California's meal and rest break laws are not preempted by the FAAAA are: *Villalpando v. Exel Direct Inc.*, No. 12-cv-04137JCS, 2014 WL 1338297, at *12 (N.D. Cal. Mar. 28, 2014); *Brown v. Wal-Mart Stores, Inc.*, No. C08-5221SI, 2013 WL 1701581, at *3–4 (N.D. Cal. Apr. 18, 2013); *Mendez v. R+L Carriers, Inc.*, No. C11-2478CW, 2012 WL 5868973, at *4–7 (N.D. Cal. Nov. 19, 2012) (unpublished decisions); *Reinhardt v. Gemini Motor Transp.*, 869 F. Supp. 2d 1158, 1165–67 (E.D. Cal. 2012).

This is the first time that the question is before us. It is also before us in *Campbell v. Vitran Express, Inc.*, No. 12-56250, which we decide in a memorandum disposition issued this date.

waived by mutual consent of the employer and employee; for employees who work no more than 12 hours, one of the two meal breaks may be waived by mutual consent. *Id.* If the nature of the work prevents an employee from taking an off-duty meal break, the employer and employee may agree to an on-duty meal break by mutual consent. *Id.* For transportation workers whose daily work time is at least three and one-half hours, employers must provide a paid rest period of 10 minutes for every four hours "or major fraction thereof." Cal. Code Regs. tit. 8, § 11090(12)(A). The regulations governing transportation workers are consistent with those governing workers in other industries. *See id.* §§ 11010–11170.

An employer may not require an employee to work during any meal or rest period. Cal. Lab. Code § 226.7(b). An employer must pay an employee for an additional hour of work at the employee's regular rate for each workday for which a meal or rest period is not provided. Cal. Lab. Code § 226.7(c). "[S]ection 226.7 does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay. . . . The failure to provide required meal and rest breaks is what triggers a violation of section 226.7." *Kirby v. Immoos Fire Prot., Inc.*, 274 P.3d 1160, 1168 (Cal. 2012). "The 'additional hour of pay' . . . is the legal remedy . . . ." *Id.*

The California Supreme Court, in an opinion published after the order on summary judgment issued in this case, clarified that state laws allow

some flexibility with respect to the timing and circumstances of meal breaks. *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012). 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," but "does not impose additional timing requirements." *Id.* at 537. "[A]n employer must relieve the employee of all duty for the designated [meal] period, but need not ensure that the employee does no work." *Id.* at 532. When the nature of the work makes offduty meal breaks infeasible, the employer and employee may, by mutual written agreement, waive the off-duty meal break requirement. *Id.* at 533 (citing California's Industrial Welfare Commission Wage Order No. 5). Finally, "as a general matter, one rest break should fall on either side of the meal break. [But s]horter or longer shifts and other factors that render such scheduling impracticable may alter this general rule," and employers have flexibility in scheduling breaks according to the nature of the work. *Id.* at 531 (citation, brackets, and internal quotation marks omitted).

B. The "Related to" Test for FAAAA Preemption

In considering the preemptive scope of a statute, congressional intent "is the ultimate touchstone." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040 (9th Cir. 2007) (internal quotation marks omitted). "Congress'

intent . . . primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed . . . through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (citations and internal quotation marks omitted).

"Preemption analysis begins with the presumption that Congress does not intend to supplant state law. Although Congress clearly intended FAAAA to preempt some state regulations of motor carriers who transport property, the scope of the pre-emption must be tempered by the presumption against the pre-emption of state police power regulations." *Tillison*, 424 F.3d at 1098 (citation and internal quotation marks omitted); *Medtronic, Inc.*, 518 U.S. at 485; *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (noting that the presumption against preemption applies "in all preemption cases" and is especially strong in areas of traditional state regulation (internal quotation marks and brackets omitted). Wage and hour laws constitute areas of traditional state regulation, although that fact alone does not "immunize" state employment laws from preemption if Congress in fact contemplated their preemption. *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 330–34 (1997).

"Where, as in this case, Congress has superseded state legislation by statute, our task is to identify the domain expressly pre-empted. To do so, we focus first on the statutory language, which necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (citation and internal quotation marks omitted) (interpreting the FAAAA). The FAAAA's preemption clause provides, in relevant part: "States may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The statutory "related to" text is "deliberately expansive" and "conspicuous for its breadth." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992) (internal quotation marks omitted). That said, the FAAAA does not go so far as to preempt state laws that affect prices, routes, or services in "only a tenuous, remote, or peripheral manner, such as state laws forbidding gambling." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (internal quotation marks and alteration omitted). As the Supreme Court recently observed, "the breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars*, 133 S. Ct. at 1778.

Because "everything is related to everything else," *Dillingham Constr.*, 519 U.S. at 335 (Scalia, J., concurring), understanding the nuances of congressional intent is particularly important in FAAAA preemption analysis. We must draw a line between laws that are significantly "related to" rates, routes, or services, even indirectly, and thus are

preempted, and those that have "only a tenuous, remote, or peripheral" connection to rates, routes, or services, and thus are not preempted. *Rowe*, 552 U.S. at 371. To better discern congressional intent, we turn next to the legislative history and broader statutory framework of the FAAAA. *Lohr*, 518 U.S. at 486.

Enacted in 1994, the FAAAA was modeled on the Airline Deregulation Act of 1978. In 2008, the Supreme Court summarized the history behind the FAAAA:

> In 1978, Congress "determin[ed] that 'maximum reliance on competitive market forces'" would favor lower airline fares and better airline service, and it enacted the Airline Deregulation Act. *Morales*[, 504 U.S. at 378] (quoting 49 U.S.C. App. § 1302(a)(4) (1988 ed.)); see 92 Stat. 1705. In order to "ensure that the States would not undo federal deregulation with regulation of their own," th[e Airline Deregulation] Act "included a pre-emption provision" that said "no State . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier." *Morales*, *supra*, at 378; 49 U.S.C. App. § 1305(a)(1) (1988 ed.).
>
> In 1980, Congress deregulated trucking. See Motor Carrier Act of 1980, 94 Stat. 793. And a little over a decade later, in 1994, Congress similarly sought to pre-

> empt state trucking regulation. See Federal Aviation Administration Authorization Act of 1994, 108 Stat. 1605–1606; see also ICC Termination Act of 1995, 109 Stat. 899. In doing so, it borrowed language from the Airline Deregulation Act of 1978 and wrote into its 1994 law language that says: "[A] State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1); see also § 41713(b)(4)(A) (similar provision for combined motor-air carriers).

Rowe, 552 U.S. at 367–68.

By using text nearly identical to the Airline Deregulation Act's, Congress meant to create parity between freight services provided by air carriers and those provided by motor carriers. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998). Therefore, the analysis from *Morales* and other Airline Deregulation Act cases is instructive for our FAAAA analysis as well. The one difference between the Airline Deregulation Act and the FAAAA is that the latter contains the additional phrase "with respect to the transportation of property," which is absent from the Airline Deregulation Act and which "massively limits the scope of preemption ordered by the FAAAA." *Dan's City Used Cars*, 133 S. Ct. at 1778 (internal quotation marks omitted). Here, the

parties do not dispute that the transportation of property is involved, so our analysis turns on the "related to price, route, or service" element of the FAAAA preemption test.

The principal purpose of the FAAAA was "to prevent States from undermining federal deregulation of interstate trucking" through a "patchwork" of state regulations. *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 395–96 (9th Cir. 2011). The sorts of laws that Congress considered when enacting the FAAAA included barriers to entry, tariffs, price regulations, and laws governing the types of commodities that a carrier could transport. H.R. Conf. Rep. No. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. The FAAAA expressly does *not* regulate a state's authority to: enact safety regulations with respect to motor vehicles; control trucking routes based on vehicle size, weight, and cargo; impose certain insurance, liability, or standard transportation rules; regulate the intrastate transport of household goods and certain aspects of tow-truck operations; or create certain uniform cargo or antitrust immunity rules. 49 U.S.C. § 14501(c)(2), (3). This list was "not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756. Accordingly, Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services. Consistent with that instruction, we have held that

the FAAAA does not preempt a state's prevailing wage law, *Mendonca*, 152 F.3d at 1189, or a state law requiring that towing services obtain express authorization to tow from private property, *Tillison*, 424 F.3d at 1099–1100, and that the Airline Deregulation Act does not preempt a generally applicable city anti-discrimination law, *Air Transp. Ass'n of Am. v. City of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001).

In 2008, after reviewing the relevant statutory text, legislative history, and jurisprudence, the Supreme Court identified four principles of FAAAA preemption: (1) "'state enforcement actions having a connection with, or reference to,' carrier 'rates, routes or services' are pre-empted"; (2) "such pre-emption may occur even if a state law's effect on rates, routes or services 'is only indirect'"; (3) "it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulation"; and (4) "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Rowe*, 552 U.S. at 370–71 (brackets and emphasis omitted) (quoting the Airline Deregulation Act analysis in *Morales*, 504 U.S. at 384, 386–87, 390).

Contrary to Defendants' argument, *Rowe* did not represent a significant shift in FAAAA jurisprudence. Nor did it call into question our past FAAAA cases, such as *Mendonca*, 152 F.3d at 1187–89. *See also Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc) (holding that a three-judge panel may ignore binding circuit precedent only if it

is "clearly irreconcilable with the reasoning or theory of intervening higher authority"). *Rowe* instructs us to apply to our FAAAA cases the settled preemption principles developed in Airline Deregulation Act cases, including the rule articulated in *Morales* that a state law may "relate to" prices, routes, or services for preemption purposes even if its effect is only indirect, 504 U.S. at 385–86, but that a state law connected to prices, routes, or services in "too tenuous, remote, or peripheral a manner" is not preempted, *id.* at 390 (internal quotation marks omitted). *See also* H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755 (noting that the drafters of the FAAAA did "not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*"). We applied precisely that rule in *Mendonca*, 152 F.3d at 1187–89. *Rowe* simply reminds us that, whether the effect is direct or indirect, "the state laws whose effect is forbidden under federal law are those with a *significant* impact on carrier rates, routes, or services." 552 U.S. at 375 (internal quotation marks omitted).

Rowe concerned a Maine law requiring tobacco retailers to use a delivery service that provided recipient verification. The Supreme Court held that the verification requirement interfered with the de-regulatory goals behind the FAAAA's preemption clause because it would "require carriers to offer a system of services that the market does not provide[,] . . . would freeze into place services that carriers might prefer to discontinue in the future," and would directly substitute Maine's "own governmental

commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." 552 U.S. at 372 (internal quotation marks omitted). The Maine statute also required that carriers provide a special checking system to receive any shipment originating from a known tobacco retailer. *Id.* at 373. The Supreme Court held that requiring the carriers to check packages in this way would "regulate a significant aspect of the motor carrier's package pickup and delivery service" and, again, could freeze into place services that the market would not otherwise provide. *Id.*

In short, the Maine statute required carriers to provide or use certain special services in order to comply with the law. The statute was, as we have described other preempted laws, one in which "the existence of a price, route or service [was] essential to the law's operation." *Air Transp. Ass'n*, 266 F.3d at 1071 (internal quotation marks and brackets omitted). In an Airline Deregulation Act case following *Rowe*, we held that, in "'borderline' cases" in which a law does not refer directly to rates, routes, or services, "the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry." *Am. Trucking*, 660 F.3d at 397 (emphasis added) (internal quotation marks and alterations omitted). Thus, laws mandating motor carriers' use (or non-use) of particular prices, routes, or services in order to comply with the law are preempted.

Laws are more likely to be preempted when they operate at the point where carriers provide services to customers at specific prices. In *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1431 (2014), the Supreme Court held that an airline customer's claim against the airline for breach of an implied covenant, stemming from the termination of his frequent flyer account, was "related to" prices, routes, and especially services. The Court held that, because frequent flyer credits could be redeemed for services offered for free or at reduced prices, the state law contract claim met the "related to" test, *id.*, and, because the state law claim sought to enlarge the contractual relationship that the carrier and its customer had voluntarily undertaken, was preempted under the Airline Deregulation Act, *id.* at 1433; *see also S.C. Johnson & Son v. Transp. Corp. of Am.*, 697 F.3d 544, 558 (7th Cir. 2012) (noting that *Morales* and *Mendonca* both stand for the proposition that the Airline Deregulation Act and FAAAA do not preempt "laws that regulate . . . inputs [that] operate one or more steps away from the moment at which the firm offers its customer a service for a particular price"); *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) (the preempted law "directly regulates how an airline service is performed and how its price is displayed to customers—not merely how the airline behaves as an employer or proprietor").

On the other hand, generally applicable background regulations that are several steps removed from prices, routes, or services, such as

prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide. Such laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment. *Mendonca*, 152 F.3d at 1189. Indeed, many of the laws that Congress enumerated as expressly *not* related to prices, routes, or services—such as transportation safety regulations or insurance and liability rules, 49 U.S.C. § 14501(c)(2)—are likely to increase a motor carrier's operating costs. But Congress clarified that this fact alone does not make such laws "related to" prices, routes, or services. Nearly every form of state regulation carries some cost. The statutory text tells us, though, that in deregulating motor carriers and promoting maximum reliance on market forces, Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability. 49 U.S.C. § 14501(c); *see also, e.g.*, *Rowe*, 552 U.S. at 375 (holding that a state law is not preempted when it "prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public").

Nor does a state law meet the "related to" test for FAAAA preemption just because it shifts incentives and makes it more costly for motor carriers to choose some routes or services *relative* to others, leading the carriers to reallocate resources or make different business decisions. For example, a San Francisco city ordinance requiring equal

protection for domestic partners did not "compel or bind the Airlines to a particular route or service," even though it might increase the cost of doing business at the San Francisco airport relative to other markets. *Air Transp. Ass'n*, 266 F.3d at 1074. Despite the potential cost increase associated with using the San Francisco airport as a result of the city ordinance, carriers could still "make their own decisions about where to fly and how many resources to devote to each route and service." *Id.*

In short, even if state laws increase or change a motor carrier's operating costs, "broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices[, routes,] and services"—that is, those that do not directly or indirectly mandate, prohibit, or otherwise regulate certain prices, routes, or services— are not preempted by the FAAAA. *Id.* at 1072.

C. California's Meal and Rest Break Laws are Not Preempted

Although we have in the past confronted close cases that have required us to struggle with the "related to" test, and refine our principles of FAAAA preemption, we do not think that this is one of them. In light of the FAAAA preemption principles outlined above, California's meal and rest break laws plainly are not the sorts of laws "related to" prices, routes, or services that Congress intended to preempt. They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly. They are

"broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices[, routes,] and services." *Air Transp. Ass'n*, 266 F.3d at 1072. They are normal background rules for almost *all* employers doing business in the state of California. And while motor carriers may have to take into account the meal and rest break requirements when allocating resources and scheduling routes—just as they must take into account state wage laws, *Mendonca*, 152 F.3d at 1189, or speed limits and weight restrictions, 49 U.S.C. § 14501(c)(2)—the laws do not "bind" motor carriers to specific prices, routes, or services, *Am. Trucking*, 660 F.3d at 397. Nor do they "freeze into place" prices, routes, or services or "determin[e] (to a significant degree) the [prices, routes, or] services that motor carriers will provide," *Rowe*, 552 U.S. at 372.

Further, applying 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. The fact that laws may differ from state to state is not, on its own, cause for FAAAA preemption. In the preemption provision, Congress was concerned only with those state laws that are significantly "related to" prices, routes, or services. A state law governing hours is, for the foregoing reasons, not "related to" prices, routes, or services and therefore does not contribute to "a patchwork of state *service-determining* laws, rules, and regulations." *Rowe*, 552 U.S. at 373 (emphasis added). It is instead more analogous to a state wage law, which may differ from

the wage law adopted in neighboring states but nevertheless is permissible. *Mendonca*, 152 F.3d at 1189.[2]

Defendants argue that California's meal and rest break laws are "related to" routes or services, "if not prices too," in six specific ways. None of those examples convinces us that California's laws are "related to" prices, routes, or services in the way that Congress intended.

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[2] We recently noted that it was an "open issue" "whether a federal law can ever 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). We need not resolve that issue here. For the reasons discussed in this section, we hold that California's meal and rest break laws, as generally applied to motor carriers, are not preempted.

Were we to construe Defendant's argument as an "as applied" challenge, we would reach the same conclusion and, if anything, find the argument against preemption even stronger. Plaintiff drivers work on short-haul routes and work exclusively within the state of California. They therefore are not covered by other state laws or federal hours-ofservice regulations, 49 C.F.R. § 395.3, and would be without *any* hoursof- service limits if California laws did not apply to them. *See Hours of Service of Drivers*, 78 Fed. Reg. 64,179-01, 64,181 (Oct. 28, 2013) (amending 49 C.F.R. § 395.3 to exclude short-haul drivers, in compliance with *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 914 (2014)). Consequently, Defendants *in particular* are not confronted with a "patchwork" of hour and break laws, even a "patchwork" permissible under the FAAAA.

First, Defendants argue that the state break laws impermissibly mandate that *no* motor carrier service be provided during certain times because the laws require a cessation of work during the break period. But the state law requires only that *each individual employee* take an off-duty break at some point within specified windows—not that a motor carrier suspend its service. Defendants are at liberty to schedule service whenever they choose. They simply must hire a sufficient number of drivers and stagger their breaks for any long period in which continuous service is necessary.

Second, Defendants argue that mandatory breaks mean that drivers take longer to drive the same distance, providing less service overall. But that argument equates to nothing more than a modestly increased cost of doing business, which is not cause for preemption, *Air Transp. Ass'n*, 266 F.3d at 1071; *Mendonca*, 152 F.3d at 1189. Motor carriers may have to hire additional drivers or reallocate resources in order to maintain a particular service level, but they remain free to provide as many (or as few) services as they wish. The law in question has nothing to say about *what* services an employer does or does not provide.

Third, Defendants argue that break laws require carriers to alter "the frequency and scheduling of transportation," which directly relates to services under *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265–66 (9th Cir. 1998) (en banc). *Charas* held that, under the Airline

Deregulation Act, services include "such things as the frequency and scheduling of transportation, and . . . the selection of markets to or from which transportation is provided." *Id.* Again, this argument conflates requirements for *individual drivers* with requirements imposed on motor carriers. Motor carriers may schedule transportation as frequently or as infrequently as they choose, at the times that they choose, and still comply with the law. They simply must take drivers' break times into account—just as they must take into account speed limits or weight restrictions, 49 U.S.C. § 14501(c), which are not preempted by the FAAAA.

Fourth, Defendants argue that California break laws require motor carriers to schedule services in accordance with state law, rather than in response to market forces, thereby interfering with the FAAAA's deregulatory objectives. But the mere fact that a motor carrier must take into account a state regulation when planning services is not sufficient to require FAAAA preemption, so long as the law does not have an impermissible effect, such as binding motor carriers to specific services, *Am. Trucking*, 660 F.3d at 397, making the continued provision of particular services essential to compliance with the law, *Rowe*, 552 U.S. at 372; *Air Transp. Ass'n*, 266 F.3d at 1074, or interfering at the point that a carrier provides services to its customers, *Nw., Inc.*, 134 S. Ct. at 1431. Moreover, all motor carriers in California are subject to the same laws, so all intrastate carriers like Defendants are equally subject to the relevant market forces.

Turning to routes, Defendants' fifth argument is that the requirement that drivers pull over and stop for each break period necessarily dictates that they alter their routes. To the extent that compliance with California law requires drivers to make minor deviations from their routes, such as pulling into a truck stop, we see no indication that this is the sort of "route control" that Congress sought to preempt. "'[R]outes' generally refer[s] to . . . point-to-point transport . . . [and] courses of travel." *Charas*, 160 F.3d at 1265. The requirement that a driver briefly pull on and off the road during the course of travel does not meaningfully interfere with a motor carrier's ability to select its starting points, destinations, and routes. Indeed, Congress has made clear that even more onerous route restrictions, such as weight limits on particular roads, are not "related to" routes and therefore are not preempted. 49 U.S.C. § 14501(c).

Sixth, and relatedly, Defendants argue that finding routes that allow drivers to comply with California's meal and rest break laws will limit motor carriers to a smaller set of possible routes. But Defendants, who bear the burden of proof in establishing the affirmative defense of preemption, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2587 (2011), submitted no evidence to show that the break laws in fact would decrease the availability of routes to serve the Whirlpool accounts, or would meaningfully decrease the availability of routes to motor carriers in California. Instead, Defendants submitted only very general information about the difficulty of finding parking for commercial trucks in California.

Although compliance with California's meal and break laws may require some minor adjustments to drivers' routes, the record fails to suggest that state meal and rest break requirements will so restrict the set of routes available as to indirectly bind Defendants, or motor carriers generally, to a limited set of routes, *Am. Trucking*, 660 F.3d at 397, or make the provision or use of specific routes necessary for compliance with the law, *Air Transp. Ass'n*, 226 F.3d at 1074. Moreover, drivers already must incorporate into their schedule fuel breaks, pick ups, drop offs and, in some cases, time to install products or wait for their partner to complete an installation.

Finally, in an amicus brief filed at our invitation, the Secretary of Transportation argued that: (1) state laws like California's, which do not directly regulate prices, routes, or services, are not preempted by the FAAAA unless they have a "significant effect" on prices, routes, or services; (2) in the absence of explicit instructions from Congress, there is a presumption against preemption in areas of traditional state police power, including employment; and (3) there is no showing of an actual or likely significant effect on prices, routes, or services, and so the California laws at issue are not preempted. *See also Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers*, 73 Fed. Reg. 79,204-01, 79,206 (Dec. 24, 2008) (determining, in an order issued by the Department of Transportation, that the agency lacked jurisdiction to preempt California's meal and rest break laws under another statute, 49 U.S.C. § 31141, because those state laws

are not "laws [or] regulations on commercial motor safety").

The government's position is not controlling, because it does not concern a statute that the Department of Transportation is tasked with implementing, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), nor does it concern regulations on which the agency has issued past reasoned, consistent opinions, *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997). But three factors specific to this issue lead us to "place some weight upon DOT's interpretation," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000): (1) the agency's general expertise in the field of transportation and regulation, (2) the fact that the position taken in the brief represents the agency's reasoned consideration of the question, and (3) the fact that the government's position is generally consistent with its approach to other preemption questions concerning California's meal and rest break laws (although this is the first time that the government has taken a position on FAAAA preemption specifically).

For the reasons discussed above, we agree with the government's position. We find it particularly persuasive that the Department of Transportation, which has great familiarity with transportation regulations, sees no evidence that California's meal and rest break laws will significantly affect the prices, routes, or services of motor carriers.

CONCLUSION

The FAAAA does not preempt California's meal and rest break laws as applied to Defendants, because those state laws are not "related to" Defendants' prices, routes, or services. The district court dismissed this action on summary judgment because of Defendants' preemption defense, so it has not yet considered the merits of Plaintiffs' claims. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

ZOUHARY, District Judge, concurring:

I write separately to emphasize one aspect of this case. As the Majority notes, Penske bears the burden of proof on its preemption defense. *See supra*, at 22. But Penske did not offer specific evidence of (for example) the actual effects of the California law on Penske's own routes or services. Instead, Penske relied on a general hypothetical likelihood that a Penske delivery driver, with limited flexibility in traveling from point A to point B, is further restricted to certain routes that would allow a driver to park his or her truck and enter "off-duty" status.

Penske failed to carry its burden. I consequently express no opinion, for example, that the possibility a "driver [must] *briefly* pull on and off the road during the course of travel *does not meaningfully interfere* with a motor carrier's ability to select its starting points, destinations, and routes." *Id.* (emphases added). Maybe so. Maybe not.

Further, the Majority incorrectly posits that Defendants are at liberty to schedule as they choose, tempered only by hiring more drivers and staggering breaks. Customer demands and practicalities must also be considered. As in air and train transportation, substitution crews may now be needed when hours of service are reached with some expense, delay, and impact on service. With respect to costs-of-labor, Penske did produce specific evidence, reflecting an estimated 3.4 percent increase in annual pricing to service a relevant

account. Without more, that minimal increase in pricing is an insufficient basis for preempting the decades-old meal and rest break requirement. *Mendonca*, 152 F.3d at 1189 (finding California's prevailing wage requirement, which increased a motor-carrier defendant's prices by 25 percent, "in a certain sense . . . 'related to' [the motor carrierdefendant's] prices, routes and services," but had an effect that was "no more than indirect, remote, and tenuous").

Finally, I note what this case is not about. This case is not an occasion for us to reexamine prior precedent—the discussion of *Rowe*, *Northwest, Inc.*, and *Gammie* makes that clear. Nor is this case about FAAAA preemption in the context of interstate trucking—though one gets the sense that various amici wish it were. On this record, and in the intrastate context, California's meal and rest break requirements are not preempted.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION; Lindeman Brothers, Inc.; Yuba Trucking, Inc., Plaintiffs–Appellants, v. Roberta E. MENDONCA; Lloyd W. Aubry, Jr.; James W. Van Loben Sels; California Department of Transportation; California Department of Industrial Relations; California Department of Labor, Defendants–Appellees, and International Brotherhood of Teamsters, AFL–CIO, Intervenor–Defendant–Appellee.	No. 97–16026 OPINION

Decided Aug. 21, 1998.

Before: SNEED and TROTT, Circuit Judges, and WALLACH,* Judge.

The issue before us is whether the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501 et seq. ("FAAA Act") preempts enforcement of California's Prevailing Wage Law, Cal. Lab.Code §§ 1770–80 ("CPWL"). We hold that it does not do so.

The language and structure of the FAAA Act does not evidence a clear and manifest intent on the part of Congress to preempt the CPWL. Although CPWL is not entirely unrelated "to a price, route or service of ... motor carriers," the teachings of recent Supreme Court cases make clear that a state law dealing with matters traditionally within its police powers, and having no more than an *indirect, remote, and tenuous* effect on motor carriers, are not preempted. Such is the case here. Thus, we affirm the district court's dismissal of plaintiffs' complaint.

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* Honorable Evan J. Wallach, Judge of the United States Court of International Trade, sitting by designation.

I.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs Californians for Safe & Competitive Dump Truck Transportation, Lindeman Brothers, Inc. and Yuba Trucking, Inc. (collectively "Dump Truck")[1] are public works contractors who provide transportationrelated services on publicly-funded projects within California. The defendants (collectively "Mendonca") are several California agencies and their agents in whom the State of California vests the statutory authority to enforce CPWL.

Since 1937, when CPWL was enacted, California has required contractors and subcontractors who are awarded public works contracts to pay their workers "not less than the general prevailing rate ... for work of a similar character in the locality in which the public work is performed." *See* Cal. Lab.Code § 1771.[2] Failure to

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[1] Plaintiff Californians for Safe & Competitive Dump Truck Transportation is a nonprofit association of approximately eleven individuals and entities operating as motor carriers in California or utilizing the transportation services of motor carriers. Plaintiffs Lindeman Brothers, Inc. and Yuba Trucking, Inc. are motor carrier enterprises incorporated in California which are engaged in the transportation of property in intrastate and interstate commerce.

[2] The CPWL essentially adopted the provisions of the 1931 Davis–Bacon Act, 46 Stat. 1494, as amended, 40 U.S.C. §§ 276a to 276a—5, which required that wages paid on federal public

pay prevailing wages results in the assessment of penalties against the contractor. *See* Cal. Lab.Code § 1775. Mendonca assessed Dump Truck various penalties after it failed to pay its workers the prevailing wage.

On September 20, 1996, Dump Truck filed suit in the district court seeking both declaratory and injunctive relief. Dump Truck claimed that enforcement of CPWL violated the Supremacy Clause because the FAAA Act preempted CPWL. Jurisdiction was based on the existence of federal questions and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

On October 18, 1996, Mendonca filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and, in late 1996, the International Brotherhood of Teamsters ("IBT") sought leave to intervene as a defendant. Dump Truck opposed both motions. The district court granted IBT's motion to intervene and, thereafter, granted Mendonca's motion to dismiss after the district court concluded that CPWL was not preempted. The district court entered final judgment, and Dump Truck timely appeals the district court's ruling on the preemption issue as well as its decision to grant IBT's motion to intervene.

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works projects equal wages paid in the project's locale on similar, private construction jobs.

II.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal under 28 U.S.C. § 1291. A district court's decision regarding preemption is reviewed de novo. *Gee v. Southwest Airlines,* 110 F.3d 1400, 1404 (9th Cir.1997), *cert. denied,* 522 U.S. 915, 118 S.Ct. 301, 139 L.Ed.2d 232 (1997).

III.

DISCUSSION

Part I: The District Court's Dismissal of the Complaint

Dump Truck contends that the plain meaning of the FAAA Act's preemption clause, the intent of Congress, and the Supreme Court's "broad interpretation" of the ADA's preemption clause, compel a conclusion that the FAAA Act preempts CPWL. Dump Truck therefore asserts that the district court erred by dismissing its complaint under Fed. R. Civ. P. 12(b)(6).

We commence with the assumption that state laws dealing with matters traditionally within a state's police powers are not to be preempted unless Congress's intent to do so is clear and manifest. *See Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). The Supreme Court has indicated that CPWL is an example of

state action in a field long regulated by the states. *See California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.,* 519 U.S. 316, 117 S.Ct. 832, 835, 840, 136 L.Ed.2d 791 (1997). Thus, the crux of this case is whether Congress exhibited a clear and manifest intent to preempt CPWL.

Nonetheless, to determine Congressional intent, we first must consult the text of the FAAA Act, as well as its structure and purpose. We are mindful of the Supreme Court's admonition that "preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

1. *The Text of the FAAA Act*

On January 1, 1995, Section 601 of the FAAA Act became federal law. As a general matter, this section preempts a wide range of state regulation of intrastate motor carriage. It provides:

> (c) Motor carriers of property. (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision *having the force and effect of law related to a price, route, or service of any motor carrier* ... with respect to the transportation of property.

49 U.S.C. § 14501(c)(1)(1997) (emphasis added). Paragraphs (2) and (3) exempt a number of types of state regulations and controls. *See* 49 U.S.C. § 14501(c)(2), (3). None of the exemptions, however, apply here. Beyond this, the text offers little else in the way of definition or direction as to the FAAA Act's preemptive scope.

2. *The Legislative History of the FAAA Act*

Congress apparently regarded the preemption clause of the FAAA Act as a way of solving two major problems facing interstate commerce. First, Congress believed that across-the-board deregulation was in the public interest as well as necessary to eliminate non-uniform state regulations of motor carriers which had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtail[ed] the expansion of markets." H.R. Conf. Rep. No. 103–677, at 86–88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758–60.

Second, by enacting a preemption provision identical to an existing provision deregulating air carriers (the Airline Deregulation Act ("ADA")), Congress sought to "even the playing field" between air carriers and motor carriers. *Id.* at 85, 1994 U.S.C.C.A.N. at 1757, 1759. This imbalance arose out of this court's decision in *Federal Express Corp. v. California Pub. Utils. Comm'n,* 936 F.2d 1075 (9th Cir.1991). By holding that Federal Express fit within the ADA's definition of "air carrier," this court

concluded that California's intrastate economic regulations of the carrier's shipping activities were preempted. As a result, air-based shippers gained a sizeable advantage over their more regulated, groundbased shipping competitors. By preempting the states" authority to regulate motor carriers, Congress sought to balance the regulatory "inequity" produced by the ADA's preemption of the states' authority to regulate air carriers. *See* H.R. Conf. Rep. No. 103–677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1759.

It is revealing to note that Congress identified fortyone jurisdictions which regulated intrastate prices, routes and services, followed by ten jurisdictions which did not regulate in these areas. *See* H.R. Conf. Rep. 103–677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1758. Of the ten jurisdictions which Congress found *did not* regulate intrastate prices, routes and services, seven of these jurisdictions had, and continue to have, general prevailing wage laws substantially similar to CPWL.[3]

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[3] The seven jurisdictions with prevailing wage laws similar to the CPWL are: Alaska, Delaware, the District of Columbia, Maine, Maryland, New Jersey, and Wisconsin. *See, e.g.,* Alaska Stat. § 386.05.010 et seq. (Michie 1996); Del.Code Ann. tit. 29, § 6960 (1997); 40 U.S.C. § 276(a) (1994) (making the Davis–Bacon Act applicable to the District of Columbia); Me.Rev.Stat. Ann. tit. 26, § 1304 (West 1997); Md.Code Ann., State Finance and Procurement § 17– 201 (1997); N.J. Stat. Ann. § 11–56.26 (West 1997); Wis. Stat. § 66.293 (West 1998).

This portion of the legislative history constitutes indirect evidence that Congress did not intend to preempt CPWL. This perception is reinforced by the absence of any *positive* indication in the legislative history that Congress intended preemption in this area of traditional state power. *See Travelers,* 514 U.S. at 655, 115 S.Ct. 1671.

3. *Recent Cases Interpreting the "Related To" Language*

While this legislative history counsels against preemption in this case, we draw additional support from recent Supreme Court cases interpreting the preemptive scope of the ADA and ERISA preemption clauses. To repeat, these cases instruct that state regulation in an area of traditional state power having no more than an indirect, remote, or tenuous effect on a motor carriers' prices, routes, and services are not preempted.

The Supreme Court's first encounter with the ADA's preemption clause was *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). There the Court held that a state law may "relate to" the ADA, and therefore run afoul of the ADA's preemption clause, even though such law has only an indirect effect on the rates, routes, or services of an air carrier. *See id.* at 385–86, 112 S.Ct. 2031.[4] It was acknowledged, however, that

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[4] In *Morales,* the Court referred to the preemption test found in ERISA's preemption clause "[s]ince the relevant language of the ADA is identical...." *Morales,* 504 U.S. at 384, 112 S.Ct. 2031.

some state action may affect an air carrier's fares in "too tenuous, remote, or peripheral a manner" to have preemptive effect. *Id.* at 390, 112 S.Ct. 2031 (citation omitted). Moreover, *Morales* "express[ed] no views about where it would be appropriate to draw the line." *Id.*[5]

In *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995), the Court again confronted the issue of where to draw the line in interpreting the ADA's preemptive scope. Although the two minority opinions in *Wolens* advocated either "minimal preemption" or "total preemption," *see id.* M 234, the majority took the "middle course" and held that state action was preempted to the extent that it imposed its substantive standards on the prices, routes, or services of an air carrier. *See id.* at 232, 115 S.Ct. 817. The majority further held that the ADA's preemption clause did not bar states from enforcing contract terms which the airline had voluntarily undertaken. *Id.* at 232–33, 115 S.Ct. 817. While adhering to its holding in *Morales,* the Court recognized that "principles seldom can be settled on the basis of one or two cases, but require a closer

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The Court thus adopted ERISA's preemption test and declared that "[s]tate enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are preempted under 49 U.S.C.App. § 1305(a)(1)." *Id.*

[5] In the FAAA Act's legislative history, Congress endorsed the "broad preemption interpretation" adopted by the Court in *Morales. See* H.R. Conf. Rep. 103–677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1755.

working out." *Id.* at 234–35, 115 S.Ct. 817 (citation omitted).

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), a unanimous Supreme Court read the *Morales* ruling narrowly, and held that traditional state regulation having no more than an *indirect effect* on ERISA plans were not "related to" such plans within the meaning of ERISA's preemption clause. *See id.* at 661– 62, 115 S.Ct. 1671. The Court acknowledged, however, that a state law might produce "acute, albeit indirect, economic effects ... that such a state law might indeed be preempted...." *Id.* at 668, 115 S.Ct. 1671.

In *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997), the Supreme Court confronted an ERISA preemption challenge to CPWL based on the contention that it "related to" and had a "connection with" ERISA plans because CPWL increased costs of providing certain benefits, thereby affecting the choices made by ERISA plans. *See id.* 519 U.S. at ——, 117 S.Ct. at 840. Rejecting this argument, a unanimous Court held that it "could not hold pre-empted a state law in an area of traditional state regulation based on so *tenuous* a relation" to ERISA plans. *See id.* 519 U.S. at ——, 117 S.Ct. at 842 (emphasis added). In determining whether the a state law had the forbidden connection, the Court looked to

> the *objectives* of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the *effect* of the state law on ERISA plans.

Dillingham, 519 U.S. at ——, 117 S.Ct. at 838 (citation omitted) (emphasis added).

Clearly the Court in these cases is attempting to preserve the proper and legitimate balance between federal and state authority. Of particular note is Justice Scalia's concurrence in *Dillingham*. He stressed that the Court's "first take on this statute was wrong" and that the " 'relate to' clause of the preemption provision is meant, not to set forth a *test* for preemption, but rather to identify the field in which ordinary *field pre-emption* applies...." *Id.* 519 U.S. at ——, 117 S.Ct. at 843 (emphasis in original). Justice Scalia further stated that "applying the 'relate to' provision according to its terms was ... doomed to failure, since ... everything is related to everything else." *Id.*

4. *CPWL is not "Related To" Prices, Routes or Services*

It is against the backdrop of *Dillingham, Travelers,* and *Wolens* that we now confront Dump Truck's preemption argument. Dump Truck contends that the FAAA Act preempts CPWL because it directly affects, and therefore is "related to," the prices, routes, and services of Dump Truck's motor carrier enterprises. It argues that CPWL increases

its prices by 25%, causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue. As proof of these assertions, Dump Truck alleges that its rates for "services" are based on: (1) costs, including cost of labor, permits, insurance, tax and license; (2) performance factors; and (3) conditions, *including prevailing wage requirements.*

While CPWL in a certain sense is "related to" Dump Truck's prices, routes and services, we hold that the effect is no more than indirect, remote, and tenuous. *See Dillingham,* 519 U.S. at ——, 117 S.Ct. at 842. We do not believe that CPWL frustrates the purpose of deregulation by *acutely* interfering with the forces of competition. *See Travelers,* 514 U.S. at 668, 115 S.Ct. 1671. Nor can it be said, borrowing from Justice Scalia's concurrence in *Dillingham,* that CPWL falls into the "field of laws" regulating prices, routes, or services. *See Dillingham,* 519 U.S. at ——, 117 S.Ct. at 843.[6] Accordingly, we hold that CPWL is not "related to" Dump Truck's prices, routes, and services within the meaning of the FAAA Act's preemption clause. The FAAA Act thus does not preempt CPWL.

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[6] The test for ordinary "field preemption" was set forth in *Rice v. Santa Fe Elevator Corp.,* 331 U.S. at 236, 67 S.Ct. 1146 (test is whether Congress has declared it policy with respect to the matter on which the state asserts the right to act). To repeat, nowhere in the FAAA Act do we find any mention of Congress's intent to occupy the field of general prevailing wage laws.

Part II: The Granting of IBT's Motion to Intervene

Dump Truck also contends that the district court erred by granting IBT's motion to intervene as of right because, in Dump Truck's view, IBT failed to meet the test for intervention under Fed. R. Civ. P. 24(a). We disagree.

A district court's decision concerning intervention as of right pursuant to Fed. R. Civ. P. 24(a) is reviewed de novo. *See Greene v. United States,* 996 F.2d 973, 976 (9th Cir.1993). We apply a four-part test under Fed. R. Civ. P. 24(a):

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; (4) the applicant's interest must be inadequately represented by the parties to the action.

Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1493 (9th Cir.1995) (citation omitted).

Here, IBT satisfied each of the elements of Rule 24(a). First, it is uncontested that IBT timely sought to intervene. Second, its members had a "significant interest" in receiving the prevailing wage

for their services as opposed to a substandard wage. Moreover, California's law guaranteeing prevailing wages, the CPWL, was the subject of Dump Truck's preemption suit. Third, in the event Dump Truck prevailed, it would have clearly impaired IBT's members' right to receive the prevailing wage. Fourth, because the employment interests of IBT's members were potentially more narrow and parochial than the interests of the public at large, IBT demonstrated that the representation of its interests by the named defendants-appellees may have been inadequate. *See Id.* Accordingly, the district court did not err by granting IBT intervention as of right.

IV.

CONCLUSION

The district court's judgment dismissing Dump Truck's complaint under Fed. R. Civ. P. 12(b)(6) is affirmed. Additionally, the district court's decision granting IBT's motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a) is affirmed.

AFFIRMED.