No. 17-1111

IN THE

SUPREME COURT OF THE UNITED STATES

J.B. HUNT TRANSPORT, INC.,
Petitioner,

v.

GERARDO ORTEGA, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE TRUCKING INDUSTRY DEFENSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REVIEW AND BRIEF IN SUPPORT OF PETITIONER

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ISSUE PRESENTED

Contrary to Congressional intent, the Ninth Circuit, and courts across the country, have misinterpreted the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), specifically 49 U.S.C §14501(c), by upholding state meal- and rest-break laws that are directly related to interstate motor carrier's prices, routes, or services, and that do not fall into any of the exemptions codified in 49 U.S.C §14501(c) paragraphs (2) and (3).

The Ninth Circuit has skirted preemption and Supreme Court precedent by upholding California's meal- and rest-break laws using its own standard of whether the state law "binds" a motor carrier to "specific" prices, routes or services. (This standard is also used in the Eleventh Circuit and the lower courts within the Ninth and Eleventh Circuit jurisdictions.) Using the "binds" test gives great latitude to courts to subjectively find that laws of general applicability, but relating to motor carriers' prices, routes, and services, are not preempted by the FAAAA. This has created a patchwork of meal-and rest-break laws that are different from state to state and have significantly weakened the protections to interstate motor carriers.

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INTERESTS OF *AMICUS CURIAE*[1]

The Trucking Industry Defense Association ("TIDA") is an international organization that includes over 1,900 members comprised of motor carriers, transportation logistics companies, insurers of motor carriers, third party claims administrators, and defense counsel. The motor carrier members of TIDA include common carriers, private carriers, and private fleets that haul cargo throughout the United States and internationally. The insurance company members provide transportation cargo insurance for the trucking industry. Part of TIDA's mission is to reduce loss costs to the trucking industry and promote operational economies. It is, therefore, TIDA's commitment to provide training and assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, cargo damage and loss, insurance and workers' compensation claims. Because of this commitment, TIDA seeks to address issues germane to its members and improve the civil justice system.

TIDA participates as an *amicus curiae* in cases that raise issues of vital concern to its membership. The case of *J.B. Hunt Transport, Inc. v. Gerardo Ortega, et al.,* 694 Fed.App'x 589 (2017) is such a case. Pet. App. 1a-4a.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have been given notice of and consented to the filing of this brief, and emails of consent are on file with counsel of record for *amicus curiae*.

TIDA's members are involved in both the operation of motor carriers and in the insurance aspects of the trucking industry nationwide and, therefore, they have a substantial interest in having this Court effectuate Congressional intent to eliminate non-uniform state regulations that have resulted in a myriad of different state laws concerning meal and rest breaks in the trucking industry, which is exactly why the FAAAA was enacted. Interstate motor carriers should not be subject to different laws relating to their prices, routes, and services each time they enter a new state.

TIDA believes that resolution of the important issue raised by this petition is necessary because the Ninth Circuit has misconstrued the FAAAA and has weakened the protections afforded. Preemption needs to be consistent from state to state. As this Court made clear in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), state laws are preempted where "state requirements could easily lead to a patchwork of state service-determining laws, rules and regulations." *Id.* at 373. Decisions such as the Ninth Circuit's create confusion, delivery delay, increase costs to consumers, and will open the flood gates of litigation in various states as claimants seek to test the boundaries of FAAAA preemption. As such, the issue presented affects not only the motor carrier industry, but also affects consumers by driving up costs for the interstate transportation of the goods.

STATEMENT OF THE CASE

The FAAAA prohibits States from enacting or enforcing laws having the force and effect of law related to a price, route, or service of motor carriers. By creating its own standard for applying the FAAAA, the Ninth Circuit has erroneously upheld California statutes enforcing meal and rest breaks for motor carriers that relate to price, route, or services, and which do not fall within one of the exceptions codified in 49 U.S.C §14501(c) paragraphs (2) and (3).

SUMMARY OF ARGUMENT

The Court should grant the petition and restore the FAAAA's broad preemption over a law, regulation, or other provision having the force and effect of law related to price, routes, or service of any motor carrier as intended by Congress. Decisions such as the Ninth Circuit's create confusion, delivery delay, increase costs to consumers, and a myriad of litigation to test the boundaries of FAAAA preemption. Moreover, the various lower court decisions on the application of the FAAAA is creating a patchwork of state service-determining laws, rules and regulations that Congress intended to avoid by enacting the FAAAA.

ARGUMENT

I.
THE PREEMPTION RULE AND ITS APPLICATION TO THE FAAAA AND CALIFORNIA LAW

A. The Supremacy Clause Supports Broad Application of the FAAAA

The Supremacy Clause found in Article VI, clause 2 of the U.S. Constitution forms the basis for preemption of state law:

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

Preemption of state law occurs when Congress, in enacting a federal statute, (1) expresses a clear intent to pre-empt state law, (2) when there is outright or actual conflict between federal and state law, (3) when there is implicit in federal law a barrier to state regulation, (4) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or (5) where the state law stands as an obstacle to the accomplishment and execution of the full

objectives of Congress. *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986).

As set forth below, the broad application of the FAAAA supports preemption of California's meal-- and rest-break laws.

B. The FAAAA Preempts State Law On The Regulation Of Motor Carriers With Limited Exceptions

The FAAAA prevents a State from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). When creating this federal preemption, Congress determined that "maximum reliance on competitive market forces" would best further "efficiency, innovation, and low prices" as well as "variety [and] quality." Therefore, Congress wanted to ensure that States would not undo federal deregulation with regulation of their own. *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 378 (1992).

The only exceptions to the preemptive force of the FAAAA are the following: the FAAAA shall not (1) "restrict the safety regulatory authority of a State with respect to motor vehicles," (2) "the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo," or (3) "the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." *Id.* at § 14501(c)(2)(A). The

exceptions also include the intrastate transportation of household goods, the regulation of tow truck operations, and uniform cargo rules/antitrust immunity. *Id.* at § 14501(c)(2)(B)-(C),(c)(3).

C. The Practical Application Of California's Labor Laws Do Affect A Motor Carriers' Price, Route, Or Service

The pertinent portion of California Labor Code section 226.7, provides:

> (b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

California's meal breaks are codified in Cal. Labor Code section 512(a), which provides in part,

> An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, and an employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes.

One of the orders mandated by the Industrial Welfare Commission is Order No. 9-2001, which applies to all employers and employees in the transportation industry. The order provides, "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes." Indus. Welfare Comm'n Order No. 9-2001, section 11(A).

It also mandates employers to "permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours." *Id*. at section 12(A).

Suppose an interstate trucking company has a motor carrier traveling from Seattle, Washington to Phoenix, Arizona. The motor carrier has to make stops in Oregon and California on the way to its final destination. As the law currently stands, once that motor carrier crosses into California from Oregon, that trucking company now has to ensure that the motor carrier stops after five hours to take a mandatory 30 minute meal period and take 10 minute rest periods every four hours. Suppose further that the motor carrier has been driving for four hours prior to crossing over into California. May the motor carrier continue driving for another two hours before stopping or does the carrier have to stop right at the five hour mark to take the 30 minute meal break since the carrier is now in California? Additionally, the motor carrier cannot just stop anywhere along the highway. The motor carrier has to find a truck stop or other area that can legally accommodate the truck and tractor trailer. What if the motor carrier crosses into California after driving for four hours and the nearest area to legally park the motor carrier is two hours away? These are not simply "deviations"

from routes as the Ninth Circuit held in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014).

Additionally, the motor carrier may be forced to deviate from the most efficient route and schedule to ensure the routes its drivers travel allow him or her to take the mandated breaks to comply with California law. Perhaps carriers will avoid long barren stretches of highway where it may be difficult to pull off the highway to comply with mandatory meal and rest breaks and instead favor more populated stretches of highway with more opportunities for complying with meal or rest breaks. Moreover, this also directly affects the price and service of the trucking company because they have to factor in the mandatory meal and rest periods into their pricing/delivery schedule as well as whether or not their service can accommodate the end customers' requirements to deliver cargo in a specified timeframe.

The Ninth Circuit's "binds to" test that holds California's meal- and rest-break laws are not preempted where it only requires motor carriers to "deviate" from their routes does not pass muster when applied at the practical level. California labor laws do in fact "bind" the carrier to a specific price, route, or service as illustrated *supra* which is contrary to Congress' intent in enacting the FAAAA. Furthermore, "deviations" still have significant impact upon a motor carriers' routes, prices, and services, thus running afoul of the FAAAA.

D. Congress Enacted The FAAAA To Have A Broad Preemption Effect On State Law

Congress' overarching goal in passing the FAAAA was to "ensure transportation rates, routes, and services that

reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 371 (2008).

Congress took the exact same preemption language from the Airline Deregulation Act (ADA) of 1978 and placed it in the FAAAA. *Id.* at 370. "[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,* 547 U.S. 71, 85 (2006). The key phrase in determining whether a state law is preempted by the ADA and now the FAAAA is "relating to" and its ordinary meaning "is a broad one" and thus "express[es] a broad pre-emptive purpose." *Morales*, 504 U.S. at 383 .

In *Rowe*, this Court held that the FAAAA preempts state law when (1) state enforcement actions have a connection with, or reference to, carrier rates, routes, or services; (2) pre-emption may occur even if a state law's effect on rates, routes, or services is only indirect; (3) in respect to pre-emption, it makes no difference whether a state law is consistent or inconsistent with federal regulation; and (4) pre-emption occurs at least where states laws have a significant impact related to Congress' deregulatory and pre-emption-related objectives. *Rowe*, 552 U.S. at 370-71. The pre-emption test to be applied is therefore, whether the state law rule or regulation directly or indirectly effects or relates to rates, routes or service.

This Court severely limited the application of state laws only if the law has a "tenuous, remote, or peripheral" effect. *Id.* at 371.

The intent of preemption under the FAAAA is to avoid a "patchwork of state service-determining laws, rules, and regulations" inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace. *Id.* at 373.

II.
CALIFORNIA'S MEAL- AND REST-BREAK LAWS FALL SQUARELY WITHIN PREEMPTION BY THE FAAAA

A. California's Mandated Meal- And Rest-Break Laws Affect A Motor Carrier's Price, Route, Or Service

The Ninth Circuit created a new test for preemption under the FAAAA by holding that unless the state law "binds" a motor carrier to a specific price, route, or service, California's meal- and rest- break laws were not preempted because it only required drivers to "deviate" from their routes. *Dilts*, 769 F.3d at 649. The Ninth Circuit relied on *Dilts* in reversing the decision which is the subject of this Petition.

In *Dilts*, the court stated that Congress "did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise *regulate* prices, routes or services." *Id.* at 644 (emphasis added). The petitioner in *Morales* argued that "the ADA impose[d] no constraints on laws of general applicability." *Morales*, 504 U.S. at 386. This Court rejected that argument finding it created "an utterly irrational loophole" and "ignore[d] the sweep of the 'relating to' language." *Id.*

Similarly, here the Ninth Circuit completely ignores the broad text of the FAAAA which states any State law is preempted if it has "the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). A "deviation" of a motor carrier's route for meal and rest breaks by its very definition has an effect on the route of a motor carrier because it directly relates to and interferes with the frequency and scheduling of transportation. This interference subsequently affects the competitive market forces in the industry which directly conflicts with Congress' intent in enacting the FAAAA to promote a competitive marketplace.

B. California's Meal- And Rest- Break Laws Do Not Fall Within The Limited Exceptions To The FAAAA

The broad language of the FAAAA occupies the entire field of the regulation of motor carriers with respect to the transportation of property while providing only limited exceptions to the States. *Louisiana Public Service Com'n*, 476 U.S. at 368-69; *Morales*, 504 U.S. at 383-84; 49 U.S.C. § 14501(c). California's meal-- and rest- break laws do not fall within any of the exceptions stated *supra*, therefore they are preempted by the FAAAA. Had Congress intended to exclude such laws and regulations, they would have listed them in the FAAAA.

C. Allowing Various Interpretations Of The FAAAA To Stand Will Subject Motor Carriers To A Patchwork Of State Laws Contrary To Congress's Intent

If multiple interpretations of the FAAAA are allowed to stand, a trucking company would then need to

know the meal- and rest- break laws of every State on its route before it crosses state lines in order to comply with state law. This amounts to a direct interference in the free flow of goods along our state highways. Moreover, if a lower court is allowed to interpret the FAAAA a certain way depending on the individual state law, every State will be able to seek an interpretation of its own state law as it applies to the FAAAA.

Multiple interpretations of the FAAAA will open up a floodgate of lawsuits against the trucking industry as individual motor carriers will be subject to multiple interpretations of the FAAAA and thus multiple violations of individual state laws depending on which state lines they cross during a given route. This patchwork of state laws amounts to an obstacle to the accomplishment and execution of the full objectives of Congress in passing the FAAAA. See *Louisiana Public Service Com'n*, 476 U.S. at 368-69; *Rowe*, 552 U.S. at 370-71; U.S.C. § 14501(c). Additionally, the inevitable inconsistent application of the FAAAA on a state by state basis directly affects the price, routes, and services of the trucking industry by imposing longer travel times because the individual driver has to stop to comply with individual state meal- and rest- break laws. It also subjects motor carriers to increased risk that a driver is unable to timely take mandatory meal or rest breaks due to route conditions (i.e., no safe place to stop or pull over) thereby exposing the motor carrier to liability.

Ultimately, the Ninth Circuit ignored the intent of Congress and the clear instruction and precedent of this Court with respect to applying the FAAAA thereby creating the patchwork of different state laws and regulations affecting prices, routes, and services that the FAAAA and this Court sought to prevent.

CONCLUSION

For the foregoing reasons, amicus curiae Trucking Industry Defense Association respectfully requests that the Court grant J.B. Hunt Transport, Inc.'s petition for a writ of certiorari to resolve the ongoing effort to narrow the scope of preemption under the FAAAA currently causing motor carriers to be subject to a patchwork of state laws contrary to Congress' intent.

8 March 2018

Respectively submitted.

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