No. _____

IN THE

Supreme Court of the United States

SKYWEST, INC., ET AL.,

Petitioners,

v.

ANDREA HIRST, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Amanda C. Sommerfeld
JONES DAY
555 S. Flower St.
15th Floor
Los Angeles, CA 90071

Shay Dvoretzky
Counsel of Record
Douglas W. Hall
Jeffrey R. Johnson
Vivek Suri
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioners

QUESTION PRESENTED

1. Is a state law exempt from the Dormant Commerce Clause merely because it does not discriminate against interstate commerce?

2. Is a state law exempt from the Dormant Commerce Clause merely because Congress has passed a federal statute saving the law from preemption under that statute?

PARTIES TO PROCEEDINGS BELOW

Petitioners SkyWest, Inc. and SkyWest Airlines, Inc. were defendants-appellees below. Respondents Andrea Hirst, Molly Stover, Emily Stroble Sze, Cheryl Tapp, Renee Sitavich, Sarah Hudson, Brandon Colson, and Brüno Lozano were plaintiffs-appellants below.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of SkyWest Airlines, Inc. is SkyWest, Inc., a company that owns 10% or more of SkyWest Airlines, Inc.'s stock. SkyWest, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case is about the limits that the Dormant Commerce Clause imposes on state regulation of airlines. It arose after a group of flight attendants sued petitioner SkyWest Airlines, Inc., for allegedly violating state and local minimum-wage, wage-timing, and wage-statement laws.

The district court ruled that the application of state and local wage-and-hour laws to an airline's flight crew violates the Dormant Commerce Clause because it imposes excessive burdens on interstate commerce, contrary to this Court's decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In a single trip, a flight attendant may spend time in several different states and localities, each with its own wage-and-hour laws. To comply with even a single jurisdiction's laws, an airline may have to track the precise moment the attendant enters and exits the jurisdiction's airspace, as well as the precise amount of time spent on the ground in that jurisdiction's airports. To comply with similar laws in other jurisdictions, an airline may have to make similar calculations for every state (or, worse, every municipality) in which the flight attendant worked during that trip. And because flight attendants' schedules—and the jurisdictions in which they work—change from trip to trip, the airline would have to make these calculations again and again, for each new trip. "This isn't a logistical conundrum; it's a logistical nightmare." App. 47a.

Yet to the Seventh Circuit, none of this mattered. The Seventh Circuit did not contest the district court's assessments of the burdens that the application of state and local wage-and-hour laws would im-

pose on airlines. The Seventh Circuit ruled, however, that these burdens made no difference, because the Dormant Commerce Clause simply did not apply to these state and local wage-and-hour laws in the first place. The Seventh Circuit reached this extraordinary conclusion by adopting two novel limitations on the scope of the Dormant Commerce Clause—limitations that contradict this Court's cases and that conflict with other circuit courts' decisions on the issue.

To begin, the Seventh Circuit deemed state and local wage-and-hour laws immune from the Dormant Commerce Clause because they were nondiscriminatory. This Court's precedents, however, "rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090–91 (2018). The Seventh Circuit simply jettisoned the second of these "primary principles," ruling that the Dormant Commerce Clause "is triggered *only* when the challenged law *discriminates* against interstate commerce." App. 10a. Because the state and local wage-and-hour laws at issue did not discriminate against interstate transactions, the Dormant Commerce Clause challenge failed—irrespective of the severity of the burdens imposed on airlines. The upshot is that, whereas this Court and other circuits agree that "even nondiscriminatory burdens on commerce may be struck down," *Dep't of Revenue v. Davis*, 553 U.S. 328, 353 (2008), the Seventh Circuit has ruled that a court may "invalidate a state law

only where there is a clear showing of discrimination against interstate commerce," App. 9a.

To make matters worse, the Seventh Circuit ruled that, "even if [state and local] minimum wage laws did discriminate against interstate commerce," they would still comply with the Constitution, because Congress authorized them in the Fair Labor Standards Act. App. 10a. This Court has ruled that a federal statute authorizes a state law that would otherwise violate the Dormant Commerce Clause only if "Congress' intent and policy to sustain state legislation from attack under the Commerce Clause [is] expressly stated." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982). It has also ruled that "a standard nonpre-emption clause" does not suffice to immunize state regulation from constitutional scrutiny; such a clause serves "simply to define the extent of the federal legislation's pre-emptive effect on state law," not to "alter the limits of state power otherwise imposed by the Commerce Clause." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341, 343 (1982). Other courts of appeals have had no trouble following these precedents. Not, however, the Seventh Circuit. That court ruled here that the Fair Labor Standards Act's standard non-preemption clause—a clause that says only that the federal minimum wage does not preempt even higher state or local minimum wages—*does* immunize state and local minimum-wage laws from constitutional scrutiny. This ruling means, in the Seventh Circuit's own words, that "[e]ven … minimum wage laws [that] did discriminate against interstate commerce" would be constitutional. App. 10a. For example, Chicago could now adopt a $15 minimum wage for Chicagoans but

a $10 minimum wage for commuting Indianans. And Indiana could retaliate by adopting a $10 minimum wage for businesses headquartered in Indianapolis but a $15 minimum wage for businesses headquartered in Illinois.

The Seventh Circuit's decision strips away vital protections for interstate commerce. It threatens to make the business of running airlines unworkable. And it undermines this Court's precedents. This Court should grant certiorari.

OPINIONS BELOW

The opinion of the court of appeals is reported at 910 F.3d 961 and reproduced at App. 1a–11a. The district court's opinion dismissing respondents' claims with prejudice is reported at 283 F. Supp. 3d 684 and reproduced at App. 12a–48a. Its earlier opinion dismissing those claims without prejudice is unreported, but available at 2016 WL 2986978 and reproduced at App. 49a–89a.

JURISDICTION

The court of appeals reversed the district court's judgment and remanded the case on December 12, 2018. App. 1a. The court of appeals denied panel rehearing and rehearing en banc on January 11, 2019. App. 90a–91a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, provides:

> Congress shall have Power … To regulate Commerce with foreign Nations, and among

the several States, and with the Indian Tribes.

Section 218(a) of the Fair Labor Standards Act, 29 U.S.C. § 218(a), provides:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

STATEMENT OF THE CASE

A. Factual Background

SkyWest, an airline headquartered in St. George, Utah, employs over 2,600 flight attendants. App. 3a. These attendants are based in airports in fifteen cities across ten different states. App. 3a. Flight attendants do not necessarily live where they are based. Moreover, in the course of their work, they travel to and from scores of different cities that SkyWest serves.

A single flight attendant typically works in multiple states on any given workday. App. 43a. For example, a flight attendant might work flight legs to and from Minnesota, North Dakota, and Wisconsin the first two days; Minnesota, Nebraska, and Tennessee the third day; and Tennessee, Kentucky, and Minnesota the day after that. During a different four-day period, the same attendant might work on flight legs to and from Illinois, Texas, and California on one day; California and Missouri the next two days; and Missouri, Illinois, and Georgia the day after that.

B. District Court Proceedings

In March 2015, three former SkyWest flight attendants—respondents Andrea Hirst, Molly Stover, and Emily Stroble Sze—filed a putative class-action lawsuit in the Northern District of Illinois, alleging that SkyWest failed to pay the minimum wage required by the Illinois Minimum Wage Law. App. 4a. A few months later, five more former SkyWest flight attendants—respondents Cheryl Tapp, Renee Sitavich, Sarah Hudson, Brandon Colson, and Brüno Lozano—filed a similar putative class-action lawsuit

in the Northern District of California, alleging that SkyWest failed to pay the minimum wage required by state and local minimum wage laws in California, Arizona, Washington, San Francisco, and Los Angeles. App. 4a. The state minimum-wage claims take aim principally at SkyWest's "block time" policy for determining flight attendants' pay. Under this policy, a flight attendant receives a wage—between $17.50 and $40.13 per hour—for each hour spent on the airplane after the cabin door is closed for departure until the cabin door is opened for arrival. The policy does not, however, allocate a separate wage for hours spent onboard the aircraft while the cabin door is open, or for time spent in the airport. App. 3a. The essence of the claims here is *not* that SkyWest's average hourly wage—that is, the total wages paid divided by the total hours worked, including hours worked in the airport or while the cabin door is open—falls short of the applicable minimum wage. App. 2a. Rather, the essence of the claims is that the block-time *method* for calculating wages is unlawful under state law—for instance, because California prohibits averaging and requires the payment of a separate wage "for every hour of work." App. 42a.

In addition to bringing minimum-wage claims, the California plaintiffs alleged that SkyWest failed to provide them with wage statements that complied with California law and to pay their wages within the time limits set by California law. App. 3a & n.2. The Illinois and California plaintiffs both also raised federal minimum-wage claims under the Fair Labor Standards Act, but they were dismissed and are not relevant here.

The district court in California transferred the California lawsuit to the Northern District of Illinois, where the two lawsuits were consolidated. App. 4a.

In May 2016, the district court granted SkyWest's motion to dismiss the Illinois flight attendants' claim under the Illinois minimum wage law. App. 49a. The district court ruled that applying the state minimum-wage law to flight attendants would violate the Dormant Commerce Clause. App. 74a–86a. The court explained that, in considering whether a state regulation complies with the Dormant Commerce Clause, "a court first determines if the regulation directly discriminates against interstate commerce or has the effect of favoring in-state economic interests." App. 74a. If it does, "the state regulation is generally struck down." App. 74a–75a. If it does not, the regulation is upheld unless—in the words of this Court's decision in *Pike*, 397 U.S. at 142—"the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." App. 75a.

The court concluded that the application of the state minimum wage law to airlines violated the *Pike* test. The Illinois minimum-wage provisions would apply "only … to [flight attendants] based in Illinois and only to the hours they worked in Illinois." App. 76a. As a result, "to calculate the time the plaintiffs worked to which the [state law] would apply, SkyWest would have to track each minute pre- or post-flight in Illinois and the amount of turn time between flights that [flight attendants] spent in Illinois." App. 76a. Even worse, SkyWest might be required to "include flight time over the state"—"to determine the precise minute each flight crossed into

and out of Illinois airspace." App. 76a n.14. What is more, "every state's comparable laws would also apply," subjecting SkyWest to "a labyrinth of potentially conflicting wage laws [for] [flight attendants] based out of different states and cities, working on the same flights, literally moving through interstate commerce on a daily basis." App. 76a–77a. "This is precisely the type of burden on interstate commerce that the Commerce Clause prohibits." App. 77a.

In November 2017, after respondents amended their pleadings, the district court dismissed *all* respondents' claims under state and local wage-and-hour laws, again on the ground that applying these laws to flight attendants would violate the Dormant Commerce Clause. App. 12a. The district court repeated the central points it had made in its first opinion: An airline would face the burden of "track[ing] each minute pre- or post-flight" spent in each state, plus the burden of complying with a "labyrinth of potentially conflicting wage laws" across 50 states. App. 40a.

The district court then addressed respondents' argument that "compliance would not be cumbersome because only the wage laws of the state and locality where [a flight attendant] is based would apply to her." App. 41a. "Would that it were so simple." App. 41a. "Some wage ordinances, for example, may apply to all hours worked by an employee who is employed within a state, even if some hours are worked out of state; others apply only to employees who work predominantly in one state for hours they work in that state, while still others apply to all hours worked by an employee in a state, even if the employee predominantly works or is employed elsewhere." App. 41a.

"Further complicating matters is the fact that different states use different measures for calculating minimum wage." App. 41a–42a.

"The burdens that would be imposed on airlines were they required to comply with state and local wage laws concerning flight attendants, then, is more substantial than merely complying with the wage laws of the state where each [flight attendant] is *based*. Instead, SkyWest would be forced to contend with the wage laws of each state in which [a flight attendant] *works*." App. 42a–43a. To do so, SkyWest would have to "(1) measure each increment that each [flight attendant] spends on the ground in each of the 43 states in which it operates, (2) determine the precise extent to which each wage law in the states and localities in which it operates applies and/or applies extraterritorially, and then (3) ensure compliance with a different set of wage laws and ordinances for each [flight attendant] based on the amount of time they spent in each state and locality." App. 43a. In addition, SkyWest would have to ascertain the wage-calculation method used in each jurisdiction—that is, it would have to determine whether the jurisdiction permits an employer to average wages across a workweek or workday, or whether it instead requires the employer to pay the minimum wage separately for each hour worked. App. 46a–47a. And because flight-attendant schedules "shift from week to week," SkyWest would be forced to "comply with a different patchwork of wage laws" every week. App. 43a. "As the court noted in its earlier opinion, this is precisely the kind of onerous burden on interstate commerce that the Commerce Clause prohibits,

even in the face of weighty state interests in protecting workers and providing a living wage." App. 43a.

C. Seventh Circuit Proceedings

The Seventh Circuit reversed the district court's dismissal of the flight attendants' state and local wage-and-hour claims. It began by casting doubt on Dormant Commerce Clause jurisprudence: because the Dormant Commerce Clause "lack[s] … a textual anchor"—it has merely been "inferred" by this Court—"the continued validity of the dormant Commerce Clause has been questioned." App. 9a & n.4.

The court then upheld the state and local laws, first on the ground that they were non-discriminatory. Citing the Seventh Circuit's earlier decision in *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495 (7th Cir. 2017), the court declared: "Under the dormant Commerce Clause, we invalidate a state law only where there is a clear showing of discrimination against interstate commerce, either expressly or in practical effect." App. 9a. The court continued that the balancing test established by this Court in *Pike* "is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application." App. 10a. The court perceived no such discrimination here. "State and local wage laws can burden companies within their own localities just as much, if not more, than out-of-state ones. All airlines—indeed all employers—are subject to these laws, regardless of state citizenship." App. 10a. The absence of "discrimination against interstate commerce," the court concluded, "precludes the application of the dormant Commerce Clause to the Flight Attendants' state and local claims." App. 10a.

The court also upheld the state and local minimum-wage laws in particular on the additional ground that Congress had authorized them. "Even if minimum wage laws did discriminate against interstate commerce," the court observed, "the dormant Commerce Clause does not apply to state and local laws expressly authorized by Congress." App. 10a. The court found such an authorization in the Fair Labor Standards Act. Section 218(a) of the Act provides: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter." The Seventh Circuit concluded that, "[b]ecause Congress expressly authorized states and localities to legislate in this realm, the application of multiple minimum wage laws to an employer cannot violate the Dormant Commerce Clause." App. 10a–11a.

SkyWest then filed this petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. BY HOLDING THAT NON-DISCRIMINATORY STATE LAWS ARE EXEMPT FROM THE DORMANT COMMERCE CLAUSE, THE SEVENTH CIRCUIT DEPARTED FROM THIS COURT'S AND OTHER CIRCUITS' DECISIONS

This Court has repeatedly held that a law is subject to review under the Dormant Commerce Clause both if the law discriminates against interstate commerce (in which case the law is almost automatically invalid) and if the law is neutral toward interstate commerce (in which case the law is invalid only if the burdens on commerce clearly outweigh the lo-

cal benefits). Similarly, the other courts of appeals to consider the question have held that a law can violate the Dormant Commerce Clause even if it is evenhanded, so long as the burdens of the law clearly outweigh the benefits. The Seventh Circuit however, has held—both in this case and in previous decisions—that a law is subject to review under the Dormant Commerce Clause *only* if the challenger makes "a clear showing of discrimination against interstate commerce, either expressly or in practical effect." App. 9a.

A. This Court has held that nondiscriminatory but unduly burdensome regulations violate the Dormant Commerce Clause

"Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Wayfair*, 138 S. Ct. at 2090–91.

Under the first of these "primary principles," a state law that discriminates against interstate commerce is subject to a "virtually *per se* rule of invalidity," and can stand only if it survives strict scrutiny. *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 (1992). "[A] state law may discriminate against interstate commerce either on its face or in practical effect." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1805 (2015). Either way, it remains subject to the same "virtually *per se* rule of invalidity." *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (strict scru-

tiny triggered "once a state law is shown to discriminate against interstate commerce either on its face or in practical effect"); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (strict scrutiny triggered when the state statute "discriminates against interstate commerce either on its face or in practical effect").

Under the second of this Court's "primary principles," a state law that "regulates even-handedly" and whose "effects on interstate commerce are only incidental" is subject to a balancing test. *Pike*, 397 U.S. at 142. A statute survives the *Pike* balancing test "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.*

As this framework makes clear, a law can violate the Dormant Commerce Clause *either* because it discriminates against interstate commerce *or* because it excessively burdens interstate commerce. This Court has confirmed this point time and again:

• "[The Dormant Commerce Clause] prohibit[s] States from discriminating against or imposing excessive burdens on interstate commerce." *Wynne*, 135 S. Ct. at 1794.

• "Concluding that a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all dormant Commerce Clause challenges, for we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down." *Davis*, 553 U.S. at 353.

• "[E]ven nondiscriminatory state legislation may be invalid under the dormant Commerce

Clause." *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997).

• "Even if a statute regulates evenhandedly, and imposes only incidental burdens on interstate commerce, the courts must nevertheless strike it down if the burden imposed on such commerce is clearly excessive." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

The Court's cases addressing state burdens on transportation illustrate these principles. In these cases, the Court struck down "genuinely nondiscriminatory" state laws, because they burdened interstate commerce by "undermin[ing] a compelling need for national uniformity in regulation." *Tracy*, 519 U.S. at 298 n.12. For example, in one case, the court struck down a state law prohibiting the use of large trucks solely on account of "the burden on interstate commerce," without "consider[ing] whether the statute … operated to discriminate against that commerce." *Kassel v. Con. Freightways Corp. of Del.*, 450 U.S. 662, 678 n.26 (1981) (plurality). In another case, the Court struck down a neutral state law regulating truck mudflaps, even though "no contention [was] made that the statute discriminates against interstate commerce," and even though "it [was] clear that its provisions appl[ied] alike to vehicles in intrastate as well as in interstate commerce." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523 n.3 (1959). In a third, the Court struck down a neutral state law setting a maximum length for trains, *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945)—rejecting the view of a dissenting Justice who believed that "the courts should intervene only where

the state legislation discriminate[s] against interstate commerce," *id.* at 795 (Douglas, J., dissenting).

This Court's cases thus leave no doubt: A state law can still violate the Dormant Commerce Clause—although it is judged under a balancing test instead of a virtually *per se* rule of invalidity—if it is evenhanded and does not discriminate against interstate commerce either on its face or in its practical effect.

B. The other courts of appeals agree that nondiscriminatory regulation of interstate commerce violates the Dormant Commerce Clause if it is sufficiently burdensome

The other courts of appeals to consider the question have held that nondiscriminatory state laws remain subject to the Dormant Commerce Clause—and, more specifically, to the balancing test set forth in *Pike*.

First Circuit. "[A] state regulation that discriminates against interstate commerce on its face, in purpose, or in effect is highly suspect and will be sustained only when it promotes a legitimate state interest that cannot be achieved through any reasonable nondiscriminatory alternative. Laws that regulate evenhandedly and only incidentally burden commerce are subject to less searching scrutiny under a balancing test." *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 33 (1st Cir. 2007).

Second Circuit. "Regulations may discriminate unconstitutionally against interstate commerce on their face and in their effect." *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir.

2003). Nondiscriminatory statutes "are evaluated under the balancing test articulated in *Pike*." *Id.*

Third Circuit. "Heightened scrutiny applies when a law discriminates against interstate commerce in its purpose or effect." *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 261 (3d Cir. 2006). "If the plaintiff does not succeed in showing that the purpose or effect of the state law discriminates against interstate commerce—but, rather, the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental—the court must determine whether the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 262.

Fourth Circuit. "State laws that discriminate against interstate commerce in any of the three ways identified by this court—facially, in practical effect, or in purpose—are subject to a virtually *per se* rule of invalidity." *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013). "Even if [a statute] discriminates neither in purpose nor in effect, it may still be unconstitutional under *Pike* … if it places an 'undue burden' on interstate commerce." *Id.* at 545.

Fifth Circuit. "[N]ondiscriminatory regulations are analyzed under the balancing test established in *Pike*." *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 499–500 (5th Cir. 2001).

Sixth Circuit. "To determine whether a statute violates the Commerce Clause, this Court must first determine whether the statute discriminates against interstate commerce, either by discriminating on its

face, by having a discriminatory purpose, or by discriminating in practical effect. If the statute is not discriminatory, it is valid unless the burdens on interstate commerce are clearly excessive in relation to the putative local benefits." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431–32 (6th Cir. 2008) (citations omitted).

Eighth Circuit. "[I]f the state law discriminates against interstate commerce—facially, in purpose or in effect—it will be invalidated unless the state can show, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *IESI AR Corp. v. Nw. Ark. Regional Solid Waste Mgmt. Dist.*, 433 F.3d 600, 604 (8th Cir. 2006). "[A] law that does not overtly discriminate against interstate commerce, but instead regulates evenhandedly, will still be invalidated if the burden it imposes upon interstate commerce is clearly excessive in relation to the putative local benefits." *Id.*

Ninth Circuit. "If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it [satisfies strict scrutiny]...Absent discrimination, we will uphold the law unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087–88 (9th Cir. 2013).

Tenth Circuit. "The first-tier inquiry turns on whether the challenged law affirmatively or clearly discriminates against interstate commerce on its face or in practical effect." *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009). "If the challenged law does not discriminate, the challenger must rely

on a second-tier inquiry, which employs the balancing test of *Pike*." *Id*.

Eleventh Circuit. "We begin our inquiry by determining whether [the statute] discriminates … on its face or in effect." *Locke v. Shore*, 634 F.3d 1185, 1192 (11th Cir. 2011). "Because [the statute] does not discriminate against out-of-state residents, it is constitutional under the Dormant Commerce Clause unless the burden it imposes on interstate commerce clearly exceeds its putative local benefits." *Id.* at 1194.

C. The Seventh Circuit now considers nondiscriminatory regulation, no matter how burdensome, to be immune from the Dormant Commerce Clause

1. For the past two years, the Seventh Circuit has used a Dormant Commerce Clause framework that diverges sharply from the framework used by this Court and by ten other Circuits. Everybody else agrees that laws that discriminate against interstate commerce in their practical effect are subject to strict scrutiny or a virtually *per se* rule of invalidity, but the Seventh Circuit has subjected these laws only to *Pike* balancing. And everybody else agrees that evenhanded laws that have only incidental effects on interstate commerce are subject to *Pike* balancing, but the Seventh Circuit has held that these laws are not subject to review under the Dormant Commerce Clause at all.

The Seventh Circuit first went astray in *Park Pet Shop*, 872 F.3d 495. In that case, the court declared that the Dormant Commerce Clause "does not apply to *every* state and local law that affects interstate

commerce." *Id.* at 501. Instead, "Dormant Commerce Clause doctrine applies only to laws that *discriminate* against interstate commerce, either expressly or in practical effect." *Id.* The court repeated: "*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application." *Id.* at 502. Because the ordinance at issue in that case "d[id] not expressly discriminate against interstate commerce," and also did not "discriminat[e] against interstate commerce in practical effect," "the dormant Commerce Clause d[id] not come into play and *Pike* balancing d[id] not apply." *Id.*

The Seventh Circuit doubled down on this holding in *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047 (7th Cir. 2018). There, the Seventh Circuit once again held: "Importantly, the dormant Commerce Clause does not apply to *every* state and local law that affects interstate commerce, but rather only to laws that *discriminate* against interstate commerce, either expressly or in practical effect." *Id.* at 1058–59. Because the challenged statute "d[id] not categorically discriminate against *out-of-state* commerce," "the dormant Commerce Clause d[id] not come into play and *Pike* balancing d[id] not apply." *Id.* at 1060.

This case is the apotheosis of the Seventh Circuit's unique approach. The district court explained in two thorough opinions that the application of state wage-and-hour laws to flight attendants imposes intolerable burdens on interstate commerce. An airline would be forced to "calculate the time … to which the [state law] would apply" by "track[ing] each minute pre- or post-flight in [the state] and the amount of turn time between flights [in the state]." App. 40a. In

addition, an airline would be forced to navigate "a labyrinth of potentially conflicting wage laws" across 50 states—some of which apply to an employee who both is based in and works in the state, some of which apply to an employee based in the state regardless of where he works, and some of which apply to an employee who works in the state regardless of where he is based. App. 40a. Making matters worse, the legal maze would be in constant flux, because flight-attendant schedules "shift from week to week." App. 43a. To the Seventh Circuit, however, none of this analysis mattered. The Seventh Circuit never contested the district court's careful analysis of the burdens imposed on interstate commerce, but declared that analysis altogether irrelevant, because "we invalidate a state law only where there is a clear showing of discrimination against interstate commerce," and because "*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application." App. 9a–10a.

2. The Seventh Circuit's cases contradict the cases of this Court and the cases of other circuits. This Court has ruled that "[c]oncluding that a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all dormant Commerce Clause challenges," *Davis*, 553 U.S. at 353; the Seventh Circuit, by contrast, has ruled that "we invalidate a state law only where there is a clear showing of discrimination against interstate commerce," App. 9a. And this Court has ruled that *Pike* balancing is triggered when "a statute has only indirect effects on interstate commerce and regulates evenhandedly," *Brown-Forman Distill-*

ers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); the Seventh Circuit, by contrast, has ruled that "*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application," App. 10a. The clash could hardly be starker.

In fact, one of the Seventh Circuit's own judges has recognized the conflict. In *Park Pet Shop*, Judge Hamilton dissented in part on the ground that "the Supreme Court itself has not yet confined the balancing test under *Pike* … as narrowly as [the Seventh Circuit] suggest[ed]." 872 F.3d at 504. Judge Hamilton found it difficult to reconcile the Seventh Circuit's approach with "*Pike* itself," where "the Court wrote that this balancing test applies where 'the statute regulates *even-handedly* … and its effects on interstate commerce are *only incidental*.'" *Id.* (quoting *Pike*, 397 U.S. at 142). Judge Hamilton also considered "[t]he Supreme Court's more recent discussions of *Pike* … difficult to reconcile with this approach." *Id.* Judge Hamilton made all of these observations "with some diffidence and a sense of irony," since he was "among those who have suggested [that *Pike*] should ultimately be abandoned." *Id.* at 505. It is telling that even a critic of *Pike* would say that the Seventh Circuit's efforts to confine that decision contradict this Court's cases.

II. UNDER THIS COURT'S PRECEDENTS, A STATE LAW IS NOT EXEMPT FROM THE DORMANT COMMERCE CLAUSE SIMPLY BECAUSE IT IS COVERED BY A FEDERAL PREEMPTION SAVING CLAUSE

The Seventh Circuit also announced a second holding applicable specifically to the "minimum

wage" claims (App. 10a)—as opposed to the wage-timing and wage-statement claims. This holding, too, flouted Dormant Commerce Clause doctrine. This Court has repeatedly held that a saving clause—that is, a clause that shields state laws from preemption under a federal statute—does *not* immunize state legislation from the Dormant Commerce Clause. Yet the Seventh Circuit ruled that the saving clause in the FLSA *does* immunize state minimum-wage legislation from the Dormant Commerce Clause. Under the Seventh Circuit's decision, Illinois is now free to enact a law requiring businesses headquartered in the state to pay a $10 minimum wage, but businesses headquartered outside the state to pay a $15 minimum wage. This holding, too, calls out for this Court's intervention.

A. Congress' enactment of a preemption saving clause does not suffice to exempt state law from the Dormant Commerce Clause

Congress may "remov[e] obstacles to state action arising from … the commerce clause." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 430–31 (1946). Yet Congress has exercised this authority in only a "few unique federal statutes." *United States v. Pub. Utilities Comm'n of Cal.*, 345 U.S. 295, 304 (1953); *see, e.g.*, 15 U.S.C. § 1011 (McCarran-Ferguson Act) (declaring that "continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States").

Legislation that exempts state regulation from the Dormant Commerce Clause must satisfy a clear-statement rule: "[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). A statute satisfies this clear-statement rule only if "Congress' intent and policy *to sustain state legislation from attack under the Commerce Clause* [is] expressly stated." *Sporhase*, 458 U.S. at 960 (emphasis added). A statute that merely contemplates state regulation in general, but whose "language indicates no consideration or desire to alter the limits of state power otherwise imposed by the Commerce Clause," does not meet this threshold. *Pub. Utilities Comm'n*, 345 U.S. at 304.

In accordance with these principles, this Court has held that a statute does not immunize a state law from the Dormant Commerce Clause merely because it immunizes the law from federal preemption. For example, in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court considered a Dormant Commerce Clause challenge to a state statute regulating bank holding companies. The state asserted that Congress had authorized the state statute by enacting the Bank Holding Company Act of 1956, which provided: "No provision of this chapter shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846; *see* 447 U.S. at 45. This Court held, however, that "Congress' concern was to define the extent of the federal legislation's pre-

emptive effect on state law"—specifically, "to preserve existing state regulations of bank holding companies, even if they were more restrictive than federal law." 447 U.S. at 48–49. "[N]othing in its language … support[ed] the contention that it also was intended to … creat[e] a new state power to discriminate between foreign and local bank holding companies." *Id.* at 49.

Similarly, in *Sporhase*, 458 U.S. 941, this Court rejected an effort to find congressional authorization in a clause of the Reclamation Act of 1902 that stated: "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." 32 Stat. 390, § 8; *see* 458 U.S. at 959. "Such language defines the extent of the federal legislation's pre-emptive effect on state law." 458 U.S. at 959. It "do[es] not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 959–60.

So too in *New England Power Co.*, 455 U.S. 331, and *Wyoming*, 502 U.S. 437. In each of those cases, a state defended a state electricity regulation by invoking the saving clause of the Federal Power Act: "The provisions of this subchapter … shall not … deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." 16 U.S.C. § 824(b)(1); *see New England Power*, 455 U.S. at 341; *Wyoming*, 502 U.S. at 457. Yet, in *New England Power*, this Court rejected the state's argument: "[T]his provision is in no sense an affirmative grant of power to the states to burden interstate commerce

in a manner which would otherwise not be permissible. ... Rather, Congress' concern was simply to define the extent of the federal legislation's pre-emptive effect on state law." 455 U.S. at 341 (citation omitted). The Court reaffirmed that holding in *Wyoming*: "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause … [N]othing in the statute … evinc[es] a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause … Instead, … by its plain terms, [the saving clause] simply saves [state regulation] from pre-emption." 502 U.S. at 458.

B. Other courts of appeals have held that a preemption saving clause does not exempt state law from the Dormant Commerce Clause

The courts that have confronted the issue have held that preemption saving clauses do not suffice to immunize state law from the Dormant Commerce Clause.

First Circuit. In *United States v. Taylor*, 752 F.2d 757 (1st Cir. 1985), *judgment rev'd on other grounds*, 477 U.S. 131, the First Circuit refused to find an immunity from the Dormant Commerce Clause in a federal statute that provided: "Nothing in this chapter shall be construed to prevent the several States … from making or enforcing laws or regulations not inconsistent with the provisions of this chapter." 16 U.S.C. § 3378(a). Citing this Court's decision in *Sporhase*, the court ruled: "This provision has nothing to do with the question of congressional consent … since it merely defines the extent of the

federal legislation's preemptive effect on state law." 752 F.2d at 763 n.20.

Second Circuit. In *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), the Second Circuit ruled that Congress did not exempt state statutes from the Dormant Commerce Clause by enacting: "Nothing in this chapter shall be construed to prohibit any State … from imposing any requirements … which are more stringent than those imposed by [federal] regulations." 42 U.S.C. § 6929. Citing this Court's decision in *Wyoming*, the Second Circuit ruled that this "savings provision" is not "sufficient to shield completely the [state] statute from dormant Commerce Clause scrutiny." 272 F.3d at 113.

Eighth Circuit. In *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985), a state claimed immunity from the Dormant Commerce Clause on account of several provisions of the Public Utility Holding Company Act of 1935, including one that said: "[N]or shall anything in this chapter affect the jurisdiction of … any state … over any person, security, or contract." *Id.* at 415 (quoting 15 U.S.C. § 79u (1982)). Citing this Court's decision in *New England Power*, the court found in this statute "no express statement by Congress to exempt [the state] from the commerce clause." *Id.* at 414. The statute "contain[ed] no direction from Congress concerning immunity from the commerce clause"; rather, the statute "d[id] nothing more than sav[e] from federal preemption state authority that was otherwise lawful." *Id.* at 414–15.

Ninth Circuit. In *Rocky Mountain Farmers Union*, 730 F.3d 1070, the Ninth Circuit rejected the ar-

gument that the Clean Air Act lifted the prohibitions of the Dormant Commerce Clause by providing: "Any State [that satisfies certain requirements] may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive." 42 U.S.C. § 7545(c)(4)(B). The Ninth Circuit ruled that "the sole purpose of [this provision] is to waive … the express preemption found [elsewhere in the statute]." 730 F.3d at 1106. The state "failed to establish that the savings clause demonstrates express exemption from Commerce Clause scrutiny." *Id.*

C. The Seventh Circuit, by contrast, allows a preemption saving clause to exempt state law from the Dormant Commerce Clause

The Seventh Circuit held that a preemption saving clause *does* immunize state law from the Dormant Commerce Clause. In the decision below, the Seventh Circuit relied on section 218(a) of the Fair Labor Standards Act, which provides: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any … State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter." 29 U.S.C. § 218(a). The Seventh Circuit's analysis of this statutory provision consisted of a single sentence: "Because Congress expressly authorized states and localities to legislate in this realm, the application of multiple minimum wage laws to an employer cannot violate the dormant Commerce Clause." App. 11a.

The Seventh Circuit's decision directly contradicts the precedents of this Court and other courts of appeals. Section 218(a) says nothing at all about the Commerce Clause. It "is in no sense an affirmative grant of power to the states to burden interstate commerce in a manner which would otherwise not be permissible." *New England Power*, 455 U.S. at 341. Nowhere does it expressly declare a congressional decision "to sustain state legislation from attack under the Commerce Clause." *Sporhase*, 458 U.S. at 960. Its language "indicates no consideration or desire to alter the limits of state power otherwise imposed by the Commerce Clause." *Pub. Utilities Comm'n*, 345 U.S. at 304.

Instead, section 218(a) serves "simply to define the extent of the federal legislation's pre-emptive effect on state law." *New England Power*, 455 U.S. at 341. Section 218(a) begins with the words "No provision of this chapter … shall excuse noncompliance." These words show that the statutory provision addresses the preemptive effect of the "provision[s] of this chapter"—not the effect of the Commerce Clause, which is a provision of the U.S. Constitution. In addition, section 218(a) closes with the words "minimum wage higher than the minimum wage established under this chapter." These words likewise demonstrate that section 218(a) is a saving provision—that its object is "to preserve existing state regulations of [the minimum wage], even if they were more restrictive than federal law." *Lewis*, 447 U.S. at 48–49. Under this Court's and other circuits' precedents, this saving clause speaks only about preemption; it does not authorize (much less clearly authorize) violations of the Dormant Commerce Clause.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

The conflicts just discussed deserve this Court's attention, because the Seventh Circuit's decision threatens grave consequences for interstate commerce in general and even graver consequences for the airline industry in particular.

A. The Seventh Circuit has eliminated vital protections for interstate commerce

The Dormant Commerce Clause "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state … laws that burdened interstate commerce." *Wynne*, 135 S. Ct. at 1794. The doctrine "serve[s] the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179–80 (1995). In so doing, the Dormant Commerce Clause has contributed more than any other constitutional doctrine to "the solidarity and prosperity of this Nation." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949).

The Seventh Circuit's decision, however, prevents the Dormant Commerce Clause from serving these important purposes. The part of the Dormant Commerce Clause that the Seventh Circuit has nullified—the part that forbids state laws that excessively burden interstate commerce—is exceedingly important. "Our national free intercourse is never in danger of being suddenly stifled by dramatic and sweeping acts of restraint. That would produce its own antidote. Our danger, as the forefathers well

knew, is from the aggregate strangling effect of a multiplicity of individually petty and diverse and local regulations." *Duckworth v. Arkansas*, 314 U.S. 390, 401 (1941) (Jackson, J., concurring in result). The prohibition on excessively burdensome state regulation protects commerce against this aggregate strangling effect. The Seventh Circuit's decision, however, deprives interstate commerce of this essential protection.

In addition, the Seventh Circuit nullified this Court's "rule requiring a clear expression of approval by Congress" for state laws that would otherwise violate the Dormant Commerce Clause. *Wunnicke*, 467 U.S. at 92. Until now, only a "few unique federal statutes" sufficed to authorize state regulation contrary to the Dormant Commerce Clause. Under the decision below, however, a "standard non-preemption clause" suffices to overcome the Dormant Commerce Clause. Such clauses, however, are ubiquitous in the U.S. Code (which is why this Court referred to them as "standard" in *New England Power*). *See* Joseph F. Zimmerman, *Congress: Facilitator of State Action* 135 (2010) ("Numerous preemption statutes contain one or more savings clauses exempting specified state laws from preemption"); Christopher R. Drahozal, *The Supremacy Clause: A Reference Guide to the United States Constitution* 18 (2004) ("Twice as many statutes found in a computer search of federal statutes enacted from 1990–2000 include preemption savings clauses as include express preemption clauses (84 versus 42)"). The Seventh Circuit's decision, at a minimum, leaves every business that is affected by any one of these saving

clauses uncertain about whether it can still claim the protection of the Dormant Commerce Clause.

B. The Seventh Circuit has eliminated vital protections for airlines in particular

The consequences of the Seventh Circuit's decision are even worse for the airline industry. It relies on the protection of the Dormant Commerce Clause to an unusual degree. Airplanes cross dozens of states in a single day. They could hardly continue to operate properly if the airline or the crew had to start complying with a new regulatory regime each time the plane crossed into a new state. "Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time." *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

This case vividly illustrates the dangers. The district court explained that, in order to comply with Illinois' minimum-wage law, SkyWest would be required to calculate "the hours [each flight attendant] worked in Illinois." App. 40a. That means, at a minimum, tracking "each minute pre- or post-flight in Illinois and the amount of turn time between flights that [flight attendants] spent in Illinois." App. 40a. It might also mean "tracking the minute-by-minute location of each [flight attendant] on each operating SkyWest flight to determine the precise moment she enters and exits Illinois airspace." App. 76a. As if that were not bad enough, SkyWest would also be required to comply with "every state's comparable laws." App. 76a. It would have to find its way through a "labyrinth of potentially conflicting wage

laws" across 50 states (not to mention thousands of municipalities). App. 77a. "SkyWest would be forced to determine which state and local wage laws apply based on the precise amount of time each [flight attendant] spends in each locale, and then comply with a different set of wage laws on a weekly, daily, or even hourly basis. This isn't a logistical conundrum; it's a logistical nightmare." App. 46a–47a.

The problem is bad enough with respect to minimum-wage laws. States, however, have enacted a wide range of wage-and-hour laws: laws regulating the calculation of hours worked, the content of wage statements, the timing of wage payments, rest breaks, meal breaks, and on and on. And plaintiffs—including respondents below, in this very case—have already brought class-action lawsuits against airlines for allegedly failing to comply with these state laws. *See, e.g.*, App. 13a; *Oman v. Delta Air Lines, Inc.*, 889 F.3d 1075 (9th Cir. 2018) (lawsuit against airline under California's minimum-wage, wage-statement, and wage-timing laws); *Ward v. United Airlines, Inc.*, 889 F.3d 1068 (9th Cir. 2018) (lawsuit against airline under California's wage-statement law); *Bernstein v. Virgin Am., Inc.*, 227 F. Supp. 3d 1049 (N.D. Cal. 2017) (lawsuit against airline under California's minimum-wage, overtime, meal-break, rest-break, and wage-statement laws). The cumulative burden of complying with these varying state laws—issuing a wage statement in different formats for hours spent in different states, paying wages at different intervals (weekly, biweekly, semimonthly, and so on) for hours spent in different states, providing different rest breaks to different flight attend-

ants based on their states of residence, and more—is intolerable.

An airline employee or a state is certainly entitled to argue that these burdens are not "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. In the Seventh Circuit's view, however, there is no need even to ask that question. The entire Dormant Commerce Clause inquiry is terminated at the outset, irrespective of the seriousness of the burden imposed on airlines, simply because the law does not discriminate against interstate commerce. The threat to the free flow of commerce in the air is obvious. This Court should intervene.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

Amanda C. Sommerfeld
JONES DAY
555 S. Flower St.
15th Floor
Los Angeles, CA 90071

Shay Dvoretzky
Counsel of Record
Douglas W. Hall
Jeffrey R. Johnson
Vivek Suri
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioners

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