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The Motor Carrier Excuse

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I. INTRODUCTION

In the spring of 2016, Haskell Fuller and Micah Lindsey worked as former employees for Two Men and a Truck Arkansas, Inc. (TMT).[1] Fuller and Lindsey's primary job was to safely move, pack, and unpack customers' possessions.[2] Additionally, Fuller and Lindsey assisted truck drivers in completing inspections and maneuvering trucks into docking stations.[3] In the fall of 2016, Fuller and Lindsey filed a suit against their former employer, TMT, seeking compensation for overtime.[4]

The court dismissed the complaint with prejudice.[5] The court did not dismiss the case because the plaintiffs failed to plead sufficient facts showing that TMT did not pay the required overtime.[6] Instead, the court relied on provisions in the Fair Labor Standards Act (FLSA)[7] and a provision in the Arkansas code[8] that allow employers to deny their workers overtime.[9] This result reflects an abuse that has plagued the transportation industry for nearly a century.[10]

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1. *In re* Two Men & a Truck Litig., No. 5:16-CV-05255, 2017 U.S. Dist. LEXIS 26017 *4 n.3 (W.D. Ark. Feb. 24, 2017).
2. *Id.*
3. *Id.*
4. *Id.* at 3.
5. *Id.* at 2.
6. *See id.* at 17.
7. *See Two Men & a Truck*, 2017 U.S. Dist. LEXIS 26017 at *3; Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 213(b)(1)) (providing an exemption to 29 U.S.C. § 207, which establishes maximum hours and overtime provisions, for any employee "to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49").
8. *See Two Men & a Truck*, 2017 U.S. Dist. LEXIS 26017 at *1; ARK. CODE. ANN. § 11-4-211 (West 2021) (stating that employers' requirement to pay employees overtime for working in excess of forty hours a week does not apply to "any employee exempt from the overtime requirements of the federal Fair Labor Standards Act pursuant to the provisions of 29 U.S.C. § 213(b)(1) – (24) and (b)(28) – (30), as they existed on March 1, 2006").
9. *Cf. In re* Two Men & a Truck Litig., 2017 U.S. Dist. LEXIS 26017 at *15–17 (discussing Arkansas authority that establishes that loaders can be denied overtime despite never leaving the state if their employer subjects them to performing interstate moves that would impact the safety of interstate commerce).
10. *See, e.g.*, Levinson v. Spector Motor Serv., 330 U.S. 649, 776, 778 (1947) (holding that an employee engaged in mostly loading or directing the loading of trucks was not entitled overtime by virtue of the Motor Carrier Act exemption); Williams v. Cent. Transp. Int'l., Inc., 830 F.3d 773, 778 (8th Cir. 2016); Vaughn v. Watkins Motor Lines, Inc., 291 F.3d 900, 906 (10th Cir. 2002); Graham v. Town & Country Disposal of W. Mo., Inc., 865 F. Supp. 2d 952, 961 (W.D. Mo. 2011).

The modern trend of employers refusing to pay transportation workers overtime originated when the Supreme Court of the United States determined that loaders engaged in safety operations impacted interstate commerce and, under the authority of the Interstate Commerce Commission (ICC), were not entitled to overtime.[11] In *Levinson v. Spector Motor Service*, Justice Rutledge, joined by Justice Black and Justice Murphy, offered a dissenting opinion stating that nothing in the Motor Carrier Act of 1935 ("Original MCA")[12] inhibits or forbids the operation of the maximum hour provisions[13] of the FLSA.[14] Despite the dissent's appeal that the FLSA should be applied "broadly and liberally"[15] to achieve its objective of "distributing and raising standards of employment and living[,]"[16] subsequent courts have continued to use *Levinson*[17] to deny transportation employees overtime compensation.[18]

The Motor Carrier Act exemption to the FLSA[19] exists despite being contrary to congressional intent. Congress intended the maximum hours provision of the FLSA to eliminate the brutal conditions impacting the welfare and health of the American people.[20] The maximum hour provision was designed to foster work opportunities for the unemployed seeking work by reducing the oppressive work hours of the employed.[21]

The disparate impact of the Motor Carrier Act exemption has significant implications for Arkansas. Arkansas has 86,860 trucking industry jobs.[22] Over eight percent of Arkansas's workforce is engaged in the trucking industry,[23] which is the highest concentration of trucking industry jobs for any state in the United States.[24] Nearly 33,000 Arkansans are employed

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11. *Levinson*, 330 U.S. at 685 (forbidding a loader-employee from recovering overtime from his prior employer because his duties affected the safety of motor carrier operations and therefore fell under the Motor Carrier Exemption to the FLSA).

12. Pub. L. No. 74-255, 49 Stat. 543 (1935).

13. Pub. L. No. 75-718, 52 Stat. 1060, 1063–65 (1938).

14. *Levinson*, 330 U.S. at 686.

15. *Id.*

16. *Id.*

17. *Id.* at 685.

18. *See, e.g.*, Bilyou v. Dutchess Beer Distribs., Inc., 300 F.3d 217, 229 (2d Cir. 2002); Resch v. Krapf's Coaches, Inc., 785 F.3d 869, 875 (3d Cir. 2015); Songer v. Dillon Res., Inc., 618 F.3d 467, 474 (5th Cir. 2010); Alexander v. Tutle & Tutle Trucking, Inc., 834 F.3d 866, 872 (8th Cir. 2016).

19. 29 U.S.C. § 213(b)(1).

20. 81 CONG. REC. 7847, 7848 (1937) (statement of Sen. Healy).

21. *Id.*

22. AM. TRANSP. RSCH. INST., ARKANSAS TRUCKING FAST FACTS, https://l8r.63b.myftpupload.com/wp-content/uploads/2019/01/TruckingFastFacts_AR.pdf (last updated Dec. 2018).

23. *Id.*

24. *Id.*

as truck drivers,[25] and Arkansas's transportation industry accounts for an even larger share of the state's total payrolls.[26] Additionally, Arkansas is home to transportation giants J.B. Hunt[27] and ABF Freight.[28]

While large carriers are prevalent in Arkansas, over ninety percent of Arkansas trucking companies operate twenty or fewer trucks.[29] The end result has been nothing less than a "truckathon"[30] that results in Arkansas truck drivers performing work in exchange for sweatshop wages. The surplus of truck drivers and the reduction of wages contradicts the FLSA's purpose to provide more opportunities for those seeking work. Arkansas's unique position as the state with the highest concentration of trucking industry jobs[31] places it at the forefront of the battle to provide the trucking industry with fair labor standards.

This Note explores the history, inequity, and application of the Motor Carrier Act exemption to the FLSA.[32] Part II of this Note examines the history of the Motor Carrier Act.[33] Part III of this Note disputes that Congress intended to exclude transportation employees from overtime.[34] Part IV illustrates how the courts fail to fairly apply the MCA exemption[35] by exploring the Eighth Circuit *Baouch* decision.[36] Part V argues that truck drivers are never truly off-duty and concludes that truck drivers should be paid for eve-

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25. *Id.*

26. *Id.*

27. SJ CONSULTING GROUP, TOP 25 TRUCKLOAD AND LTL CARRIERS, J. COM 41 (Mar. 18, 2019) http://jindel.com/wp-content/uploads/2019/04/2018-Top-50-TL-and-LTL-Carriers-SJC.pdf (stating J.B. Hunt was the third largest truckload carrier in the United States in 2018).

28. *Fifteen ATA Members Make Top 100*, ARK. TRUCKING ASS'N. (July 22, 2015), https://www.arkansastrucking.com/newsinbrief/341-fifteen-ata-members-make-top-100 (stating that in 2015, ABF Freight was the seventh largest less-than-truckload carrier in the United States, and five Arkansas companies were in the Top 100 carriers by gross revenue in North America).

29. *Trucking's Impact*, ARK. TRUCKING ASS'N., https://www.arkansastrucking.com/about/impact (last visited Aug. 6, 2020).

30. *See* 79 CONG. REC. 12212 (1935) (statement of Rep. Monaghan) (stating his concerns about an oversupply of truck drivers that results in a "truckathon," which is described as the "brutal, inhumane, and dangerous practice" where drivers work eighteen- to twenty-hour days to the detriment of their health). The high concentration of primarily small, locally owned trucking companies eliminates the ability of truck drivers to unionize and seek higher wages, which, in effect, exacerbates the impact of the MCA exemption. *See* 81 Cong. Rec. 7848 (1937) (statement of Sen. Healy).

31. AM. TRANSP. RSCH. INST., *supra* note 22.

32. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 213(b)(1)).

33. *See infra* Part II.

34. *See infra* Part III.

35. 29 U.S.C. § 213(b)(1).

36. *See infra* Part V.

ry hour they are in the truck.[37] Finally, Part VI appeals to the Arkansas General Assembly to follow in the footsteps of other states that have amended their state laws[38] to preempt federal law[39] by removing the Motor Carrier Act exception from Arkansas's statutory language.[40]

II. HISTORY OF THE MOTOR CARRIER ACT

In 1935, Congress passed the Motor Carrier Act to regulate truck drivers' hours.[41] With this Act, Congress's intent was to increase safety,[42] promote an economically sound trucking industry, and ensure highway transportation would always progress.[43] First, this Section will explore the origins of the ICC. Second, it will examine the history of the Original MCA. Lastly, it will discuss the Motor Carrier Act of 1980 (MCA) and the impact of deregulation on the trucking industry.

A. The Birth of the Interstate Commerce Commission

In the late nineteenth century, the Supreme Court of the United States in *Wabash, St. Louis & Pac. Ry. v. Illinois*, held that Illinois violated the Commerce Clause when it acted to set price ceilings on the rates charged by railroads.[44] In turn, Congress created the ICC in 1887[45] because multiple states that had been previously regulating railroads were prohibited from continuing the practice by the *Wabash* decision.[46] The broad design of the ICC led to courts initially interpreting it to cover only railroads.[47] In re-

37. *Id.*

38. *See, e.g.*, N.C. GEN. STAT. ANN. § 95-25-14(a)(1)(c) (West 2020) (providing the North Carolina MCA exemption to FLSA); N.H. REV. STAT. ANN. § 279:21(VIII)(b) (West 2020) (exempting New Hampshire employees covered by MCA from overtime); KAN. STAT. ANN. § 44-1204(c)(1) (West 2020) (exempting Kansas employees covered by MCA from overtime); NEV. REV. STAT. ANN. § 608.018(3)(f) (West 2020); *see also infra* Part VI.

39. *See* Pettis Moving Co. v. Roberts, 784 F.2d 439, 441 (2d Cir. 1986) (citing Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 201 *et. seq.*)) (holding that state laws requiring overtime for all employees cannot be superseded by the FLSA).

40. *See infra* Part VI.

41. Pub. L. No. 74-255, 49 Stat. 543, 546 (1935).

42. 74 CONG. REC. 12211 (1935) (statement of Rep. Crawford).

43. *See id.* at 12204 (statement of Rep. Sadowski).

44. Wabash, St. Louis & Pac. Ry. v. Ill., 118 U.S. 557, 577 (1886) (holding that railroad transportation is of national character and if it is to be regulated, then only the Congress of the United States should have the authority to do so through utilization of the Commerce Clause of the Constitution).

45. Pub. L. No. 49-41, 24 Stat. 379 (1887).

46. *Wabash*, 118 U.S. at 577.

47. Jurgen Basedow, *Common Carriers Continuity and Disintegration in U.S. Transportation Law*, 13 TRANSP. L. J. 1, 21 (1983).

sponse, Congress passed the Hepburn Act in 1906[48] to guarantee that ICC regulations extended to facilities and other services involved in railroad transportation logistics.[49]

In 1906, President Roosevelt commented that the Hepburn Act's amendment of the ICC "has rather amusingly falsified the predictions, both of those who asserted that it would ruin the railroads and of those who asserted that it did not go far enough and would accomplish nothing."[50] The President stated that regulation of the railroads would "tend to put a stop to the securing of inordinate profits by favored individuals at the expense of the general public, the stockholders, or the wageworkers."[51] Following that declaration, he stated, "[o]ur effort should be not so much to prevent consolidation as such, but so to *supervise and control it as to see that it results in no harm to the people*."[52]

B. The History of the Motor Carrier Act

The increased regulations on railroad companies, which were unforeseeable at the time of the Hepburn Act's passage in 1906, swung the door wide open for a newly emerging trucking industry.[53] One scholar estimated that total railway freight decreased by nearly half from 1920 to 1930.[54] The increased competition by the trucking industry can also be attributed to the Supreme Court's holding in *Buck v. Kuykendall*.[55] The Court in *Buck* held that the State of Washington's refusal to allow Mr. Buck to engage in interstate transportation services limited competition in violation of the Commerce Clause, and this holding ushered in an era of monopolistic protection of the trucking industry.[56] The Court's decision directly impacted the forty states that previously required common carriers to obtain a certificate to drive on state highways.[57] In turn, Congress expanded the authority of the

48. Pub. L. No. 59-337, 34 Stat. 584 (1906).

49. Basedow, *supra* note 47, at 21.

50. Theodore Roosevelt, *Sixth Annual Message*, THE AM. PRESIDENCY PROJECT (Dec. 3, 1906), https://www.presidency.ucsb.edu/documents/sixth-annual-message-4.

51. *Id.*

52. *Id.* (emphasis added).

53. *See generally* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L. J. 235, 268–69 n.317 (2003) (providing the historical origins of the trucking industry); Pub. L. No. 59-337, 34 Stat. 584 (1906).

54. John J. George, *Federal Motor Carrier Act of 1935*, 21 CORNELL L. REV. 249, 249–50 (1936).

55. Buck v. Kuykendall, 267 U.S. 307, 316 (1925). Prior to this holding, a common carrier would be required to apply for a certificate in each state that it planned to transport persons or freight. *Id.* at 312–13.

56. *Id.*

57. Charles A. Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANSP. L.J. 91, 92 (1976).

ICC[58] to include the trucking industry and to protect railroad companies' revenues from "destructive competition."[59]

The decision in *Buck* can be directly attributed to the Original MCA.[60] Congress passed the Original MCA because it was concerned that the low barriers of entry for incoming truck drivers would result in truck drivers driving merely for gas money or to make payments on the truck.[61] The Federal Coordinator of Transportation, testifying to the Senate on a set of bills slated to become the Original MCA, stated that "[t]he most important thing, I think, is the prevention of an oversupply of transportation; in other words, *an oversupply which will sap and weaken the transportation system rather than strengthen it*."[62]

The Original MCA included a provision allowing the ICC to establish a reasonable limit on the maximum hours employees could work.[63] Particularly relevant to the hours of service requirement was Congress's concern about highway safety and the inhumane treatment of workers who sometimes worked twenty hours a day and an upwards of 120 hours a week.[64] Representative Monaghan coined the term "truckathon," referring to the inhumane and brutal practice that endangered the welfare of the traveling public and the health of the truck drivers.[65]

Section 206(a) of the Original MCA allowed the ICC to grant new and existing motor carriers "magic pieces of paper" required for a trucker to engage in interstate commerce.[66] The Court defended this portion of the Original MCA because it believed the industry was economically unstable due to ease of entry and overcrowding caused by smaller companies.[67] The Court stated that Congress was "compelled to require authorization for all interstate operations to preserve the motor transportation system from over-

58. *See* Motor Carrier Act, 1935, Pub. L. No. 74-255, 49 Stat. 543 (1935).

59. Basedow, *supra* note 47, at 28–29; Dempsey, *supra* note 53, at 239, 241–42.

60. Webb, *supra* note 57, at 91–92.

61. William E. Thoms, *Rollin' On . . . To a Free Market Motor Carrier Regulation 1935–1980*., 13 TRANSP. L. J. 43, 48 (1983).

62. *Id.* (citing *Hearings on S. 1629, S. 1632, and S. 1635 Before the Senate Committee on Interstate Commerce*, 74th Cong., 78 (1935)) (emphasis added).

63. Pub. L. No. 75-255, § 204(a), 49 Stat, 543, 546 (1935).

64. 79 CONG. REC. 12212 (1935) (statement of Rep. Monaghan).

65. *Id.*

66. Jonathan C. Rose, *Surface Transportation and the Antitrust Laws: Let's Give Competition a Chance*, 8 TRANSP. L. J. 1, 7 (1976) (stating that some consider the certificates of operating rights the ICC granted to motor carriers under the Original MCA as "golden eggs" because they had an average annual return of sixteen percent).

67. Am. Trucking Ass'ns. v. United States, 344 U.S. 298, 312 (1953).

competition, while at the same time protecting existing routes through the 'grandfather' clause."[68]

C. The Impact of Deregulation on the Trucking Industry

Calls for deregulation, mostly for increases in competition,[69] which would likely reduce transportation costs, began to echo louder throughout the 1970s.[70] Congress responded with the Motor Carrier Act of 1980 that instructed the ICC to promote efficiency and competitiveness throughout the transportation industry.[71] As a direct result, the number of new trucking companies increased dramatically, more than doubling from 1980 to 1990.[72] The "golden certificates" once worth hundreds of thousands of dollars were rendered worthless by the MCA of 1980.[73] In an ultimate act of deregulation, Congress passed the ICC Termination Act of 1995, which eliminated the ICC and allowed the free market to set freight rates.[74]

The Motor Carrier Act of 1980 had dire consequences for large carriers.[75] About half the carriers with over one million in annual revenues went bankrupt, resulting in the loss of 175,000 jobs.[76] Deregulation resulted in the dislocation of more than half the freight industry's employees.[77] Most transportation employees stayed in the industry but ended up taking jobs that paid half their previous wages despite working longer hours than before the

68. *Id.* at 312–13 (providing that certificates would grant a transportation provider the ability to transport goods from one to city to another, but not necessarily the other way around. The certificates essentially granted carriers a one-way ticket to deliver goods).

69. *See* Rose, s*upra* note 66, at 8.

70. MARK H. ROSE ET AL., THE BEST TRANSPORTATION SYSTEM IN THE WORLD: RAILROADS, TRUCKS, AIRLINES, AND AMERICAN PUBLIC POLICY IN THE TWENTIETH CENTURY, 133 (2006) ("Starting in the 1970s, Presidents Richard M. Nixon, Gerald R. Ford, and Jimmy Carter looked to deregulation of transportation and other industries as a device that would reduce the costs of production and consumption in an economy characterized by fast-rising prices and fast-rising unemployment—the dreaded stagflation.").

71. Paul Stephen Dempsey, *Congressional Intent and Agency Discretion Never the Twain Shall Meet: The Motor Carrier Act Of 1980*, 58 CHI.-KENT L. REV. 1, 23 (1981).

72. Thomas Gale Moore, *Trucking Deregulation*, LIBR. OF ECON. AND LIBERTY, https://www.econlib.org/library/Enc1/TruckingDeregulation.html (last visited Aug. 6, 2020).

73. *Id.* (providing that motor carriers were no longer required to have a certificate granted by the ICC to travel to a particular destination; they are considered golden certificates because they would often be the largest asset on a transportation company's balance sheet, worth more than their trucks).

74. Pub. L. No. 104-88, 109 Stat. 803 (1995).

75. MICHAEL H. BELZER, SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION 41 (2000) (stating that carrier bankruptcies were a result of new entrants into the market, mostly small trucking operations that lacked the overhead of existing carriers).

76. *Id.* (stating that for many existing carriers, the ICC-granted certificates were the largest asset on their balance sheet).

77. *Id.*

industry was deregulated.[78] Ultimately, the fears brought up by Congress over a century ago[79] when they decided to regulate the freight industry have now come to fruition, with many truckers working sixty-five hours a week while spending nearly three weeks on the road every month.[80]

III. THE ORIGIN AND LEGISLATIVE INTENT OF THE MCA EXEMPTION

A few years after passing the Original MCA, Congress passed the FLSA.[81] The maximum hours provision within the FLSA stated that no employer that produced goods or was otherwise engaged in commerce could work its employees longer than forty hours a week.[82] The provision also implemented a "penalty of paying more wages"[83] for employers who required employees to work more than forty hours a week.[84] However, the FLSA provided an exception, stating that if the ICC had the power to establish maximum hours of service for the employee, then the forty-hour workweek and overtime provisions did not apply.[85] This is how the MCA exemption to the FLSA was born.[86]

In *Southland Gasoline Co.*, the Court held that the language of the MCA exemption barred truck drivers from the overtime provisions of the FLSA.[87] In *Levinson*, the Court applied the MCA exemption to the FLSA to loaders and driver helpers,[88] basing its reasoning on the decision it had made in *Southland Gasoline Co. v. Bayley*.[89]

This Section will first discuss how *Southland* failed to fully consider the Congressional Record when it held that Congress intended to exempt truck drivers from the maximum hours provision of the FLSA.[90] Next, it will consider the original Senate Bill before it was stalled in the House Rules Committee. It will then examine the meaning of the "oppressive workweek" and Fair Labor Standard as discussed by the House the winter before the passing of the FLSA. Then, this Section will conclude with thoughts on the

78. *Id.*

79. *See* 79 CONG. REC. 12212 (1935) (statement of Rep. Monaghan).

80. BELZER, *supra* note 75, at 42.

81. *See generally* Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 201 *et. seq.*).

82. *Id.* § 7, 52 Stat. at 1063 (stating that overtime is due for a workweek over forty hours, three years after the enactment date of the Bill).

83. 81 CONG. REC. 7655 (1937) (statement of Sen. Walsh).

84. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 207); *see* explanatory parenthetical, *supra* note 82.

85. *Id.* at § 13(b)(1), 52 Stat. at 1068.

86. *See* Southland Gasoline Co. v. Bayley, 319 U.S. 44, 48–49 (1943).

87. *Id.* at 48–50; *see also* BELZER, *supra* note 75, 48–49.

88. Levinson v. Spector Motor Serv., 330 U.S. 649, 685 (1947).

89. *Id.* at 686; *see generally Southland Gasoline Co.*, 319 U.S. 44.

90. *Southland Gasoline Co.,* 319 U.S. 44 at 49.

true legislative intent behind the MCA exemption. Finally, this Section will explore the consequences of the decisions in *Southland Gasoline Co.*[91] and *Levinson*.[92]

A. *Southland* Merely Scratches the Surface of the Congressional Record

The *Southland* Court held that employees covered by the Original MCA could not recover overtime, as required under the FLSA.[93] The Court determined that the congressional purpose of the FLSA was to expand employment and to maintain the health of American workers.[94] The Court justified the MCA exemption by holding that Congress was relying on the Motor Carrier Act's provisions to govern the safety of motor carrier employees.[95] The Court reasoned that Congress did not intend to burden motor carriers with overtime pay requirements so as to prevent their hours of service from being regulated by two separate federal agencies.[96]

Justice Black, who joined the majority, was a member of the U.S. Senate before being appointed to the Supreme Court.[97] As a member of the Senate, Justice Black co-sponsored the Black-Connery Bill, which was eventually amended into the FLSA.[98] To justify the opinion, the Court in *Southland* cites to the only instance in the record where truck drivers are mentioned.[99] The conversation cited includes a statement made by Justice Black before he was appointed to the Court.[100] The conversation[101] revolves around an amendment that exempted transportation employers from the maximum hour provisions of Senate Bill 2475 if they were under the authority of the ICC.[102] The amendment ensured that transportation employers, under the authority of the ICC, would still be accountable for the wage provisions of the Bill.[103]

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91. *Id.*
92. *Levinson*, 330 U.S. at 685.
93. *Southland Gasoline Co.*, 319 U.S. at 49.
94. *Id.* at 48.
95. *Id.*
96. *Id.* (citing 81 CONG. REC. 7875 (1937)).
97. Dennis J. Hutchinson, *Hugo Black Among Friends*, 93 MICH. L. REV. 1885, 1888 (1995); Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 138 (2000).
98. Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2287–88 (1998).
99. *Southland Gasoline Co.*, 319 U.S. at 48–49 (citing 81 CONG. REC. 7875 (1937)).
100. *Id.*
101. *Id.*
102. *See* 81 CONG. REC. 7875 (1937).
103. *Id.*

B. The Original Senate Bill Before it was Amended

The conversation cited in *Southland* took place before Senate Bill 2475 passed on July 31, 1937.[104] Senate Bill 2475 would have passed in the House and been signed into law had it not been bottled up in the House Rules Committee.[105] Senator Black stated during negotiations on Senate Bill 2475 that he would have found it unwise to trust the responsibility for regulating hours to two separate governmental agencies.[106]

Shortly after Senator Black's response, another senator raised a concern regarding the wages of the truck drivers in his home state, some of whom were only earning twenty cents an hour.[107] Yet, the concerned senator was assured by the drafter of the amendment that the Bill would resolve his worry regarding wages.[108] Senator Moore stated that his amendment only sought to leave the ICC the ability to fix hours for truck drivers and that the amendment had nothing to do with the ability to fix truck driver wages.[109] This was followed by Senator Black stating that Senator Moore's amendment would ensure that the minimum wage provision covered trucking company employees from the maximum hours provision.[110]

Notwithstanding the fact that the FLSA enacted a minimum wage of twenty-five cents an hour during the first year after its enactment,[111] further evidence exists that disputes the holding in *Southland*.[112] Specifically, there is evidence that Congress did not intend to exempt transportation employees from overtime.[113]

C. The Oppressive Workweek and Fair Labor Standard

Senate Bill 2475 contained *separate provisions* for minimum wages, maximum hours, and overtime.[114] Section 4(c) states that a Labor Standards Board could fix a maximum workweek.[115] This provision is the portion that Senator Moore's amendment intended to leave with the ICC.[116]

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104. 81 CONG. REC. 7956–57 (1937); *see Southland Gasoline Co*., 319 U.S. at 48–49.
105. *See* 83 CONG. REC. 6165–66 (1938).
106. 81 CONG. REC. 7875 (1937) (statement of Sen. Black).
107. *Id.* (statement of Sen. Shipstead) (20 cents an hour in 1937 is $3.86 in 2021 when adjusted for inflation).
108. *Id.* (statement of Sen. Moore).
109. *Id.*
110. *Id.* (statement of Sen. Black).
111. Pub. L. No. 75-718, § 6(a)(1), 52 Stat. 1060, 1062–63 (1938).
112. Southland Gasoline Co. v. Bayley, 319 U.S. 44, 48–49 (1943).
113. *See infra* Part II.C, D.
114. S. 2475, 75th Cong. (1937); *see* 81 CONG. REC. 7750 (1937) (emphasis added).
115. S. 2475, 75th Cong. § 4(c) (1937).
116. 81 CONG. REC. at 7875 (statement of Sen. Moore).

However, Section 6(a) expressly stated that an employer could "maintain an oppressive workweek" if he paid his employees overtime.[117] That following spring, the term "oppressive workweek" was defined as "a workweek or workday longer than that set by order of the Board under the provisions of section 4 of the bill."[118] Section 4 contained both the minimum wage and maximum hour provisions.[119] Section 6 of the Bill explicitly exempted only apprentices, individuals with impaired capacity, some miscellaneous deductions for lodging and meals, and peak activities or emergencies from its oppressive workweek clause.[120]

Under the context of the same Bill, the Labor Standards Board could impose penalties on employees for violating the minimum wage provisions under the authority of the ICC.[121] In December of 1937, the House amended the Senate's Bill, nearly passing the Norton Amendment.[122] The Norton Amendment would have allowed an Administrator the discretion to determine whether an employer was imposing an oppressive workweek on its employees.[123] The amendment would have allowed the administrator to weigh factors such as one's relationship to work, the well-being and health of the worker, how many workers were available for employment in a certain occupation, and how many hours were generally worked in the industry or bargained for by comparable unions.[124] Employees covered by the Motor Carrier Act would not have been excluded by the Norton Amendment.[125]

Additionally, *Southland* cited Section 1573 of the Congressional record[126] in support of its opinion, but the relevant sections of Senate Bill 2475 in the record explicitly state that motor vehicle carriers are subject to the wage provisions of the Act.[127] That Bill also defined a "Fair Labor Standard" as employment conditions preventing an oppressive wage or workweek.[128] The Bill also stated that the Administrator can determine exceptions to "Fair Labor Standard." Nowhere in the text are motor vehicle carriers explicitly exempted from the Fair Labor Standard.[129]

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117. *Id.* at 7750.
118. 83 CONG. REC. 9250 (1938).
119. S. 2475, 75th Cong. § 4 (1937).
120. S. 2475, 75th Cong. § 6 (1937); *see* 81 CONG. REC. 7750 (1937).
121. S. 2475, 75th Cong. (1937); *see* 81 CONG. REC. 7750–51 (1937).
122. 82 CONG. REC. 1605 (1937).
123. *Id.*
124. *Id.*
125. *Id.*
126. Southland Gasoline Co. v. Bayley, 319 U.S. 44, 49 (1943).
127. S. 2475, 75th Cong. (1937).
128. S. 2475, 75th Cong. (1937); 82 CONG. REC. 1573 (1937).
129. *See* S. 2475, 75th Cong. (1937); 82 CONG. REC. 1573 (1937).

Furthermore, the Court in *Southland* compared the exemption provided to railroad employees to motor carriers.[130] Yet, evidence exists that the justification for exempting railroad employees was not based on the fact that some employees were working for less than a satisfactory wage.[131] Rather, members of the House felt that shortly after passage of the bill, all railroad workers would be covered by collective bargaining agreements.[132] Congress did not wish to disturb agreements between employees and their employers.[133] The FLSA explicitly states that in determining a minimum wage for any given industry, the industry committee should consider wages established by collective bargaining agreements between employers and their employees.[134]

D. Concluding Remarks on Legislative Intent

In *Southland*, the Court stated it would require definitive evidence that Congress intended private motor carriers to be entitled overtime from their employers before they would accept the plaintiff's arguments.[135] Congress did not want the Labor Standards Board and the ICC to have simultaneous control over the maximum hours transportation employees could work.[136] The Senate intended the Labor Standards Board to have the ability to enforce penalties against employers, subject to the Motor Carrier Act, who subjected employees to an oppressive workweek but failed to pay their employers overtime.[137]

The main purpose of the FLSA was "to provide for the establishment of *fair labor standards* in employments in and affecting interstate commerce[.]"[138] At no point in the record is it stated that the exemption from the maximum hours provision would exclude employees subjected to an oppressive workweek from overtime.[139] The only rational conclusion is that the holding in *Southland*[140] directly conflicts with the legislative intent to put an end to "sweatshop wages," eliminate the brutal conditions impacting the

130. *Southland Gasoline Co.*, 319 U.S. at 49.
131. *See* 82 CONG. REC. 1698 (1937) (statement of the Chairman).
132. *Id.* (statement of Rep. Mead).
133. *Id.* at 1699 (statement of Rep. Griswold).
134. Pub. L. No. 75-718, § 8(c)(2), 52 Stat. 1063, 1064 (1938).
135. *Southland Gasoline Co.*, 319 U.S. at 49–50.
136. 81 CONG. REC. 7875 (1937) (statement of Sen. Black).
137. *See* 81 CONG. REC. 7750–51 (1937).
138. Pub. L. No. 75-718, § 1, 52 Stat. 1060, 1060 (1938) (emphasis added).
139. *See generally* 82 CONG. REC. 1573–1605 (1937); *see also* Note, *Safety and Overtime Pay: The Motor Carrier Exemption From the FLSA*, 57 YALE L. J. 1129, 1133 n.19 (1948).
140. *Southland Gasoline Co.*, 319 U.S. at 49.

welfare and wealth of the American people, provide more opportunities for those seeking work, and to increase their purchasing power.[141]

Senator Walsh, the head of the Senate Labor Committee, answered questions he received from his peers[142] the day before the Senate voted on the final version of Senate Bill 2475 on June 14, 1938,[143] prior to sending it to be signed by President Franklin D. Roosevelt.[144] Senator Walsh stated that under no circumstances could any industry avoid the overtime requirements unless a collective bargaining agreement existed, or the work was seasonal, "but even in all these cases the workday is limited to not more than 12 hours and the workweek to not more than 56 hours."[145]

E. The Disastrous Consequences of the MCA Exemption

After the holding in *Southland*,[146] the MCA exemption was expanded in *Levinson* to deny overtime not only to drivers but also any driver-helpers, loaders, or mechanics whose services could impact the safety of transportation.[147] In *Alexander*, the truck drivers argued that during the recruiting process, managers told them they would stay in Arkansas.[148] More importantly, none of the truck drivers traveled outside of the State of Arkansas more than five times and some as seldom as only once.[149] Nevertheless, the Eighth Circuit held that the truck drivers should have reasonably expected to be engaged in interstate travel and that the MCA exemption applied even when interstate travel made up only a small portion of an employee's duties.[150] The truck drivers further argued that their interstate activities should fall under the de minimis exception.[151] The Eighth Circuit denied the de minimis

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141. 81 CONG. REC. 7848 (1937) (statement of Sen. Healy).

142. 83 CONG. REC. 9176–77 (1938).

143. *Id.*

144. *Id*. at 9523.

145. *Compare id*. at 9177, *with* 49 C.F.R. § 395.3(b)(1)–(a)(2) (2020) (allowing truck drivers to drive up to sixty hours a week and be on-duty for up to fourteen consecutive hours).

146. Southland Gasoline Co. v. Bayley, 319 U.S. 44, 49 (1943).

147. Levinson v. Spector Motor Serv., 330 U.S. 649, 683, 685 (denying overtime to a loader because a substantial portion of his duties impacted the "safety of motor carrier operation"). *But see* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005) (amending the Transportation codes to allow overtime pay for employees operating commercial vehicles 10,000 pounds or less, as prescribed by the FLSA).

148. Alexander v. Tutle & Tutle Trucking Inc., 834 F.3d 866, 871 (8th Cir. 2016).

149. *Id*. at 868.

150. *Id*. at 871.

151. *Id.*; *see* 29 C.F.R. § 782.2(b)(3) (2020) (stating that an employee is due overtime under the FLSA if "the continuing duties of the employee's job have no substantial direct

argument, instead holding that despite infrequent interstate travel, the law's application was not trivial to the safety of motor vehicle operations in interstate commerce.[152]

The holding in *Alexander*[153] would likely shock the conscience of the dissenting Justices in *Levinson*.[154] Recall that the dissent in *Levinson*[155] was joined by the original drafter of the FLSA, Justice Black.[156] The *Levinson* dissenters' concern that Congress did not intend to exclude employees from the overtime protections of the FLSA because their employer subjected them to spend a small portion of their time impacting interstate safety came to full fruition in *Alexander*.[157] Additionally, the fear that employers could easily evade the overtime requirements by deploying their employees to minuscule portions of interstate travel[158] was realized in *Morris v. McComb*.[159] In *Morris*, overtime was denied to a common carrier where interstate commerce accounted for less than four percent of his total trips.[160]

It is baffling that the Supreme Court would rule adversely to Justice Black in regards to legislative intent when he co-wrote the original version of the FLSA.[161] The Court has misconstrued the legislative intent of keeping two separate government agencies from regulating the hours of truck drivers[162] and broadly applied the exception as a means to subject transportation employees to an oppressive workweek without overtime compensation.[163] Truck drivers were left out of the Act "to provide for the establishment of

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effect on such safety of operation or where such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis").

152. *Alexander*, 834 F.3d at 871–72.

153. *Id.*

154. Levinson v. Spector Motor Serv., 330 U.S. 649 (1947) (Rutledge, J., dissenting).

155. *Id.*

156. Hutchinson, *supra* note 97, at 1888.

157. *Compare Levinson*, 330 U.S. at 689 (Rutledge, J., dissenting) (arguing that the employees spending small portions of time engaged in interstate commerce should not be excluded from overtime), *with Alexander*, 834 F.3d at 868, 871–72 (holding that truck drivers that only left the state of Arkansas five or less times in a year were not entitled to overtime).

158. *See Levinson*, 330 U.S. at 689 (Rutledge, J., dissenting).

159. *See* Morris v. McComb, 332 U.S. 422, 433–34 (1947) (holding with a 5-4 decision, with Justices Murphy, Rutledge, Black and Douglas dissenting).

160. *Id.* at 433–34 (holding with a 5-4 decision, with Justices Murphy, Rutledge, Black and Douglas dissenting). Justice Murphy dissented, rejecting the Court's conception that employees outside the authority of the commission during ninety-seven percent of their activities should be denied overtime, stating it was unjust that "it is by the slender thread of this 'power' that they fall within § 13(b)(1) and hence are deprived of the benefits of the Fair Labor Standards Act." *Id.* at 438–39 (Murphy, J., dissenting).

161. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L. & CONTEMP. PROBS. 464, 466 (1939).

162. *See* 81 CONG. REC. 7875 (1937) (statement of Sen. Black).

163. *See Cf. Levinson*, 330 U.S. at 683–85.

fair labor standards."[164] The failure of the Supreme Court to accurately determine legislative intent has directly resulted in harm to Arkansas transportation employees for over eighty years[165] and should motivate the Arkansas General Assembly to enact legislation to protect its citizens from the effects of enduring judicial abuse.

IV. INCONSISTENT JUDICIAL APPLICATION OF THE MCA EXEMPTION

In *Baouch v. Werner Enterprises*, the United States Court of Appeals for the Eighth Circuit held that per diem payments deducted from gross wages to reduce income taxes still functioned as a wage for purposes of minimum wage calculations under the FLSA.[166] This Section will provide an overview of how per diem payments function in relation to truck drivers. Next, it will discuss the holding in *Baouch*.[167] Lastly, it will discuss how *Baouch*[168] should have been overturned due to the court's reliance on a section of the FLSA from which truck drivers are generally exempt.[169]

A. Per Diem and Truck Drivers

The Internal Revenue Service Treasury regulations provide an accountable plan that permits employers to give tax-free reimbursements to employees.[170] The reimbursements are not included as gross income and are not subject to employment taxes.[171] If per diem[172] is paid under an accountable plan (i.e., there is a business connection,[173] substantiation,[174] and excess amounts paid are returned),[175] then the per diem payments are not treated as

164. *See* Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 1, 52 Stat. 1060 (emphasis added).

165. *See, e.g.*, *In re* Two Men & a Truck Litig., No. 16-CV-05255, 2017 U.S. Dist. LEXIS 26017, at *17–18 (W.D. Ark. Feb. 24, 2017); Alexander v. Tutle & Tutle Trucking, Inc., 834 F.3d 866 (8th Cir. 2016).

166. Baouch v. Werner Enters., 908 F.3d 1107, 1117–18 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 122 (2019).

167. *Id.*

168. *Id.*

169. 29 C.F.R. § 778.217(a) (2020) derives its statutory authority from 29 U.S.C. § 207(e), (h) both of which exempt truck drivers under the MCA exemption.

170. 26 C.F.R. § 1.62-2(c)(4) (2020).

171. *Id.*

172. *See* 26 C.F.R. §1.62-2(f)(2) (2020). "Per diem" refers to the transportation industry's practice of giving truck drivers an allowance, generally on a daily basis, that provides "for ordinary and necessary expenses of traveling away from home[.]" *Id.*

173. 26 C.F.R. § 1.62-2(d) (2020).

174. *Id.* § 1.62-2(e).

175. *Id.* § 1.62-2(f).

gross income, are not subject to withholding or employment taxes, and *are not considered wages*.[176]

To remain competitive in the trucking industry, most employers have adopted the tactic of paying truck drivers per diem as an incentive program.[177] Employers deduct per diem from gross wages to increase take-home pay for drivers.[178] Employees are able to opt-in to a per diem plan, and the per diem deductions from gross wages will be tied to either the number of miles driven or the number of days spent away from home.[179]

Furthermore, as stated previously,[180] per diem payments paid under an accountable plan reduce gross wages and are not accounted as income for the truck drivers.[181] The consequence of the per diem arrangement, not only in practice but also regarding public policy,[182] is that it enables employers the ability to avoid paying Federal Insurance Contributions Act (FICA) taxes on behalf of their employees.[183]

B. The Eighth Circuit's Holding in *Baouch*

In *Baouch*, a group of Nebraska truck drivers argued in federal district court that per diem deductions from gross pay should not be included in their employer's computation of minimum wage under the FLSA.[184] The drivers argued that the deductions were "genuine reimbursements for expenses[]" incurred on behalf of their employer.[185] The district court relied in part on an Eighth Circuit opinion regarding firefighters[186] and a Tenth Circuit opinion regarding seismic-mapping employees[187] to conclude that the

176. *Id.* 1.62-2(h) (emphasis added).

177. *Cf.* Baouch v. Werner Enters., 908 F.3d 1107, 1118 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 122 (2019).

178. *Cf. id.*

179. *Cf. id.* at 1111.

180. *See supra* text accompanying notes 165–75.

181. 26 C.F.R. § 1.62-2 (2020).

182. Bond v. Comm'r of Revenue, 691 N.W.2d 831, 837 (Minn. 2005) (stating that the intention of Congress when enacting the Social Security Act was to provide insurance for the "security of the men, women, and children of the Nation against certain hazards and vicissitudes of life") (quoting Economic Security Act: Hearing Before the H. Comm. on Ways and Means, 74 Cong. 1st Sess. at 13 (1935) (Message From the President of the United States Transmitting a Recommendation for Legislation on the Subject of Economic Security).

183. *Compare* 26 U.S.C. § 3101 (stating the tax rate for FICA), *with* 26 C.F.R. § 1.62-2(h) (stating that the per diem paid under an accountable plan is not to be treated as wages and is therefore not subject to withholding taxes).

184. Baouch v. Werner Enters. Inc., 244 F. Supp. 3d 980, 990 (D. Neb. 2017).

185. *Id.*

186. *Id.* at 991, 993; *see generally* Acton v. City of Columbia, 436 F.3d 969 (8th Cir. 2006).

187. *Baouch*, 244 F. Supp. 3d at 992; *see generally* Sharp v. CGG Land (US), Inc., 840 F.3d 1211 (10th Cir. 2016).

per diem paid to the truck drivers was more akin to a wage than a true travel expense or per diem reimbursement.[188]

On appeal, the Eighth Circuit affirmed the district court's holding, reiterating that the net pay the truck drivers received was strikingly similar to that of the truck drivers who opted out of the per diem plan.[189] This finding supported the conclusion that the drivers were compensated for the time they worked because their wages were similar to those who opted out.[190] The court recognized the requirement for employers to pay a minimum wage.[191] Yet, it also cited the exclusions, finding that reimbursements for travel expenses for the employer's benefit are not included as part of the regular rate.[192] The court found that reimbursements for travel expenses that benefit the employee can be included as part of the regular rate if the employer increases the employee's regular rate by doing so.[193] The court held that the per diem deductions from gross wages continued to function as wages.[194] Accordingly, per diem payments could be included within an employer's minimum wage calculation because they were payments made for hours of employment.[195]

C. The Supreme Court Should Have Granted Certiorari and Overturned *Baouch*

The United States District Court for the District of Nebraska's holding in *Baouch* relies exclusively upon statutory provisions and definitions that are not applicable to truck drivers engaged in interstate commerce.[196] The plaintiffs and the district court failed to acknowledge that the plain language of the MCA exemption[197] spared truck drivers from the maximum hour provisions of the FLSA.[198] The court utilized the "[r]eimbursement for expenses" section of the regulations[199] in its holding.[200] However, the court failed to

188. *Baouch*, 244 F. Supp. 3d at 993.
189. Baouch v. Werner Enters. Inc., 908 F.3d 1107, 1118 (8th Cir. 2018).
190. *Id.*
191. *Id.* at 1114–15.
192. *Id.* at 1113–14 (citing 29 U.S.C. § 207).
193. *Id.* at 1115 (citing 29 C.F.R. § 778.217(d) (2018)).
194. *Id.* at 1118.
195. *Baouch*, 908 F.3d at 1118.
196. *Compare id*. at 1114–18 (relying on Section 7 of the Fair Labor Standards Act of 1938 and 29 C.F.R. § 778.217), *with* 29 U.S.C. § 213(b)(1) (stating that the provisions of Section 7 of the Fair Labor Standards Act of 1938 do not apply to employees covered by the Motor Carrier Act).
197. 29 U.S.C. § 213(b)(1).
198. 29 U.S.C. § 207; *cf.* Alexander v. Tutle & Tutle Trucking, Inc., 834 F.3d 866 (8th Cir. 2016).
199. 29 C.F.R. § 778.217 (2020).
200. *Baouch*, 908 F.3d at 1002–03.

acknowledge that the particular regulation they cited[201] derives its statutory authority from the maximum hours provision that defines both the regular rate[202] and the provision detailing credits toward the minimum wage.[203] Truck drivers are exempt from both provisions by virtue of the MCA exemption.[204] *Baouch* is distinguishable from the cases cited by the district court because neither of those classes of employees is generally covered by the MCA exemption to the FLSA.[205]

Furthermore, when the plaintiffs appealed to the Eighth Circuit, the court also ignored the relevance of the MCA exemption.[206] The Eighth Circuit used the same language included within the maximum hours provision of the FLSA[207] to deny truck drivers the ability to exclude per diem wages paid under an accountable plan[208] when configuring truck drivers' hourly wages under the FLSA.[209] The court openly acknowledged that the FLSA requires employers to pay their employees the statutory minimum wage.[210] Yet the court relied on the maximum hours provision of the FLSA to define the regular rate[211] and failed to acknowledge that truck drivers are exempt from all provisions of Section 7 of the FLSA.[212] Recall that *Alexander*, decided just a year earlier by the same court, held that truck drivers could not claim overtime because the plain language of the MCA exemption[213] excused them from all sections of the maximum hours provision.[214]

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201. *Id.* (citing 29 C.F.R. § 778.217 (2020)).

202. 29 U.S.C. § 207(e).

203. 29 U.S.C. § 207(h).

204. 29 U.S.C. § 213(b)(1) (stating that provisions of 29 U.S.C. § 207 do not apply to employees covered by the Motor Carrier Act).

205. *Baouch*, 244 F. Supp. 3d at 992 (citing Acton v. City of Columbia, 436 F.3d 969, 969, 977 (8th Cir. 2006); Sharp v. CGG Land (US), Inc., 840 F.3d 1211, 1216 (10th Cir. 2016)).

206. 29 U.S.C. § 213(b)(1) (stating that provisions of 29 U.S.C. § 207 do not apply to employees covered by the Motor Carrier Act).

207. 29 U.S.C. § 207(e)(2) ([T]he 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include . . . (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment[.] . . .").

208. 26 C.F.R. § 1.62-2(c)(2) (2020).

209. *Baouch*, 244 F. Supp. 3d at 1118.

210. *Id.* at 1114.

211. *Id.*

212. *See id;* 29 U.S.C. § 213(b)(1) (2018).

213. *Id.*

214. *See* Alexander v. Tutle & Tutle Trucking, Inc., 834 F.3d 866, 868 (8th Cir. 2016).

In *Baouch*, the court failed to unearth relevant statutory authority[215] and followed the test used by the lower court, stating that to determine whether "the [per diem] [p]ayments should be excepted from the regular rate calculation, [courts must evaluate] (1) whether the [p]ayments were reimbursements for expenses incurred solely for Werner's benefit or convenience; and (2) whether the [p]ayments approximated actual expenses."[216] The Eighth Circuit, in its misguided attempt to dive deeper, used the Department of Labor (DOL) Handbook for guidance, citing its provision that states "[i]f the amount of per diem or other subsistence payment is based upon and thus varies with the number of hours worked per day or week, such payments are a part of the regular rate in their entirety."[217]

However, the relevant chapter cited by *Baouch* is labeled "Overtime,"[218] and the general rule under the subsection labeled "[r]eimbursement of employee expenses"[219] cites to 29 CFR 778.217 in subsection (a).[220] Thus, it can be inferred that the DOL's entire guidance relevant to this portion is based on the DOL's statutory authority given to it by 29 U.S.C. § 207,[221] a section that truck drivers are exempt from due to the plain language of the MCA exemption.[222]

Therefore, the Supreme Court should have granted certiorari and overturned the holding in *Baouch*[223] because truck drivers, and "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49"[224] are exempt from 29 U.S.C. § 207.[225] Because transportation employees are exempt from the provision for maximum hours, the definitions of the regular rate as described in Section 207 do not apply to them,[226] nor does any DOL regulation that derives its authority from

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215. 29 C.F.R. § 778.217(a) (2020) derives its statutory authority from 29 U.S.C. § 207(e), (h) (2018) both of which truck drivers are exempt from by virtue of the MCA exemption.

216. Baouch v. Werner Enters. Inc., 908 F.3d 1107, 1116 (8th Cir. 2018).

217. U.S. DEP'T OF LAB. WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK, REIMBURSEMENT FOR EMPLOYEE EXPENSES § 32(d)(05)(a),(c), (Nov. 17, 2016) https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-32#B32d05 [hereinafter WAGE AND HOUR HANDBOOK].

218. *Id.*

219. *Id.*

220. *Id.*

221. *See id.*

222. *See* Alexander v. Tutle & Tutle Trucking, Inc., 834 F.3d 866, 869 (8th Cir. 2016) (citing 29 U.S.C. § 213(b)(1)).

223. Baouch v. Werner Enters., 908 F.3d 1107, 1118 (8th Cir. 2018).

224. 29 U.S.C. § 213(b)(1).

225. *See Baouch*, 908 F.3d at 1118.

226. *See id.*; 29 U.S.C. § 207(e).

Section 207[227] or a DOL handbook that also relies upon the same authority.[228] Due to these limitations, the holding in *Baouch*[229] is wrong. The only interpretation of wages that should be computed when determining whether an employer paid an employee within the bounds of the FLSA[230] should be the plain language of the IRS codifications. The IRS codifications clearly state that per diem paid under an accountable plan are not wages.[231] *Baouch*[232] was unjust and stands as an excellent example as to why the General Assembly must enact legislation to protect Arkansas transportation employees from judicial abuse.

V. TRUCKERS MUST BE PAID FOR EVERY HOUR THEY ARE IN THE TRUCK

In *Browne v. P.A.M. Transp., Inc.*, United States District Judge Timothy L. Brooks found that there were genuine disputes of fact of whether a trucking company was requiring its truck drivers to be on-duty at all times while on the road.[233] First, this Section of the Note will briefly discuss the factual background of *Browne.*[234] Next, it will discuss the conflicts between the Department of Transportation (DOT) and DOL guidelines and why these conflicts require truck drivers to be on-duty for periods of twenty-four hours or more. Finally, this Section will discuss sleeper berths and why employers' inability to provide truck drivers with an adequate sleeping facility, in conjunction with truck drivers being on-duty for periods of twenty-four hours or more, should entitle drivers to compensation for every hour they are on the road.

A. The United States District Court for the Western District of Arkansas's Finding in *Browne*

P.A.M.'s requirement that their truck drivers remain responsible for the truck, the trailer, and cargo security, despite a driver technically being off-duty, raises serious questions as to whether they should be considered "always on duty for the purposes compensability."[235] If truck drivers were always on-duty, it would enable truck drivers to receive compensation for

227. 29 C.F.R. § 778.108 (2020).
228. WAGE AND HOUR HANDBOOK, *supra* note 216.
229. *Baouch*, 908 F.3d at 1119.
230. 29 U.S.C. § 206.
231. 26 C.F.R. § 1.62-2(h)(1) (2021) ("[T]he amounts treated as paid under an accountable plan are not wages and are not subject to withholding and payment of employment taxes.").
232. *Baouch*, 908 F.3d at 1118.
233. Browne v. P.A.M. Transp., Inc., 434 F. Supp. 3d 712, 721 (W.D. Ark. 2020).
234. *Id.*
235. *Id.*

every hour they are on the road, if their employers require them to be responsible for their truck, trailer, and cargo at all times.[236]

P.A.M.'s policy will potentially result in the drivers being entitled to sixteen hours of compensation at minimum wage if it is found that they require their truck drivers to be responsible for the cargo at all times.[237] Additionally, there are regulations, separate from any company's policy, that require truck drivers to always be on duty. In essence, truck drivers should be entitled to continuous compensation while on the road, based on the proceeding arguments.[238]

B. DOT Regulations Require Truck Drivers to be On-Duty at All Times

First, it is important to note that the DOT only defines "on-duty,"[239] while the DOL only defines "off-duty;"[240] and the two definitions are contradictory. The DOT regulations state that a driver is "on-duty" when the driver begins to work, or his employer requires him to be ready to work.[241] The DOT excludes, within its definition of off-duty, any time that a truck driver is in the sleeper berth[242] or up to three hours riding in the passenger seat after being in the sleeper berth.[243]

By contrast, the DOL defines "off-duty" as a period in which the employee is able to use his time for his own purposes.[244] An employee is not considered off-duty under DOL regulations "unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived."[245]

The DOT regulations leave out any mention of the truck driver being able to effectively use the time for his or her own purposes.[246] The DOT's regulations define "on-duty time" as "the time a driver . . . is required to be in readiness to work until the time the driver is relieved from work and all responsibility for *performing*[247] work."[248] The preceding regulation does not

236. *See id.*
237. *Id.*
238. *See supra* Part.IV.B, C.
239. 49 C.F.R. § 395.2 (2020).
240. 29 C.F.R. § 785.16 (2020).
241. 49 C.F.R. § 395.2 (2020).
242. *Id.* § 395.2(4)(ii).
243. *Id.* § 395.2(4)(iii).
244. 29 C.F.R. § 785.16(a) (2020).
245. *Id.*
246. *Id.* § 785.16.
247. PERFORM, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/perform (last visited Aug. 13, 2020) ("[T]o carry out an action or pattern of behavior.").
248. 49 C.F.R. § 395.2 (2020).

capture *P.A.M.*'s requirement that drivers remain responsible for their truck, trailer, and cargo security,[249] or if it does, a majority of the trucking industry would be in violation of the hours of service regulations.[250] If truck drivers are to be responsible for the cargo they are carrying, even when they are in their sleeping berths, they are unable to effectively use that time for their own purposes.[251]

Furthermore, conflicts arise between state statutes and DOL and DOT regulations. The DOT states that "[e]very motor carrier and its employees must be knowledgeable of and comply with the requirements and specifications of this part."[252] For example, DOT regulations require that "[a]ll lamps required by this subpart shall be capable of being operated at *all times*."[253] Some states, like Arkansas, go further by penalizing the failure to have lamps equipped at all times in a proper condition as a misdemeanor offense.[254] This penalty can be enforced even if the vehicle is unattended and parked adjacent to a roadway.[255] DOT regulations also specify that "all brakes with which a motor vehicle is equipped must at *all times* be capable of operating."[256] DOT regulations further state that "[t]he parking brake system shall, *at all times*, be capable of being applied by either the driver's muscular effort or by spring action."[257]

Truck drivers are never truly off duty because they are required by DOT regulations to ensure their lights,[258] brakes,[259] and parking brakes[260] are operable at all times. Truck drivers can be fined by the State for failing to ensure these parts are working.[261] Despite the truck drivers having to be aware that these parts of their trucks are always working, the DOT does not count the time doing so against the truck drivers' hours of service.[262] However, the truck driver is never completely relieved from duty and able to effectively use the time for his or her own purposes.[263]

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249. Browne v. P.A.M. Transp., Inc., 434 F. Supp. 3d 712, 721 (W.D. Ark. 2020).
250. *See* 49 C.F.R. § 395.3 (2020).
251. *See id.*
252. 49 C.F.R. § 393.1(b)(1) (2020) (intending part to mean § 393.1 *et. seq.*, parts, and accessories necessary for safe operation).
253. 49 C.F.R. § 393.9(a) (2021) (emphasis added).
254. ARK CODE ANN. § 27-36-101 (West 2021).
255. *Id.* § 27-36-206(a) (West 2021).
256. 49 C.F.R. § 393.48 (2020) (emphasis added).
257. *Id.* § 393.41 (2020) (emphasis added); *see also* 49 C.F.R. § 397.5 (2020) (providing that a truck carrying certain types of hazardous materials must be attended by the driver at all times).
258. 49 C.F.R. § 393.9(a) (2020).
259. *Id.* § 393.48 (2020) (emphasis added).
260. 49 C.F.R. § 393.41 (2020) (emphasis added).
261. ARK. CODE ANN. § 27-36-101 (West 2021); *id.* § 27-36-206(a) (West 2021).
262. *See* 49 C.F.R. § 395.2 (2020).
263. *See id.*

Therefore, truck drivers should be subject to the regulations describing the requirements for employees who are required to be on-duty for twenty-four hours or more.[264] The regulations governing employees required to be on service for twenty-four hours or more explicitly state that "[a]ny work which an employee is required to perform while traveling must, of course, be counted as hours worked."[265] Truck drivers should be entitled to the minimum wage for every hour they are away from home. The only exception to this standard should be implied or express agreements between the employer and truck driver that eight hours of work a day will be excluded if the truck driver is provided with an adequate sleep facility.[266]

C. Sleeper Berths Are Not Adequate Sleeping Facilities

The following argument assumes that truck drivers are always on-duty, as described previously.[267] The DOL has requirements employers must follow if their employees are required to be on-duty for longer than twenty-four hours.[268] Of greatest significance is the provision permitting employees that are required to be on service for twenty-four hours or more to agree to exclude eight hours a day from compensation if the employer provides adequate sleeping facilities.[269] No more than eight hours can be credited, even if the sleeping period extends beyond eight hours.[270] Also, the employee must be able to enjoy a reasonable amount of sleep.[271] If the employee is unable to get at least five hours of sleep, then the employee must be paid for the entire twenty-four-hour period.[272]

Employees must be paid for all the time they are required to be at work, even sleeping hours, under the FLSA.[273] The DOL had previously

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264. 29 C.F.R. § 785.22 (2020); *see also* Browne v. P.A.M Transp., 434 F. Supp. 3d 712, 722 (W.D. Ark. 2020).

265. 29 C.F.R. § 785.41 (2020).

266. *See* 29 C.F.R. § 785.22 (2020).

267. *See supra* Part IV.B. *But see* Petrone v. Werner Enters., No. 8:11 CV307, 2017 U.S. Dist. LEXIS 218981 at *28, *34–38, *45 (D. Neb. Feb. 2, 2017) (disregarding the DOL handbook because it contradicted 24-hour-on-duty regulations, yet holding that truck drivers are usually not on-duty while in their sleeper berths); Nance v. May Trucking Co., No. 3:12-cv-01655-HZ, 2014 U.S. Dist. LEXIS 5520 at *16–23 (D. Or. Jan. 15, 2014) (assumed truck drivers are always on-duty but held truck driver trainees are barred compensation for sleeper berth time as a matter of law), *aff'd in part*, *vacated in part*, 685 Fed. Appx. 602 (9th Cir. 2017).

268. *See* 29 C.F.R. § 785.22 (2020).

269. *Id.* § 785.22(a) (2020).

270. *Id.*

271. *Id.* § 785.22(b) (2020).

272. *Id.*

273. Giguere v. Port Res. Inc., 927 F.3d 43, 47 (1st Cir. 2019) (citing 29 C.F.R. § 785.7 (2021)).

issued guidance stating that "[b]ecause the WHD (Wage and Hour Division) regulations classify sleeper berth time as non-working travel time, rather than on-duty sleeping time, such time is presumptively off-duty and not compensable."[274] However, the DOL had improperly assumed that a sleeper berth is an adequate sleeping facility[275] and that truck drivers are relieved of all duties and responsibilities while in the sleeping berth.[276] The Field Operations Handbook for the Wage and Hour Division of the U.S. Department of Labor states that "[b]erths in trucks are regarded as adequate sleeping facilities for the purposes of 29 CFR § 785.41 and 29 CFR § 785.22."[277] Multiple courts have relied, at least in part, on this language in the DOL handbook to deny truck drivers wages for the time spent in their sleeper berths.[278]

The phrase "adequate sleeping facility" has never been defined by the courts. In *Plummer v. Harvester War Depot, Inc.*, the court held that employees were not entitled to compensation for sleep time because they "were getting sleep in the same manner as if they were at home[.]"[279] The Eighth Circuit found that "suitable sleeping and living quarters" existed where "comfortable beds, blankets, bed linens, and laundry services were provided for the sleeping quarters."[280] The Seventh Circuit held that the sleep time for employees was non-compensable in part because "[t]he sleeping quarters consisted of large rooms with wooden or iron beds and mattresses."[281] Nei-

274. Opinion Letter from U.S. Dep't of Lab., Wage & Hour Div., (July 22, 2019) (withdrawn on Jan. 26, 2021) [hereinafter DOL Opinion Letter].

275. *Id.* (stating drivers and assistants are off-duty when permitted to sleep in adequate facilities, such as a sleeper berth).

276. *Id.*

277. U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK, §31(b)(09)(a) (Nov. 17, 2016), http://www.dol.gov/whd/FOH/FOH_Ch31.pdf.

278. Petrone v. Werner Enters., No. 8:12CV307, 2017 U.S. Dist. LEXIS 218981, at *28–30 (D. Neb. Feb. 2, 2017) (relying also on the Hour of Service requirement under 49 C.F.R. § 395.2 defining "'on-duty time' as 'all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work[,]'" as well as 49 C.F.R. 395.3(a)(3)).

279. Plummer v. Harvester War Depot, Inc., 70 F. Supp. 495, 496 (N.D. Ohio 1947) (dismissing firemen-plaintiff's action to recover overtime under FLSA for the ten hours of rest time provided by their employer).

280. Bridgeman v. Ford, Bacon & Davis, Inc., 161 F.2d 962, 963 (8th Cir. 1947) (affirming the judgment of the district court that held that appellant-firemen were not entitled to overtime for an eight-hour rest period, despite being required to stay at the fire station, because they were "free to sleep, eat and engage in recreational activities of their own choosing").

281. Bowers v. Remington Rand, Inc., 159 F.2d 114, 115 (7th Cir. 1946) (affirming the district court's opinion against appellant-fireman seeking overtime compensation for sleep time because the firemen had "agreed to wait to be engaged," and therefore "were willing to keep themselves available for duty if called upon during their rest period, [and] they were willing in consideration of their employment as firemen to sleep on the premises").

ther the Eighth Circuit, the Seventh Circuit, nor the Ohio court defined an adequate facility but only implied what they considered adequate.

Despite the legal system's inability to determine what necessitates an adequate sleeping facility, multiple scientific studies have shown that sleeper berths negatively impact the "quality and depth of sleep[.]"[282] All truck drivers experience conditions adverse to quality sleep. Team drivers receive an even lower quality of sleep than solo drivers because team-driven trucks are in constant motion.[283] Studies have established that "the noise and motion environment in the sleeper berth degraded . . . drivers' sleep."[284] Studies revealed that truck drivers are "often forced to sleep during rest times along noisy motorways[,]" which exposes the drivers to sleep disturbances.[285] The engine noise and lights from passing vehicles have been found to have a negative impact on truck drivers' health.[286] An Australian study of fatigue in truck drivers found that truck drivers get more hours of sleep and a better quality of sleep when they are at home in contrast to sleeping in their trucks.[287] However, one study concluded that despite truck drivers sleeping nearly an hour longer when at home,[288] there were "only minor deviations in sleep quality associated with the use of sleeper berths."[289]

The DOL's guidance that sleeper berths are considered adequate sleeping facilities[290] is in direct conflict with existing case law.[291] Scientific studies show a direct negative correlation between sleeper berths and sleep quality.[292] The courts suggest that adequate sleeping facilities require comfortable beds,[293] large sleeping quarters,[294] or at the very least, the same manner of sleep one could get at home.[295] Therefore, it is unlikely that any truck

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282. THOMAS A. DINGUS ET AL., IMPACT OF SLEEPER BERTH USAGE ON DRIVER FATIGUE 188 (Nov. 2001) https://vtechworks.lib.vt.edu/bitstream/handle/10919/55096/PB2002107930.pdf?sequence=1&isAllowed=y.

283. *Id*.

284. *Id*.

285. Roland FJ Popp, et al., *Impact of Overnight Traffic Noise on Sleep Quality, Sleepiness, and Vigilant Attention in Long-Haul Truck Drivers: Results of a Pilot Study*, 17 NOISE & HEALTH 387, 388 (2015).

286. *See id.*

287. Stuard D. Baulk & Adam Fletcher, *At Home and Away: Measuring the Sleep of Australian Truck Drivers*, 45 ACCIDENT ANALYSIS & PREVENTION 36, 36–38 (2012) (Supp. Mar. 2012).

288. David Darwent et al., *How Well Do Truck Drivers Sleep in Cabin Sleeper Berths?*, 43 APPLIED ERGONOMICS 442, 445 (2012).

289. *See id.* at 446.

290. DOL Opinion Letter, *supra* note 274.

291. *See* Bridgeman v. Ford, Bacon & Davis, Inc., 161 F.2d 962, 963 (8th Cir. 1947).

292. DINGUS ET AL., *supra* note 282.

293. *Bridgeman*, 161 F.2d at 963.

294. Bowers v. Remington Rand, Inc., 159 F.2d 114, 115 (7th Cir. 1946).

295. Plummer v. Harvester War Depot, Inc., 70 F. Supp. 495, 496 (N.D. Ohio 1947).

driver "is permitted to sleep in adequate facilities furnished by the employer."[296] Sleeper berths are not adequate facilities, and truck drivers should be entitled to hourly compensation for every hour spent away from home.[297]

VI. ARKANSAS CAN ENSURE TRANSPORTATION EMPLOYEES ARE PAID OVERTIME

Haskell Fuller's and Micah Lindsey's experience has been replicated across the country, which has led some state legislatures to take action.[298] In Colorado, Michael Combs, a Jaguar Energy Services, LLC. employee, was responsible for loading trucks and performing duties as a driver helper.[299] The Tenth Circuit denied Mr. Comb's claim for overtime,[300] despite the undisputed fact that his employer never required him to perform work outside of Colorado's borders.[301] First, this Section will briefly describe the action taken by Colorado to resolve the abusive and broad interpretation of the MCA exemption. Next, it will explore other states' statutory codes, illustrating how far some states have gone to protect their workers against the MCA exemption, contrasted with how little some other states have acted. Lastly, it will identify the authority Arkansas's legislature can use to protect its transportation employees and propose a solution that will resolve this issue.

A. Colorado's Response to *Combs v. Jaguar Energy Services*

Prior to Mr. Combs being denied overtime,[302] the Colorado Division of Labor had published a wage order that separately defined interstate and intrastate drivers.[303] The wage order only allowed drivers whose employers directed them to cross state lines to be covered by the MCA exemption to the overtime requirements of the FLSA.[304]

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296. 29 C.F.R. § 785.41 (2020); 29 C.F.R. § 785.22 (2020).

297. *See generally supra* text accompanying notes at 289–95.

298. *See In re* Two Men & a Truck Litig., No. 5:16-CV-05255, 2017 U.S. Dist. LEXIS 26017, at *17–18 (denying overtime under the MCA exemption to loader employees who never left the state of Arkansas).

299. Combs v. Jaguar Energy Servs., LLC, 683 F.App'x. 704, 705 (10th Cir. 2017).

300. *Id.* at 708.

301. *Compare id.* at 705, *with supra* case cited in note 129.

302. *Combs*, 683 F. App'x. at 708.

303. Brunson v. Colo. Cab Co., LLC, 433 P.3d 93, 95, 100 (Colo. App. 2018) (citing Colo. Minimum Wage Order Number 31, 7 CRR 1103-1 (Jan. 1, 2010), https://cdle.colorado.gov/sites/cdle/files/Minimum%20Wage%20Order%2031.pdf).

304. *Id.*

However, the wage order failed to include loaders,[305] leading the state to adopt the Colorado Overtime and Minimum Pay Standards Order #36 that includes employees, covered by the MCA exemption, who cross the state lines during the course of their work.[306] If this order had been effective when Mr. Combs was employed by Jaguar Energy Services, LLC., the new standard adopted by Colorado should have entitled him to the overtime compensation he claimed.[307]

B. The Other Forty-Eight States

Chapter 8 of the FLSA states that "[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter."[308] Courts have interpreted this to mean that state overtime laws can cover even workers exempted by the FLSA.[309]

Multiple states do not have overtime laws on the books and rely upon the Federal Government to protect their employees.[310] Multiple other states, including Arkansas, have the same exemptions as the FLSA.[311] The remaining states have made some progress in ensuring truck drivers receive overtime pay. Alaska, for example, requires that truckers be paid under a system comparable to overtime for hours worked in excess of forty hours a week or over eight hours a day.[312] Washington has a similar statute stating that truck drivers are exempt from the overtime provision, but only if "the compensation system under which the truck driver is paid includes overtime pay for work in excess of 40 hours a week or for more than eight hours a day[.]"[313]

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305. *Combs*, 683 F. App'x. at 706; *see* Colo. Minimum Wage Order Number 31, 7 CRR 1103-1 (Jan. 1, 2010), https://cdle.colorado.gov/sites/cdle/files/Minimum%20Wage%20Order%2031.pdf.

306. 7 COLO. CODE. REGS. § 1103-1, 2.2.6(A) (Lexis 2020).

307. *Compare id.*, *with Combs*, 683 F. App'x. at 706–08.

308. 29 U.S.C. § 218(a).

309. *See, e.g.*, Williams v. W.M.A. Transit Co., 472 F.2d 1258, 1261 (D.C. Cir. 1972); Pettis Moving Co. v. Roberts, 784 F.2d 439, 441–42 (2nd Cir. 1986) (holding that § 218(a) of the FLSA allows states to set overtime provisions because the MCA only regulates safety and should not be allowed to preempt states from exercising their traditional powers of economic regulation).

310. Noah A. Finkel, *The Fair Labor Standards Act: State Wage-and-Hour Law Class Actions: The Real Wave of "FLSA" Litigation?*, 7 EMPL. RTS. & EMPLOY. POL'Y J. 159, 163 (2003).

311. *See* statutes cited *supra* note 38.

312. ALASKA STAT. § 23.10.060(15) (2020).

313. WASH. REV. CODE ANN. § 49.46.130(2)(f) (West 2020); *see also* Bostain v. Food Express, Inc., 153 P.3d 846, 858 (Wash. 2007) (holding that truck drivers employed in state

The State of New Mexico does not have an MCA exemption[314] and requires truck drivers to be paid overtime for hours worked in excess of forty hours a week.[315] Massachusetts requires employers to pay overtime payments to loaders and driver helpers for any time they are not "on a truck."[316] Connecticut allows loaders to collect overtime, but not drivers or driver helpers.[317]

Even New York has made progress towards fair compensation for truck drivers. New York courts historically had dismissed overtime complaints by truck drivers[318] despite a DOL Opinion from 2010 stating that even employees who satisfy the requirements of the MCA exemption were due overtime wages.[319] Likewise, New York's overtime statute requires that employees covered by the MCA exemption must be paid overtime.[320] In April 2020, the Second Circuit weighed in and determined that truck drivers employed in New York are due overtime pay if they work over forty hours a week.[321]

C. What Action Can Arkansas Take to Protect Its Transportation Employees?

The Arkansas General Assembly could update its statutory code in multiple ways to protect transportation employees. At a minimum, language similar to that used in Colorado or Massachusetts should be used to enable trucking industry employees working entirely within the borders of Arkansas to collect the overtime pay they are due. Ensuring trucking industry em-

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of Washington are due overtime regardless of how many hours they spend driving in other states).

314. *See* N.M. STAT. ANN. § 50-4-22(E) (West 2020).

315. *Id.*

316. MASS. GEN. LAWS ANN. ch. 151, § 1A(8) (West 2020) ("[T]his section shall not be applicable to any employee who is employed . . . as a driver or helper on a truck with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" from overtime pay).

317. Overnite Transp. Co. v. Tianti, 926 F.2d 220, 221–22 (2d Cir. 1991); *see also* CONN. GEN. STAT. § 31-76i (West 2021).

318. *See, e.g.*, Chaohui Tang v. Wing Keung Enters., 210 F. Supp. 3d 376, 410–11 (E.D.N.Y. 2016); Kennedy v. Equity Transp. Co., No. 1:14-CV-0864, 2015 U.S. Dist. LEXIS 143565 at *21.

319. New York State Dep't of Lab., Opinion Letter, RO-10-0025 (June 30, 2010), https://statistics.labor.ny.gov/legal/counsel/pdf/Overtime/RO-10-0025.pdf.

320. N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2021).

321. Hayward v. IBI Armored Servs., 954 F.3d 573, 576 (2d Cir. 2020) (holding that New York Labor Law "clearly states that for employees who are exempt from the FLSA under the Motor Carrier Exemption, employers must provide overtime compensation at a rate of one and one-half times the minimum wage").

ployees are paid what they are due prevents future unjust outcomes similar to Haskell Fuller and Micah Lindsay's experience.[322]

Furthermore, Arkansas could follow in the footsteps of Alaska and Washington and amend § 11-4-211(d) to exempt employees only if their gross pay is equivalent to what they would have earned if they had been paid overtime. Even better, Arkansas could remove the MCA exemption from the books entirely and redact the language in § 11-4-211(d) that allows an exemption based on 29 U.S.C. §213(b)(1).[323] Any of these options are preferable to the current system.

VII. CONCLUSION

Congress never intended to exempt truck drivers working over forty hours a week from overtime. At the very least, courts should stop cherry-picking the relevant statutes and enforce the MCA exemption to allow truck drivers to exclude per diem reimbursements from their wages. Considering Arkansas's unique position of having the highest concentration of trucking industry jobs in the United States,[324] it should place itself at the forefront of the battle to provide fair labor standards to these essential employees. There is also an economic incentive for the state to provide fair labor standards, since providing fair and legal compensation will increase the marketability of Arkansas for truck drivers.

Arkansas must act to protect its transportation employees from the egregious judicial abuse described throughout this Note by changing its own code, either by allowing employees who never leave the state for their jobs to be protected by our current overtime laws or extending coverage to all employees currently exempted by the MCA exemption. Arkansas should also rectify the current trucking industry's sweatshop nature and amend its statutes to ensure truck drivers are compensated for every hour they are away from home unless they are sleeping in an employer-paid hotel room. Not only will this provide truck drivers with adequate sleeping accommodations, but it will provide them with a better night's sleep and will likely result in fewer fatalities on the roads and interstates within its borders.

322. *See In re* Two Men & a Truck Litig., No. 5:16-CV-05255, 2017 U.S. Dist. LEXIS 26017 *16–17 (W.D. Ark. Feb. 24, 2017).

323. *See* ARK. CODE. ANN. § 11-4-211(d) (West 2021).

324. AM. TRANSP. RSCH. INST., *supra* note 22.

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* J.D., University of Arkansas at Little Rock, William H. Bowen School of Law, expected May 2022. B.S., Accounting, Western Governors University. I owe thanks to this Note's advisor, Professor Phillip Oliver; his instruction has been paramount to my understanding of tax policy. I owe a loving thanks to Ashley Frederick and Niecy Gibbs—they are truly the two pillars that hold my head above water; to my son, Christian--his infinite energy serves as my inspiration; and to the members of this Law Review, for their work and support to publish this Note. I dedicate this Note to America's transportation workers: I will forever be in your corner.