ADVANCE SHEET HEADNOTE
May 16, 2022

2022 CO 21

No. 20SC950, *Gomez v. JP Trucking, Inc.*—Interstate Drivers—Overtime Compensation—Overtime Exemption—Colorado Minimum Wage Order, 7 Colo. Code Regs. 1103-1—Fair Labor Standards Act, 29 U.S.C. §§ 201–209—Motor Carrier Act Exemption, 29 U.S.C. § 213(b)(1).

In this case, the supreme court considers whether four commercial truck drivers are entitled to overtime pay from their former employer, JP Trucking, Inc., for hours they worked exceeding forty hours per week or twelve hours per day. A state regulation in effect during the relevant timeframe (i.e., throughout 2015), Colorado Minimum Wage Order 31, contains a provision exempting "interstate drivers" from overtime compensation ("Wage Order 31 exemption"). The court holds that the term "interstate drivers" in the Wage Order 31 exemption refers to drivers whose work takes them across state lines, regardless of how often. Therefore, concludes the court, the Wage Order 31 exemption is triggered the first time a driver crosses state lines during a work trip.

Here, two of the four truck drivers did not cross state lines during a work trip. Consequently, they do not come within the scope of "interstate drivers" in the Wage Order 31 exemption and are entitled to overtime compensation. But the other two drivers each crossed state lines during a work trip, which rendered them "interstate drivers" under the Wage 31 exemption and thus ineligible for overtime compensation. The fact that these two drivers crossed state lines on only one occasion is academic. Contrary to the truck drivers' contention, there is no basis to hold that the term "interstate drivers" applies only if a driver's work takes him across state lines predominantly.

In light of these conclusions, the supreme court reverses the judgment of the court of appeals and remands for further proceedings consistent with this opinion. On remand, the division should consider JP Trucking's remaining contentions regarding the calculation of damages.

The supreme court cautions that the holding in this case is limited by a recently enacted state regulation, which changes the meaning of "interstate drivers." Today's decision governs only the Wage Order 31 exemption and other Wage Orders containing that exemption.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2022 CO 21

Supreme Court Case No. 20SC950
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA2384

Petitioners:

Leonel Gomez, Francisco Gonzalez, Ebarardo Sanchez, and Nathan Abbott,

v.

Respondent:

JP Trucking, Inc.

Judgment Reversed
en banc
May 16, 2022

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 During the relevant timeframe, the four truckers who initiated this action ("the truck drivers") regularly drove more than forty hours per week for their employer, JP Trucking, Inc., a Colorado transport company. The question they present to us is whether they're entitled to overtime pay for hours exceeding forty hours per week or twelve hours per day. The answer depends on the meaning of a state regulation that exempts "interstate drivers" from overtime compensation.

¶2 The truck drivers and JP Trucking both urge us to declare that the term "interstate drivers" is unambiguous. Yet they offer conflicting interpretations of it. The truck drivers argue that the term refers to drivers whose work predominantly takes them across state lines. JP Trucking, in contrast, maintains that "interstate drivers" are drivers who are involved in the transportation of goods in interstate commerce, even if their work never takes them across state lines.

¶3 A division of the court of appeals determined that "interstate drivers" was unambiguous. *See Gomez v. JP Trucking, Inc.*, 2020 COA 153, ¶ 22, 490 P.3d 977, 983. It then sided with JP Trucking's understanding of the term. We see it differently and, accordingly, reverse. But we're not in complete agreement with the truck drivers either.

¶4 We conclude that "interstate drivers" is an ambiguous term. And, consistent with the decision by a different division of the court of appeals in *Brunson v. Colorado Cab Co.*, 2018 COA 17, ¶ 45, 433 P.3d 93, 100, we hold that "interstate drivers" refers to drivers whose work takes them across state lines, regardless of how often. Hence, the state exemption from overtime compensation is triggered the first time a driver crosses state lines during a work trip.

¶5 Here, it is undisputed that two of the truck drivers, Francisco Gonzalez and Nathan Abbott, each crossed state lines on one occasion while transporting goods for JP Trucking. Upon doing so, they became "interstate drivers" and thus ineligible for overtime pay during the rest of their employment at JP Trucking. The other two truck drivers, Leonel Gomez and Ebarardo Sanchez, never crossed state lines while transporting goods for JP Trucking and, therefore, did not lose their entitlement to overtime pay. In light of these conclusions, we remand for further proceedings consistent with this opinion and to allow the division to consider JP Trucking's remaining contentions regarding the calculation of damages.

¶6 We note that our holding is necessarily limited by a recently enacted state regulation, which provides that commercial drivers now come within the ambit of the overtime exemption if they are subject to the exemption's federal counterpart (i.e., if they are engaged in the transportation of goods in interstate commerce) and

are paid a certain wage. Today's opinion doesn't affect any cases governed by the new regulation.

I. The Alphabet Soup Must Be Served First

¶7 Before summarizing the facts and procedural history, we briefly outline the different federal and state statutes that are implicated, as well as certain regulatory orders promulgated under those legislative pronouncements. Because each act, regulation, and enacting body has its own abbreviation—forming a hodgepodge of acronyms—and because it isn't easy to digest this alphabet soup, we hope that providing some background will be helpful.

¶8 The Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201–219, sets federal minimum wage and overtime requirements for certain employers nationwide. Of relevance here, section 207 of the FLSA, which applies to many categories of employers, provides that "no employer shall employ any of his employees who in any workweek is engaged in commerce . . . for a workweek longer than forty hours unless such employee receives [overtime] compensation." *Id.* at § 207(a)(1) (specifying that such an employee must be paid for any employment exceeding forty hours during a workweek "at a rate not less than one and one-half times the regular rate at which he is employed").

¶9 But the FLSA contains an extensive section of "Exemptions," which discusses circumstances when some provisions of the FLSA "shall not apply." *Id.*

at § 213(b)(1). Section 213(b)(1), known as the Motor Carrier Act ("MCA") exemption, states that section 207 (the aforementioned section addressing maximum hours and overtime compensation) shall not apply to "any employee with respect to whom the Secretary of Transportation [("Secretary")] has power to establish qualifications and maximum hours of service." *Id.* at § 213(b)(1).

¶10 The Secretary's power extends only over employees who (1) are employed by carriers whose transportation of passengers or property by motor vehicle is subject to the Secretary's jurisdiction under the MCA and (2) engage in activities that affect the safe operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce. 29 C.F.R. § 782.2(a) (2022). "The U.S. Supreme Court has accepted the Agency determination" that such activities "are included in the kinds of work which has been defined as the work of drivers, driver's helpers, loaders, and mechanics" employed by the specified motor carriers. *Id.* at § 782.2(b)(1). Thus, distilled to its elements, and as relevant here, the MCA exemption covers: (1) drivers, driver's helpers, loaders, and mechanics; (2) employed by motor carriers; and (3) involved in the movement of goods in interstate commerce. *Id.* at § 782.2(b)(2).[1]

[1] The MCA exemption's rationale is safety, as "[i]t is dangerous for drivers to spend too many hours behind the wheel, and 'a requirement of pay that is higher for overtime service than for regular service tends to . . . encourage employees to

¶11 While the FLSA applies nationally, the Colorado Wage Claim Act ("CWCA"), §§ 8-4-101 to –124, C.R.S. (2021), and the Colorado Minimum Wage Act ("CMWA"), §§ 8-6-101 to –120, C.R.S. (2021), contain provisions regarding minimum wage and overtime pay for employees who work in certain industries in Colorado. The CWCA and the CMWA are implemented through Colorado Minimum Wage Orders ("Wage Orders"), which are regularly promulgated by the Colorado Department of Labor and Employment ("Department"). Starting in 2020, the Department renamed its Wage Orders; they are now titled Colorado Overtime and Minimum Pay Standards ("COMPS") Orders.

¶12 Wage Order 31 was in effect during the timeframe in question (i.e., throughout 2015). *See* Dep't of Lab. & Emp., Wage Order 31, 7 Colo. Code Regs. 1103-1 (eff. between Dec. 30, 2014, and Dec. 31, 2015) [https://perma.cc/4DFR-69JU]. Like other Wage Orders, Wage Order 31 applies only to work performed "within the boundaries of the state of Colorado." *Id.* at § 1. Though Wage Orders are revised annually to reflect the current Colorado minimum wage, the germane language in Wage Order 31 appears in Wage Orders spanning more than a decade.

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seek' overtime work." *Burlaka v. Cont. Transp. Servs. LLC*, 971 F.3d 718, 719 (7th Cir. 2020) (quoting *Levinson v. Spector Motor Serv.*, 330 U.S. 649, 657 (1947)).

See, e.g., Dep't of Lab. & Emp., Wage Order 24, 7 Colo. Code Regs. 1103-1:1 (eff. between Jan. 1, 2008, and Dec. 31, 2008) [https://perma.cc/6A8F-ZSPV].

¶13 Wage Order 31 requires some Colorado employers to pay overtime at a rate of "time and one-half" the employee's normal rate of pay. Wage Order 31 § 4. But Wage Order 31 also contains an exemptions section that excludes many employees from all of Wage Order 31's provisions:

> 5. Exemptions from the Wage Order:
>
> The following employees or occupations, as defined below, are exempt from all provisions of Minimum Wage Order No. 31: administrative, executive/supervisor, professional, outside sales employees, and elected officials and members of their staff. Other exemptions are: companions, casual babysitters, and domestic employees employed by households or family members to perform duties in private residences, property managers, *interstate drivers, driver helpers, loaders or mechanics of motor carriers*, taxi cab drivers, and bona fide volunteers. Also exempt are: students employed by sororities, fraternities, college clubs, or dormitories, and students employed in a work experience study program and employees working in laundries of charitable institutions which pay no wages to workers and inmates, or patient workers who work in institutional laundries.

Id. at § 5 (emphasis added).[2]

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[2] For the sake of convenience, we refer to the portion of the exemption in section 5 of Wage Order 31 addressing "interstate drivers, driver helpers, loaders or mechanics of motor carriers"—the MCA exemption's state counterpart—as "the Wage Order 31 exemption." We focus our analysis, however, on the quoted phrase, not on the entire exemption.

¶14 Although Wage Order 31 lists "interstate drivers," it does not define the term. However, the Department published an advisory bulletin defining "interstate drivers" as "drivers whose work takes them across state lines." Colo. Div. of Lab., Advisory Bulletins and Resource Guide § 22(I) (Mar. 31, 2012) ("Advisory Bulletin") [https://perma.cc/7PLA-ZTRD].

II. Facts and Procedural History

¶15 The truck drivers are former employees of JP Trucking. As JP Trucking's employees, they delivered construction equipment to jobsites within Colorado, though Gonzalez and Abbott each performed a job that required them to cross state lines on one occasion.

¶16 It is undisputed that the truck drivers regularly drove more than forty hours per week for JP Trucking and that JP Trucking did not pay them overtime. In 2016, the truck drivers sued JP Trucking for violations of the FLSA, the CWCA, and the CMWA. They sought overtime pay for hours worked in excess of forty hours per week or twelve hours per day. JP Trucking countered that the truck drivers were not entitled to overtime pay because they fell within the scope of the MCA exemption and the Wage Order 31 exemption.

¶17 Following a bench trial, the district court ruled that the truck drivers were entitled to overtime compensation because they did not fall within either exemption. The court therefore awarded the truck drivers all requested damages.

¶18 JP Trucking timely appealed, and a division of the court of appeals remanded the case to the district court with instructions to supplement the factual findings and, if necessary, amend the conclusions of law. On remand, the district court (with a different judge presiding) made new findings of fact and reached revised conclusions of law.

¶19 The district court reversed the original ruling regarding federal law, determining instead that the truck drivers fell within the MCA exemption to overtime pay because they were involved in "interstate commerce" (even if their work was entirely within the state). But, relying on the court of appeals' decision in *Brunson*, the district court affirmed the original ruling regarding state law, finding that the truck drivers were not "interstate drivers" within the ambit of the Wage Order 31 exemption to overtime pay because their work didn't take them across state lines. The district court acknowledged that Gonzalez and Abbott had each driven outside of Colorado on one occasion while transporting goods for JP Trucking. However, it concluded that this fact was inconsequential because such out-of-state driving was "de minimis"[3] and could not qualify Gonzalez and Abbott

[3] When something is so insignificant or negligible as to be "de minimis," "a court may overlook it in deciding an issue or case." *De Minimis*, Black's Law Dictionary (11th ed. 2019).

as interstate drivers. Thus, pursuant to the provisions of Wage Order 31, the district court awarded the truck drivers damages and their reasonable fees and costs.

¶20 The case was thereafter recertified on appeal and assigned to a different division of the court of appeals. *See Gomez*, ¶ 3, 490 P.3d at 979. Because the parties did not take issue with the district court's ruling regarding the MCA exemption, the division limited its analysis to the Wage Order 31 exemption. *Id.* at ¶ 8, 490 P.3d at 980. The division reversed the judgment, rejecting the holding in *Brunson* and concluding that the Wage Order 31 exemption mirrored the scope of the MCA exemption. *Id.* at ¶ 25, 490 P.3d at 984; *see also Chavez v. Chavez*, 2020 COA 70, ¶ 13, 465 P.3d 133, 138 ("[W]hile a division may defer to the determination of another division, divisions are not bound by the decisions of other divisions . . . ."). Since the truck drivers were indisputably exempt from overtime pay under federal law, the division determined that they were also exempt from overtime pay under state law. *Gomez*, ¶ 26, 490 P.3d at 985.

¶21 Viewing the two exemptions as substantially similar, the division leaned heavily on federal case law interpreting the MCA exemption. *See id.* at ¶¶ 22–23, 490 P.3d at 983–84. Indeed, the division sought to harmonize the Wage Order 31 exemption with the MCA exemption—or, to be more precise, with federal case law construing the MCA exemption. *See id.* at ¶ 21, 490 P.3d at 983.

¶22 Under the precedent anchoring the division's decision, the MCA exemption applies to any driver who transports goods in interstate commerce, including a driver whose delivery is an intrastate link in the practical chain of movement across state lines. *Id.* at ¶ 22, 490 P.3d at 983 (citing *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147, 1155 (10th Cir. 2016)). Federal appellate decisions applying the MCA exemption have consistently concentrated on the shipper's intent and the movement of goods in interstate commerce, not on the driver's movement. *Id.* Shepherded by this case law, the division ruled that when an employer moves goods in interstate commerce with the intent to do just that, the Wage Order 31 exemption applies—even to a driver who is only responsible for an intrastate leg of an interstate journey. *Id.* at ¶¶ 23–24, 26, 490 P.3d at 984–85.

¶23 Having summoned federal precedent applying the MCA exemption, the division unsurprisingly determined that the Wage Order 31 exemption was unambiguous because it was susceptible of only one reasonable reading—the one that rendered it harmonious with federal cases interpreting the MCA exemption. *Id.* at ¶ 22, 490 P.3d at 983. The division explained that it was not moved by the truck drivers' contention that "interstate drivers" could also reasonably be understood as drivers who cross state lines. *Id.* In this regard, the division ascribed significance to the timing of Wage Order 31's promulgation, pointing out that at that time federal tribunals had already established that intrastate transport

may qualify as interstate in character under the MCA exemption. *Id.* at ¶ 23, 490 P.3d at 983–84. But, noted the division, despite the Department's presumed awareness of this authority, Wage Order 31 does not include any language limiting the term "interstate drivers" to drivers who cross state boundaries. *Id.* at ¶ 24, 490 P.3d at 984. And, said the division, it could not engraft a restriction onto Wage Order 31 that was not placed there by the Department. *Id.*

¶24 As for the Department's Advisory Bulletin, the division acknowledged its existence. *Id.* at ¶ 25 n.5, 490 P.3d at 984 n.5. But the division did little more than that, giving it short shrift in a footnote.

¶25 The truck drivers timely sought certiorari, and we granted their petition. We agreed to consider the following issue:

> Whether the court of appeals erred in rejecting *Brunson v. Colorado Cab Co.*, 2018 COA 17, 433 P.3d 93, and determining that a regulatory exemption from Colorado's wage-and-hour laws was unambiguous due to its incidental similarities with an exemption in the federal Fair Labor Standards Act, 29 U.S.C. §§ 201–209 (2018), despite explicit contrary guidance from the Colorado Department of Labor and Employment.

III. Controlling Standard of Review and Relevant Tenets of Regulatory Interpretation

¶26 Before proceeding to analyze the certiorari question, we consider the standard of review and the relevant tenets of regulatory interpretation. These authorities serve as our guideposts.

¶27 We review administrative regulations de novo. *Gessler v. Colo. Common Cause*, 2014 CO 44, ¶ 7, 327 P.3d 232, 235. The construction of an administrative regulation such as Wage Order 31 is guided by the same principles that apply to statutory interpretation. *Brunson*, ¶ 10, 433 P.3d at 96. Consequently, our foremost goal in interpreting a regulation is to give effect to the promulgating body's intent. *Id.* And, as with a statute, if the language of a regulation is unambiguous, we enforce it as written, giving the words and phrases their common and ordinary meaning. *Id.* In such a situation, we may not rely on other canons of construction. *Id.*

¶28 If the language of a regulation is ambiguous, however, we may resort to other interpretative aids to discern the drafters' intent. *Id.*; *accord McDonald v. People*, 2021 CO 64, ¶ 20, 494 P.3d 1123, 1128 (involving a statute). For instance, to the extent that the provisions and purposes of a state enactment closely parallel those of its federal counterpart, federal case law construing the latter is highly persuasive. *McDonald,* ¶ 20, 494 P.3d at 1128. Additionally, in some circumstances, an agency's reasonable interpretation of its regulation is helpful. *Brunson*, ¶ 11, 433 P.3d at 96.

¶29 The question of what deference, if any, to afford an agency's reasonable interpretation of its regulation is a difficult one and is subject to substantial debate. But it's one we don't have to reach here. In *Christensen v. Harris Cnty.*, 529 U.S.

576, 586–87 (2000), the Supreme Court noted that an agency's reasonable interpretation may be worthy of deference only if the language of the regulation is ambiguous. Courts call that "*Auer* deference." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (referring to *Auer v. Robbins*, 519 U.S. 452 (1997)). *Auer* deference is rooted in the rebuttable presumption that the legislature "would generally want the agency to play the primary role in resolving regulatory ambiguities." *Id.* at 2412.

¶30 But the Supreme Court has cautioned that *Auer* deference isn't the answer every time a question arises related to the meaning of ambiguous language in an agency's regulation. *Id.* at 2414. For one thing, such deference is only available when the regulation is "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Id.* ("[W]hen we use that term, we mean it—genuinely ambiguous."). A court cannot wave the ambiguity flag before emptying its interpretation toolkit and carefully considering the text, structure, history, and purpose of a regulation. *Id.* at 2415. Beyond that, when the reasons for the aforementioned presumption don't apply or when there are countervailing reasons outweighing them, "courts should not give deference to an agency's reading." *Id.* at 2414. In such a situation, however, the Supreme Court has instructed that we may still accord the agency's interpretation "a measure of deference proportional to the 'thoroughness evident in its consideration, the

validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)). Therefore, under Supreme Court jurisprudence, even assuming an agency's interpretation of its regulation doesn't warrant *Auer* deference, it may still deserve "respect" if it has the "power to persuade." *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

IV. Analysis

¶31 The only enactment before us is Wage Order 31. And the parties' dispute specifically revolves around the meaning of "interstate drivers" as that term is used in the Wage Order 31 exemption.[4]

¶32 The division got off on the wrong foot. Before considering whether the Wage Order 31 exemption was ambiguous, the division ran straight to federal case law interpreting the MCA exemption. But the initial step in construing a regulation is to look to its language. *See Carrera v. People*, 2019 CO 83, ¶ 17, 449 P.3d 725, 729 (involving a statute); *see also Cowen v. People*, 2018 CO 96, ¶ 12,

[4] We need not, and thus do not, consider whether the word "interstate" in the Wage Order 31 exemption qualifies only "drivers" or also "driver helpers, loaders or mechanics of motor carriers." Wage Order 31 § 5. The issue we confront is quite narrow and, accordingly, so is our analysis.

431 P.3d 215, 218 (stating, in a case involving a statute, that "'a court should always turn first' to the plain meaning rule 'before all other[s]'") (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)). As we have explained, while "federal precedent is persuasive in construing similar language in our [state] law, we should first look to the plain language of the controlling statutes under our law." *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1100 (Colo. 1995) (internal citation omitted). If the language of an enactment is unambiguous, we give effect to its plain and ordinary meaning and look no further. *Carrera*, ¶ 18, 449 P.3d at 729. In that scenario, the plain meaning rule is both the first and the last canon, and nothing more is required of our inquiry. *See id.*; *see also Crandall v. City & Cnty. of Denver*, 238 P.3d 659, 662 (Colo. 2010) (noting that if statutory language "is clear and unambiguous, our analysis is at an end").

¶33 By the time the division decided that the term "interstate drivers" was unambiguous, it had already embraced federal case law interpreting the MCA exemption. But because we may not put the cart before the horse, the starting point for our analysis is to ask whether the term "interstate drivers" in the Wage Order 31 exemption is ambiguous. We agree with the division in *Brunson* that the answer is yes because "interstate drivers" is susceptible of more than one reasonable interpretation. *Brunson*, ¶ 18, 433 P.3d at 97; *see also Elder v. Williams*,

2020 CO 88, ¶ 18, 477 P.3d 694, 698 ("A statute is ambiguous when it is reasonably susceptible of multiple interpretations.").

A. The Wage Order 31 Exemption is Ambiguous

¶34 On the one hand, it is reasonable to construe the term "interstate drivers" consistent with federal case law interpreting the MCA exemption. *Brunson*, ¶¶ 18 & n.4, 433 P.3d at 97 & n.4. Such case law focuses on whether the "essential character" of the shipment is interstate in nature, not on whether the driver actually crosses state lines. *Deherrera*, 820 F.3d at 1155 (quoting *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 672 (10th Cir. 1993)). A driver engages in interstate commerce if his delivery is part of the continuity of movement from one state to another. *Id.* Because the interstate nature of some shipments can become blurred (including while goods are temporarily stored in a warehouse or moved by different carriers), federal courts "look to the shipper's 'fixed and persisting intent' at the time of the shipment." *Id.* (quoting *Foxworthy*, 997 F.2d at 672). If "the final intended destination at the time the shipment begins is another state, the [MCA exemption] applies throughout the shipment, even as to a carrier that is only responsible for an intrastate leg of the shipment." *Id.* at 1159 (quoting *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 75 (2d Cir. 2001)). Thus, the MCA exemption sweeps in some drivers who do not cross state lines.

¶35 On the other hand, it is equally reasonable to construe "interstate drivers" as drivers who actually cross state lines. *Brunson*, ¶ 17, 433 P.3d at 97. After all, "interstate" means "[b]etween two or more states . . . ; involving different states, esp. in the United States." *Interstate*, Black's Law Dictionary (11th ed. 2019); *accord* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*interstate* [https://perma.cc/ASX2-9P28] (defining "interstate" as "of, connecting, or existing between two or more states especially of the U.S."). And, by its own terms, Wage Order 31 applies only to work performed "within the boundaries of the state of Colorado," Wage Order 31 § 1, so a colorable argument can be mounted that any driving that crosses state lines is beyond the scope of the Wage Order and the Department's jurisdiction.

¶36 Given this ambiguity, we must venture beyond the language of Wage Order 31 to ascertain the Department's intent and purpose. More specifically, to choose between the two possible readings of "interstate drivers," we must look for help in our interpretive toolbox. One possible source of assistance is federal case law applying the MCA exemption. Another is the Department's interpretation of "interstate drivers" in its Advisory Bulletin. We inspect each in turn.

B. Federal Case Law Interpreting the MCA Exemption

¶37 The division hitched its wagon to federal case law construing the MCA exemption because it viewed the Wage Order 31 exemption as substantially

similar to, and largely patterned after, the MCA exemption. *Gomez*, ¶ 21, 490 P.3d at 983. While we recognize that there are similarities between the two exemptions, we conclude that they are not so substantial as to render federal case law on the MCA exemption persuasive.

¶38 In sizing up the Wage Order 31 exemption, the division placed it against the MCA exemption and commented that both similarly excluded "interstate drivers" from overtime compensation. *Id*. However, this observation is somewhat circular because whether the two exemptions similarly exclude "interstate drivers" depends on the meaning of "interstate drivers." If the term means what JP Trucking says it means (drivers engaged in the transportation of goods in interstate commerce), then, yes, both exemptions exclude the same drivers. But if the term means what the truck drivers say it means (drivers who cross state lines predominantly), then, no, the exemptions do not exclude the same drivers—in that case, only the MCA exemption excludes drivers engaged in interstate commerce who don't cross state lines at all or whose work doesn't predominantly take them across state lines.

¶39 True, both Wage Order 31 and the FLSA exclude some of the same categories of workers: administrative employees; professional and executive employees; outside salesmen; casual babysitters and domestic service companions; driver helpers; taxi cab drivers; and salespersons, parts-persons, and

mechanics of retail businesses dealing in automobile, truck, and farm implements. *Compare* Wage Order 31 § 5, *with* 29 U.S.C. § 213(a)(1), (a)(15), (b)(1), (b)(10)(A), (b)(11), (b)(17). However, as the division acknowledged, the FLSA "exempts a far greater number of employee categories than [Wage Order 31] does." *Gomez*, ¶ 21, 490 P.3d at 983.

¶40 Equally important, the Wage Order 31 exemption lumps "interstate drivers" in with all the categories of exempted employees and excludes all of them from all its provisions (not just from its overtime pay provisions). *See* Wage Order 31 § 5. The MCA exemption, by contrast, is one of numerous exemptions in the FLSA and is an exemption only from the maximum hours and overtime pay provisions of the FLSA (not from all of the FLSA's provisions). *Brunson*, ¶ 32, 433 P.3d at 99.

¶41 Moreover, the force of the MCA exemption hinges on the Secretary's authority to regulate qualifications and maximum hours of service for drivers engaged in interstate commerce. *See* 29 U.S.C. § 213(b)(1). In Colorado, the Wage Order 31 exemption doesn't even mention the Secretary, let alone the Secretary's authority to set qualifications and maximum hours of service for certain employees. *See* Wage Order 31 § 5. Nor does the Wage Order 31 exemption discuss whether a driver is involved in interstate commerce; instead, it expressly lists "interstate drivers." *Id.*

¶42 JP Trucking nevertheless argues that the Wage Order 31 exemption excludes from its provisions "interstate drivers, driver helpers, loaders or mechanics of motor carriers," which JP Trucking characterizes as "terms of art" that originated in, and derive their meaning from, interpretive guidance and case law applying the MCA exemption. *See* 29 C.F.R. § 782.2(b)(1)–(2) (indicating that the MCA exemption applies only to "drivers, driver's helpers, loaders, and mechanics" whose work involves "transportation in interstate . . . commerce"); *see also Levinson v. Spector Motor Serv.*, 330 U.S. 649, 673 (1947) (stating that "full-duty drivers, mechanics, loaders and helpers" are the only occupations that fall within the MCA exemption). However, this contention overlooks a glaring difference between the two exemptions: Despite otherwise using MCA-exemption-related terms verbatim in the Wage Order 31 exemption, the Department chose not to refer to "interstate commerce"; instead, it chose to refer to "interstate drivers." In other words, when it came to drivers, the Department clearly deviated from interpretive guidance and case law applying the MCA exemption, opting for "interstate drivers" rather than drivers involved in "interstate commerce."

¶43 Unsurprisingly, the *Brunson* division made a similar observation: "While Colorado's Wage Order lists interstate drivers as exempt employees, the MCA overtime pay exemption of the FLSA does not list 'interstate drivers' at all." ¶ 28,

433 P.3d at 98. Rather, remarked the *Brunson* division, the MCA exemption excludes drivers engaged in interstate commerce. *Id.*

¶44 That the Department is presumed to have been aware of existing federal case law at the time it promulgated Wage Order 31 only shoves the stake deeper into the heart of JP Trucking's case. *Cf. Larrieu v. Best Buy Stores, L.P.*, 2013 CO 38, ¶ 13, 303 P.3d 558, 561 ("When the General Assembly legislates in a particular area, we presume it was aware of existing case law precedent."). Presumably aware of federal case law construing the MCA exemption as applying to drivers involved in "interstate commerce," the Department nevertheless used "interstate drivers" in the Wage Order 31 exemption. Viewed in the context of existing case law, this change suggests a deliberate attempt by the Department to exempt a smaller group of commercial drivers from overtime pay in Colorado.

¶45 JP Trucking tries to downplay the inconsistency between the two exemptions. To our mind, however, the difference between drivers engaged in "interstate commerce" and "interstate drivers" is significant. When the two exemptions are juxtaposed, the difference sticks out like a sore thumb:

> **MCA Exemption:** drivers, driver's helpers, loaders, and mechanics employed by motor carriers and involved in *interstate commerce*.
>
> **Wage Order 31 Exemption:** *interstate drivers*, driver helpers, loaders or mechanics of motor carriers.

If, as the division discerned, and JP Trucking now urges, the Department meant to closely model the Wage Order 31 exemption after the MCA exemption, then why didn't the Department simply refer to drivers engaged in "interstate commerce" in Wage Order 31? And why did it use the term "interstate drivers" when federal case law at the time clearly defined drivers involved in "interstate commerce" as including some drivers who didn't cross state lines?

¶46 This variance becomes all the more pronounced when we consider that states are free to provide employees with benefits that exceed those set out in the FLSA. *Brunson*, ¶ 21, 433 P.3d at 97. As the Seventh Circuit put it, "The FLSA sets a floor, not a ceiling, on compensation that employees must receive." *Barefield v. Vill. of Winnetka*, 81 F.3d 704, 711 (7th Cir. 1996); *see also Martinez v. Combs*, 231 P.3d 259, 280–81 (Cal. 2010) ("Courts must give . . . wage orders independent effect in order to protect [an agency's] delegated authority to enforce the state's wage laws and, as appropriate, to provide greater protection to workers than federal law affords.").

¶47 It was the Department's prerogative to promulgate a Wage Order whose overtime protective shelter surpassed the FLSA's. Here, the Department appears to have done just that by promulgating an exemption more limited in scope than the MCA exemption.

¶48 Significantly, the Department specifically stated that, to the extent Wage Order 31 provides greater benefits than the FLSA, the former must take precedence over the latter. *See* Wage Order 31 Introduction ("If an employee is covered by both state and federal minimum wage laws, the law which provides a higher minimum wage or sets a higher standard shall apply."); *see also* Wage Order 31 § 22 ("Whenever employers are subjected to both federal and Colorado law, the law providing greater protection or setting the higher standard shall apply.").[5] In considering the Wage Order 31 exemption's divergence from the MCA exemption, we must be mindful of this declaration by the Department. *See Brunson*, ¶ 10, 433 P.3d at 96. And we must be heedful of our practice to construe exemptions narrowly. *See, e.g.*, *Deherrera*, 820 F.3d at 1161 (indicating that the Wage Order exemption in question there, which is identical to the one before us, should be construed "narrowly"); *see also Comm'r v. Clark*, 489 U.S. 726, 739 (1989) (noting that if "a general statement of policy is qualified by an exception, we

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[5] At oral argument, JP Trucking maintained that construing Wage Order 31 as providing a wider protective blanket to commercial drivers than the one available under the FLSA would create inconsistencies between federal and state law, making it difficult for employers to avoid violations. We're not persuaded. Employers must follow both federal and state law, and to the extent that there are differences between them, employers must adhere to the law that affords employees more protection or sets a more demanding standard for employers.

usually read the exception narrowly in order to preserve the primary operation of the provision").

¶49 It bears emphasizing that nothing we say today should be taken as discrediting the proposition that federal case law construing a federal enactment deserves great weight in interpreting a state enactment where the two enactments "are identical or substantially so," *Colonial Bank v. Colo. Fin. Servs. Bd.*, 961 P.2d 579, 583 (Colo. App. 1998), or where the provisions of the state enactment are "closely patterned after and designed to implement the policies of the federal" one, *People v. Gallegos*, 251 P.3d 1056, 1062 (Colo. 2011) (quoting *People v. Wahl*, 716 P.2d 123, 128 (Colo. 1986)). But given the contextual differences between the MCA exemption and the Wage Order 31 exemption, we join the *Brunson* division in concluding that federal case law interpreting the MCA exemption is not persuasive in interpreting the Wage Order 31 exemption. *Brunson*, ¶ 31, 433 P.3d at 98.

¶50 Finally, we would be remiss if we failed to acknowledge that the Tenth Circuit went in a different direction in *Deherrera*, the case that served as the compass for the division below. In *Deherrera*, the court held that, since plaintiffs were "engaged in interstate commerce for purposes of the MCA exemption to the FLSA," they were "also 'interstate drivers' under the Wage Order exemption." 820 F.3d at 1161 (reviewing a Wage Order exemption identical to the Wage Order

31 exemption). But the parties in *Deherrera* agreed "that the 'interstate drivers' exemption under the Wage Order should be read in harmony with the meaning of interstate commerce under the MCA exemption to the FLSA." *Id.* Not so here. And, regardless, we've already concluded that, while there are similarities between the Wage Order 31 exemption and the MCA exemption, they're not so substantial as to render federal case law construing the MCA exemption persuasive.

¶51 Having determined that federal case law interpreting the MCA exemption isn't persuasive for our purposes, we continue our quest to discern the Department's intent in exempting "interstate drivers" from all the provisions of Wage Order 31. We shift our attention now to the Department's interpretation of "interstate drivers" in its Advisory Bulletin.

C. The Department's Interpretation in Its Advisory Bulletin

¶52 In 2012, the Department issued an Advisory Bulletin.[6] The Department's purpose in distributing the Advisory Bulletin was to "discharg[e] its statutory

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[6] The Wage Order in effect at that time contained the same pertinent language that Wage Order 31 does. *See* Dep't of Lab. & Emp., Wage Order 28, 7 Colo. Code Regs. 1103-1 (eff. between Jan. 1, 2012 and Dec. 31, 2012) [https://perma.cc/E49E-ZCVK].

duty of educating and assisting Colorado employees, employers, and the general public on Colorado labor and employment laws and related workplace topics." *See* Advisory Bulletin Foreword.

¶53 We need not decide whether the Advisory Bulletin merits *Auer* deference because neither party has asked us to give it such deference, much less made the necessary showing justifying it. But even assuming the Advisory Bulletin isn't entitled to *Auer* deference, it may still warrant our "respect" if it has the "power to persuade." *See Christensen*, 529 U.S. at 587 (quoting *Skidmore,* 323 U.S. at 140). We now conclude that the Advisory Bulletin has all the hallmarks of an agency's interpretation possessing the power to persuade.

¶54 To begin, the Advisory Bulletin is quite thorough (200 pages in length), comprehensively discusses wage law and other workplace topics, and constitutes a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *See Skidmore*, 323 U.S. at 140; *Brunson*, ¶ 38, 433 P.3d at 99. It is authored and issued by the Department and considers "extensive input and feedback . . . received from Colorado employees, employers, attorneys, law firms, and organizations." *Brunson*, ¶ 38, 433 P.3d at 99 (quoting Advisory Bulletin Foreword).

¶55 Additionally, the Advisory Bulletin's reasoning strikes us as valid. *See Skidmore*, 323 U.S. at 140. As we explain later, the distinctions the Advisory

Bulletin draws between "interstate drivers" and "intrastate drivers"—terms it defines—are in line with those terms' plain and ordinary meaning. And, relatedly, the Advisory Bulletin's different treatment of the two categories of drivers for purposes of the overtime exemption accords with the limits of both the Department's jurisdiction and the scope of the Wage Order in effect when the Advisory Bulletin was issued. That is, the Advisory Bulletin makes clear that only interstate drivers (i.e., drivers who cross state lines) are always exempt from overtime compensation.

¶56 Lastly, the Advisory Bulletin is consistent with other pronouncements published by the Department, including Wage Orders.[7] *See id.*; *Brunson*, ¶ 39, 433 P.3d at 99. The Advisory Bulletin actually fulfills "the Department's statutory duty" to explain the term "interstate drivers" in Wage Order 31 without contravening, or otherwise modifying, that Wage Order. *Brunson*, ¶ 39, 433 P.3d at 100; *see also* Advisory Bulletin Foreword (observing that the Advisory Bulletin was "not intended to expand, narrow, or contradict current law"; it was meant to shed light on it). And the Advisory Bulletin echoes what Wage Order 31 says

[7] We recognize that the Advisory Bulletin is not consistent with the two most recent promulgations by the Department. However, as we discuss in the next section of this opinion, those promulgations were the result of the Department's change of heart about the meaning of the term "interstate drivers."

about employees deserving the benefit of whichever law is most beneficial to them:

> Employers and employees in Colorado may be covered by either federal wage law, state wage law, both state and federal law, or neither, depending upon the particular circumstances. Whenever employers are subject to both federal and Colorado law, the law providing greater protection for the employee or setting the higher standard shall apply.

Advisory Bulletin § 29(I); *cf.* Wage Order 31 § 22 ("Whenever employers are subjected to both federal and Colorado law, the law providing greater protection or setting the higher standard shall apply.").

¶57 Hence, like the division in *Brunson*, we conclude that we may properly look to the Advisory Bulletin for some guidance in ascertaining the Department's intent vis-à-vis the exemption of "interstate drivers" from Wage Order 31's provisions. *See Christensen*, 529 U.S. at 587; *accord Christopher*, 567 U.S. at 159. We do so now.

¶58 The Advisory Bulletin defines "interstate drivers" as "drivers whose work takes them across state lines." § 22(I). This definition is consistent with the dictionary definitions of "interstate" we quoted earlier. *See supra* at ¶ 35. According to the Advisory Bulletin, all "interstate drivers" are exempt from the provisions of Wage Order 31. § 22(I).

¶59 Conversely, the Advisory Bulletin defines "intrastate drivers" as "[d]rivers whose work travel is entirely within the State of Colorado." *Id.* Like the Advisory Bulletin's definition of "interstate drivers," this definition is consistent with the

dictionary definition of "intrastate." *See* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*intrastate* [https://perma.cc/QW9D-AQ3P] (defining "intrastate" as "existing or occurring within a state"). Per the Advisory Bulletin, "intrastate drivers" are "not specifically exempted from the provisions" of Wage Order 31. § 22(I). Instead, determinations related to coverage and exemptions with respect to "intrastate drivers" must be made on "a case-by-case basis in accordance with the provisions" of Wage Order 31. *Id.*

¶60 Giving the Advisory Bulletin the respect it deserves, *see Christensen*, 529 U.S. at 587, we hold that the term "interstate drivers" in the Wage Order 31 exemption refers to drivers whose work takes them across state lines. Therefore, a driver responsible for transporting goods during an intrastate leg of an interstate trip does not qualify as an "interstate driver" for purposes of the Wage Order 31 exemption.

¶61 Here, Gomez and Sanchez's work for JP Trucking did not take them across state lines. Consequently, they do not come within the scope of "interstate drivers" in the Wage Order 31 exemption and are entitled to overtime compensation. On the other hand, Gonzalez and Abbott's work for JP Trucking did take them across state lines on one occasion. When that occurred, it rendered them "interstate drivers" and pulled them within the scope of the Wage Order 31

exemption, making them ineligible for overtime compensation during the rest of their employment at JP Trucking.

¶62 The fact that Gonzalez and Abbott's work for JP Trucking took them across state lines on only one occasion is academic. Contrary to the truck drivers' contention, there is no basis to hold that the term "interstate drivers" applies only if a driver's work takes him across state lines *predominantly*. And applying such a standard would be unworkable. Would five out-of-state work trips qualify as predominant? Would ten? Would it depend on the percentage of work trips that are out-of-state?

D. The Limited Scope of Today's Opinion

¶63 Before we wrap up, we feel compelled to add an epilogue related to the limited scope of today's opinion. In COMPS Order 37, which was issued on November 10, 2020, the Department changed course on the meaning of "interstate drivers."[8] That COMPS Order advised that the Department had received "transportation industry feedback on having a state exemption requiring actually crossing state lines but a federal exemption covering certain wholly intrastate

[8] Recall that the Department recently switched terminology from Wage Orders to COMPS Orders.

employees." COMPS Order 37, Statement of Basis, Purpose, Specific Statutory Authority, and Findings, 6–7 [https://perma.cc/M9VS-QA5L]. The Department found "credible the industry point that when and whether in-vehicle employees cross state lines can be unpredictable." *Id.* at 7. Importantly, the industry feedback referenced in COMPS Order 37 came on the heels of the previous COMPS Order, COMPS Order 36, where the Department had declared that its "original intent" with respect to exempting "interstate drivers" was "to exempt employees whose work took them across state lines and thus beyond [the Department's] jurisdiction." COMPS Order 36, Statement of Basis, Purpose, Specific Statutory Authority, and Findings, 23 [https://perma.cc/6ULT-Z9QA].

¶64 In light of the industry feedback received following COMPS Order 36, the Department turned over a new leaf in COMPS Order 37:

> Drivers, and Driver's Helpers, Subject to the Federal Motor Carrier Act ("MCA"). Drivers and their driver's helpers . . . are exempt from Rule 4 (overtime) . . . while and to the extent they are . . . (A) subject to the federal MCA and exempt from overtime requirements of the Fair Labor Standards Act . . . ; (B) working on MCA-covered non-passenger vehicles . . . ; and (C) paid compensation equivalent to at least 50 hours at the Colorado minimum wage with overtime . . . .

COMPS Order 37 § 2.4.6(A)–(C) [https://perma.cc/9CYM-SD3T]. Because COMPS Order 38, which is currently in effect, contains the same provision, commercial drivers in Colorado are now exempt from the overtime pay requirement if they also fall within the scope of the MCA exemption and are paid

a certain wage. It follows that today the state overtime exemption is in substantial harmony with the MCA exemption.

¶65 Of course, COMPS Order 38 wasn't yet in effect at the time the truck drivers worked for JP Trucking. For that reason, it doesn't affect our decision. Our holding today is limited in scope to the Wage Order 31 exemption and other Wage Orders containing that exemption.

V. Conclusion

¶66 We conclude that the division below erred. Like the division in *Brunson*, we hold that the term "interstate drivers" in the Wage Order 31 exemption refers to drivers whose work takes them across state lines. Because Gomez and Sanchez's work at JP Trucking never took them across state lines, they are not "interstate drivers" and are therefore eligible for overtime compensation. But after Gonzalez and Abbott's work took them across state lines, they became "interstate drivers" and therefore ineligible for overtime compensation during the rest of their employment at JP Trucking.

¶67 Accordingly, we reverse the division's judgment and remand for further proceedings consistent with this opinion. On remand, the division should address JP Trucking's outstanding contentions regarding the calculation of damages.