CONSOLIDATED CASE NOS. 18-73488, 19-70323, 19-70329, 19-70413

in the

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, ET AL.,

Respondents.

On Petitions for Review of
Federal Motor Carrier Safety Administration
Determination of Preemption
Docket No. FMCSA-2018-0304

REPLY BRIEF OF INTERVENOR IN SUPPORT OF PETITIONERS

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a private citizen who has not issued debt securities to the public

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STATUTES AND REGULATIONS

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STATEMENT OF THE ISSUE

Whether challenges raised in the Intervenor's Brief are properly before this Court.

SUMMARY OF ARGUMENT

Respondents have presented false or misleading claims about the efficacy, flexibility, and purpose of existing federal regulations in their Determination of Preemption which must not go unchallenged: in particular that California's Meal and Rest Break rules

> "have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, that they are incompatible with the Federal hours of service regulations, and that they cause an unreasonable burden on interstate commerce." 83 F.R. 67470. ER1.

In their Consolidated Brief at 3 (Note 1), Respondents further claim that "Trescott dedicates his brief to raising a number of arguments that attack [these] FMSCA regulations" and that "[t]hese challenges are not properly before this Court." The factual challenges raised in the Intervenor's Brief are properly before the Court because Respondents' claims touting the efficacy and flexibility of those regulations are before this Court. Although Respondents conclude at 54 that "California's laws would have been preempted if the agency found just one of the three factors met," their contested claim that "the record reasonably supported the agency's conclusion that all three were met" reveals that the Agency's reasoning was arbitrary and

capricious. The Court must use a 7th Amendment test to determine if state laws are "identical to, or have the same effect" as Federal Motor Carrier Safety Regulations under 49 C.F.R. § 355.5.

ARGUMENT

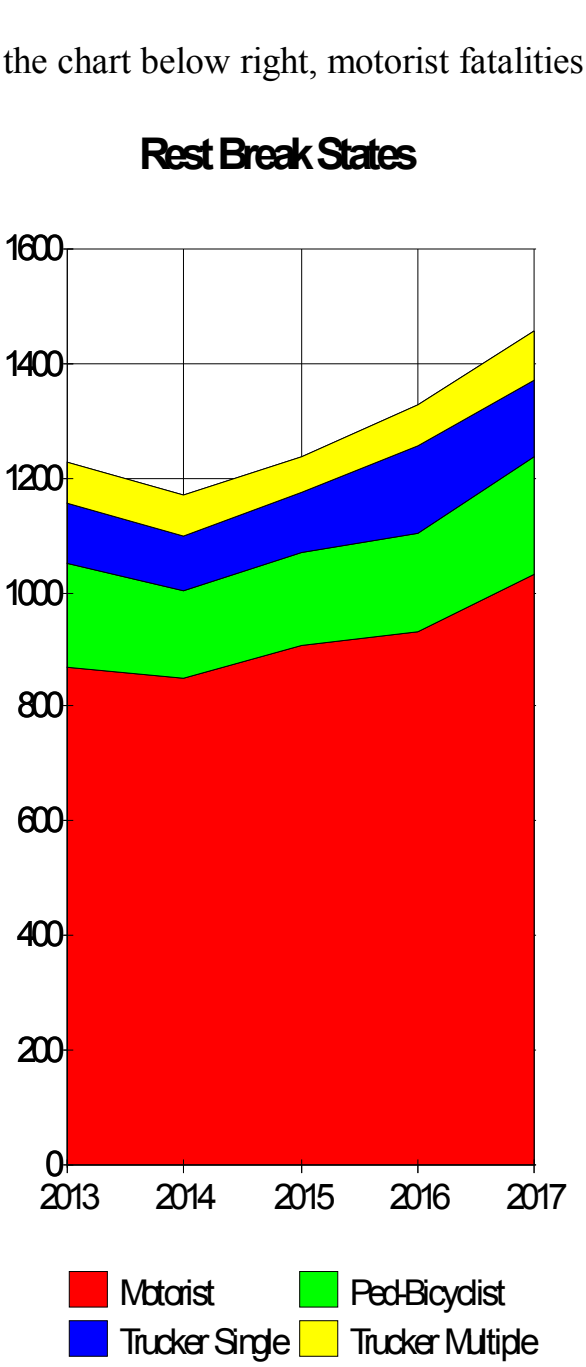
I. The Secretary's own data proves that state Meal and Rest Break Laws have statistically significant safety benefits that extend beyond those provided by the Federal Motor Carrier Safety Regulations

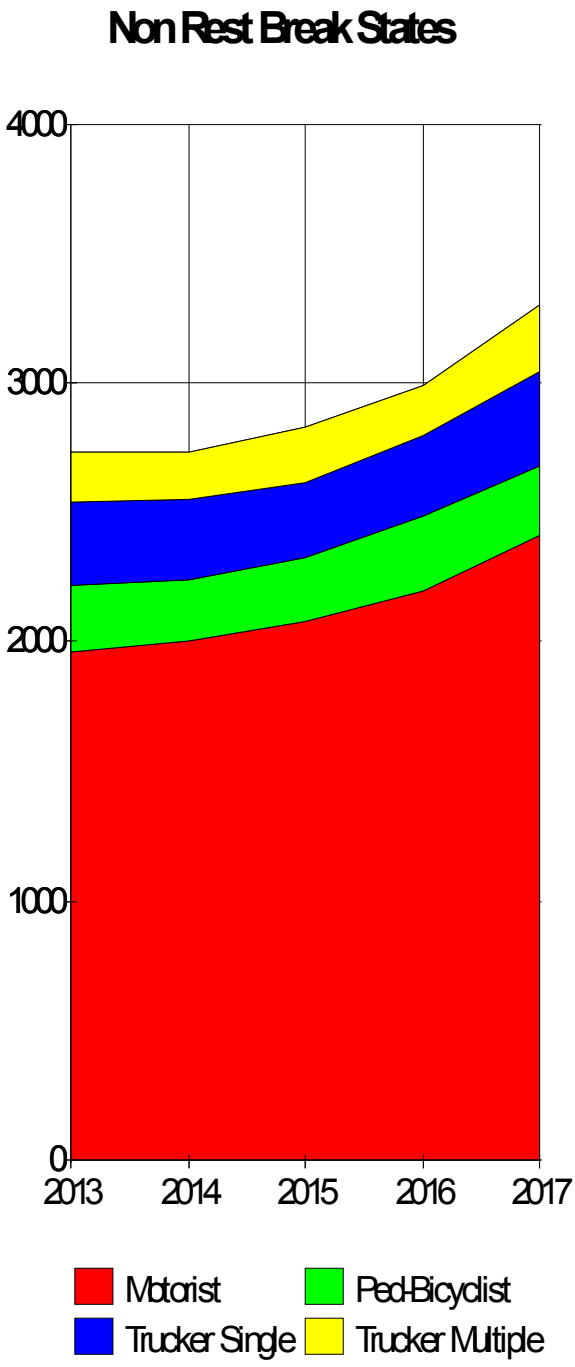
A. Truck fatalities declined in states with rest break laws in 2014

Ignoring the Secretary's own data obtained from the National Highway Traffic Safety Administration's Fatality Analysis Reporting System presented in comments before the Agency, C1-3, ER21-22, Respondents pound the table with unsupported claims at 12, 13, 25, 52, and 54 that state meal and rest break laws "do not provide any measurable safety benefit." As shown in the charts below using data obtained from the National Highway Traffic Safety Administration's published *Traffic Safety Facts—Large Trucks* fact sheets,[1] there are statistically significant differences between states having meal and rest break laws[2] and those that do not:

[1] Publication Numbers: DOT HS 812 150; DOT HS 812 279; DOT HS 812 373; DOT HS 812 497; DOT HS 812 663 (*see* individual state tabulations)
[2] California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, and West Virginia per Note 13 of the Determination, ER10

As shown on the chart below left, fatalities declined in states having meal and rest break laws in 2014 while, as shown on the chart below right, motorist fatalities

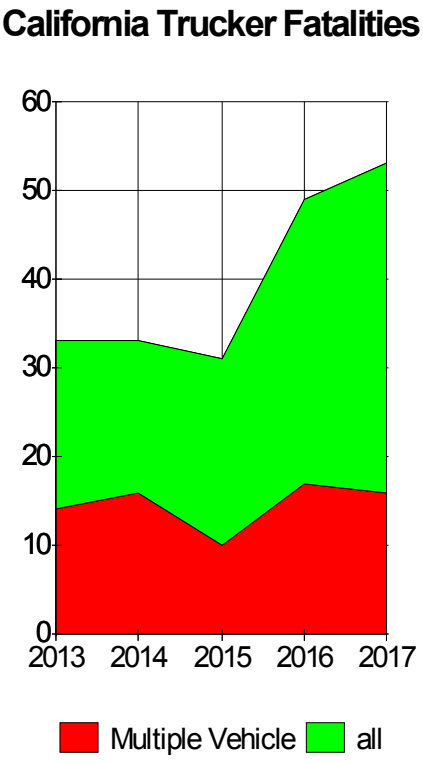




increased in states lacking meal and rest break laws. These charts prove that State meal and rest break laws had an obvious measurable safety benefit in 2014.

B. Single vehicle trucker fatalities more than doubled when tracking devices forced truckers to skip state mandated meal and rest breaks

As explained in the Intervenor's Brief at 7 & 16, fatalities increased in most states on December 16th 2015, the 242nd anniversary of the Boston Tea Party, when tracking devices incompatible with state meal and rest break laws were mandated in an effort to prevent a nationwide trucker strike. 49 C.F.R. § 395.8 et seq. 80 F.R. 78383. In states with meal and rest break laws, however, single vehicle trucker fatalities such as running off the road or falling asleep at the wheel (shown in blue above) increased by one third until they matched the high rates seen in non-rest-break states, killing an additional 50 truckers per year. This means that truckers had been benefiting from these laws. As shown on the California Trucker Fatalities chart at right, also displaying data obtained from NHTSA's *Large Trucks* fact sheets,[1] single vehicle trucker fatalities (shown in green) more than doubled 118% in California between 2014 and 2017—killing an additional 20 truckers per year in California alone.



C. California's meal and rest break laws reduced trucker fatalities 60%

The chart on C2 presented in comments before the Agency showed a 60%

reduction in semi-driver fatalities when a California court ordered meal and rest break laws to be enforced. *Cicairos v. Summit Logistics, Inc*., 133 Cal App.4th 949 (2006). The above California Trucker Fatalities chart shows that California's meal and rest break laws reduced trucker fatalities 60% during the nine years they were being enforced—strongly supporting The State of California's claim on Page 2 of its brief that meal and rest break laws "are necessary to protect the health and welfare of California workers" and The State of Washington's claim on Page 12 of its brief that "[m]eal and rest breaks play a vital role in safety on the highways."

D. Motorist and pedestrian fatalities increased when tracking devices forced truckers to skip state mandated rest breaks

The above charts disprove Respondents' claims at 42 that "truck drivers parked in 'unofficial or illegal' spots such as 'highway ramps or shoulders,' [are] a 'serious potential hazard to other motorists,'" and at 44 that "any marginal decrease in crash risk that might accompany additional breaks did not outweigh the safety risks associated with requiring these breaks on a more frequent and less flexible basis." ER7. The above charts clearly show that fatigued truck drivers are a greater threat to motorists and pedestrians than parked trucks are. As tabulated in NHTSA's *Large Trucks* fact sheets,[1] the number of pedestrians and cyclists killed by trucks in California jumped 60% in just one year and motorist fatalities increased 10% when tracking devices forced truckers to switch from nighttime to daytime driving,

causing the deaths of an additional 55 Californians in 2017. Indeed, single vehicle trucker fatalities such as running off the road or falling asleep at the wheel (shown in blue above at 6) correlate with pedestrian deaths (shown in green in the charts at 6), suggesting not that rest break laws kill pedestrians, but that high rates of pedestrian deaths are a causal factor that influences states to enact meal and rest break laws. Together with the additional 20 truckers killed per year, 75 additional persons are likely to be killed each year in California if the preemption is not reversed.

II. Challenges to FMCSA's regulations are properly before this Court

Respondents repeatedly pound the table over and over again at 8, 14, 16, 19, 35, 41, ER7, and ER9, with unsupported claims in defiance of their own statistical evidence, that "drivers have substantial flexibility to take breaks" and that "the regulations allow the driver flexibility to determine when that break should occur" with "great flexibility in deciding when to take the break." They also claim at 3 (Note 1) that challenges to these assertions in the Intervenor's Brief at 6 and 20, which would be admitted as eyewitness testimony if presented in district court, that tracking devices "forced truckers to violate speed limits whenever delayed by weather or traffic, racing against the clock to arrive at a safe place to park before running out of driving time" and that "I developed hypertension due to job stress," attack other FMCSA regulations "than the preemption determination at issue" and "are not properly before this Court."

Challenges to these regulations are properly before this court because 49 U.S.C. § 31141(c)(4)(A) provides that "the State law or regulation may be enforced unless [it] has no safety benefit." Therefore, a cost-benefit analysis comparing the effectiveness of FMCSA's regulations with state laws is mandated by Congress. Respondents point out at 40 that "employers are prohibited from coercing a driver too fatigued to…remain behind the wheel," citing 49 C.F.R. § 390.6; but they fail to explain how employers are supposed to know when drivers are "too fatigued" to be ordered to drive eight continuous hours without a break. Would not plain common sense suggest that anyone monitored by tracking devices and ordered to drive eight continuous hours without a break develops job stress?

A. The Agency's conclusion was arbitrary and capricious

Ignoring the Secretary's own data proving that tracking devices more than doubled single-vehicle crashes thought to be fatigue related,[1] Respondents conclude their Summary of Argument at 15 with the astounding claim that:

> "FMCSA reasonably determined that federal regulations adequately prevent risks from fatigued driving and that California's more stringent requirements do not provide any additional benefit on this front. Petitioners have not provided any reason to find that this conclusion was unreasonable."

The agency's decision must be overturned "if the agency has…entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency…" *Motor Vehicle*

Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Failure to include any analysis of the danger of fatigued truck drivers to pedestrians is a failure "to consider an important aspect of the problem" and leaves the Determination of Preemption at 83 F.R. 67470, ER7, "unsupported by substantial evidence." *id*.

B. Congress did not authorize a two-step process

The question now before the Court is whether Congress intended to allow an agency, in a circular way, to preempt a state law in a lengthy two-step process: first, by promulgating an incompatible regulation under 49 C.F.R. § 395.8 that removed the law's safety benefit; then, determining without the support of a cost-benefit analysis to "examine relevant data and articulate a satisfactory explanation," that the law does not provide any additional benefit? *State Farm* at 43. This Court ruled that an agency may not "put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards." *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198 (9th Cir. 2008). Clearly, if Congress requires a cost-benefit analysis in the statutory construction, then a cost-benefit analysis is properly before the court regardless who provides it—even an Intervenor!

III. The 7th Amendment to the Constitution must govern whether California's meal and rest break laws are identical to, or have the same effect as federal regulations

A. Congress required that 7th Amendment protections be upheld

Respondents agree at 4 that The Motor Carrier Safety Act of 1984, Pub. L.

No. 98-554, title II, 98 Stat. 2829, 2832; 49 U.S.C. § 31131 *et seq.*, required a 15-member "Commercial Motor Vehicle Safety Regulatory Review Panel" (a quasi-judicial body equivalent to a jury for 7th Amendment purposes), to analyze "laws and regulations of each State and determine" if they "pertain to commercial motor vehicle safety." Pub. L. No. 98-554 §§ 208(b)(1), 209(a). Respondents admit at 6 that in 1994, Congress recodified Title 49 of the United States Code, Pub. L. No. 103-272, 108 Stat. 745, transferring this quasi-judicial power to make preemption determinations to the Secretary (National Transportation Safety Board) under 49 U.S.C. § 31141(f)(1) and that the Secretary removed any pretense of 7th Amendment protection from agency due process when this quasi-judicial power was transferred to the Federal Motor Carrier Safety Administrator under 49 C.F.R. § 1.87(f).

B. Civil penalties trigger 7th Amendment Protections

Respondents admit at 8 that the Agency's regulations under 49 C.F.R. § 392.3 prohibit drivers from operating commercial motor vehicles if impaired by stress related illnesses that result from inadequate rest breaks such as those described in the Intervenor's Brief at 5, 6, and 20; thus robbing truckers of income to support their families and triggering 7th Amendment protections. Respondents agree at 9 that California Labor Code Section 226.7(c) requires employers to provide rest breaks intended to prevent such illnesses or "pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the

meal or rest or recovery period is not provided"—again triggering 7th Amendment protections. The 7th Amendment says:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

See *Tull v. United States*, 481 U.S. 412, 421 n.5 (1987)(holding that the 7th Amendment applies to cases involving civil penalties to abate interferences with public health or safety).

C. California's meal and rest break laws do not have the same effect as federal regulations because they impose different civil penalties

Respondents claim at 19 that "California laws cover the same subject matter" as 49 C.F.R. § 395.3 even though their enforcement schemes are neither identical nor have the same effect. As the American Trucking Associations made clear in their Amicus Brief at 12:

> "skipping the 30-minute break required under 49 C.F.R. § 395.3(a)(3)(ii) or driving while fatigued in violation of 49 C.F.R. § 392.3 carries serious consequences. Such violations can result in putting drivers "out of service", i.e., prohibited from continuing their trips [and] expose drivers to civil penalties up to $3,855 per violation (see 49 C.F.R. § 386 App. B ¶ (a)(4). Skipping the breaks provided under the California MRB rules, by contrast, carries no consequence for the driver whatsoever.
>
> b. California's rules…impose a penalty on a motor carrier…drivers may pursue a civil action for an additional hour of pay for a violation. Cal. Lab. Code § 226.7(c); Wage Order 9 § 11(D), 12(B)."

One hundred years ago in *Missouri K.&T. Ry. Co. v. United States*. 231 U.S.

112 (1913), the Supreme Court provided three tests to determine whether employees are on duty or off duty, ruling:

> "Employees, though inactive, are none the less on duty…
> [1]where they are under orders,
> [2]liable to be called upon at any moment, and
> [3]not at liberty to go away."

This Court ruled that a temporary relief from duty where employees had to remain in the vicinity was a form of on duty time. *United States v. Southern Pacific Co.* 245 Fed. 722 (9th Cir. 1917). Thus, even if they are eating or sleeping, drivers are still "on duty" if they are "not at liberty to go away," such as if they are "under orders" to take a mandatory 30-minute break from driving under 49 CFR 395.3(a)(3)(ii). California law, in contrast, requires employers to provide "off duty" breaks wherein drivers are "at liberty to go away," not "under orders" or "liable to be called upon at any moment" by dispatchers, allowing them "peaceably to assemble" to protest or attend union meetings as guaranteed by the First Amendment.

Respondents' reliance at 47 on 49 C.F.R. § 355.5 to define "compatibility," "that State laws applicable to intrastate commerce are either identical to, or have the same effect as, the FMCSRs," is therefore unreasonable in this circumstance. Not only are California's Meal and Rest Break Laws not identical to the FMCSRs, they have a completely opposite effect: What good would a burglar alarm be if instead of apprehending the burglar, police mistakenly arrested a teller for robbing her own

bank? What good would a fire alarm be if instead of apprehending the arsonist, police mistakenly arrested a homeowner for burning down his own house? What good would a panic button be if instead of apprehending a stalker, police arrested a woman for raping herself? Similarly, what good would an electronic logging device be if instead of compensating a trucker with additional pay if he was overworked, police arrested him for killing someone after falling asleep at the wheel when it was the employer monitoring the tracking device who was actually responsible? In all cases, the perpetrators would get away with their crimes and the victims would be penalized for reporting the crimes. What driver would be foolish enough to report being overworked if he was exposed to a civil penalty up to $3,855 per violation under Section 386 App. B ¶ (a)(4)? As the American Trucking Associations made clear, under California law, a driver is rewarded with additional pay if he reports the crime. Anyone with common sense will recognize that punishing a victim has the opposite effect, not the same effect, of punishing a perpetrator.

As stated in the Intervenor's Brief at 12, 15, and 30, harassing victims has violent consequences: The first time a FMCSA Administrator presented false or misleading claims about the effectiveness of the FMCSA's regulations, the FBI raided the home of the Senator who confirmed him without a hearing three weeks later. When no one who profited from the additional deaths went to jail, a trucker committed the deadliest attack on Jews in the history of the United States on the

tenth anniversary of his conviction.[3] When the judge who wrote the opinion in *American Trucking Ass'ns v. FMCSA*, 724 F.3d 243(D.C. Cir. 2013) did not go to jail after denying truckers standing, another irate trucker killed seven people as well as himself on the second anniversary of her retirement.[4] Clearly, punishing victims presents additional costs to society that cannot be measured on fatality charts. Therefore, California's meal and rest break laws are neither "identical to, or have the same effect" as federal regulations under Section 355.5.

Respondents' feebly attempt to defend this blame-the-victim policy by claiming at 53 and 54 that the record "showed considerably higher operating costs and lost productivity time in California" and that "costs are further increased by the administrative burdens." They admit at 41 that the additional deaths described in the cost-benefit analysis presented above were premeditated in an effort to provide employers with additional flexibility to increase productivity:

> "the MRB Rules abrogate the flexibilities [for the employer] the Agency purposefully built into the Federal HOS Rules regarding when a driver is required [by the employer] to take a 30-minute rest period, and they graft onto the Federal HOS regulations a requirement for additional 10-minute rest breaks." 83 F.R. 67476. ER7.

Anyone with common sense will recognize that drivers should stop to rest whenever

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[3] Rich Lord, *Pittsburgh Post Gazette*, 10/29/2018
[4] Lucinda Holt, Manny Fernandez, "West Texas Shooting Spree Terrorized Two Towns and Killed 7," *New York Times*, 9/1/2019

they are tired, not just when they are authorized to stop by their employers.

D. Because appellate jurisdiction is limited by the 7th Amendment and the statute specifically assigns jurisdiction to a court of appeals, this Court must limit the Agency's jurisdiction to match the Court's jurisdiction

Rather than deciding what the word "on" means, this Court should limit its jurisdiction under Section 31141(f)(1) to decisions of the National Transportation Safety Board except for preemptions of state laws trampling on regulations on the design and construction of commercial motor vehicles under Section 31136 which do not involve civil penalties. Congress did not authorize a Federal Motor Carrier Safety Administrator to preempt state laws "on" the personal health and safety of citizens just because they conflict with motor carrier regulations promulgated under Section 31502. See *Tull* at 421 n.5 (holding that the 7th Amendment applies to cases involving "interferences with public health, as in…the practice of medicine [or motor carrier safety] by one not qualified"). Respondents do not dispute the claim raised in the Intervenor's Brief at 25-26, that the Administrator who issued the challenged Determination of Preemption lacked "professional experience in motor carrier safety" as required under 49 U.S.C. § 113(c). Indeed, he responded to this challenge by resigning on the day before the Agency's response to the October 1st Motion to Stay Enforcement was due. If Congress intended that an unskilled person should be allowed to preempt a state law, the word "professional" under Section 113(c) would be "superfluous." See *Duncan v. Walker*, 533 U.S. 167, 174 (2001)

("a statute ought, on the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"). See also *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982)("By "professional" decision-maker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue").

A 7th Amendment test should determine whether a state law is "on" motor vehicle safety and can be preempted or "on" motor carrier safety, which may not be preempted. Just as Congress does not want state legislators (or a jury of unskilled persons) to make emotional, politically motivated, knee-jerk decisions about the precise mathematical formulae motor carrier safety professionals use to design safe commercial motor vehicles; Congress equally does not want a computer to decide whether a trucker is too tired to drive. Thus, the Court must analyze who or what is being regulated: If a state is regulating a vehicle, such as if a truck is not permitted to drive do to a safety defect, then the state is interfering with interstate commerce and the 7th Amendment does not apply, so the law can be preempted. If a motor carrier or any other type of person is being regulated, such as if a carrier is required to compensate an overworked driver, the 7th Amendment applies and the law may not be preempted because, in granting jurisdiction to courts of appeals and removing all references to the "Commercial Motor Vehicle Safety Regulatory Review Panel" previously required, Congress expressed a clear intent to limit agency jurisdiction to

laws not covered by the 7th Amendment. Respondents claim at 33 that "Petitioners cite no decision or authority that suggests that the presumption against preemption has any applicability to resolving this jurisdictional question…" Fortunately, their Intervenor did cite such an authority at 32. The 7th Amendment is the applicable authority as the Supreme Court ruled in *Tull v. United States*, 481 U.S. 412 (1987).

CONCLUSION

The Determination of Preemption should be set aside.

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STATEMENT OF RELATED CASES

I am unaware of any related cases other than those consolidated with this case.

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I further certify that I have sent the foregoing document by First Class Mail to:

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I further certify under penalty of perjury that the above is true and correct.

_____

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UNITED STATES COURT OF APPEALS
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