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 PENSKE TRUCK LEASING CO., L.P. AND PENSKE LOGISTICS LLC AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Interest of *Amici Curiae* 1

Summary of Argument 2

Argument... 4

I. Congress Enacted the FAAAA to Extend and Preserve the Benefits of Deregulation.. 4

a. Regulation stifled competition, Growth, and Innovation 4

b. Deregulation reduced costs, improved service, and spurred innovation 6

c. The FAAAA preempted all state interference that could erode the benefits of deregulation................ 7

II. This Court's Decisions Effectuate Congress's Broad Preemptive Intent... 10

a. The FAAAA broadly preempts even indirect interference through laws of "general application" 10

b. Preemption of generally applicable laws is not limited to those that set (or "bind" motor carriers to) prices, routes, or services... 12

c. Preemption occurs whenever there is a significant impact on Congress's deregulatory objectives.. 13

III. The Ninth Circuit's Approach to Preemption Contravenes the Letter and Purpose of the FAAAA and Deviates from This Court's Decisions ... 14

a. There is no "presumption" against preemption ... 15

b. There is no special test for laws of "general applicability." ... 16

c. The California laws here relate to J.B. Hunt's prices, routes, and services ... 18

Conclusion ... 22

TABLE OF AUTHORITIES

Page(s)

Cases

American Airlines, Inc. v. Wolens, 513 U.S. 219 3

American Trucking Associations, Inc. v. City of Los Angeles, 569 U.S. 641 (2013) 20

Brown v. United Airlines, Inc., 720 F.3d 60 (1st Cir. 2013) 14

Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184 (9th Cir. 1998) 14

Chamber of Commerce of United States of America v. Whiting, 563 U.S. 582, 131 S.Ct. 1968, 179 L.Ed.2d 1031 (2011) 15

Cole v. CRST Van Expedited, Inc., 559 Fed. Appx. 755 (9th Cir. 2015) 21

Costello v. Beavex, Inc., 810 F.3d 1045 (7th Cir. 2016) 17, 18

Dan's City Used Cars v. Pelkey, 569 U.S. 251 (2013) 11, 22

DiFiore v. American Airlines, Inc., 646 F.3d 81 (1st Cir. 2011) 16

Dilts v. Penske Logistics LLC, 769 F.3d 637 (9th Cir. 2014) .... passim

Ginsberg v. Northwest, Inc, 695 F.3d 873 (9th Cir. 2012) 12, 13

Lupian v. Joseph Cory Holdings, LLC, 240 F.Supp.3d 309 (2017) 18

Massachusetts Delivery Ass'n v. Coakley, 769 F.3d 11 (1st Cir. 2014) 17

Morales v. TransWorld Airlines, Inc., 504 U.S. 374, (1992) .... passim

Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422 (2014) 11, 12, 14

Puerto Rico v. Franklin California Tax-Free Tr., 136 S. Ct. 1938 (2016) 15

Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364 (2008) 11, 13, 19, 20

S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc., 697 F.3d 544 (7th Cir. 2012) 4

Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429 (1st Cir. 2016) 17

United States v. Rosenwaser, 323 U.S. 360 (1945) 15

Statutes

49 U.S.C. § 1302(a) 5, 9

49 U.S.C. § 14501(c) 2, 8, 19, 22

49 U.S.C. § 40101 .... 5, 10

49 U.S.C. § 41713 5

Pub.L. No. 96-296, 94 Stat. 793 5

Pub.L. No. 95-0504, 92 Stat. 1702 5

Regulations

49 C.F.R. 390.5 21

49 C.F.R. 395 15

Other Authorities

Clifford Winston, et al., The Economic Effects of Surface Freight Deregulation 15-42 (1990) 6

H.R. Conf. Rep. 96-1069, 1980 U.S.C.C.A.N. 2283 ....4, 5, 6, 7

H.R. Conf. Rep. 103-677, 1994 U.S.C.C.A.N. 1715 .... passim

Martha M. Hamilton, FTC, ICC Chiefs Back Trucking Industry Deregulation, Wash. Post, May 26, 1988 6

Special Message to the Congress on Transportation (April 5, 1962) www.presidency.ucsb.edu/ws/index.php?pid=8587 5

The Impact of Deregulation on the Trucking Industry, 47 Admin. L. Rev. 527 (1995)............. 4, 6

U.S. Department of Transportation, Moving America: New Directions, New Opportunities, A Statement of National Transportation Policy 19 (February 1990), https://archive.org/details/movingamericanew00unse_0 7

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

This brief of *amici curiae* in support of Petitioner J.B. Hunt Transport, Inc. is submitted by Penske Truck Leasing Co., L.P. and Penske Logistics LLC.

Penske Truck Leasing, together with its wholly-owned subsidiary, Penske Logistics, is a leading global transportation services provider, operating and maintaining more than 270,000 vehicles and serving customers from approximately 3,000 locations in North America, South America, Europe, Australia and Asia. The companies provide a wide variety of freight transportation services to shippers, including for-hire transportation of freight by commercial motor vehicles pursuant to authority granted by the Federal Motor Carrier Safety Administration ("FMCSA"), an agency of the U.S. Department of Transportation ("DOT"), as well as full-service truck leasing, contract maintenance, commercial and consumer truck rentals, used truck sales, transportation and warehousing management, and supply chain management solutions.

Penske Truck Leasing and Penske Logistics were defendants in the case of *Dilts v. Penske Logistics LLC*, 769 F.3d 637 (9th Cir. 2014), in which, as in this

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[1] All parties have consented in writing to the filing of this brief. No counsel for any party has written any portion of this brief and no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation and submission of this brief.

case, the Ninth Circuit held that California's meal and rest break laws are not preempted by the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c) (the "FAAAA").

SUMMARY OF ARGUMENT

When it enacted the FAAAA, Congress expressly preempted all state interference with prices, routes, and services of motor carriers with respect to property transportation. It did so to prevent states from eroding the gains made from deregulation of the surface transportation industry. While Congress's prior deregulatory efforts (most notably passage of the Motor Carrier Act of 1980 (the "MCA")) had been naturally concentrated on shifting from anachronistic federal economic regulations like market entry restrictions and price controls to an exclusive focus on safety regulation, Congress knew that its work opening transportation markets would not be complete until all direct and indirect interference was eliminated so that motor carrier prices, routes, and services throughout the nation would be uniformly dictated by market competition alone. FAAAA preemption was the solution to that part of the deregulatory puzzle.

This Court's decisions interpreting the FAAAA acknowledge Congress's broad preemptive intent, holding, among other things, that (1) the FAAAA applies equally to all state law claims, not just those expressly directed at motor carriers, (2) Congress did not limit FAAAA preemption to laws that prescribe (or "bind" motor carriers to) particular rates, routes, or services, but rather, subject to exceptions not applicable here, (3) Congress preempted the enactment or enforcement of any state law that could interfere with the natural operation of the

deregulated transportation market with respect to motor carrier prices, routes, and services.

The California laws at issue in this case should not have survived preemption. The first is a law dictating when and for how long truck drivers must stop delivering freight to take meal and rest breaks. The second is a rule that prohibits motor carriers from paying truck drivers on an activity basis, the standard method for incentivizing driver productivity. Both unquestionably implicate motor carrier prices, routes, and services as they relate to property transportation. And both represent California's attempt to override the deregulated interstate transportation market with its local policy preferences.

The Ninth Circuit nevertheless concluded that California was free to regulate Petitioner's operations because, in its view, a state may enforce laws of "general applicability" that do not "bind" a motor carrier to a particular price, route, or service. There is no basis for this test in the text or history of the FAAAA, and it cannot be squared with this Court's decisions. The FAAAA preempts all laws coming within its ambit, not just those that single out motor carriers, and not just those that "bind" carriers to particular prices, routes, or services.

The Ninth Circuit's refusal to accept the reality of deregulation has created a split among circuit courts and, if not corrected, will invite states to impose their public policies on the "operations of [] carrier[s]." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n.5. This Court's review is critical to align the circuits to the express will of Congress.

ARGUMENT

I. Congress Enacted the FAAAA to Extend and Preserve the Benefits of Deregulation.

a. Regulation stifled competition, growth, and innovation.

In 1935, Congress passed the first Motor Carrier Act, bringing motor carriers under the jurisdiction the Interstate Commerce Commission (the "ICC"). Motor Carrier Act, 1935, ch. 498, 49 Stat. 543. The ICC precluded carriers from entering the market or serving new routes unless the service was required by "public convenience and necessity," a determination based largely on whether other carriers already provided service. *See The Impact of Deregulation on the Trucking Industry*, 47 Admin. L. Rev. 527, 530 (1995).

It soon became evident that the ICC's restrictive, public utility-like regulations were not a good fit for the diverse and competitive motor carrier industry, but rather impeded commerce by protecting established, inefficient carriers and producing artificially inflated prices. *Id.*; *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.*, 697 F.3d 544, 548 (7th Cir. 2012). For example, route restrictions frequently prevented carriers from "providing service by way of the most direct routes," instead forcing them to "travel circuitous routes," resulting in "operating inefficiencies and wasted fuel," and, ultimately, "inflated transportation costs to the … consumer." H.R. Rep. 96-1069, at 18, 1980 U.S.C.C.A.N. 2283, 2300.

Lifting the burden of these counterproductive regulations attracted the attention of policymakers.

In 1962, President Kennedy criticized "[a] chaotic patchwork of inconsistent and often obsolete legislation and regulation" that did "not fully reflect either the dramatic changes in technology of the past half-century or the parallel changes in the structure of competition," but rather "shackles and distorts managerial initiative." Special Message to the Congress on Transportation (April 5, 1962) www.presidency.ucsb.edu/ws/index.php?pid=8587. More robust pushes for deregulation would come in subsequent administrations, but Congress would not act for over a decade.

Congress first moved to deregulate the airline industry, passing the Airline Deregulation Act of 1978 (the "ADA"), Pub.L. No. 95-0504, 92 Stat. 1702, explaining that "maximum reliance on competitive market forces" would promote, among other things, "efficiency, innovation, and low prices." *See* 49 U.S.C. § 1302(a) (currently codified at 49 U.S.C. § 40101). To ensure national uniformity in airline deregulation, Congress barred states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713.

Deregulation of the motor carrier industry began with passage of the MCA in 1980, Pub.L. No. 96-296, 94 Stat. 793. The MCA partially deregulated trucking in several important ways. It made it easier for new carriers to enter the industry and for existing carriers to respond to market demands for services by making the grant of authority under the "public convenience and necessity" test the norm rather than the exception. H.R. Rep. 96-1069, at 4, reprinted in 1980 U.S.C.C.A.N. 2283, 2291. It limited collective ratemaking, giving carriers more leeway to set rates

based on market demands. *See The Impact of Deregulation on the Trucking Industry*, 47 Admin. L. Rev. 527, 536 (1995). And it eased restrictions that specified routes carriers had to travel.

b. Deregulation reduced costs, improved service, and spurred innovation.

Congress's partial deregulation of the trucking industry transformed the business of motor carriage to the benefit of the public. As predicted, increased competition forced inefficient carriers out of the market, driving freight prices down. Carriers could offer more efficient service using the most direct routes, improving service times and service quality. Overall, deregulation saved shippers (and thus the public) billions of dollars per year while improving service and spurring innovation. Clifford Winston, et al., The Economic Effects of Surface Freight Deregulation 15-42 (1990); Martha M. Hamilton, *FTC, ICC Chiefs Back Trucking Industry Deregulation*, Wash. Post, May 26, 1988 (citing FTC report that deregulation saved shippers $39 billion to $63 billion per year).

One of the ways deregulation allowed carriers to respond to market needs came from the elimination of restrictions preventing them from utilizing the most efficient routes between two points. For example, carriers' newfound freedom to ship freight between two points on routes of their choosing, as opposed to inefficient, circuitous routes, helped foster the innovative practice of just-in-time production and inventory management techniques, which allowed manufacturers and suppliers to reduce inventories (and therefore significant expenses) by arranging for the delivery of materials as they are needed in the production process. *See* Winston, *supra*, at 12.

c. The FAAAA preempted all state interference that could erode the benefits of deregulation.

The dramatic success of partial deregulation encouraged policymakers to finish the project by eliminating all remaining barriers to an open, market-based system. The DOT summarized the work to be done in a 1990 report:

> Since the late 1970's, transportation providers have been released from many of the hobbles of Federal economic regulation, unleashing creative and competitive energies .... In the 1980's, previously regulated transportation companies across all modes have introduced innovations in service, route systems, fares, and operating strategies unprecedented in modern transportation history. … That process will continue as Federal, State, and local barriers to more efficient, service-oriented transportation are eliminated. One of the greatest opportunities for improving transportation efficiency and service in the future lies in allowing market forces to work, minimizing government intervention, and increasing flexibility for the private sector.

U.S. Department of Transportation, Moving America: New Directions, New Opportunities, A Statement of National Transportation Policy 19 (February 1990), https://archive.org/details/moving americanew00unse_0.

Congress acted on the DOT's charge to eliminate "State, and local barriers" by adding a preemption provision to the FAAAA four years later. As the House Conference Report explained, "preemption legislation is in the public interest as well as necessary to facilitate interstate commerce" because state interference "causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets." H.R. Conf. Rep. 103-677, 86-88, 1994 U.S.C.C.A.N. 1715, 1758-60.

To free motor carriers from that interference, the FAAAA provides that, subject to enumerated exceptions that no party claims are applicable here:

> A State … may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier … with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). Absent from the statute is any limitation to "state economic regulation," of motor carrier prices, routes, and services. The FAAAA contains no exemption for laws of "general applicability" and is not limited to laws prescribing specific prices, routes, or services.

Lest a court try to read such limitations into the statute, Congress instructed that the FAAAA preempted more than just traditional economic regulation aimed at motor carriers (price controls and market entry restrictions). Rather, the "sheer diversity" of state "regulatory schemes" was a "huge problem for national and regional carriers attempting to conduct a standard way of doing business," and the

FAAAA was designed to preempt all direct and indirect impediments to commerce:

> The conferees do not intend the regulatory authority which the States may continue to exercise … to be used as a guise for continued economic regulation as it relates to prices, routes or services. There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and services, may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

H.R. Conf. Rep. 103-677, 83, 1994 U.S.C.C.A.N. 1715, 1755.

Congress made it clear that questions of interpretation should be resolved in light of the deregulatory purpose of the statute. Congress explained that the FAAAA's preemption provision was modeled after the one in the ADA, H.R. Conf. Rep. 103-677, 85, 1994 U.S.C.C.A.N. 1715, 1757, which, as noted above, was enacted to ensure that prices, routes, and services would be set by "maximum reliance on competitive market forces," and not influenced by state actions. *See* 49 U.S.C.

§ 1302(a) (currently codified at 49 U.S.C. § 40101). Congress specifically confirmed that this Court's expansive interpretation of the ADA's preemption provision in *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, (1992), discussed below, was correct. As the FAAAA Conference Report stated, at the end of the day, motor carrier services had to be "dictated by the marketplace; and not by an artificial regulatory structure." H.R. Conf. Rep. 103-677, 88, 1994 U.S.C.C.A.N. 1715, 1760. Thus, to the extent a state sought to substitute its policy preferences for the natural operation of the deregulated market by imposing any "artificial regulatory structure" relating, directly or indirectly, to a motor carrier's prices, routes, or services with respect to the transportation of property, the state's efforts were to be preempted.

II. This Court's Decisions Effectuate Congress's Broad Preemptive Intent.

a. The FAAAA broadly preempts even indirect interference through laws of "general application."

Before Congress enacted the FAAAA, this Court addressed the scope of the ADA's preemption provision in *Morales*, which addressed perhaps the two most predictable preemption issues: if Congress sought to eliminate economic regulation of the airline industry, which historically took the form of direct price and market entry controls, should ADA preemption be limited to laws explicitly directed to the airline industry as opposed to generally applicable laws? Likewise, should preemption only cover laws actually prescribing carrier prices, routes, and services, as opposed to those merely impacting those

subjects indirectly? The answer to both questions was an emphatic "no."

The Court began by noting that the phrase "relating to" expressed Congress's "broad pre-emptive purpose," and that any state enforcement actions "having a connection with or reference to airline 'rates, routes, or services' are preempted" under the ADA. *Morales*, 504 U.S. 374 at 383-384. Given breadth of the phrase, "relating to," the Court naturally rejected the contention that "only state laws specifically addressed to the airline industry," as opposed to laws of general applicability, "are pre-empted." *Id.* at 386. This proposed limitation "ignores the sweep of the 'relating to' language." *Id.* The Court stated that exempting generally applicable laws would "creat[e] an utterly irrational loophole," because there was no good reason that "state impairment of the federal scheme" of a deregulated transportation system "should be deemed acceptable" just because the state's interference was effected through "a general statute." *Id.*

This Court has repeatedly affirmed that the phrase "related to" embraces state laws "having a connection with or reference to carrier 'rates, routes, or services,' whether directly or indirectly." See *Morales*, 504 U.S. at 384; *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008); *Dan's City Used Cars v. Pelkey*, 569 U.S. 251, 260 (2013); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1430 (2014).

b. Preemption of generally applicable laws is not limited to those that set (or "bind" motor carriers to) prices, routes, or services.

In *Morales*, the Court clarified that the ADA does not merely preempt states from "actually prescribing rates, routes, or services." *Id.* at 385. Imposing such a limitation similarly "reads the words 'relating to' out of the statute." *Id.* As the Court explained, if Congress wanted to limit preemption to state laws that set (or "bind") carriers' rates, routes, or services, "it would have forbidden the States to '*regulate* rates, routes, and services." *Id.* (emphasis in original).

None of this Court's subsequent decisions have ever suggested that preemption only applies to state laws prescribing, setting, fixing, or binding carriers to particular prices. Rather, the Court has applied the same standard every time in every circumstance.

Most recently, the Court reversed the Ninth Circuit's determination that a common law claim for breach of implied covenant of good faith and fair dealing was not preempted in part because, according to the Ninth Circuit, the claim would not '"force the Airlines to adopt or change their prices, routes or services – the prerequisite for … preemption."' *Ginsberg*, 134 S.Ct. at 1428 (quoting *Ginsberg v. Northwest, Inc.,* 695 F.3d 873, 879 (9th Cir. 2012)). This Court held the state law claims preempted because they were "related to" prices and services, not because they set them. 134 S.Ct. at 1430-1431.

c. Preemption occurs whenever there is a significant impact on Congress's deregulatory objectives.

As noted above, Congress explained that the ultimate touchstone for assessing the contours of preemption is whether it appears a state is attempting to substitute its public policy preferences for those of the market with respect to motor carrier prices, routes, and services. H.R. Conf. Rep. 103-677, 86-88, 1994 U.S.C.C.A.N. 1715, 1758-60. As this Court recognized in *Morales*, Congress added preemption to the ADA "[t]o ensure that the States would not undo federal deregulation with regulation of their own." 504 U.S. at 378, 389-90.

Since *Morales*, this Court has faithfully adhered to Congress's command to measure the limits of preemption against the FAAAA's deregulatory purpose. For example, in *Rowe*, the Court held Maine regulations preempted where they "produce[d] the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces.'" *See Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378). The Court in *Rowe* went on to explain that, if a state were allowed to substitute its own policy preferences for what the interstate transportation market supported, the result would be a "state regulatory patchwork … inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Id.* at 373.

In *Ginsberg*, the Court similarly relied on Congress's deregulatory intent in rejecting the proposition that common law claims were exempt from FAAAA preemption, stating "[w]hat is

important … is the effect of a state law, regulation, or provision, not its form, and the ADA's deregulatory aim can be undermined just as surely by a state common-law rule as it can by a state statute or regulation." 134 S.Ct. at 1430. Quoting the First Circuit, the Court recognized that "'[i]t defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry.'" *Id.* at 1430 (quoting *Brown v. United Airlines, Inc.*, 720 F.3d 60, 66-67 (1st Cir. 2013). Further, in response to the suggestion that the Court's ruling would "leave participants in frequent flyer programs without protection," the Court explained that "[t]he ADA is based on the view that the best interests of airline passengers are most effectively promoted, in the main, by allowing the free market to operate." *Id.*, 134 S.Ct. at 1433.

III. The Ninth Circuit's Approach to Preemption Contravenes the Letter and Purpose of the FAAAA and Deviates from This Court's Decisions.

The Ninth Circuit's memorandum decision held that J.B. Hunt was not entitled to summary judgment on the plaintiff's meal and rest break claims or his minimum wage claims on the ground that J.B. Hunt's preemption arguments were precluded by the Ninth Circuit's prior rulings in *Dilts v. Penske Logistics LLC*, 769 F.3d 637 (9th Cir. 2014) (holding that California's meal and rest break laws are not 'related to' motor carrier prices, routes, or services) and *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (holding California's prevailing wage law not preempted). *See Appx.* at 3a-4a. Because the Ninth

Circuit's decision contained no additional analysis, this section discusses both the error in the Ninth Circuit's application of the FAAAA to the present case and the foundations for that error evident from its earlier decisions, particularly *Dilts*.

a. There is no "presumption" against preemption.

The Ninth Circuit prefaced its decision in *Dilts* on the erroneous proposition that "[p]reemption analysis begins with the presumption that Congress does not intend to supplant state law," particularly in areas within a state's traditional police powers. 768 F.3 at 642-643. That notion has never been applied to the FAAAA by this Court because the FAAAA contains an express preemption provision. Where a "statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce of United States of America v. Whiting*, 563 U.S. 582, 594 (2011)).

Moreover, in any case, it is simply wrong that regulation of truck driver meal and rest breaks has ever been a subject within the exclusive domain of traditional police powers. Rather, regulation of truck drivers' hours of service, including regulation of drivers' breaks, has long been a subject of extensive federal action. *See* 49 C.F.R. Part 395. Likewise, federal law has long permitted employers to average pay earned during a workweek over the number of hours worked during the week to establish compliance with the FLSA. *See United States v.*

Rosenwaser, 323 U.S. 360, 363-64 (1945). The California laws at issue here have never been part of the state's exclusive police powers.

The Ninth Circuit's presumption theory conflicts with at least one other circuit. *See DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 86 (1st Cir. 2011) ("However traditional the area, a state law may simultaneously interfere with an express federal policy – here, one limiting regulation of airlines.").

b. There is no special test for laws of "general applicability."

In *Dilts*, the Ninth Circuit held that California's meal and rest break rules were not preempted in part because they were "generally applicable background regulations that are several steps removed from prices, routes, or services." 769 F.3d at 646. The Ninth Circuit held that these kinds of "normal background rules for almost *all* employers doing business in the state of California" could not be preempted unless they "'bind' motor carriers to specific prices, routes, or services." 769 F.3d at 647.

As noted above, Congress expressly disavowed any exception from preemption for laws of general applicability. H.R. Conf. Rep. 103-677, 83, 1994 U.S.C.C.A.N. 1715, 1755. This Court likewise rejected such an exception in *Morales*. 504 U.S. 374 at 383-384, 386. And neither *Morales* nor any of this Court's other decisions has ever applied any special test to generally applicable laws.

The Ninth Circuit not only applied the wrong test, it applied the very test this Court explicitly rejected in *Morales*. As this Court noted in *Morales*, Congress did not limit preemption to state laws that "prescribe" (or "bind") carriers' rates, routes, or services. 504 U.S.

at 385. It preempted all state regulatory efforts *related to* carrier prices, routes, and services. This Court has never evaluated preemption on the basis of anything other than the express terms of the statute, which, as always, is the best indicator of legislative intent. *See Morales*, 504 U.S. at 383. Indeed, the Ninth Circuit's "binds" test effectively eliminates the possibility that the FAAAA preempts any law of general applicability because no generally applicable law would expressly bind a motor carrier to particular prices, routes, or services. There is only one test, for all laws: whether the claims refer to or have a connection with "prices, routes, or services … with respect to the transportation of property."

The Ninth Circuit's "binds" test also conflicts with the other Circuits that apply the correct test. *See Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 19-20 (1st Cir. 2014) (criticizing the Ninth Circuit's approach as "counter to Supreme Court precedent broadly interpreting the 'related to' language in the FAAAA."). The First Circuit relied on that analysis in the follow-up case of *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016).

On the other hand, the Seventh Circuit has fashioned another special test for laws "not specifically directed to motor carriers." *Costello v. Beavex, Inc.*, 810 F.3d 1045, 1055 (7th Cir. 2016). In that Circuit's view, the proper inquiry for such laws is not whether they prescribe, or "bind" carriers' prices, routes, or services, but whether the law "will have a significant impact on the prices, routes, and services that" a carrier "offers to its customers." *Id.*

The Court should grant certiorari to align the circuits to the proper standard.[2]

c. The California laws here relate to J.B. Hunt's prices, routes, and services.

But for the Ninth Circuit's erroneous conclusion in *Dilts* that the meal and rest break laws did not "bind" carriers to "specific prices, routes, or services," 769 F.3d at 647, the court's concessions about the impact of the rules, equally applicable to J.B. Hunt, were more than sufficient to show that those rules have a reference to and connection with a motor carrier's prices, routes, and services.

For example, the Ninth Circuit acknowledged that motor carriers would "have to take into account the meal and rest break requirements when allocating resources and scheduling routes;" that "no motor carrier service [could] be provided during certain times;" and that drivers would be required to make "deviations from their routes, such as pulling into a truck stop" to take breaks. *Dilts*, 769 F.3d at 648-649. The court found these restrictions did not bind carriers to specific prices, routes, and services because carriers remain "at liberty to schedule service whenever they choose" so long as they "hire a sufficient number of" additional drivers and "stagger their breaks for any long period in which continuous service is necessary." Moreover, although "[m]otor carriers may have to hire additional drivers or

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[2] This inter-Circuit dissonance will continue until this Court steps in. The Third Circuit is currently deciding a case in which the district court rejected the First Circuit's decision in *Schwann* and instead followed the Seventh Circuit's decision in *Costello*. *Lupian v. Joseph Cory Holdings, LLC*, 240 F.Supp.3d 309 (2017), *appeal pending*, No. 17-2346 (3d Cir.).

reallocate resources in order to maintain a particular service level, … they remain free to provide as many (or as few) services as they wish." *Id.*

The Ninth Circuit's comments demonstrate both the significant connection between California's break rules and prices, routes, and services, and just how far the Circuit's approach deviates from Congress's intent and this Court's decisions.

To begin with, a law that requires a truck driver to stop transporting freight multiple times each day to take meal and rest breaks necessarily "relates to" a motor carrier's routes and services with respect to the transportation of property. Even the Ninth Circuit conceded that the rules mandated deviations from planned routes. The Ninth Circuit suggested that route controls could only be preempted if they amounted to restrictions specifying the beginning or end point of a route, 769 F.3d at 649, but as noted above, Congress was concerned in part about eliminating the burdens resulting from restrictions that forced carriers to pursue *circuitous* routes *between* two points. That is precisely the impact here.

And the motor carrier's service *is* the transportation of property. Claims that use state law to delay the performance of that service necessarily "relate to" the service. The Ninth Circuit's comparison of break rules to speed limits, 769 F.3d at 648-649, ignores the fact that the FAAAA expressly exempts safety rules like speed limits from preemption. *See* 49 U.S.C. § 14501(c)(2)(A). California's break rules do not fit within any exception to the FAAAA, and this Court has counseled against reading additional exceptions into the statute. *See Rowe*, 552 U.S. at 997 (declining to recognize an implied public health exception).

The Ninth Circuit suggested that these impacts were irrelevant because the rules affected drivers, not motor carriers. This reasoning makes no sense as a motor carrier's drivers perform the service of transporting property for the motor carrier. The claims relate to their role as truck drivers—the very service from which they must break—not as members of the general public. *Rowe*, 552 U.S. at 375. This Court has rejected similar state efforts to evade preemption by focusing their interference on actors or activity any number of steps removed from the motor carrier. *American Trucking Associations, Inc. v. City of Los Angeles*, 569 U.S. 641, 652 (2013) ("We have often rejected efforts by states to avoid preemption by shifting their focus from one company to another in the same supply chain."); *Rowe*, 552 U.S. at 996 (state requirements preempted even though they targeted retailers, not motor carriers).

The notion that these impacts on carrier routes and services could be ameliorated by hiring additional drivers, reallocating resources, and changing driver schedules and delivery routes only proves the break rules must be preempted. At its essence, the problem is this: a motor carrier responds to market demands for property transportation services by agreeing to pick up a shipper's freight at one location at a particular time and to transport it to another location by a particular time for a specified price. Operation of California's meal and rest break rules will change the way the service is provided by requiring the carrier's driver to deviate from the specified route (which is, by operation of the market, necessarily the most efficient route) at various times and for various durations depending on the length of the trip. As a result, the transportation cannot be completed in the time the carrier and shipper agreed. Moreover, as a result of

the additional transit time and fuel costs, the carrier will have to charge more than the agreed market price for the service. These are exactly the kinds of market distortions preempted by the FAAAA.[3]

The same is true of California's *Armenta* rule. Motor carriers frequently pay truck drivers on an activity basis (per mile, per delivery, etc.) to incentivize efficiency and productivity. The prevalence of this form of compensation demonstrates that it is a product of the free market. By requiring motor carriers to pay drivers separately for each hour worked, rather than on an activity basis, California is affirmatively substituting its policy preferences for the preferences of the market. And there can be no question that by eliminating incentive-based compensation, California's market intervention will reduce the quality, quantity, and frequency of transportation services, while increasing prices. That

[3] The Ninth Circuit also held in *Dilts* that California's meal and rest break rules were not preempted because Penske's drivers did not cross a state border. This misapprehends the nature of interstate transportation. Penske Logistics is an interstate motor carrier. Its DOT registration information can be found at http://safer.fmcsa.dot.gov under its motor carrier registration number, MC-143308. And the final segment of an interstate shipment is still part of interstate commerce subject to DOT jurisdiction even when it takes place entirely within one state. *See* 49 C.F.R. 390.5 (defining interstate commerce to include transportation "Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States"). In any case, despite the Ninth Circuit's misapprehension about the nature of Penske's interstate operations in *Dilts*, the Circuit has refused to hold California's interference with cross-border transportation preempted in this case and at least one other. *See Cole v. CRST Van Expedited, Inc.*, 559 Fed. Appx. 755 (9th Cir. 2015).

was what J.B. Hunt's evidence demonstrated here. *See* Appx. at 36a-40a. This is precisely the kind of regulatory market override that the FAAAA prohibits.

In holding the *Armenta* rule not preempted, the Ninth Circuit cited its decision in *Mendonca*, which held that California's prevailing wage law was not preempted because it was not related to prices, routes, and services. *Mendonca* was correct, but for a different reason. California's prevailing wage law was not saved from preemption because it was a generally applicable law, but because any impact it might have had with respect to "prices, routes, and services" was not "related to transportation of property." 49 U.S.C. 14501(c)(2)(A). As this Court has noted, the "related to transportation of property" clause "massively limits" the FAAAA to its proper object – state interference with interstate motor carriage of property. *See Dan's City*, 569 U.S. at 260.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

[4] This limitation, not found in the ADA, provides Congress's answer, for FAAAA preemption, of the "tenuous, remote, or peripheral" inquiry this Court imported from the ERISA context to assess the scope of ADA preemption in *Morales*. 505 U.S. at 390. That is, if state interference with motor carrier "prices, routes, and services" implicates the carrier's "transportation of property," it is necessarily not too "tenuous, remote, or peripheral" to escape preemption.

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