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 BNSF RAILWAY COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAAA) provides that "a State [or] political subdivision … 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).

The questions presented are:

1. Whether the Ninth Circuit correctly held—like the Eleventh Circuit, but contrary to decisions from this Court and the First and Seventh Circuits—that a state law of general applicability is not preempted by the FAAAA unless it "binds" a motor carrier to "specific" prices, routes, or services.

2. Whether the Ninth Circuit correctly held—like the Third Circuit, but contrary to the First, Second, Fifth, Seventh, and Eleventh Circuits—that the FAAAA's use of the terms "price, route, or service" refers only to "point-to-point transport."

3. Whether the Ninth Circuit correctly held that California's wage and labor laws, which prohibit motor carriers from using industry-standard incentive-based pay structures, are not preempted by the FAAAA, in conflict with the First Circuit's holding that Massachusetts's wage and labor laws, which similarly restrain the way that motor carriers incentivize their drivers, are preempted by the FAAAA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

BNSF Railway is a rail carrier as defined by 49 § 10102(5). It operates one of the largest freight railroad networks in North America, with 32,500 miles of rail across the western two-thirds of the United States.

BNSF has an interest in this case because, just as federal law preempts state regulation relating to motor carriers' prices, routes, and services, so too it preempts state regulation with respect to rail carriers' prices, routes, and services. While railroad preemption is much broader and has a longer pedigree, courts often interpret these preemption provisions in a similar fashion. As a result, the Ninth Circuit's decision in this case could affect the application of preemption rules to cases involving rail carriers, including BNSF.[1]

SUMMARY OF ARGUMENT

This *amicus curiae* brief explains why the questions presented are critically important to the transportation industry. First, the legal issues raised by this case affect a wide range of industries. Second, the questions presented arise frequently. Finally, the questions presented have far-reaching practical significance.

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[1] In accordance with Supreme Court Rule 37.6, BNSF states that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than BNSF and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of the filing of this brief in compliance with Supreme Court Rule 37.2, and each has consented in writing to the filing of this brief.

ARGUMENT

I. The Questions Presented Affect A Wide Range Of Industries

This case involves the meaning of a federal statute that preempts state laws "related to a price, route, or service *of any motor carrier*." 49 U.S.C. § 14501(c)(1) (emphasis added). Yet the questions presented in this case matter to a wide range of businesses beyond motor carriers. That is so because a variety of transportation statutes contain preemption clauses that parallel the preemption clause of the FAAAA.

Congress began regulating the transportation industry in 1887, when it enacted the Interstate Commerce Act to regulate the nation's railroads. 24 Stat. 379 (1887). During the Great Depression, Congress followed up with the Motor Carrier Act, 49 Stat. 543 (1935), which regulated the trucking industry, and the Civil Aeronautics Act, 52 Stat. 973 (1938), which regulated air carriers. Federal regulators "controll[ed], among other things, routes, rates, and services." *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1428 (2014). In addition, carriers were in many instances "also regulated by the States." *Id.*

Several decades of experience revealed the shortcomings of this approach. Regulators "were too often lazy, unfair, mistaken, or all three." Stephen Breyer, *Afterword, Symposium: The Legacy of the New Deal*, 92 Yale L. J. 1614, 1616 (1983). In some cases, they were "'captured' by those they were to regulate." *Id.* In others, they "fanatically pursued their single missions with tunnel vision and without common sense." Such regulation undermined competition, increased prices, and hurt consumers.

Starting in the 1970s, therefore, Congress began deregulating the transportation industry and promoting "maximum reliance on competitive market forces." 49 U.S.C. § 40101(a)(6). Congress began with the Airline Deregulation Act of 1978, 92 Stat. 1705 (ADA). Then came the Motor Carrier Act of 1980, 94 Stat. 793, which largely deregulated trucking, and the Staggers Rail Act of 1980, 94 Stat. 1895, which largely deregulated railroads. Continuing the trend, Congress included further deregulatory measures in the Federal Aviation Administration Act of 1994, 104 Stat. 1569 (FAAAA) and the Interstate Commerce Commission Termination Act of 1995, 109 Stat. 803 (ICCTA).

Eliminating federal regulation was not enough; Congress also sought to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). In order to accomplish that objective, Congress expressly preempted state regulation of the transportation industry. The preemption clauses that Congress has adopted all use similar language:

- *Air carriers*. The ADA preempts state laws "related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b).
- *Combined air and motor carriers*. A separate provision of the ADA preempts state laws "related to a price, route, or service of an air carrier … [that] is transporting property … by motor vehicle." 49 U.S.C. § 41713(b)(4)(A).
- *Motor carriers*. The FAAAA preempts state laws "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1).

- *Rail carriers*. The ICCTA states that the Federal Government's "jurisdiction … over … remedies … with respect to rates, classifications, rules … , practices, routes, services, and facilities of [rail] carriers … is exclusive." 49 U.S.C. § 10501(b).

To be sure, these provisions differ from one another in some respects. For example, the rail-carrier clause is more sweeping than its counterparts; it preempts laws "with respect to rates, classifications, rules … , practices, routes, services, and facilities," rather than just laws "related to a price, route, or service." Still, because these preemption provisions use similar language, have similar deregulatory purposes, and share common statutory ancestors, courts usually interpret them in tandem. *See, e.g.*, *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364, 370 (2008) (interpreting the motor-carrier provision alongside the "similar" air-carrier provision); *id.* at 368 (interpreting the air-carrier provision alongside the "similar provision for combined motor-air carriers"); *PCS Phosphate Co.* v. *Norfolk Southern Corp.*, 559 F.3d 212, 219 (CA4 2009) (interpreting the rail-carrier provision alongside the air-carrier provision, which shares a "similar deregulatory purpose"); *Dnow, L.P.* v. *Paladin Freight Solutions, Inc.*, 2018 WL 398235, at *4 (SD Tex. Jan. 12, 2018) (interpreting the motor-carrier provision alongside the "similar language" of the rail-carrier provision).

This overlap means that the questions presented matter to a lot of different businesses. They matter to motor carriers under the FAAAA, to air carriers and combined air-and-motor carriers under the ADA, and to rail carriers under the ICCTA. Indeed, it is no exaggeration to say that the legal issues raised by this

case affect almost the entire transportation network of the United States.

Of all of these industries, railroads have perhaps the keenest interest in federal preemption. Notwithstanding the Staggers Act and other deregulatory efforts, railroads remain subject to one of "the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Aside from ICCTA, a sampling of some of the many federal laws that govern railroads includes the Railway Labor Act, 45 U.S.C. §§ 151–163 (labor relations); the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (worker injuries); the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351–368 (unemployment and sick leave); the Safety Appliance Act, 49 U.S.C. §§ 20302–20306 (equipment), the Locomotive Inspection Act, 49 U.S.C. §§ 20701–20703 (locomotives); and the Railroad Retirement Act, 45 U.S.C. §§ 231–231v (pensions). Thus, railroads often depend on preemption to avoid duplicative or inconsistent state regulation.

II. The Questions Presented Arise Frequently

The legal issues raised in this case also recur frequently. To start at the most general level: Preemption comes up almost as a matter of routine in litigation involving the transportation industry. According to Westlaw, in the last twelve months, courts have cited the air or air-and-motor carrier preemption provisions in 51 cases, the motor-carrier preemption provisions in 43 cases, and the rail-carrier preemption provisions in 26 cases.

What is more, the particular claims involved in this case also tend to come up with regularity. Respondents' claim for meal and rest breaks is an example. Truck drivers, flight attendants, and railway engineers often must work long shifts. Unsurprisingly, they have all claimed that state law entitles them to meal and rest breaks along their interstate journeys. *See, e.g.*, *Ortega* v. *J.B. Hunt Transport, Inc.*, 694 F. App'x 589, 589 (CA9 2017) (truck drivers); *Valadez* v. *CSX Intermodal Terminals, Inc.*, 2017 WL 1416883, at *13 (ND Cal. April 10, 2017) (truck drivers); *Shook* v. *Indian River Transport Co.*, 236 F. Supp. 3d 1165, 1166 (ED Cal. 2017) (truck drivers); *Bernstein* v. *Virgin America, Inc.*, 227 F. Supp. 3d 1049, 1077 (ND Cal. 2017) (flight attendants); *BNSF Ry. Co.* v. *Sacks*, 2018 WL 837991, at *6 (WD Wash. Feb. 13, 2018) (railway employees).

So too for respondents' claim that state law prohibits or conditions the use of incentive-based or activity-based pay policies. Transportation businesses routinely use pay policies that are designed to provide a set amount for particular tasks or that otherwise depart from the common approach of hourly pay for time worked.[2] They have thus faced—or are currently facing—numerous lawsuits from workers claiming that these pay policies violate state law. *See, e.g.*, *Ortega*, 694 F. App'x at 590 (motor carrier); *Villalpando* v. *Exel Direct Inc.*, 2015 WL 5179486, at *24 (ND Cal. Sep. 3,

[2] The complexity of pay systems in transportation industries, including the railroads, is due at least in part to the fact that these industries remain heavily unionized. These businesses thus are subject to detailed—and often quite esoteric—collectively bargained pay rules that have developed over the course of many decades.

2015) (motor carrier); *Taylor* v. *Fedex Freight, Inc.*, 2015 WL 2358248, at *12 (ED Cal. May 15, 2015) (motor carrier); *Bernstein*, 227 F. Supp. 3d at 1073 (airline); *Sumlin* v. *BNSF Ry.*, No. 5:17-cv-02364 (CD Cal.) (railroad); *Fowler* v. *Union Pacific R.R.*, No. 5:17-cv-02451 (CD Cal.) (railroad); *Gonzalez* v. *BNSF Ry.*, No. 4:17-cv-05193 (ED Wash.) (railroad). The frequency of these claims further reinforces the case for granting review.

III. The Questions Presented Have Great Practical Significance

Preemption matters to the transportation industry much more than it does to most other businesses. As a result, it is distinctively important that the Court review the questions presented by this case.

1. Preemption uniquely matters to the transportation industry because the industry has a special need for regulatory uniformity. An office or factory or power plant stays put in a single state. In contrast, a single truck, train, or airplane may travel through multiple different states on a single day. It would be impracticable for its operator or crew to have to comply with various different sets of state laws along the way. Unsurprisingly, therefore, this Court has long understood that the "transportation of passengers or merchandise" is "in [its] nature national," and "admit[s] of one uniform system or plan of regulation." *Case of the State Freight Tax*, 82 U.S. 232, 279–80 (1872). There "can be no divided authority over interstate commerce, and the acts of Congress on that subject are supreme and exclusive." *Kalo Brick*, 450 U.S. at 318 (quoting *Missouri Pacific R.R. Co.* v. *Stroud*, 267 U.S. 404, 408 (1925)).

The Ninth Circuit's approach to preemption in this case would deny transportation businesses the uniformity they need. Most obviously, the Ninth Circuit's approach here would give every state leeway to impose its own rules on its portion of a carrier's continuous interstate journey. An air crew flying from Billings to Los Angeles would have to comply with Montana's rest-break rules during takeoff, Idaho's during beverage service, Oregon's during cruising, and California's during descent. To require a single carrier to comply with these "diverse … requirements" over the course of a single journey is to eliminate the "uniformity [that] is essential for the functioning of commerce … [i]n the field of transportation." *Morgan* v. *Virginia*, 328 U.S. 373, 377–78, 381, 386 (1946).

The Ninth Circuit's decisions also undermine uniformity by conflicting with decisions from other circuits. Today, the operator of a large railroad faces one preemption test when getting underway in Portland, Oregon, but a different preemption test when arriving in Chicago, Illinois. (*See* Pet. 13.) The carrier would have to honor state rest-break requirements in the Ninth Circuit, but could disregard them in the Seventh Circuit. (Pet. 18.) It would have to comply with state restrictions on incentive-based pay policies while passing through California, but need not comply with similar restrictions while passing through Texas. (Pet. 19.) That is no way to run a railroad.

2. Preemption also matters to the transportation industry because state regulation of transportation can interrupt "the free flow of commerce from state to state." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 (1945). In transportation, "prompt movement [is] of the essence." *Bibb* v. *Navajo Freight Lines, Inc.*, 359

U.S. 520, 527 (1959). State regulation that "delay[s]" transportation thus "place[s] a great burden" on carriers. *Id.* at 529.

The decision below countenances just such delays. California's meal- and rest-break requirements can force a driver to "pull on and off the road during the course of travel." *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637, 649 (CA9 2014). In the words of one of this Court's earlier decisions, California's law "delay[s] the transportation of … passengers and [goods]," by requiring the carrier to "tur[n] aside … from the direct interstate route," to stop "away from a point on that route," and to return "back again to the same point … before proceeding on its way." *Illinois Cent. R.R. Co.* v. *Illinois*, 163 U.S. 142, 153 (1896). This delay "prevent[s] the free flow of commerce," "increasing its cost and impairing its efficiency." *Southern Pacific*, 325 U.S. at 779.

Such delays are a particularly serious problem for rail carriers. Trains operate along fixed tracks with limited sidings and no passing lanes. A train cannot use a given section of track until all the trains ahead of it have moved on. Accordingly, a state law that delays one train will necessarily also slow down every train behind it—or even ahead of it—on the same tracks. State-imposed obstacles such as rest-break requirements thus do more than impair the operation of a single vehicle; they can clog entire rail lines or networks.

These delays also pose serious problems for carriers participating in intermodal transportation. Intermodal transportation is the use of different modes of transport—motor, air, rail, and so forth—for different legs of a single journey. For example, a carrier might

use a truck to ship goods from a seller's warehouse to one terminus of a railway, a train to move the goods across the country, and a truck again to deliver the goods from the other terminus of the railway to the customer's store. Intermodal transportation is extremely "popula[r]," since it can be more "efficient" than using only a single mode for the whole journey. *Norfolk Southern Ry. Co.* v. *James N. Kirby, Pty. Ltd.*, 543 U.S. 14, 34 (2004). Here, state laws that delay one leg of the intermodal journey can have downstream effects on other legs. For example, a rest break law that forces a driver to pull over repeatedly *en route* to a train station impairs not just the truck portion, but also the rail portion, of the intermodal journey.

* * *

In sum, the Ninth Circuit's decision is inconsistent with the objective of federal uniformity that this Court has repeatedly upheld. Over the last century, this Court has, from time to time, intervened to abate the "evil" of "multiple control" of matters affecting interstate transportation, because "such control . . . has proved detrimental to the public interest." *Kalo Brick*, 450 U.S. at 320. The time has come to do so again.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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