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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AIRLINES FOR AMERICA, AND RETAIL INDUSTRY LEADERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber"), Airlines for America, and the Retail Industry Leaders Association respectfully submit this brief as *amici curiae* in support of Petitioner J.B. Hunt Transport, Inc. ("J.B. Hunt").

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region in the country. Its members include motor carriers as well as customers of motor carriers, beneficiaries of the nationwide market that Congress deregulated in the motor carrier provisions of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), now codified at 49 U.S.C. § 14501.

A principal function of the Chamber is to represent the interests of its members in matters before

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties received timely notice of *amici*'s intent to file this brief. Both Petitioner and Respondents consented to the filing of this brief. Copies of Petitioner's and Respondents' consents have been filed contemporaneously with this brief.

Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. The Chamber has submitted *amicus* briefs in this Court in numerous express preemption cases concerning the transportation industry. *See, e.g., Penske Logistics LLC v. Dilts*, No. 14-801 (May 4, 2015) (FAAAA preemption); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014) (ADA preemption); *American Trucking Ass'ns v. City of Los Angeles*, 569 U.S. 641 (2013) (FAAAA preemption); *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (FAAAA preemption).

Air Transport Association of America, d/b/a Airlines for America ("A4A"), is the nation's oldest and largest airline trade association, representing the leading passenger and cargo airlines of the United States. Its passenger carrier members and their marketing partners accounted for 72 percent of all U.S. scheduled passenger airline capacity and carried 593 million passengers in 2016, and its all-cargo and passenger members together carried nearly 90% of the total cargo shipped on U.S. airlines. A4A advocates on behalf of its members to shape crucial policies and measures that promote a safe, secure, and healthy U.S. airline industry. Since its inception, A4A has played a major role in significant government decisions regarding the aviation industry, and it regularly participates in litigation that impacts commercial air transportation. A4A has submitted numerous *amicus* briefs in this Court and

the U.S. Courts of Appeals, including in the cases noted above.

The Retail Industry Leaders Association ("RILA") is a public policy organization consisting of the country's largest retailers. Together RILA's members account for more than $1.5 trillion in annual sales, provide millions of jobs, and operate more than 100,000 stores, manufacturing facilities, and distribution centers. Many of RILA's member companies operate significant roadway fleets and thus have an interest in this litigation.

Many of the Chamber's, A4A's, and RILA's (collectively, "*Amici*'s") members transact business on a nationwide scale and benefit from the nationwide transportation market that Congress has protected not only under the FAAAA, but also under other statutes such as the Airline Deregulation Act of 1978 (ADA). *Amici*'s members have a strong interest in this Court's review and correction of the decision below, reinvigorating this Court's holdings as to the breadth of the FAAAA preemption clause (and by implication the closely related ADA preemption clause) and resolving the circuit splits outlined by Petitioner.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision markedly departs from the settled precedent of this Court. The decision below is neither faithful to congressional intent nor to this Court's broad interpretation of the

preemption provisions of the FAAAA and the ADA. Moreover, as Petitioner has described in detail, the circuits are splintered in three different ways as a result. This Court's review is needed.

By its terms, the FAAAA preempts all state laws "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). This broad language mirrors that of the ADA, which preempts state laws "related to a price, route, or service of an air carrier." *Id.* § 41713(b). This Court has interpreted these provisions *in pari materia*, recognizing that they both have the same expansive reach: They preempt all state laws that have any "*connection with, or reference to*, carrier 'rates, routes, or services' . . . even if [the] state law's effect on rates, routes, or services 'is only indirect.'" *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

In contrast to other Circuits, the Ninth Circuit has failed to follow this Court's broad interpretation and has instead constructed its own novel test. Under the Ninth Circuit's test, a law affecting the rates, routes, and services of a carrier cannot be preempted unless it "*binds* the air carrier to a particular price, route or service." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014) (emphasis added); *Air Transp. Ass'n of Am. v. City and County of San Francisco*, 266 F.3d 1064, 1072 (9th Cir. 2001) (ADA); *see also American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 397

(9th Cir. 2011) (FAAAA), *reversed in part on other grounds*, 569 U.S. 641 (2013). As a result of the Ninth Circuit's application of its unique "binds" test, the decision below improperly held that California's meal and rest-break laws are not preempted by the FAAAA.

This Court's review is warranted because the Ninth Circuit's interpretation departs from the plain text enacted by Congress and the binding precedent of this Court, and conflicts with the decisions of multiple other Circuits. The circuit split is deep and mature and is unlikely to be resolved absent this Court's intervention. This Court's review of the issue at this time is warranted due to the exceptional importance of the issue for the transportation industry and the broader economy.

ARGUMENT

I. The Ninth Circuit's Position Is Wrong, and It Is Entrenched Within that Circuit.

A. Congress Intended the FAAAA To Deregulate Motor-Carrier Transportation of Property in Order To Promote Efficiency, Competition, and Innovation.

In 1887, Congress enacted the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), and established the Interstate Commerce Commission ("ICC") to regulate the country's railroads. After the Great Depression, Congress enacted the Motor Car-

rier Act of 1935, 49 Stat. 543, which granted the ICC authority to regulate the trucking industry as well. Congress enacted the Civil Aeronautics Act of 1938, 52 Stat. 973, three years later, creating the Civil Aeronautics Board ("CAB") to regulate air carriers. *See S.C. Johnson & Son, Inc. v. Transport Corp. of Am., Inc.*, 697 F.3d 544, 548 (7th Cir. 2012).

After several decades of bitter experience with heavy regulation of rail, motor, and air carriers, the deregulation movement began to make inroads in the 1970s. *See* Andrew Downer Crain, *Ford, Carter, and Deregulation in the 1970s*, 5 J. TELECOMM. & HIGH TECH. L. 413 (2007). Those in favor of deregulation of the transportation industry believed that it would engender competition that would give rise to innovation to the benefit of consumers. *See* Stephen Breyer, *Afterword, Symposium: The Legacy of the New Deal: Problems and Possibilities in the Administrative State*, 92 YALE L.J. 1614, 1616 (1983).

In 1977, President Carter appointed one of the supporters of deregulation, Alfred Kahn, as the head of the CAB, and the CAB shortly thereafter "lifted restrictions on charter companies, allowed airlines much greater flexibility in setting fares, and eliminated rules requiring that first-class fares be 50% higher than coach fares." *Johnson*, 697 F.3d at 548 (quoting *Sharp Relaxing of Air-Fare Regulations Planned by CAB in Drive to Cut Controls*, WALL ST. J., Apr. 4, 1978, at 8).

Congress took up the cause, enacting the Air Cargo Deregulation Act of 1978, Pub. L. No. 95-163, 91 Stat. 1278, followed by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 ("ADA"). *See Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 255-56 (2013); *Johnson*, 697 F.3d at 548. Congress designed the ADA to promote "efficiency, innovation, and low prices" in the airline industry via "maximum reliance on competitive market forces and on actual and potential competition." *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428 (2014). Thus, Congress's intent in enacting the ADA was to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 378 (1992).

In 1980, the focus turned to trucking deregulation, beginning with the Motor Carrier Reform Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, which "lifted most restrictions on entry, on the goods that truckers could carry, and on routes." *Johnson*, 697 F.3d at 548. That legislation, however, did not eliminate the requirement to file tariffs or the power of state regulatory commissions to limit entry and regulate prices. *Id.*

After more than a dozen years of continued tariff and price regulation of motor carriers, Congress enacted the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 (Title VI addressed "Intrastate Transportation of Property" by air and motor carriers), and

the Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1673. Congress pursued this course "upon finding that state governance of intrastate transportation of property had become 'unreasonably burden[some]' to 'free trade, interstate commerce, and American consumers.'" *Dan's City Used Cars*, 569 U.S. at 256 (citation omitted). The FAAAA therefore eliminated state regulations that had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets." H.R. REP NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. And in 1995, Congress dissolved the Interstate Commerce Commission that had regulated the trucking industry at the federal level, ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, inaugurating a new era of nationwide, free-market competition for the transportation of property by motor carrier. *See* H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760 (noting purpose was to deregulate motor carriers so that "[s]ervice options will be dictated by the marketplace[,] and not by an artificial regulatory structure.").

B. The Reach of the Preemption Clause in the FAAAA Is as Broad as the Reach of the Preemption Clause in the ADA.

The language of the FAAAA at issue in this case is as follows:

> (c) Motor carriers of property. (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provisions 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) (emphasis added).

Congress adopted this provision, which is identical in relevant part to the preemption provision deregulating air carriers and motor carriers in the ADA, in order to "create a completely level playing field" between motor carriers and air carriers. H.R. REP. NO. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757.[2] Before the FAAAA, air-based shippers had a large advantage over their more regulated, ground-based shipping competitors, based on the Ninth Circuit's decision in *Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), which held that the ADA preempted California's intrastate economic regulations as applied to Federal Express's shipping activities. *Id.* at 1077. Congress enacted the FAAAA to re-balance that regulatory inequity. *See* H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994

[2] The ADA expressly preempts state laws "related to a price, route, or service of an air carrier[.]" 49 U.S.C. § 41713(b)(1).

U.S.C.C.A.N. 1715, 1759. In light of this connection, courts construe the two provisions *in pari materia*. *See Rowe*, 552 U.S. at 370.

In interpreting the scope of the key phrase "related to" in the ADA, this Court held that it expressed a "broad pre-emptive purpose," and that "related to" meant "a connection with, or reference to, airline rates, routes, or services." *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 383-84 (1992); *see also Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428-29 (2014); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 (1995) (reaffirming the broad interpretation of the ADA preemption provision in *Morales*); *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 18 (1st Cir. 2014) (describing the "related to" test as "purposefully expansive"). Indeed, in *Morales*, the Court explicitly embraced the "sweep of the 'relating to' language," rejecting the petitioner's argument that the ADA preempted only state laws specifically addressing the airline industry. 504 U.S. at 386 (noting that laws affecting rates, routes, and services can be preempted even if "the effect is only indirect") (citation omitted).

This Court took up the ADA preemption clause again three years later in *Wolens*, this time in the context of an airline's frequent flier program. Again, the Court noted that in *Morales*, it had interpreted the words "relates to" an employee benefit plan as having "a connection with or reference to such a plan." *Wolens*, 513 U.S. at 223. In *Morales*,

the Court explained, the "relating to" language in the ADA preemption clause was interpreted analogously as "having a connection with, or reference to, airline 'rates, routes, or services.'" *Id.* (quoting *Morales*, 504 U.S. at 384).

This Court has affirmed the breadth of the same preemption language in the FAAAA as well. *See Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008). In *Rowe*, this Court held that the FAAAA preempted two provisions of a Maine tobacco law that regulated the delivery of tobacco to Maine customers. *Id.* at 367. As this Court noted, "the Congress that wrote the [preemption] language [in the FAAAA] copied the language of the air-carrier pre-emption provision of the [ADA] . . . [a]nd it did so fully aware of this Court's interpretation of that language as set forth in *Morales*." *Id.* at 370 (citing H.R. REP. NO. 103-677, at 82-85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754-57). The Court thus followed *Morales*, explaining, "when 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." *Id.* at 370 (citation and internal quotation marks omitted).

In 2014, the Court once again reaffirmed its broad reading of "related to" in the ADA in *Northwest*. The Court concluded that the ADA preempts a state-law claim for breach of the implied covenant of good faith and fair dealing, provided the claim

"seeks to enlarge the contractual obligations that the parties voluntarily adopt." 134 S. Ct. at 1426. The district court held that the ADA preempted the plaintiff's breach of the covenant of good faith and fair dealing claim because it was "related to" Northwest's rates and services. *Id.* at 1427. The Ninth Circuit disagreed, holding that the claim did not fall within the ADA's preemption provision because it did not "interfere with the [ADA's] deregulatory mandate," did not "force the Airlines to adopt or change their prices, routes or services—the prerequisite for preemption," and did not have a "direct effect" on either "prices" or "services." *Id.* at 1428 (citations omitted).

This Court reversed the Ninth Circuit, noting its recognition in *Morales* that "the key phrase 'related to' expresses a broad pre-emptive purpose." *Id.* (citation and internal quotation marks omitted). The Court also noted that in *Wolens*, it had "reaffirmed *Morales'* broad interpretation of the ADA pre-emption provision. . . ." *Northwest*, 134 S. Ct. at 1429. In reaching its determination, the Court once again interpreted the ADA's preemption provision broadly, stating that "[a] claim satisfies [the preemption clause's] requirement if it has 'a connection with, or reference to, airline' prices, routes, or services," and that the claim at issue "clearly ha[d] such a connection." *Id.* at 1430.

These four precedents, *Morales*, *Wolens*, *Rowe*, and *Northwest*, form the pillars of FAAAA preemption analysis. *See S.C. Johnson & Son, Inc.*

v. Transport Corp. of Am., Inc., 697 F.3d 544, 549-52 (7th Cir. 2012); *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 86 (1st Cir. 2011) ("All . . . of the major Supreme Court cases endorsed preemption and read the preemption language broadly . . . and none adopted plaintiffs' position . . . that we should presume strongly against preempting in areas historically occupied by state law.").

C. The Ninth Circuit Erroneously Eschewed this Court's ADA and FAAAA Precedents.

The Ninth Circuit's decision in this case is the latest in a long line of decisions from that Circuit that have failed to apply this Court's precedents concerning the ADA and the FAAAA. Its position has become settled enough that the three-page decision below was unpublished, citing other published Ninth Circuit cases as support. *See* Pet. App. 3a-4a. This is an indication that the Ninth Circuit views its own law in this area as fixed and binding. This Court's review is the only antidote.

The Ninth Circuit began to move in a different direction from Supreme Court ADA and FAAAA precedents and from other circuits in 1998, holding that Congress used the word "service" in the phrase "rates, routes, or service" to refer to "prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail," not to include "provision of in-flight beverages, personal assistance to passengers, the handling of luggage,

and similar amenities." *Charas v. TWA, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (*en banc*).

In 2001, the Ninth Circuit continued its move away from this Court's precedents in *Air Transport Association of America, Inc. v. City and County of San Francisco*, another ADA case. 266 F.3d 1064 (9th Cir. 2001). There, the Ninth Circuit held that "a local law will have a prohibited connection with a price, route, or service *if the law binds the air carrier to a particular price, route or service* and thereby interferes with competitive market forces within the air carrier industry." *Id.* at 1072 (emphasis added).

A decade later, the Ninth Circuit again said that its "binds" test is "the proper inquiry" for "borderline cases." *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011), *reversed in part on other grounds*, 569 U.S. 641 (2013).[3]

In 2014, the Ninth Circuit reiterated that the appropriate test is "whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646

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[3] This Court unanimously reversed *Ginsberg v. Northwest, Inc.*, 695 F.3d 873, 877-91 (9th Cir. 2013), which had relied on *American Trucking*, 660 F.3d at 397. *See Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1431 (2014).

(9th Cir. 2014) (emphasis in original) (internal quotation marks omitted).

In *National Federation of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 727 (9th Cir. 2016), the Ninth Circuit reaffirmed its commitment to this line of cases in concluding that its definition of "services" expressed in *Charas* had not been overruled by *Rowe*—despite other Circuits finding to the contrary. *See, e.g., Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 94 (1st Cir. 2013); *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008). The Ninth Circuit expressly acknowledged that "other circuit courts have articulated broader constructions of the word 'service' . . . than the one we adopted in *Charas*," and noted that it disagreed with those other courts. *Nat'l Fed'n of the Blind*, 813 F.3d at 727-28 (citing decisions from the First, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits).

In the decision below, the Ninth Circuit thus had no need for a lengthy discussion addressing the entrenched circuit split, instead merely citing its own precedent in *Dilts*. Pet. App. 3a. Its position has been made clear.

As noted, the "binds to" test conflicts with this Court's precedents, including *Morales*, *Rowe*, and *Northwest*, and with the approach adopted by other Courts of Appeals. *See* Pet. 10-19 (discussing cases).

II. The Question Presented Is Economically Important.

Motor carriers and air carriers transport trillions of dollars' worth of goods each year in the United States.[4] "Transportation is a massive enterprise with substantial direct and indirect effects on economic productivity and economic growth." Committee on National Statistics, *Key Transportation Indicators: Summary of a Workshop* (Janet Norwood & Jamie Casey eds., 2002), *available at* https://www.nap.edu/read/10404/chapter/5. Inefficiencies and increased costs affect not just motor and air carriers but also every other sector of the economy. *See* JEAN-PAUL RODRIGUE & THEO NOTTEBOOM, THE GEOGRAPHY OF TRANSPORT SYSTEMS (4th ed. 2017), https://goo.gl/UZsbFy. As Dr. Rodrigue and Dr. Notteboom note, "[w]hen transport systems are efficient, they provide economic and social opportunities and benefits that result in positive multiplier effects such as better accessibility to markets, employment and additional investments." *Id.* Conversely, "[w]hen transport systems are deficient in terms of capacity or reliabil-

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[4] "According to preliminary estimates from the 2012 Commodity Flow Survey (CFS), nearly 11.7 billion tons of freight, valued at $13.6 trillion, w[ere] transported about 3.3 trillion ton-miles in 2012 by shippers in manufacturing, wholesale trade, and mining in the United States." Michael Margreta et al., *U.S. Freight on the Move: Highlights from the 2012 Commodity Flow Survey Preliminary Data*, https://goo.gl/hgctE5 (hereinafter "2012 CFS Highlights").

ity, they can have an economic cost," *id.*, so that "raising transport costs by 10% reduces trade volumes by more than 20%." https://goo.gl/yQWBpA.

The freight "transport system" in the United States predominantly consists of motor carriers driving over roads and highways. According to the 2012 Commodity Flow Survey (CFS) preliminary data, truck shipments alone accounted for "about $10.0 trillion worth of goods and 73.7 percent of the total value of all shipments."[5]

In enacting the FAAAA, Congress's unmistakable intent was to replace the "patchwork of regulation" with a uniform nationwide market for interstate transportation of property by motor carrier. H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. The patchwork of state regulation of interstate motor carriers had resulted in "increased costs" to these carriers. H.R. REP. NO. 103-677 (1994), at 87, *reprinted in* 1994 U.S.S.C.A.N. 1715, 1759. Different state-by-state requirements also hinder carriers in responding and adapting to what the competitive national market demands. *See Rowe*, 552 U.S. at 372-73.

Congress was well aware of this when it passed the FAAAA. It expressly found that state regulations "(A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of

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[5] 2012 CFS Highlights.

trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers." PUB. L. NO. 103-305, § 601(a)(1), 108 Stat. 1605 (1994); *see also* H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 ("State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtails the expansion of markets.").

Hence, Congress barred the balkanization of the nationwide market for motor carrier transportation of property. California's meal and rest-break laws are precisely the type of local regulation that frustrates Congress's intent to preserve a competitive national market for motor carrier services. California's meal and rest-break laws subject motor carriers to significant additional costs, which directly impacts the prices, routes, and services carriers can offer to customers in California and surrounding States. Pet. 26-29. In addition, the Ninth Circuit's invocation of California's *Armenta* rule to prevent J.B. Hunt from employing its Activity-Based-Pay system also affects motor carriers' services and routes. Pet. 31-33.

Given the importance of California to the rest of the Nation's economy, the Ninth Circuit's decision will likely have widespread, negative ramifications for motor carriers and their customers as noted

above, with serious ripple effects that will negatively impact the broader economy,[6] in direct contravention of Congress's intent in enacting the FAAAA. *Rowe*, 552 U.S. at 371.

Moreover, because the language of the FAAAA is interpreted *in pari materia* with that of the ADA, *id.* at 370, the Ninth Circuit's decision could have the same deleterious impact on air carriers and their customers, who make up an increasing portion of the American economy. In 2016, U.S. airlines moved nearly 52,000 tons of cargo per day, and in 2017, the value of merchandise imported or exported by air reached an all-time high of $1.07 trillion.

When it comes to air transportation, the need to avoid a patchwork of state regulations is especially acute. As this Court has explained, air transportation is "in [its] nature national," and "imperatively demand[s] a single uniform rule, operating equally [throughout] the United States." *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 625 (1973). Under the Ninth Circuit's interpretation of ADA preemption, however, the airlines face severe burdens imposed by state-specific rules that directly regulate their operations, with enormous impact on their prices and services. If a flight makes even a brief stop at a California hub, it suddenly becomes subject to a host of regulations that will significantly

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[6] *See* RODRIGUE & NOTTEBOOM, supra p. 16.

affect the price and service of the flight as it travels through many other states. *See, e.g., Bernstein v. Virgin Am., Inc.*, 227 F. Supp. 3d 1049, 1069 (N.D. Cal. 2017) (noting that the Ninth Circuit "rejected" a "challenge to California's vessel fuel rules, even though compliance with those rules would cost the industry an additional $360 million annually"); *id.* at 1072 (noting that complying with California law requires airlines to "staff longer flights with additional flight attendants in order to allow for duty-free breaks").

In addition, the Ninth Circuit's rule overlooks that a single flight crew will often fly across many different states over the course of a single journey. Thus, if the Ninth Circuit's rule for the trucking industry under the FAAAA were applied to the airline industry via the identically worded ADA, it would have perverse results because airplanes and their flight crews, even more so than transcontinental trucks, routinely traverse multiple states over the course of a single journey. For example, the Ninth Circuit's rule would mean that an airline operating a transcontinental flight may be required to apply New York's wage-and-hour laws during the safety briefing, Michigan's during beverage service, Wisconsin's during lunch, Nebraska's during the in-flight movie, Nevada's during descent, and California's during landing. This cannot be right. But it is the logical result of the Ninth Circuit's insistence on giving an artificially narrow reading to federal preemption in an essentially interstate industry such as air transportation.

III. Absent Action by this Court, Motor and Air Carriers Traveling Through California Will Continue To Be Subject to Frequent and Costly Class Actions Alleging Violation of California's Meal and Rest-Break Laws.

As a result of the Ninth Circuit's opinion, any time a motor carrier or air carrier seeks to travel through California (or other states with similar laws), it risks exposure to class actions and other litigation alleging violation of state-specific break and wage laws. Such lawsuits are a huge cost for carriers (and the business community generally), and their costs are magnified exponentially when they are brought as class actions.

Labor and employment class actions have become the most common type of class action throughout the country, comprising 38.9 percent of corporate litigation spending. *The Carlton Fields 2017 Class Action Survey*, *available at* http://ClassActionSurvey.com/, at 6-7. The number of labor and employment class actions rose more than fifty percent from 2015 to 2016, due in part to the substantial increase in California wage and hour class actions. *Id.* at 7. Indeed, in 2016, plaintiffs prosecuted more wage and hour class and collective actions in the district courts situated in the Ninth Circuit than in any other part of the country. Seyfarth Shaw LLP, *Annual Workplace Class Action Litigation Report 2017 Edition, available at* http://src.bna.com/lxW, at 13-14.

The resulting costs to the business community are enormous. Employers frequently settle wage and hour class actions (regardless of merit) because there is too much at stake and the defense costs are prohibitive. *See* Lisa Sherman, *The Economic Realities of Employment Class Actions* (Apr. 23, 2015), *available at* https://goo.gl/GRZke5. According to one survey, seventy-five percent of class actions categorized as "routine" had exposure of $2.1 million or more with legal fees ranging from $.2 to 1.5 million. *See The Carlton Fields 2017 Class Action Survey*, *available at* http://ClassActionSurvey.com at 16-17.

Moreover, insurance coverage for wage and hour class actions is limited. "Increasingly, major insurers have included sublimits for wage and hour claims, which apply to defense only, not indemnity, with limits ranging from $150,000 to $350,000." David A. Gauntlett, *Insurance Coverage for Wage and Hour Claims* (May 29, 2014), *available at* https://goo.gl/2n32J3.

In 2016, the top ten highest wage and hour class action settlements nationwide totaled $695.5 million. Seyfarth Shaw LLP, *Annual Workplace Class Action Litigation Report 2017 Edition*, *available at* http://src.bna.com/lxW, at 8. Seven of those top ten cases involved lawsuits pending in state or federal district courts in California. *Id.* at 35-36.

The Ninth Circuit's narrow interpretation of FAAAA and ADA preemption unnecessarily exacerbates this trend. In the dozen or so cases filed with-

in the two years preceding *Dilts*, the vast majority of district courts held that the FAAAA or ADA preempted California's meal and rest-break laws. *See, e.g., Rodriguez v. Old Dominion Freight Line, Inc.*, No. CV 13-891 DSF (RZx), 2013 U.S. Dist. LEXIS 171328, at *14 (C.D. Cal. Nov. 27, 2013); *Parker v. Dean Transp., Inc.*, No. CV 13-02621 BRO (VBKx), 2013 U.S. Dist. LEXIS 184386, at *27 (C.D. Cal. Oct. 15, 2013); *Ortega v. J.B. Hunt Transp., Inc.*, No. CV 07-08336 (BRO) (FMOx), 2013 U.S. Dist. LEXIS 160582, at *18 (C.D. Cal. Oct. 2, 2013); *Burnham v. Ruan Transp.*, No. SACV 12-0688 AG (ANx), 2013 U.S. Dist. LEXIS 118892, at *12-13 (C.D. Cal. Aug. 16, 2013); *Miller v. Southwest Airlines, Co.*, 923 F. Supp. 2d 1206, 1212-14 (N.D. Cal. 2013); *Angeles v. US Airways, Inc.,* No. C 12-05860 CRB, 2013 U.S. Dist. LEXIS 22423, at *29 (N.D. Cal. Feb. 19, 2013); Minutes of Proceedings on Order Granting Def.'s Mot. for Partial J. on the Pleadings 10, *Aguirre v. Genesis Logistics*, SACV 12-00687 JVS (C.D. Cal. Nov. 2012); *Cole v. CRST, Inc.*, No. EDCV 08-1570-VAP (OPx), 2012 U.S. Dist. LEXIS 144944, at *17 (C.D. Cal. Sept. 27, 2012); *Jasper v. C.R. England, Inc.*, No. CV 08-5266-GW (CWx), 2012 U.S. Dist. LEXIS 186607, at *25 (C.D. Cal. Aug. 30, 2012); *Campbell v. Vitran Express, Inc.*, No. CV 11-05029-RGK (SHx), 2012 U.S. Dist. LEXIS 85509, at *9-10 (C.D. Cal. June 8, 2012); *Aguiar v. California Sierra Express, Inc.*, No. 2:11-cv-02827-JAM-GCH, 2012 U.S. Dist. LEXIS 63348,

at *10 (C.D. Cal. May 4, 2012); *Esquivel v. Vistar Corp.*, No. 2:11-cv-07284-JHN-PJWx, 2012 U.S. Dist. LEXIS 26686, at *18 (C.D. Cal. Feb. 8, 2012).[7]

Following *Dilts*, five of those same cases settled with an average settlement of $4,815,000.[8] There have been at least fifteen additional California wage and hour class actions against motor carriers post-*Dilts*. Six of those cases settled for a collective $29,705,000 and an average settlement of $4,950,833.[9] Two resulted in judgments—one for a

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[7] All of these FAAAA decisions were, of course, abrogated by *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014). One court has reached the same conclusion in the ADA context. *See Bernstein v. Virgin Am., Inc.*, 227 F. Supp. 3d 1049, 1072-73 (N.D. Cal. 2017) (relying on *Dilts* in rejecting ADA preemption challenge to meal and rest-break claims brought in class action). Prior to *Dilts*, a few district courts had concluded that meal and rest-break claims were not preempted. *See, e.g., Brown v. Wal-Mart Stores, Inc.*, No. C 08-5221 SI, 2013 U.S. Dist. LEXIS 55930, at *9-10 (N.D. Cal. Apr. 18, 2013); *Mendez v. R+L Carriers, Inc.*, No. C 11-2478 CW, 2012 U.S. Dist. LEXIS 165221, at *18 (N.D. Cal. Nov. 19, 2012).

[8] *Aguirre v. Genesis Logistics*, No. CV 12-0687 JVS (C.D. Cal. Nov. 29, 2017) ($7,000,000); *Campbell v. Vitran Express, Inc.*, No. CV 11-05029-RGK (C.D. Cal. Aug. 1, 2016) ($375,000); *Burnham v. Ruan Transp.*, No. SACV 12-0688 AG (ANx) (C.D. Cal. Feb. 2, 2016) ($3,500,000); *Rodriguez v. Old Dominion Freight Line, Inc.*, No. CV-13-891 DSF (RZx) (C.D. Cal. May 28, 2015) ($3,400,000); *Jasper v. C.R. England, Inc.*, No. CV 08-5266-GW (CWx) (C.D. Cal. Nov. 12, 2014) ($9,800,000).

[9] *McCowen v. Trimac Transp. Servs.*, No. 14-cv-02694-RS (N.D. Cal. Feb. 9, 2018) ($550,000); *Villalpando v. Exel Direct Inc.*, Nos. 12-cv-04137 JCS, 13-cv-03091 JCS (N.D. Cal. Dec. 9,

whopping $60,800,011.58. *See Ridgeway v. Wal-Mart Stores, Inc.*, No. 08-cv-05221-SI (N.D. Cal. Jan. 25, 2017). The appellate court affirmed the other near-million dollar judgment, expressly rejecting FAAAA preemption. *Godrey v. Oakland Port Servs. Corp.*, 230 Cal. App. 4th 1267, 1270 (2014). Only one of these cases settled on an individual basis for an undisclosed amount. *See Yoder v. W. Express, Inc.*, No. 14-cv-02273 JGB (SPx) (C.D. Cal. May 10, 2016).

Put simply, the *Dilts* rule imposes substantial costs on carriers traveling through California (and other states with similar laws) which are ultimately passed on to the broader business community and the economy at large. In addition to increasing the prices that carriers must charge, the Ninth Circuit's narrow reading of federal preemption also allows states to regulate carrier operations in a way that has a dramatic impact on the services they provide. This Court's review is thus sorely needed to relieve the excessive burdens that the Ninth Circuit has wrongly imposed on interstate commerce, and to re-

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2016) ($13,500,000); *Elijahjuan v. Mike Campbell & Assocs.*, Los Angeles County Superior Court, No. BC441598 (Oct. 17, 2016) ($155,000); *Taylor v. FedEx Freight*, No. 13-cv-1137-LJO-BAM (E.D. Cal. Oct. 13, 2016) ($3,750,000); *Lopez v. Logistics Delivery Solutions*, Santa Clara County Superior Court, No. 1-13-CV-249431 (Mar. 25, 2016) ($1,250,000); *Williams v. Ruan Transp. Corp.*, Tulare County Superior Court, No. VCU231325 (Mar. 9, 2016) ($10,500,000).

store balance to industries critical to the health and welfare of the Nation's economy.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, this Court should grant J.B. Hunt's Petition for a Writ of Certiorari.

Respectfully submitted,

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