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

REPLY BRIEF FOR PETITIONER

J. KEVIN LILLY
RICHARD H. RAHM
Littler Mendelson, P.C.
2049 Century Park East
Los Angeles, CA 90067
(310) 553-0308

JENNIFER BOATTINI
CHRISTOPHER GRAY
J.B. Hunt Transport, Inc.
615 J.B. Hunt Corporate Dr.
Lowell, AR 72745
(479) 419-3522

ROY T. ENGLERT, JR.
Counsel of Record
ALAN UNTEREINER
DANIEL N. LERMAN
WENDY LIU
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

Respondents turn somersaults to minimize or deny the conflict on the first question presented. They contend that the Ninth Circuit's "binds to" test does not even exist, because the court does not place the words "binds" and "to" immediately adjacent to each other, but rather asks whether a law "binds *a carrier* to" particular prices, routes, or services. That self-refuting argument does nothing to detract from the sharp circuit split.

They also say that the Ninth Circuit applies its "point-to-point" transportation limitation only to "routes," and not to "services" or "prices." The case law emphatically shows the opposite. And respondents say virtually nothing about the split created by the lower court's piece-rate holding, which strikes at the heart of Congress's deregulatory purpose. Instead, they contend—incorrectly—that it implicates an issue unique to California or to J.B. Hunt.

Respondents downplay the fact that *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), involved only *intrastate* transport. But in *Dilts* the Ninth Circuit's opinion, the government's brief, and even respondents' own counsel expressly relied on the exclusively intrastate context of that case. Respondents also emphasize that the decision below was unpublished—implying, in the face of seven amicus briefs attesting to this case's importance, that this Court should not bother to review a cavalier decision reversing carefully reasoned district court opinions dismissing a class action.

This Court should resolve the very real circuit conflicts created and exacerbated by the decision below.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

1. The Ninth Circuit has long applied a unique "binds to" test in FAAAA cases involving "borderline" cases. See Pet. 10-15. Respondents do not and cannot dispute that such a test conflicts with this Court's decisions. Instead, they argue that the "binds to" test "is a figment of J.B. Hunt's imagination." BIO 12.

Immediately after asserting that the "binds to" test appears "zero" times in *Dilts* (BIO 12), however, respondents *quote* the holding in *Dilts* that the meal- and rest-break laws are not preempted under the FAAAA because they "do not '***bind***' motor carriers ***to*** specific prices, routes, or services." *Dilts*, 769 F.3d at 647 (quoting *Am. Trucking Ass'ns, Inc.* v. *City of L.A.*, 660 F.3d 384, 397 (9th Cir. 2011)) (emphasis added). And *Dilts* goes on to articulate that test—asking whether a state law "binds" a carrier—many times. *Id.* at 646, 647, 649.

Respondents' lead argument, thus, is that the Ninth Circuit does not place the verb "binds" *immediately adjacent* to the preposition "to," but rather asks whether a law "binds *a carrier* to" particular prices, routes, or services. The first question presented asks whether the Ninth Circuit correctly held that a law "is not preempted by the FAAAA unless it '***binds***' a motor carrier ***to*** 'specific' prices, routes, or services." Pet. i (emphasis added).

That is exactly the formulation that respondents concede the Ninth Circuit uses.

So respondents have a fallback. They eventually admit that, in *Dilts*, the Ninth Circuit "briefly discussed the possibility" that a state law could "bind" carriers "to" specific services, but say that it did so "only to highlight one species of state law that would *undoubtedly* be preempted by the FAAAA." BIO 12, 13. That is incorrect.

Dilts articulated the test clearly: "'[T]he proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service.'" *Dilts*, 769 F.3d at 646 (quoting *Am. Trucking*, 660 F.3d at 397) (emphasis in original). Applying that test, the court articulated its holding equally clearly: California's meal- and rest-break laws are not preempted *because* those laws "do not 'bind' motor carriers to specific prices, routes, or services." *Id.* at 647. The court reiterated that "the record fails to suggest that state meal and rest break requirements will so restrict the set of routes available as to indirectly bind Defendants . . . to a limited set of routes, or make the provision or use of specific routes necessary." *Id.* at 649.[1]

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[1] Contrary to respondents' assertion, *Amerijet International, Inc.* v. *Miami-Dade County, Florida*, 627 F. App'x 744 (11th Cir. 2015), did not identify only "one possible" reason a state law could be preempted (BIO 14); it held that the challenged laws were not preempted *because* they "do not bind air carriers to any particular choice and thus function as a regulation of [air carriers' services]" or "preclude air carriers from offering services that they wish to provide." 627 F. App'x at 751.

Respondents also assert that there is no conflict between the decision below and *Massachusetts Delivery Associates* v. *Coakley* (*MDA*), 769 F.3d 11 (1st Cir. 2014), because *MDA* merely rejected "the state's erroneous characterization of *Dilts*." BIO 15. But that argument again depends on respondents' bizarre notion that in *Dilts* the Ninth Circuit *did not* apply the "binds to" test. It did. It also assumes that the Ninth Circuit *does not* apply a special pre-emption rule to laws of general applicability. It does. The Ninth Circuit has repeatedly stated that, in "'borderline' cases in which a law does not refer directly to rates, routes, or services, 'the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service.'" *Dilts*, 769 F.3d at 646 (quoting *Am. Trucking*, 660 F.3d at 397).

And the First Circuit expressly rejected that test. The court observed that "[s]ome courts have indeed used the language of 'background' laws as a shorthand for laws that are found to be too tenuous, remote, or peripheral to carriers' prices, routes, or services to satisfy the 'related to' test"—citing *Dilts*. *MDA*, 769 F.3d at 19. But, the First Circuit explained, "we have never used that language and do not find [it] particularly helpful." *Ibid.*

2. The decision below also relied on the Ninth Circuit's longstanding interpretation that "price, route, or service" refers only to "point-to-point" transportation—a question on which the circuits are divided. Pet. 16-18. Respondents concede that the Ninth Circuit has interpreted "route" to encompass only point-to-point transport. But, they say, "the Ninth Circuit has never extended this definition of

'route' to the terms 'price' or 'service.'" BIO 21 (citing *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998)).

Wrong again. The Ninth Circuit expressly held in *Charas* that the point-to-point limitation *does* apply to the term "service": "[W]e hold that Congress used the word 'service' in the phrase 'rates, routes, or service' in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail." *Charas*, 160 F.3d at 1261.

The court emphasized that the "point-to-point" transportation limitation applies to prices *and* routes *and* services:

> Airlines' "rates" and "routes" generally refer to the point-to-point transport of passengers. "Rates" indicates price; "routes" refers to courses of travel. It therefore follows that "service," when juxtaposed to "rates" and "routes," refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, "This airline provides service from Tucson to New York twice a day.").

Id. at 1265-1266, quoted in *Dilts*, 769 F.3d at 649.

The Ninth Circuit has therefore held that *the entire phrase* "price, route, or service" refers only to "point-to-point" transportation. And the Ninth Circuit applied that interpretation in *Dilts*, holding that the "requirement that a driver briefly pull on and off the road during the course of travel does not meaningfully interfere with a motor carrier's ability

to select its starting points, destinations, and routes"—*i.e.*, with "point-to-point" transportation. *Dilts*, 769 F.3d at 649. The Ninth Circuit's decisions implicate the undisputed split over the "point-to-point" limitation.

3. As we explained, the Activity Based Pay holding conflicts with decisions from the First Circuit. Pet. 19-22. Respondents' first answer is no answer at all. They say that *California for Safe & Competitive Dump Truck Transportation* v. *Mendonca*, 152 F.3d 1184 (9th Cir. 1998), has been "cited by numerous courts of appeals." BIO 24-25. But our argument is that the *decision below* creates a conflict—not *Mendonca*. Nor is it any defense that the Ninth Circuit's "reasoning was brief." BIO 25. The erroneous decision should not escape review just because it was terse in reversing a legally and factually detailed decision without serious attention to the record or the district court's reasoning.[2]

Respondents also contend that review is unwarranted because this case applies California's piece-rate rule to "J.B. Hunt's unique ABP system." BIO 25. But such efficient, incentive-based systems

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[2] Respondents contend that the split "does not exist" since the decision below is unpublished. BIO 25. But it is not unusual for this Court to review splits created by unpublished decisions. *E.g.*, *Byrd* v. *United States*, 584 U.S. ___ (2018); *Krupski* v. *Costa Crociere S.p.A.*, 560 U.S. 538 (2010); *Crawford* v. *Metro. Gov't of Nashville*, 555 U.S. 271 (2009). Particularly in light of the "increased use of unpublished" decisions, "the Court grants certiorari to review unpublished and summary decisions with some frequency." Shapiro, et al., Supreme Court Practice, ch. 4.11, at 264 (10th ed. 2013) (citing cases).

are widely used in the nationwide trucking industry. Pet. 35; Amicus Br. of Ryder Systems, Inc. 14 ("[o]utside of California, Ryder uses a piece rate system"); Amicus Br. of American Trucking Associations, et al. 17-19 (activity-based-pay systems are an "industry standard productivity incentive").

In any event, California's piece-rate laws—whether or not "idiosyncratic" (BIO 25)—undisputedly dictate *how* (not how much) motor carriers must pay their employees. The Ninth Circuit holds that the FAAAA does not preempt such laws. The First Circuit holds that it does.

Respondents argue that *Schwann* v. *FedEx Ground Package Systems, Inc.*, 813 F.3d 429 (1st Cir. 2016), addresses the incentive-based-pay issue "only *after* identifying an independently sufficient basis for preemption." BIO 26. But "an alternative holding is not dicta but instead is binding precedent." *Evans* v. *Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017).

It is unsurprising that "neither *MDA* nor *Schwann* noted any disagreement with Ninth Circuit preemption cases." BIO 26. *MDA* and *Schwann* were decided *before* the decision below. Now there is a judicially acknowledged "split between the First Circuit and the Seventh, Ninth and Eleventh Circuits, concerning the limit of federal preemption over state wage laws." *Lupian* v. *Joseph Cory Holdings, LLC*, 240 F. Supp. 3d 309, 314 (D.N.J. 2017).

II. THIS CASE IS CERTWORTHY

1. We explained that this case is more certworthy than *Dilts*: For one thing, it involves interstate

transport, whereas *Dilts* involved intrastate transport. Respondents protest that the majority in "*Dilts* referred to the intrastate nature of the transport only once." BIO 18.

Not true. Besides the sentence respondents cite (*Dilts*, 769 F.3d at 649), the court *also* stated that the plaintiff drivers "work exclusively within the state of California," and "therefore are not covered by other state laws or federal hours-of-service regulations." *Id.* at 648 n.2. And it is of no moment whether *Dilts* referred to the case's intrastate context once, twice, or ten times. That context alone underlay the court's determination that "Defendants *in particular* are not confronted with a 'patchwork' of hour and break laws." *Ibid.*

Respondents contend that the intrastate context of *Dilts* was unimportant to the government, but fail to acknowledge the government's emphasis in its *Dilts* brief that the preemption analysis "might be substantially different if California applied the law to drivers who cross state lines." Br. for the United States at 24, 769 F.3d 637 (No. 12-55705), 2014 WL 809150, at *24 (9th Cir. Feb. 18, 2014). Like the Ninth Circuit, the government saw the exclusively intrastate context of the case as significant. If this Court has any doubt that the government would see this case differently than it saw *Dilts*, it can of course request the views of the Solicitor General.

But there need be no doubt. Even counsel for respondents—who was also counsel for respondents in *Dilts*—capitalized on that aspect of *Dilts* in successfully opposing certiorari. The brief in opposition in *Dilts* went out of its way to note that the drivers' work "took place exclusively within

California." Br. in Opp. at 5, *Dilts*, Nos. 14-801, 14-819, 2015 WL 4072230, at *5 (Mar. 27, 2015). It further emphasized that both the Ninth Circuit *and* the government saw that fact as significant, asserting on its first page that the court of appeals was "aided in its analysis by the Department of Transportation, which explained in a brief below that the state laws at issue, *in the context of purely intrastate trucking*, have no preempted effects." *Id.* at *1 (emphasis added).

Respondents also contend that this case does *not* involve an "interstate" carrier because the class excludes "over-the-road drivers." BIO 19. But, as respondents admit elsewhere, that class *does* include drivers "who cross state lines." BIO 5. *Dilts* involved exclusively intrastate drivers. That is a distinction with a difference.

2. Respondents observe that "Congress is currently *considering* legislation" that, if enacted, "*could*" affect respondents' claims. BIO 20 (emphasis added). This Court has rejected that very argument in other cases. The respondents in *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355 (2002), for example, similarly argued that this Court should deny certiorari because legislation on the question presented was "under consideration by Congress." Br. in Opp. at 2, *Rush*, No. 00-1021, 2001 WL 34090258, at *2 (Feb. 20, 2001). The government urged this Court to decline review for the same reason. See Br. for the United States at 9, 16 (June 2001), https://www.justice.gov/sites/default/files/osg/briefs/2000/01/01/2000-0665.pet.ami.inv.pdf. This Court granted certiorari over those objections. 533 U.S. 948 (2001).

As the petitioners in *Rush* explained, legislative proposals are "still just that: proposals." Supplemental Br. for Petitioner at 3, *Rush*, 2001 WL 34091936, at *3 (June 7, 2001). "It should come as no surprise that legal issues of national importance are also issues of interest to Congress." *Ibid.* If this Court were to decline to review such issues simply because Congress was *considering* them, the statutory cases that most warrant this Court's review would not receive it.

III. THE DECISION BELOW IS WRONG

1. Respondents do not attempt to defend *Dilts*'s application of the Ninth Circuit's "binds to" test. They just pretend that the Ninth Circuit doesn't apply that test. Nor can respondents dispute that the Ninth Circuit applies a *special* preemption test in FAAAA cases involving laws of general applicability.

To the contrary, they double down on that purported distinction, arguing that *Morales* v. *Trans World Airlines*, *Inc.*, 504 U.S. 374 (1992), and *Rowe* v. *New Hampshire Motor Transportation Association*, 552 U.S. 364 (2008), are distinguishable because they involved laws that are "[u]nlike the generally applicable background state laws here." BIO 28. Those cases, they say, involved the "direct" regulation of rates or services, whereas this case does not. BIO 28, 29.

This Court has rejected that distinction. *Rowe* makes clear that the FAAAA preempts *all* state laws having a "*connection with*" rates, routes, or services—even if "only indirect." 552 U.S. at 370. And *Morales* holds that the "connection with" test applies equally to all laws—including generally

applicable laws that do not directly "regulate" or "prescrib[e]" carrier rates, routes, or services. 504 U.S. at 384-385.

2. Respondents' defense of the Ninth Circuit's piece-rate decision is even more threadbare. Their primary argument is that the decision below is consistent with the Ninth Circuit's *own decision* in *Dilts*—scarcely a defense of the decision below.

Even more puzzling, respondents rely on (and block-quote) the portion of *Dilts* holding that the *exceptions* to preemption for state safety regulations are, by definition, the types of laws that fall *outside* the scope of FAAAA preemption. BIO 30. As we explained (at 29), however, this Court has rejected that exact argument, noting that the exceptions "identify matters a State may regulate when it would *otherwise be precluded from doing so*." *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 264 (2013) (emphasis added). Respondents have no answer.

The FAAAA preemption analysis entails a "practical approach" that accounts for the "real-world consequences" of state laws. BIO 28, 30, 31. That, respondents say, "is just what the Ninth Circuit" did here—particularly with respect to the piece-rate holding, which, they say, involved a "fact-intensive dispute between the parties concerning the practical consequence of complying with the *Armenta* rule." BIO 30.

The record shows otherwise. The district court examined an extensive factual record and concluded that the *Armenta* rule significantly affected J.B. Hunt's services and prices. It also explained in detail why the meal- and rest-break rules have a

significant effect on a carrier's prices, routes, and services—and force carriers to comply with a patchwork of different requirements across multiple States. See Pet. 7, 25-26, 31-33.

The Ninth Circuit reversed in a three-paragraph disposition that addressed *none* of the "real-world consequences" of the California laws at issue. Nor is there anything unusual about the facts of this case; what is "undeniably unusual" (BIO 31) is the Ninth Circuit's disregard for those facts. See BIO 27 (decrying that the petition discussed "the facts of the case").

Finally, let's take a step back. Without mentioning (let alone disputing) any fact on which the district court relied to show the dramatic inconsistency of California law with Congress's deregulatory, efficiency-promoting purposes, the Ninth Circuit concluded that the challenged laws do not even *relate to* J.B. Hunt's rates, routes, *or* services. That conclusion is downright absurd. This Court has said that *gambling and prostitution laws* have too "tenuous, remote, or peripheral" an effect on rates, routes, or services to meet the statutory "relates to" test. *Morales*, 504 U.S. at 390; *Rowe*, 552 U.S. at 375. In the Ninth Circuit, that small limitation on a literal reading of statutory text has ballooned into an enormous loophole allowing all kinds of state economic regulation of transportation industries. Hardly anything could be more inconsistent with statutory text, statutory purpose, or this Court's cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. KEVIN LILLY
RICHARD H. RAHM
Littler Mendelson, P.C.
2049 Century Park East
Los Angeles, CA 90067
(310) 553-0308

JENNIFER BOATTINI
CHRISTOPHER GRAY
J.B. Hunt Transport, Inc.
615 J.B. Hunt Corporate Dr.
Lowell, AR 72745
(479) 419-3522

ROY T. ENGLERT, JR.
Counsel of Record
ALAN UNTEREINER
DANIEL N. LERMAN
WENDY LIU
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

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