No. 18-1097

IN THE

Supreme Court of the United States

SKYWEST, INC., ET AL.,

Petitioners,

v.

ANDREA HIRST, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

Statutes and Regulations

Other Authorities

TABLE OF AUTHORITIES

(continued)

Page(s)

INTEREST OF THE AMICUS CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

ATA's members send drivers into every State in the nation, and nearly if not all of its local jurisdictions. As a result, those companies face a similar "logistical nightmare" as petitioners here in contending with the burden of an expansive patchwork of state and local employment laws and regulations. The decision below precludes Commerce Clause scrutiny of the resulting burdens unless the laws in question *discriminate* against interstate commerce, no matter the magnitude of their burden, and immunizes even discriminatory state and local minimum wage laws from

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* Counsel for petitioners and respondents received timely notice of the intent to file this brief, and both parties have consented to its filing. *See* Rule 37.2(a). Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

that scrutiny. That result jeopardizes the ability of interstate motor carriers to efficiently move freight throughout the nation. Thus, ATA and its members have a strong interest in the questions presented in this petition, and in ensuring that the Constitution's safeguards against excessive burdens on interstate commerce are not undermined.

INTRODUCTION AND SUMMARY OF ARGUMENT

The trucking industry—which, by its very nature, requires motor carriers to traverse a multitude of state and local jurisdictions every day—depends on a regulatory environment that is in large measure nationally uniform, in order to effectively move the nation's freight. For motor carriers, the dormant Commerce Clause is an important safeguard for maintaining that uniformity, by placing limits on the ability of state and local governments to burden interstate commerce.

The decision below greatly undermines that constitutional restraint. If allowed to stand, it would effectively allow state and local governments to impose *whatever* burdens on interstate commerce that they wish—no matter how great, and with no consideration of whether countervailing local benefits outweigh those burdens—provided only that the burdens do not *discriminate* against interstate commerce. And it would allow even *discriminatory* state and local burdens on interstate commerce in the many areas of law where Congress has included a standard "saving" clause in a preemption statute.

But the decision below is wrong. It cannot be squared with this Court's cases prohibiting non-discriminatory but excessive burdens on interstate commerce. And its approach to the question of congressional authorization for states to ignore the constraints otherwise imposed by the Commerce Clause turns this Court's clear statement rule on its head. The Seventh Circuit's approach to the dormant Commerce Clause, if allowed to stand, presents a serious impediment to the ability of transportation companies to operate in interstate commerce, and in particular, to the ability of motor carriers to effectively and efficiently move the bulk of the nation's freight. Those dangers warrant this Court's review.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Is Inconsistent with This Court's Precedents.

A. The Dormant Commerce Clause Prohibits States from Imposing Non-Discriminatory but Excessive Burdens on Interstate Commerce.

As petitioners explain in detail, the decision below is out of step both with this Court's precedents and the decisions of the other circuits in holding that the dormant Commerce Clause allows state and local governments to impose whatever burdens on interstate commerce they wish, so long as they do so in a manner that doesn't *discriminate* against interstate commerce. Pet. 13-22. That holding, if allowed to stand, would render the framework this Court articulated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), effectively a dead letter within the Seventh Circuit. In *Pike*, the Court held that when a state law affects in-

terstate commerce but "regulates even-handedly to effectuate a legitimate local public interest … it will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id*. at 142. The court below, however, held that "'*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application.'" App. 10a (quoting *Park Pet Shop, Inc.* v. *City of Chicago*, 872. F.3d 495, 502 (7th Cir. 2017). But because the *Pike* balancing test, by the Court's own terms, is invoked only when the challenged law regulates "even-handedly"—and because "a virtually *per se* rule of invalidity has been erected" against state laws that *do* discriminate against interstate commerce, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)—the Seventh Circuit's holding makes the *Pike* balancing test superfluous.

The decision below is also inconsistent with this Court's repeated recognition—in the specific context of state regulation of interstate transportation—that even non-discriminatory burdens on interstate commerce are subject to dormant Commerce Clause scrutiny, and impermissible if the burdens are sufficiently serious, because of the particular "need for national uniformity in the regulation of interstate travel." *Morgan* v. *Virginia*, 328 U.S. 373, 386 (1946). With that principle in mind, the Court has repeatedly struck down state burdens on motor carriers, even when the state regulation at issue did not discriminate against interstate commerce. *See Kassel* v. *Consol. Freightways Corp.*, 450 U.S. 662, 671 (1980) (concluding, under *Pike*, that "Iowa truck-length limitations unconstitutionally burden interstate commerce") (plurality); *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 447 (1977) (holding that Wisconsin truck-length

limitations and prohibition on double-trailer trucks violate the Commerce Clause "because they place a substantial burden on interstate commerce," and weighing that against only "the most speculative contribution to highway safety"); *id.* at 443 (rejecting argument that "no showing of burden on interstate commerce is sufficient to invalidate local safety regulations in absence of some element of discrimination against interstate commerce" (internal quotation marks and citation omitted)); *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (striking "nondiscriminatory" Illinois truck mudflap requirement as "an unconstitutional burden on interstate commerce"); *Morgan*, 328 U.S. at 386 (striking Virginia requirement of racial segregation on buses, because "seating arrangements … in interstate motor travel require a single, uniform rule to promote and protect national travel"). The holding of the decision below would have shielded the challenged state laws in these cases from dormant Commerce Clause scrutiny altogether, and thus cannot be squared with this Court's consistent approach to burdens imposed by States on motor carriers transporting goods or passengers in interstate commerce.

B. Congress Must Make Its Intent to Exempt States from Compliance with The Dormant Commerce Clause "Unmistakably Clear."

The dormant Commerce Clause "limits the power of the States to erect barriers against interstate trade." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 25 (1980). This Court has recognized, however, that Congress, in its constitutional role as the regulator of interstate commerce, has the authority to lift the restrictions of the dormant Commerce Clause and "permit the states to regulate the commerce in a manner

which would otherwise not be permissible." *S. Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). But the Court has made clear time and again that special interpretive constraints limit the exercise of this authority: "Congress must manifest its *unambiguous intent* before a federal statute will be read to permit or approve … violation of the Commerce Clause." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992) (emphasis added). Although the Court has not required the use of any particular "talismanic" words to satisfy this requirement, it has insisted that, "for 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) (emphasis added). This means that "the legislative history or language of the statute [must] evince[] a congressional intent '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 (1982) (quoting *United States* v. *Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 304 (1953)). The Court has stated this rule repeatedly—and in the most forceful terms. *See*, *e.g.*, *Granholm* v. *Heald*, 544 U.S. 460, 482 (2005) (requiring "clear congressional intent to depart" from Commerce Clause principles); *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986) (text of the statute or legislative history must indicate that "Congress wished to validate state laws that would be unconstitutional without federal approval").

This standard—that Congress must "*affirmatively contemplate* otherwise invalid state legislation," *Wunnicke*, 467 U.S. at 91 (emphasis added)—"is mandated by the policies underlying dormant Commerce Clause doctrine," *id*. at 92. Specifically,

> [u]nrepresented interests will often bear the brunt of regulations imposed by one State having significant effect on persons or operations in other States. … On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

Ibid. Accordingly, "when Congress has not expressly stated its intent and policy to sustain state legislation from attack under the Commerce Clause, [the courts] have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power*, 455 U.S. at 343 (quotation marks and citation omitted).

Given the clarity of this principle, it is no surprise that this Court has repeatedly rejected arguments that Congress evinced the requisite intent to exempt state action from the Commerce Clause.[1] By contrast,

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[1] *See, e.g.*, *Granholm*, 544 U.S. at 482 (Webb-Kenyon Act did not express "clear congressional intent to depart from the principle … that discrimination against out-of-state goods is disfavored") (citations omitted); *Wyoming* v. *Oklahoma*, 502 U.S. at 457-58 (Federal Power Act does not contain a sufficiently "unambiguous" indication of congressional intent to "exempt from scrutiny under the Commerce Clause" Oklahoma's requirement that Oklahoma power plants buy at least 10% of their coal from mines in Oklahoma); *Maine* v. *Taylor*, 477 U.S. at 138-40 ("Maine identifies nothing in the text or

legislative history of the [1981 Lacey Act] Amendments that suggests [that] Congress wished to validate state laws that would be unconstitutional without federal approval."); *Wunnicke*, 467 U.S. at 92-93 (federal restrictions on export of unprocessed timber harvested from federal lands in Alaska were not an unmistakably clear indication of congressional intent to authorize Alaska to impose a ban on the export of unprocessed timber from state lands); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 959-60 (1982) (finding no congressional authorization for state restrictions on extraction of ground water for export out of state because, although congressional statutes "demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws"); *New England Power*, 455 U.S. at 341 (finding no congressional authorization for state restrictions on interstate power transmission because "[n]othing in the legislative history or language of the [Federal Power Act] evinces a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause") (quotation marks omitted); *Lewis*, 447 U.S. at 48 ("[W]e find nothing in [the] language or legislative history [of the Bank Holding Company Act of 1956] to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation."); *Pub. Utils. Comm'n*, 345 U.S. at 304 (finding no congressional authorization for state regulation of interstate power transmission because the statute at issue "indicate[d] no consideration or desire to alter the limits of state power otherwise imposed by the Commerce Clause" and was "not based on any recognition of the constitutional barrier"); *see also C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408-10 (1994) (O'Connor, J., concurring) (although references in Resource Conservation and Recovery Act and its legislative history "indicate that Congress expected local governments to implement some form of flow control, … they neither individually nor cumulatively rise to the level of the 'explicit' authorization [of exportation of waste to other states] required by our dormant Commerce Clause decisions").

the Court has found that Congress displaced dormant Commerce Clause requirements on only a handful of occasions, in cases that fall into two categories.

First, this Court has found congressional authorization where the text of the statute *expressly* permits states to exceed what would otherwise be the Commerce Clause's restrictions on state authority, as in the cases involving the McCarran-Ferguson Act. *See Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946) (McCarran-Ferguson Act authorized states to regulate and tax the insurance business notwithstanding the Commerce Clause by declaring that "'the 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'") (quoting 15 U.S.C. § 1011); *see also W. & S. Life Ins. Co.* v. *State Bd. of Equalization of Cal.,* 451 U.S. 648, 654-55 (1981).

Second, the Court has found such authorization when *Congress itself* was responsible for the limitation on interstate commerce, but expressly provided a role for state or local governments in implementing them. *See Ne. Bancorp* v. *Bd. of Governors of the Fed. Res. Sys.*, 472 U.S. 159, 174 (1985) (Bank Holding Company Act authorized States to implement limited waivers of a ban on acquisition of banks across state lines that had itself been enacted by Congress, as an affirmative exercise of its power under the Commerce Clause); *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983) (Congress and Department of Housing and Urban Development regulations governing use of federal funds "affirma-

tively permit[ted]" state and local "parochial favoritism"); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 155-56 (1982) (Commerce Clause limits were displaced because "Congress … affirmatively acted by providing a series of federal checkpoints that must be cleared," rendering the challenged tribal tax "significantly different," in dormant Commerce Clause terms, from a state measure "which does not need specific federal approval to take effect").

The Fair Labor Standards Act preemption saving clause that the court below relied on, 29 U.S.C. § 218(a), has nothing in common with the narrow categories of enactments in which this Court has found a congressional override of the Commerce Clause's constraints on States. It makes no clear reference to constitutional restrictions on state authority (much less to *lifting* those restrictions), and involves no federal restrictions on interstate commerce that States are affirmatively empowered to implement. Rather, as petitioners explain, such clauses are exceedingly common. Pet. at 31. The Seventh Circuit's holding that such a standard saving clause in effect constitutes "unmistakably clear" congressional intent to free states from *constitutional* limits on their ability to burden interstate commerce (rather than "simply to define the extent of the federal *legislation's* pre-emptive effect on state law," *New England Power*, 455 U.S. at 341 (emphasis added)) would free States to not just to impose whatever burdens non-discriminatory burdens they wish on interstate commerce, but to intentionally *discriminate* against interstate commerce with impunity in those many areas where Congress has enacted a preemption saving clause.

II. The Questions Presented in This Case Are Vitally Important to the Trucking Industry, and to the National Economy That Relies on Trucking for the Efficient Movement of Goods.

Petitioners, and the district court below, explain in detail the many ways in which the application of the state and local wage and hour laws at issue in this case to the airline's flight attendants would constitute a massive burden on interstate commerce. Pet. 7-11, App. 41a-47a. But it's not just the airline industry that would be subject to the "logistical nightmare," App. 47a, posed by the plaintiffs' claims. All of these burdens would similarly affect the trucking industry as well—and in a number of respects would impose an even *higher* burden. And because the national economy relies overwhelmingly on the trucking industry to efficiently move goods in interstate commerce, those burdens will inevitably be felt throughout the supply chain. *See* American Trucking Associations, American Trucking Trends 2018 at 5 (in 2017, trucks moved 70.2% of total primary shipment domestic tonnage, and accounted for 79.3% of the nation's primary shipment freight bill).

A. Imposing a Patchwork of State and Local Wage and Hour Laws on Interstate Trucking Would Massively Burden Interstate Commerce.

1. As the district court below explained, "if state and local wage laws could apply to SkyWest [flight attendants], 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." Pet. App. 46a-47a. Trucking companies, who similarly send their drivers around the country—indeed, to virtually every jurisdiction in which people live—would have to do the same. This would entail more than just tracking the amount of time each driver spends in each jurisdiction. It would also entail determining whether each jurisdiction's wage and hour laws purported to apply under the circumstances, and, if so, what the substantive obligations of those laws were. It would require monitoring each of those jurisdictions' legislatures and regulatory agencies for relevant changes in the law, and its courts for new decisions that clarify or modify how the jurisdiction's rules are interpreted and applied. And, of course, it would mean complying with those proliferating sets of substantive obligations, against a background of irregular routes and schedules that often result in little or no consistency from one week to the next, in terms of the jurisdictions a given driver will traverse. In short, it presents the same "logistical nightmare" for trucking as it does for the airlines.

2. In many respects, the burden on the trucking industry would be even *heavier* than it is for the airline industry.

a. For all practical purposes, trucks move goods to every inhabited corner of the nation—any jurisdiction where people live and buy groceries, clothes, fuel, medicine, or consumer goods is overwhelmingly likely to be served by the trucking industry. In fact, the vast majority of communities in the U.S. rely *exclusively* on trucks for their freight needs. *See, e.g.*, California Dept. of Trans., Fast Freight Facts: Commercial Vehicles (Trucks) at 1 ("[t]rucks serve virtually all mar-

kets," and "[o]ver 78 percent of all California communities depend exclusively on trucks to move their goods"), *available at* http://www.dot.ca.gov/hq/tpp/offices/ogm/fact_sheets/Fast_Freight_Facts_Trucks_bk_040612.pdf.

Thus, while airlines send their flight attendants over an indisputably complex network of routes, those routes have a set of endpoints—namely, airports—that is large in absolute terms but relatively constrained and predictable compared to the endpoints of motor carrier networks. While an airline, in other words, contends with a very large number of jurisdictional permutations, the permutations faced by the trucking industry are essentially limitless—and under the Seventh Circuit's ruling, the burden of the trucking industry's "logistical nightmare" of having to track their obligations under the wage and hour laws of each of those jurisdictions would be exponentially greater.

b. The trucking industry's extensive reliance on independent contractors would give rise to an additional layer of burdens under the Seventh Circuit's approach. Many motor carriers contract with "owner-operators"—independent businesspersons who own one or more trucks and lease them to motor carriers, and either operate them themselves or supply drivers, pursuant to 49 U.S.C. § 14102 and related regulations set forth at 49 C.F.R. § 376. This practice has a history essentially as long as the industry itself. *See* Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*, 47 Fed. Reg. 53,858, 53,860 (Nov. 30, 1982) ("Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them, commonly

referred to as owner-operators."); *see also Am. Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 303 (1953) ("Carriers … have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands.").

States, of course, have their own tests to determine whether workers are employees or independent contractors. And a single State will often have different approaches to worker classification for different purposes—*e.g.*, for application of their minimum wage laws, their unemployment insurance programs, and their workers' compensation programs. To take just one example, the California Supreme Court last year announced a so-called "ABC" test for distinguishing between employees and independent contractors for purposes of the State's Wage Orders (which govern matters such as minimum wage, breaks, and wage statement requirements), *Dynamex Operations W.* v. *Sup. Ct.*, 416 P.3d 1, 10-11 (Cal. 2018), while for other purposes the State adheres to the so-called *Borello* multi-factor balancing test, *Garcia* v. *Border Transp. Group, LLC*, 239 Cal. Rptr. 3d 360, 371 (Cal. Dist. Ct. App. 2018) (citing *S.G. Borello & Sons* v. *Dept. of Indus. Relations*, 769 P.2d 399 (Cal. 1989)). And some States have industry-specific classification rules (including, in some cases, rules specific to truck owner-operators). *See*, *e.g.*, Kan. Stat. Ann. § 44-503c (owner-operator classification test for workers' compensation purposes); Kan. Stat. Ann. § 44-703(i)(4)(Y) (different owner-operator classification test for unemployment insurance purposes).

The upshot, against the background of the decision below, is that no matter how great the burden, many motor carriers would not just have to reckon with the substantive obligations of the employment laws of the

jurisdictions they serve: carriers who work with owner-operators would also have to make separate, fact-specific threshold determinations as to whether a given owner-operator was an independent contractor or an employee, for each relevant purpose in each State the owner-operator works. Adding to the complexity, given the variation in classification tests, carriers would inevitably find themselves facing the burden of treating the same owner-operator as an employee in one State in which they work, but an independent contractor in the next.

c. Finally, in contrast to the airline industry, the trucking industry consists overwhelmingly of small businesses: over 89% of interstate motor carriers operate ten or fewer trucks, and less than one percent of carriers operate 100 or more trucks. *See* Federal Motor Carrier Safety Administration, 2018 Pocket Guide to Large Truck and Bus Statistics at 1-11, *available at* https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/413361/fmcsa-pocket-guide-2018-final-508-compliant-1.pdf. The small trucking companies that make up the bulk of the industry are unlikely to have dedicated human resources teams, much less an in-house legal department, to sort through the "logistical nightmare" presented by the patchwork of state and local employment laws they are exposed to under the Seventh Circuit's decision.

The burdens at issue here would be immense for an airline or a large trucking company; for a small trucking company, they would be insurmountable. And it would represent an enormous disincentive for smaller motor carriers in particular to accept loads headed to unfamiliar destinations, or to expand their businesses by providing freight-hauling services in

new regions. Given the central role of the trucking industry in moving the nation's freight, that disincentive itself represents a serious burden on the efficient movement of goods in interstate commerce.

B. The United States Recently Recognized the Serious Burden on Interstate Commerce Posed by Application of Similar State Laws to Commercial Drivers Who Move Goods in Interstate Commerce.

As recently as late last year, the United States expressly recognized the burden on interstate commerce that application of similar state employment laws to interstate motor carriers poses, in a closely related context. *See* Federal Motor Carrier Safety Administration, California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption, 83 Fed. Reg. 67,470 (Dec. 28, 2018).[2] As part of a broad legislative arrangement through which Congress has sought to foster a nationally uniform environment for the trucking industry and prevent state and local governments from interfering with the ability of motor carriers to efficiently move goods in interstate commerce,[3] a provision of the

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[2] That agency action is currently the subject of several pending petitions for review. *See Int'l Bhd. of Teamsters, Local 2785* v. *FMCSA*, No. 18-73488 (9th Cir.); *Int'l Bhd. of Teamsters* v. *FMCSA*, No. 19-70323 (9th Cir.); *Labor Comm'r* v. *FMCSA*, No. 19-70329 (9th Cir.); *Ly* v. *FMCSA*, No. 19-70413 (9th Cir.).

[3] *See, e.g.*, 49 U.S.C. § 14501(c)(1) (preempting any state or local "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier"); 49 U.S.C. § 31111(b) (requiring state law to conform with federal guidelines concerning commercial vehicle length); 23 U.S.C. § 127 (conditioning highway funds on state

Motor Carrier Safety Act of 1984, 49 U.S.C. § 31141, prohibits states from enforcing laws or regulations on commercial motor vehicle safety under certain circumstances—in relevant part, if the Department of Transportation determines that the state law or regulation is "additional to or more stringent than" the corresponding federal regulation and "would cause an unreasonable burden on interstate commerce" if it were enforced against interstate carriers. 49 U.S.C. § 31141(c)(4)(C).

In its recent determination, the Federal Motor Carrier Safety Administration (FMCSA)—the agency within the Department of Transportation to which review under § 31141 has been delegated, 49 C.F.R. § 1.87(f)—having first concluded that California's rules governing employee breaks were rules "on commercial motor vehicle safety" subject to review § 31141 when applied to commercial drivers subject to the agency's own safety-focused rules on driver hours, expressly turned to *Pike* for the proper framework to evaluate whether California's employee meal and rest

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conformity with federal guidelines concerning commercial vehicle weight); 49 U.S.C. § 31114 (prohibiting States from unreasonably limiting access of motor carriers traveling on the federal highway system to off-highway terminals, points of loading and unloading, and facilities for food, fuel, and rest); 49 U.S.C. § 5112 (requiring state restrictions on highway routing of hazardous materials to comply with standards promulgated by the Department of Transportation). *See also* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 119 Stat. 1144, 1761-74 (2005) (creating a Uniform Carrier Registration System to act as a clearinghouse and depository for various documentation, so that interstate motor carriers would not be subject to the varying requirements of individual States).

break rules, as applied to interstate truck drivers, unreasonably burdened interstate commerce. As FMCSA put it, "it is well settled that the Agency should consider whether the burden imposed is clearly excessive in relation to the putative local benefits derived from the State law." 83 Fed. Reg. at 67,478 (citing *Pike*, 397 U.S. at 142). As part of that analysis, it "'consider[ed] the effect on interstate commerce of implementation of that law or regulation with the implementation of all similar laws and regulations of other States.'" *Id.* at 67,479 (quoting 49 U.S.C. § 31141(c)(5)). FMCSA observed that "the diversity of State regulation of required meal and rest breaks for [commercial motor vehicle] drivers has resulted in a patchwork of requirements," and acknowledged both "the difficulty navigating them" and the "operating procedure adjustments and other administrative burdens that result from varying State requirements which serve to disrupt the flow of interstate commerce." *Id.* at 67,480. It concluded that enforcing California's employee break rules with respect to interstate drivers "decreases productivity and results in increased administrative burden and costs," and that it is "an unreasonable burden on interstate commerce for motor carriers to have to cull through the varying State requirements, in addition to Federal [regulations governing commercial drivers' work hours], to remain in compliance." *Ibid.*

To be sure, FMCSA's recent determination was an application of an express preemption statute, rather than of the dormant Commerce Clause. But that matter, just like this case, involved the burden that would be imposed by requiring interstate transportation industries to adhere to a patchwork of employment laws. FMCSA recognized that, under the *Pike* framework, even a single type of state employment rules—

rules on employee breaks—impose an impermissible burden on interstate commerce when they are applied to interstate motor carriers. That determination is, to say the least, in considerable tension with the Seventh Circuit's conclusion that *Pike* and the dormant Commerce Clause are indifferent to the burdens imposed on the transportation industries by the full panoply of state and local employment laws.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted.

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