



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 10, 2020

Mr. Steven C. McCraw
Director
Texas Department of Public Safety
Post Office Box 4087
Austin, Texas 78773-0001

Opinion No. KP-0313

Re: Whether over-the-road buses traveling on interstate highways in Texas are subject to the tandem axle weight limitations established in Transportation Code subsection 621.101(a)(2) (RQ-0320-KP)

Dear Mr. McCraw:

You ask whether over-the-road buses traveling on interstate highways in Texas are subject to the tandem axle weight limitations established in Transportation Code subsection 621.101(a)(2).¹ That subsection prohibits operation of a vehicle over or on a public highway if the vehicle has “a tandem axle weight² heavier than 34,000 pounds, including all enforcement tolerances.” TEX. TRANSP. CODE § 621.101(a)(2) (footnote added). Federal law defines an “over-the-road bus” as “a bus characterized by an elevated passenger deck located over a baggage compartment.” 42 U.S.C. § 12181(5); *see also* 23 C.F.R. § 658.5. You inform us that enforcement of the tandem axle weight limitation particularly concerns operators of double-decker buses having two-level passenger compartments because those buses often exceed the weight limit. Request Letter at 1 n.2. You tell us that an operator of over-the-road buses asserts that federal law—an exception to 23 U.S.C. § 127(a)—preempts the State overweight prohibition in subsection 621.101(a)(2). *Id.* at 1.

Section 127 of title 23 of the United States Code contains weight regulations for vehicles using the federal interstate system. *See* 23 U.S.C. § 127. Subsection 127(a) provides in pertinent part:

¹*See* Letter from Mr. Steven C. McCraw, Dir., Tex. Dep’t of Pub. Safety, to Honorable Ken Paxton, Tex. Att’y Gen. at 2 (Dec. 13, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²“Tandem axle weight” is “the total weight transmitted to the road by two or more consecutive axles” having specified measurements. TEX. TRANSP. CODE § 621.001(11).

(a) In general. –

(1) The Secretary [of Transportation] shall withhold [a portion of a State’s share of federal funds under the statute] in any fiscal year in which the State does not permit the use of The Dwight D. Eisenhower System of Interstate and Defense Highways within its boundaries by vehicles . . . with a tandem axle weight of thirty-four thousand pounds, including enforcement tolerances

(2) However, the maximum gross weight to be allowed by any State for vehicles using The Dwight D. Eisenhower System of Interstate and Defense Highways shall be . . . a tandem axle weight of thirty-four thousand pounds

Id. § 127(a)(1), (2). Thus, subsection 127(a) generally establishes the lowest and highest limitations on tandem axle weight for vehicles that a state may allow to use on interstate highways without impacting funding.

However, a statutory note to subsection 127 states in part:

“(1) Exemption. --The second sentence of section 127 of title 23, United States Code [23 U.S.C. § 127(a)(2)], relating to axle weight limitations for vehicles using the Dwight D. Eisenhower System of Interstate and Defense Highways, shall not apply to--

(A) any over-the-road bus (as defined in section 301 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181)).

23 U.S.C. § 127 note (2019) (Over-the-Road Buses and Public Transit Vehicles).³ Therefore, the issue becomes whether the statutory note’s exemption from the federal axle weight limitation preempts the state limitation in Transportation Code subsection 621.101(a)(2).

Courts recognize three types of federal preemption: “(1) express preemption, (2) field preemption, and (3) conflict preemption.” *Simmons v. Sabine River Auth. La.*, 732 F.3d 469, 473 (5th Cir. 2013); *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21, 24 (Tex. 2002). Preemption of any type relies on congressional intent, and courts “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative

³An enactment of Congress published in the Statutes at Large, but appearing in the United States Code only as a statutory note, is nevertheless “the law of the land.” *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1251 (11th Cir. 2005). The language in the statutory note derives from the Statutes at Large and was originally a temporary exemption applicable to public transit vehicles. See Dep’t of Transp. & Related Agencies Appropriations Act, 1993, Pub. L. No. 102-388, § 341, 106 Stat. 1520 (amending the Intermodal Surface Transp. Efficiency Act of 1991, Pub. L. No. 102-240, § 1023, 105 Stat. 1914 by adding subsection (h) to section 1023 and providing for a temporary exemption). In 2003 the note was amended to add “over-the-road buses.” See Consol. Appropriations Res., 2003, Pub. L. 108-7, § 347, 117 Stat. 11. The most recent amendment in 2012 deleted the “temporary” language. See Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, § 1522, 126 Stat. 405, (2012).

purpose.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quotation marks omitted). The first type, express preemption, “requires Congress to explicitly state its intent to preempt relevant state laws.” *United States v. Zadeh*, 820 F.3d 746, 751 (5th Cir. 2016). Subsection 127(a)(2) establishes a federal maximum tandem axle weight limit by prohibiting states from allowing vehicles exceeding the federal maximum tandem axle weight to use interstate highways. 23 U.S.C. § 127(a)(2). The statutory note states only that subsection 127(a)(2) does not apply to over-the-road buses. *Id.* note (2019) (Over-the-Road Buses and Public Transit Vehicles). Thus, the statutory note exempts over-the-road buses from the federal maximum tandem axle weight limitation but does not go further and affirmatively create a federal right to use interstate highways for such buses that exceed the maximum. *Id.* Moreover, the statutory note does not restrict or otherwise address state maximum limitations. A federal statute’s silence does not “explicitly state [congressional] intent to preempt relevant state laws.” *Zadeh*, 820 F.3d at 751. Accordingly, the statutory note does not expressly preempt state law.

The second type of federal preemption, field preemption, occurs when “federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.” *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (quotation marks omitted). Rather than thoroughly occupying the field, subsection 127(a) is premised on and designed around the states’ regulation of vehicle weight. *Id.* § 127(a); *Ruiz v. Comm’r of Dept. of Transp.*, 679 F. Supp. 341, 359 (S.D.N.Y. 1988) (stating that under section 127(a) “local regulations are expressly contemplated, and in fact required by the federal statute”), *aff’d*, 858 F.2d 898 (2d Cir. 1988). Thus, implied field preemption does not apply to your question. Finally, conflict preemption may occur “when compliance with both state and federal law is impossible” or “when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Zadeh*, 820 F.3d at 751 (quotation marks omitted). Because of the statutory note exemption, federal law does not regulate the maximum tandem axle weight of over-the-road buses and takes no position on state regulation. Therefore, conflict preemption also has no application. Because the exception stated in 23 U.S.C. subsection 127(a), statutory note, does not preempt state law, over-the-road buses traveling on interstate highways in Texas are subject to the tandem axle weight limitations in Texas Transportation Code section 621.101(a)(2).⁴

⁴We received briefing asserting that Texas is the only state that enforces maximum weight limits on over-the-road buses. See Brief from David H. Coburn, Counsel to Megabus Southwest, LLC at 6–7 (Jan. 15, 2020). For that reason, the brief argues, subsection 621.101(a)(2) unconstitutionally burdens interstate commerce and the statutory note should be construed to avoid that unconstitutional burden. *Id.* However, the constitutional-avoidance canon of construction “has no application absent ambiguity.” *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019). If subsection 621.101(a)(2) unconstitutionally burdens interstate commerce a court would strike it down on that basis, not rewrite the statutory note to avoid the question. See *United States v. Emerson*, 270 F.3d 203, 213 (5th Cir. 2001) (stating that the courts’ “duty to avoid constitutional questions is not a license to rewrite the statute”). Moreover, determining whether a State’s even-handed highway regulation unduly burdens interstate commerce requires a fact-intensive inquiry balancing commercial hardships against health and safety benefits. *Mid-Atl. Bldg. Sys. Council, a Div. of Pa. Builders Ass’n, Inc. v. Frankel*, 17 F.3d 50, 52 (2d Cir. 1994); see generally *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 671–78 (1981) (reviewing the evidence supporting the district court’s findings about safety relative to burden). Such a factual analysis is beyond the purview of an attorney general opinion. See Tex. Att’y Gen. Op. No. KP-0198 (2018) at 2 n.5.

S U M M A R Y

Transportation Code subsection 621.101(a)(2) prohibits operation of a vehicle over or on a public highway if the vehicle has a tandem axle weight heavier than 34,000 pounds, consistent with the provision in 23 U.S.C. § 127(a)(2) also limiting the tandem axle weight of vehicles allowed to use interstate highways to 34,000 pounds. The exemption from the federal law for over-the-road buses does not preempt a state law imposing a 34,000-pound restriction otherwise applicable to those buses. Thus, over-the-road buses traveling on interstate highways in Texas are subject to the tandem axle weight limitations in Texas Transportation Code subsection 621.101(a)(2).

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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