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 IN OPPOSITION

Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636

Gregory F. Coleman
Counsel of Record
Lisa A. White
Greg Coleman Law PC
800 S. Gay Street
Suite 1100
Knoxville, TN 37929
(865) 247-0080
greg@gregcolemanlaw.com

Counsel for Respondents

QUESTION PRESENTED

Whether the dormant commerce clause permits airlines to ignore state and local wage and hour regulations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

INTRODUCTION

The question presented is whether Petitioners SkyWest, Inc. and SkyWest Airlines, Inc. (SkyWest) and their allied *amici* in the airline and trucking industries enjoy a constitutional right to ignore state and local labor laws, including basic minimum wage requirements. The district court said yes; the Seventh Circuit correctly reversed. No court of appeals has granted the broad immunity petitioners seek. And providing that immunity would require a vast expansion of the federal courts' power to strike down otherwise valid state laws under the dormant commerce clause—a power this Court has been reining in, not expanding, over recent decades. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Ultimately, petitioners seek error correction absent any circuit disagreement or apparent error. The petition should be denied.

STATEMENT

I. Factual Background

1. SkyWest is a commercial airline that flies commuter or regional routes for Delta, United, and other large carriers. It operates a hub at Chicago O'Hare International Airport in Chicago, Illinois. In 2015, two groups of former flight attendants sued SkyWest, alleging that SkyWest's average wages and method of calculating pay violated state and local labor laws—including applicable minimum wage laws. One group of plaintiffs consisted of flight attendants based out of SkyWest's hub in Chicago, and those flight attendants asserted only violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §201 *et seq.*, and Illinois laws and ordinances. *Hirst v. SkyWest, Inc.*, N.D. Ill. No. 1:15-

cv-02036. The other group included flight attendants based out of SkyWest's California, Arizona, and Washington airports, and they likewise asserted only violations of the FLSA and laws applicable to the states and cities where they were based. *Tapp v. SkyWest, Inc.*, N.D. Ill. No. 1:15-cv-11117. These actions were consolidated in the Northern District of Illinois. Pet. App. 4a.

2. SkyWest assigns each of its flight attendants to a specific base airport or "domicile." Every trip or "pairing" for every flight attendant begins and ends at their home base. These pairings consist of multiple flights over one to four days, and flight attendants work exclusively with crew members from their own base on each flight throughout a trip. In their suits, plaintiffs alleged that SkyWest failed to abide by the state and local labor laws of these respective domiciles for each flight attendant involved. C.A. App. 139-140, 357.

3. SkyWest admits that its "block time" policy pays flight attendants an hourly wage only for "each hour spent on the airplane after the cabin door is closed for departure until the cabin door is opened for arrival." Pet. 7. It says this rate ranges from $17.50 to $40.13. *Id.* But as any air traveler surely knows, flight attendants work *far* more than those hours. They must arrive at the airport well before their flights to check in. They ready planes for passengers and spend hours each workday loading and unloading travelers. They clean planes between trips, assist with wheelchairs, and wait out any delays before or between flights. Thus, particularly when a SkyWest flight attendant works long days and short flights, she can spend well more than half her "duty day" hard at work but earning nothing.

The Federal Aviation Administration requires SkyWest to track the length of these "duty days" and the

turn time between flights, so SkyWest knows exactly how many minutes a flight attendant worked on any given day and at any given ground stop—including the periods when the cabin doors are open. But even these "duty days" do not include all the hours flight attendants are at work and under SkyWest's control. For example, flight attendants must (like passengers) deal with the uncertainties of clearing security and checking in ahead of their flights. If they are at all early, they must begin following SkyWest's directions immediately, but these minutes or hours are not included in the duty day. C.A. App. 146, 365. Moreover, each duty day automatically ends 15 minutes after the cabin door opens on the last flight. But if the plane takes longer to unload—because of the sheer number of passengers, the need for wheelchair assistance, or any number of other factors beyond the flight attendants' control—that time doesn't show up in the "duty day" either. *Id.* at 148, 367.

Contrary to SkyWest's suggestion, the result of this system is that flight attendants frequently receive an "average hourly wage—that is, the total wages paid divided by the total hours worked," that "falls short of the applicable minimum wage." *Contra* Pet. 7. That is true whether one averages across a given duty day, multi-day "pairing," or SkyWest's own 15-day pay period. Indeed, this case involves specific allegations regarding specific periods in which specific plaintiffs did not receive the applicable minimum wage.

Take, for example, flight attendant Molly Stover, who lived and was based in Chicago, Illinois. "For the [15-day] pay period lasting from October 1 to October 15, 2012, Stover was paid $656.25 for 86.07 hours of duty time. Her actual hourly rate of pay for this period was $7.62 per hour." Pet. App. 19a. At that time, the

Illinois minimum wage was $8.25/hour. And these calculations do not include any of the off-the-clock hours she worked in the airport that didn't show up in her duty hours—work that (according to the complaint) occurred *daily* for SkyWest flight attendants. C.A. App. 165.

SkyWest's block time system is problematic for other reasons, too. For example, SkyWest bases some flight attendants in states where employees must be paid "for every hour of work." Pet. 7. It is obvious why some states choose to protect employees in this way, even if their average wage over some period would amount to a very minimal floor. Imagine leaving your home to commute to work at 8:00am, working a grueling eleven-hour day, and returning home at 8:00pm, only to find that you earned a total of $52.50 because, for reasons wholly beyond your control, the cabin door was only closed for three hours of that time. The employer chooses to employ the flight attendant in that way on that day. The indignity of compensating that day's labor so poorly is not ameliorated by the possibility that the pay will be better on another day and average out to something just above minimum wage.

In fact, the truth may be worse than the imagining. The most natural way to measure an average wage may vary based on the job, but for flight attendants, it makes sense to average earnings across "trips," because that represents a single cohesive unit of labor that a flight attendant is required to work. A given trip may be one duty day or multiple duty days, just as a single "shift" for a factory worker may span multiple calendar days if they work across the midnight hour. And SkyWest compensates many of these trips in insulting ways. From October 18, 2013 to October 20, 2013, Sarah Hudson worked a total of 36 hours and 54 minutes in duty time

and received 11 hours and 51 minutes of block-time credit, at a rate of $17.50. That works out to about $5.62/hour. On one of these days, she was forced to arrive at the airport at 4:00am. And, notably, over this entire three-day pairing, she never left California, where the minimum wage was then $8.00/hour.*

As the foregoing shows, SkyWest's method for calculating wages is itself unlawful, and would treat many workers unfairly even if SkyWest paid the minimum wage either weekly or across its bi-monthly pay periods. But, to be very clear, it doesn't do that anyway. The "essence" of the claims is not that SkyWest's "*method*" of calculating pay is some technical violation of state law (*contra* Pet. 7), but rather that SkyWest pays average hourly wages across its own, chosen 15-day pay periods that fall below the bare minimum certain states require. And if flight attendants' pay is (correctly) analyzed based on daily or per-trip averages, these violations would be far worse.

II. Proceedings Below

Congress has used its affirmative Commerce Clause power to grant airlines (and other commercial carriers like railroads and trucking companies) many special exemptions from state and federal regulation. Among these is perhaps the broadest single express preemption provision in the U.S. Code. The Airline Deregulation Act of 1978 (ADA) prohibits states from enforcing any law "related to a price, route, or service of an air carrier." 49 U.S.C. §41713(b). The same rule applies to interstate trucking under 49 U.S.C. §14501, a

* SkyWest did not produce these documents until after briefing closed, but these records can be lodged at the Court's request.

provision of the Federal Aviation Administration Authorization Act of 1994 (FAAAA). In addition, the Railway Labor Act (RLA), 45 U.S.C. §151 *et seq.*—which was extended in part to airlines in 1936—eliminates suits relating to most collective bargaining agreement violations for airline employees. *See, e.g.*, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248 (1994).

Air carriers subject to the RLA are also exempted from the FLSA's overtime regulations. *See* 29 U.S.C. §213(b)(3). The FLSA's minimum-wage requirements still apply, however. *See id.* §213(a) (exempting other employees, but not air carrier employees, from additional FLSA provisions). And Congress expressly provided that those minimum-wage requirements would not be exclusive: Even for workers subject to the federal floor, the Act emphasizes that it does not "excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter." *See id.* §218(a).

Plaintiffs in this case alleged that SkyWest's system for calculating and paying wages violated the FLSA and the local labor laws applicable to each plaintiff's "domicile" airport. *See supra* p.2. Each plaintiff asserted that the state and local laws of their domicile airport governed the entirety of their employment; plaintiffs never attempted to apply the local laws applicable where flight attendants' trips landed and turned or passed overhead. *Id.*

SkyWest responded by moving to dismiss, asserting not only the present dormant-commerce-clause theory, but also preemption under the ADA and RLA. The district court roundly rejected the latter theories. As to the ADA, it cited several authorities holding that minimum

wage laws and other "state laws of general application" are "too remote" from airline rates, routes, or services to qualify for ADA preemption. As the court put it, "no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws, [such as minimum wage laws], because their effect on price is too 'remote.'" Pet. App. 82a-83a (quoting *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am.*, 697 F.3d 544, 558 (7th Cir. 2012)) (alteration in original). As to the RLA, the district court readily held that suits that do not seek "to create a contractual right or … enforce a contractual right" are not preempted either. *Id.* at 85a (citing *Hawaiian Airlines*, 512 U.S. at 258).

The district court nonetheless held that, while Congress had decided *not* to preempt the application of higher state minimum wage laws to airlines, the Constitution itself provided what Congress did not. Purporting to apply the test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the district court concluded that the "burden imposed on [interstate] commerce" from requiring carriers to pay flight attendants applicable local minimum wages would be "clearly excessive in relation to the putative local benefits." Pet. App. 40a. In general, the district court reasoned that it would be too complicated for airlines to measure how much time flight attendants were spending in or flying over different states, and to determine which state laws applied to which flight attendants. *Id.* at 43a; *see also id.* at 76a-77a. It then concluded that this putative "labyrinth of potentially conflicting wage laws" was "precisely the type of burden on interstate commerce that the Commerce Clause prohibits." *Id.* at 77a. In so holding, the district court did not purport to identify the lo-

cal benefits of local wage regulations, let alone to balance them against the asserted burdens to determine if those burdens were "clearly excessive."

Citing two independent bases for its conclusion, the Seventh Circuit reversed.

First, the Seventh Circuit noted that because there was no sense in which the state statutes at issue imposed unique, discriminatory burdens on *interstate* commerce, they were not subject to *Pike*'s balancing test. As the court explained, under its longstanding precedent, the dormant commerce clause applies only to state laws that impose special burdens on out-of-state businesses—that is, burdens that can be said to create "discrimination against interstate commerce, 'either expressly or in practical effect.'" Pet. App. 9a (citation omitted). Conversely, "if the state law affects commerce without any reallocation among jurisdictions and does not give local firms any competitive advantage over those located elsewhere, we apply the normal rational basis standard." *Id.* at 9a-10a (citation omitted). SkyWest had not even attempted to satisfy these hurdles: It "failed to allege any discrimination against interstate commerce," and did not try to show that the burdens of applying state minimum wage laws to its flight attendants so outweighed the benefits as to fail on rational-basis review. *See id.* at 10a. "This failing preclude[d] the application of the dormant Commerce Clause" to the plaintiffs' state-law claims. *Id.*

Second, the Seventh Circuit explained that the dormant commerce clause would not apply to these state laws even had SkyWest attempted the requisite showings, because those laws had been "expressly authorized by Congress." Pet. App. 10a. In so holding, the Seventh Circuit pointed to "Section 218(a) of the FLSA."

Id. at 10a-11a. In the FLSA, Congress used its Commerce Clause power to enact a comprehensive scheme protecting workers. That scheme was detailed enough to refer specifically to air transportation workers—singling them out as a group that would be exempted from its overtime requirements, but *not* from its minimum wage rules. Nonetheless, in Section 218(a), Congress specifically authorized states and localities to enact *higher minimum wage laws* for the workers covered by the FLSA, providing that nothing in "this chapter … 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." *Id.* at 11a (quoting 29 U.S.C. §218(a)). "Because Congress expressly authorized states and localities to legislate in this realm," the Seventh Circuit held, "the application of multiple minimum wage laws to an employer cannot violate the dormant Commerce Clause." *Id.*

REASONS FOR DENYING CERTIORARI

SkyWest's petition for certiorari should be denied for three key reasons.

First, SkyWest's alleged circuit conflicts are illusory; nothing here resembles a disagreement among the circuits that supports this Court's review. That is particularly true if one considers the Seventh Circuit's actual *holding*—which SkyWest's circuit-split discussion ignores. The uncontroversial ruling below was that the Constitution permits the application of state wage and hour laws to flight attendants and other transportation employees. While SkyWest portrays the Seventh Circuit as an outlier, it does not purport to identify a single minimum wage law that has ever been struck down un-

der the dormant commerce clause for being too burdensome on interstate commerce. If there is a genuine outlier in this case, it is SkyWest's view that flight attendants cannot be protected by the minimum wage laws of any state or local government, and that only Congress can protect their working conditions. Because the Seventh Circuit's holding does not even allegedly conflict with an opinion of any other court of appeals, there is no basis for this Court's review.

Even indulging SkyWest's effort to abstract the Seventh Circuit's decision into a meta-holding about the nature of dormant-commerce-clause analysis cannot conjure the conflict SkyWest suggests. Pointing to *Park Pet Shop, Inc. v. Chicago*, 872 F.3d 495 (7th Cir. 2017), SkyWest asserts that, "[f]or the past two years," the Seventh Circuit has followed a form of dormant-commerce-clause analysis that "diverges sharply" from this Court's framework and all the other circuits'. Pet. 19. But that is not correct. The Seventh Circuit's analysis in *Park Pet Shop* follows almost word-for-word from a detailed, decades-old opinion by Judge Easterbrook. *See Nat'l Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124 (7th Cir. 1995). For whatever reason, SkyWest's petition neglects to cite that decision. *Compare* Pet. viii (omitting *National Paint*), *with Park Pet Shop*, 872 F.3d at 501-04 (discussing *National Paint* more than a dozen times). *National Paint* clarifies the Seventh Circuit's rule in a way that brings it entirely in line with this Court's approach and that of the other circuits. Like this Court and all others, the Seventh Circuit applies the dormant commerce clause by: (1) using strict scrutiny for laws that facially discriminate against interstate commerce; (2) applying *Pike*'s balancing test to

laws that "have discriminatory *practical effects* on interstate commerce—or, in the *National Paint* taxonomy, state laws that have *disparate impact* on interstate commerce," *Park Pet Shop*, 872 F.3d at 501-02 & n.1, and (3) applying only "normal rational basis" review where the state law at issue "affects commerce without any reallocation among jurisdictions and does not give local firms any competitive advantage over those located elsewhere." Pet. App. 9a-10a.

Second, the Seventh Circuit's holding—considered at any level of generality—is obviously correct. As to the actual holding, the application of state and local minimum wage laws to transportation workers is uncontroversial: No judge even called for a response on SkyWest's petition for rehearing below, and SkyWest produced no case striking down such laws as unconstitutional. Nor is there anything wrong with the Seventh Circuit's general mode of analysis. As Judge Easterbrook fulsomely explained in *National Paint*, "[i]f the balancing approach of *Pike* supplied the standard applicable to all laws affecting commerce … then judicial review of statutory wisdom after the fashion of *Lochner* would be the norm." 45 F.3d at 1131. But that is exactly the rule that SkyWest seeks: On its view, a rule of *per se* invalidity applies to state laws that discriminate against interstate commerce in any way, and *Pike* balancing applies to *everything* else. *See, e.g.*, Pet. 14. Indeed, the only limiting principle SkyWest supplies for the dormant commerce clause is winning or losing on the merits of *Pike*'s own, ill-defined balancing test, *see id.* at 34, allowing judges to strike down virtually any law where they think the local benefits might not justify the putative burdens on commerce.

Moreover, if there is one place where it would be especially inappropriate to allow judges to strike down local laws under the dormant commerce clause, this would be it. Congress has made comprehensive judgments about how much state law to preempt in the labor space and has separately decided to grant airlines and trucking companies a particularly broad immunity from all kinds of local regulations. *See supra* pp.5-6. It takes real chutzpah for SkyWest and its *amici* to seek an even broader immunity under the Constitution than the one Congress already granted. Indeed, the right way to understand that request is just as the Seventh Circuit did—as flouting not only the will of the local legislature, but of Congress as well.

Third, SkyWest vastly overstates the supposed negative consequences that will flow from the decision below. For example, it imagines that the Seventh Circuit's dormant-commerce-clause rule will bless even extreme acts of local favoritism, leading to economic balkanization. *See, e.g.*, Pet. 3-4 (hypothesizing laws creating higher minimum wage for local citizens than out-of-staters). But the Privileges and Immunities Clause of Article IV already prohibits precisely those laws, and has the added virtue of appearing in the Constitution. Moreover, as the complaint in this case explained, other airlines already comply with local labor requirements, and SkyWest has the data to do so ready at hand. Any complications the district court purported to identify here required it to apply state laws in ways other than the plaintiffs claimed—to flight attendants passing through a state's airspace or the like. But even were such complications presented here (and they are not), they can be handled with basic rules limiting a state's

prescriptive jurisdiction, rather than an unwritten constitutional provision that forecloses state legislation altogether.

If there were any reason to grant this case, it would be to decide whether it remains appropriate for federal judges *ever* to use *Pike*'s cost-benefit analysis to strike down otherwise valid laws—a question on which several Justices of this Court appear dubious. *See, e.g.*, *Wayfair*, 138 S. Ct. at 2100 (Thomas, J., concurring); *id.* at 2100-01 (Gorsuch, J., concurring). More realistically, however, the Court's mounting skepticism of this part of dormant-commerce-clause analysis, and the disagreement among its members about the basic premises, are obvious reasons to deny. Unless this Court intends to vastly expand the category of state laws foreclosed by the "Imaginary Commerce Clause," *see Comptroller v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Scalia, J., dissenting), there is no reason to review the Seventh Circuit's plainly correct judgment.

I. There Is No Genuine Disagreement Among the Courts of Appeals on Any Question Presented.

The petition offers two proposed questions for this Court's review, neither of which concerns the court of appeals' actual holding that local labor laws can be applied to airline workers. But whether one considers the actual holding or the abstracted theoretical questions petitioners present, there is no genuine split that recommends this Court's review.

A. No court of appeals has struck down a minimum-wage law on dormant-commerce-clause grounds.

The first and most significant respect in which this case fails to present any circuit conflict concerns the actual holding below. Petitioners do not purport to identify a court of appeals decision that has invalidated a local minimum wage regulation based on the dormant commerce clause, and respondents are unaware of any such decision.

The nearest decisions to the issue are from the Ninth Circuit, and both uphold the application of local state and hour regulations. In *International Franchise Ass'n v. Seattle*, 803 F.3d 389 (9th Cir. 2015), the court considered a dormant-commerce-clause challenge to a Seattle ordinance imposing a higher minimum wage at franchises of large chain restaurants. There was at least a substantial theory of disparate impact on out-of-state firms there because all the large chain restaurants were based outside Seattle. But because the *franchises* themselves were local, the Ninth Circuit reasoned that "to the extent the ordinance has an effect, its primary or perhaps exclusive effect is to harm in-state firms—franchisees located in Seattle," who would "face a higher wage requirement relative to franchisees outside of Seattle and non-franchisees." *Id.* at 406. It therefore rejected the dormant-commerce-clause challenge for failure to show a "*substantial burden* on *interstate commerce*." *Id.* at 399.

Similarly, in *Sullivan v. Oracle Corp.*, 662 F.3d 1265 (9th Cir. 2011), the Ninth Circuit considered the claim that it violated the dormant commerce clause for California to apply its minimum wage law to work per-

formed in California whether done "by California residents or by out-of-state residents." *Id.* at 1271. The court easily concluded that there "is no plausible Dormant Commerce Clause argument when California has chosen to treat out-of-state residents equally with its own." *Id.* It thus upheld the local minimum wage regulation there as well.

The Washington Supreme Court has also considered the same issue and come to the same exact conclusion. In *Bostain v. Food Express, Inc.*, 153 P.3d 846, 855 (Wash. 2007) (en banc), it held that, as long as Washington's minimum wage law was applied to all hours for drivers based out of Washington, there was "no persuasive argument" that the law would violate *Pike*.

The ultimate point is simple: No court of appeals has even seriously considered invalidating a local minimum wage regulation on dormant-commerce-clause grounds. That is unsurprising. Because local minimum wage rules impose *higher* burdens on all *local* employment, there is no plausible way for them to impose special or unique burdens on *interstate* commerce in particular. Indeed, a state's higher-than-average minimum wage laws would impose their greatest burden on firms doing business exclusively within the state.

Consider this case as an example. Every employer in Illinois must pay Illinois' minimum wage, be it a Wal-Mart or a tiny mom-and-pop store. Plaintiffs say SkyWest should pay the same minimum wage to its flight attendants based out of Illinois airports, too. The only unique "burden" this rule would impose on SkyWest (or another interstate firm) would arise from that firm trying to devise a way to legally pay Illinois-based employees *less* than the wages a firm based exclusively in Illinois would pay. SkyWest can decide whether those

wage savings justify the administrative costs it catalogs throughout its petition. *See, e.g.*, Pet. 32-34. But the *opportunity* to devise a scheme to save money on wages that no Illinois firm could save is not a *burden* on interstate commerce imposed by Illinois. And this explains why SkyWest can find no case holding that a local minimum wage rule violates the dormant commerce clause.

B. The Seventh Circuit's rule is materially indistinguishable from other courts'.

Because there is no plausible circuit conflict respecting the Seventh Circuit's holding, SkyWest tries to develop a conflict on the meta-question whether a state law is "exempt from the Dormant Commerce Clause merely because it does not discriminate against interstate commerce." Pet. i. To that end, it catalogs statements from this Court and others saying that non-discriminatory regulations are still subject to *Pike*'s balancing test, *see id.* at 13-18, and then says that the Seventh Circuit has diverged from this rule only for the past two years, *see id.* at 19. This is not a fulsome account of the rule in either the Seventh Circuit or the other courts.

Start with the Seventh Circuit. If it has a different rule, it did not start with *Park Pet Shop* in 2017. Instead, as that case makes abundantly clear, it started almost 25 years ago with Judge Easterbrook's careful opinion in *National Paint*, 45 F.3d at 1130-32—or perhaps even earlier still. *See id.* at 1130 (attributing rule to *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989)). As Judge Easterbrook explained, the Seventh Circuit "has not questioned the 'validity' of *Pike* (for an inferior court must apply the Supreme Court's decisions without regard to doubts about their wisdom)." *National Paint*, 45 F.3d

at 1130. Instead, it was "obliged to determine the proper scope of its application," *id.*, and determined that unless a law imposes some unique burden on interstate commerce in particular, "the dormant commerce clause does not replace the rational-basis inquiry with a 'broader, all-weather, be-reasonable vision of the Constitution.'" *Id.*

Accordingly, the Seventh Circuit reasonably divides laws attacked under the dormant commerce clause into three categories. First, like all other circuits, it identifies laws that are demonstrably protectionist, either because they discriminate against interstate commerce on their face, or because their disparate effects on interstate commerce are very "powerful, acting as an embargo on interstate commerce without hindering intrastate sales." 45 F.3d at 1131. These laws are subject to strict scrutiny, and almost always invalid. *Id.* Second is a category of laws "with mild disparate effects and potential neutral justifications," which "are analyzed under *Pike*." *Id.* And the "third category comprises laws that affect commerce without any reallocation among jurisdictions—that do not give local firms any competitive advantage over those located elsewhere." *Id.* These laws are not subject to *Pike*, and instead subject only to ordinary rational-basis review, because "[u]nless the law discriminates against interstate commerce expressly or in practical effect, there is no reason to require special justification." *Id.*

Notice that the Seventh Circuit uses the concept of "discrimination" against interstate commerce in *three* distinct ways, whereas SkyWest's petition uses only two. On the Seventh Circuit's view, state laws can be (1) facially discriminatory; (2) discriminatory enough in effect that they should be treated as protectionist; or

(3) mildly discriminatory in effect in a way that makes *Pike* balancing appropriate. When SkyWest suggests that strict scrutiny applies to "discriminatory" laws and *Pike* applies to everything else, it collapses these potential meanings of "discrimination," undersells the laws to which the Seventh Circuit applies dormant-commerce-clause review, and overstates the scope of that review in other courts.

Importantly, *this* is the point Judge Hamilton was making in the dissent SkyWest mistakenly invokes. *See* Pet. 22. In *Park Pet Shop*, Judge Hamilton faulted his colleagues not for eliminating *Pike* balancing altogether, but rather for "tr[ying] to confine *Pike* balancing to cases of 'discrimination' … by using a notion of 'discrimination' so broad that it applies to 'even-handed' legislation with 'only incidental' effects on interstate commerce." 872 F.3d at 504 (Hamilton, J., dissenting in part) (quoting *Pike*). Thus, there may be a difference in the precise words used by the Seventh Circuit and other courts to describe the set of laws to which *Pike* balancing applies. But the substance of the rules is the same: The courts apply *Pike* to laws that have a disparate impact on interstate commerce, but only where those disparate effects are mild enough that they may be justified, and do not evince outright protectionism.

The Seventh Circuit is not alone in struggling to define the set of laws to which *Pike* applies, for many courts (including this Court) have noted the difficulty in drawing the line between the "discrimination" that merits strict scrutiny and the kind of disparate impact on interstate commerce that leads to *Pike*. Put another way, it is well-recognized that the set of laws which "discriminate against interstate commerce … in practical

effect" is *not* universally subject to strict scrutiny, because most kinds of disparate impact are clearly subject only to *Pike* balancing. *Contra* Pet. 13-14 (suggesting, incorrectly, that this Court applies strict scrutiny to all laws with disparate "practical effect[s]" on interstate commerce). As this Court has put it, "there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

Even the cases on which SkyWest most heavily relies make this point explicitly. As this Court made clear in *GMC v. Tracy*, 519 U.S. 278 (1997), in the very footnote SkyWest cites, *see* Pet. 15 (citing *Tracy* note 12):

> [O]ur cases have indicated that even nondiscriminatory state legislation may be invalid under the dormant Commerce Clause, when, in the words of the so-called *Pike* undue burden test, "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." There is, however, no clear line between these two strands of analysis, and *several cases that have purported to apply the undue burden test (including* Pike *itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations*[.]

519 U.S. at 298 n.12 (emphasis added).

Simply put, the only "conflict" at issue here is over whether to classify *Pike* cases as involving a form of disparate impact "discrimination" that *this Court itself* has identified as present in *Pike* and its progeny, or whether to call laws that impose disparate burdens on interstate

commerce by some other name. This is a difference in wording but not substance. Indeed, consider *Sullivan*—the Ninth Circuit decision described above. It recited the same dictum on which SkyWest relies over and over again: that even "[i]f a statute 'regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Compare* 662 F.3d at 1271 (quoting *Pike*), *with* Pet. 14-15 (myriad similar quotes). But *Sullivan* then immediately concluded that there was "no plausible Dormant Commerce Clause argument when California has chosen to treat out-of-state residents equally with its own." 662 F.3d at 1271. SkyWest would presumably classify the Ninth Circuit as following a different rule from the Seventh Circuit—in fact, SkyWest does just that. *See* Pet. 16-18. But it is abundantly clear that both require some form of disparate impact between interstate and intrastate commerce before applying *Pike* balancing, whether it takes the form of outright discrimination or more subtle, incidental discriminatory impacts.

C. There is no conflict over whether Congress has approved local minimum wage regulations.

SkyWest's second question presented is just like its first. As an initial matter, SkyWest does not even attempt to establish a circuit conflict respecting the actual holding below. It does not purport to identify any court that has held that local minimum wages are subject to dormant-commerce-clause challenge despite Congress's extensive, contrary legislation in this area, and it does not purport to identify any court that has held Section

218(a) insufficient to authorize local regulation. Having failed to identify any conflictual holdings, SkyWest cannot justify this Court's plenary review. This Court could end its consideration there.

Again, in response to this weakness, SkyWest tries to develop a conflict over an abstract question—this time, whether "a state law [is] exempt from the Dormant Commerce Clause merely because Congress has passed a federal statute saving the law from preemption under that statute." Pet. i. But that level of abstraction makes the question unintelligible. In particular, it relies on the notion that the FLSA's specific references to both airline employees and higher state minimum wages is "merely" a savings clause, and that this Court has a set of clear principles dividing mere savings clauses from provisions that satisfy the "clear-statement rule" that SkyWest proposes. *See* Pet. 24-25. But that, again, is not correct: The analysis required is a contextual inquiry into "congressional intent," *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984), including (grossly outdated) inquiries into legislative history and the like that pervade each of the authorities on which SkyWest relies. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) (rejecting argument that congress authorized state regulation based on silence in legislative history); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (same); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 49 (1980) (same).

SkyWest can only give the contrary impression (*i.e.*, that a clear-statement rule exists, and that the Seventh Circuit has rejected it) by inserting the word "only" in front of quotations to transform sufficient conditions into necessary ones. *See, e.g.*, Pet. 24. Indeed, in the

very case that SkyWest cites, this Court expressly *rejected* a clear-statement rule that would require Congress to expressly refer to the dormant commerce clause or the like to authorize state regulation. *See S.-Cent. Timber*, 467 U.S. at 91 ("There is no talismanic significance to the phrase 'expressly stated[.]'"); *contra* Pet. 24 (suggesting Court has held that Congress must expressly state intent to shut off dormant-commerce-clause review).

The real rule is that Congress must "affirmatively contemplate [the] otherwise invalid state legislation." *See S.-Cent. Timber*, 467 U.S. at 91-93. And that is *exactly* what the Seventh Circuit found here. *See* Pet. App. 10a-11a (concluding that FLSA "expressly authorized" states to impose higher minimum wages). SkyWest may disagree with the Seventh Circuit's conclusion, but it applies the same legal rule as this Court and every other.

Indeed, from the (controlling) perspective of congressional intent, the FLSA is plainly different from a "mere" savings clause for several reasons. These are explained in greater depth below, but it is especially notable that Section 218(a) does not just save state laws about labor in generic fashion, but rather expressly contemplates *minimum wage laws* where those minimum wages are *higher* than the FLSA requirement—the exact kind of law at issue here. This is the polar opposite of the kind of savings clause this Court found inadequate in *Lewis*, 447 U.S. at 47-48. And, meanwhile, the only example SkyWest gives of an act of Congress that is adequate to authorize state legislation—the McCarran-Ferguson Act, 15 U.S.C. §1011 *et seq.*—was itself primarily intended as a savings clause that would ex-

empt certain state insurance regulations from the Sherman Act. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 417-18 (1946) (explaining that McCarran Act was passed in response to "precedent-smashing" holding in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), that Sherman Act applied to regulations on interstate sale of insurance).

Ultimately, there is no disagreement about the governing rule—the Seventh Circuit simply applied this Court's standard to a unique statute no other court has considered, and it reached a conclusion SkyWest does not like. That does not justify this Court's review.

II. The Decision Below Is Plainly Correct.

SkyWest acknowledges that it challenges two independent holdings, both of which would have to be in error for reversal. That vehicle problem aside, however, *both* holdings below are obviously correct.

A. *Pike* balancing does not apply to neutral local minimum wage laws.

As multiple courts have held, there is "no plausible Dormant Commerce Clause argument" against a local labor law that imposes identical obligations on local and out-of-state workers and businesses. The minimum wage laws at issue here fit squarely within that box. Local minimum wages raise costs for *local* companies; they do not impose any unique costs or compliance burdens on out-of-state entities, and they certainly do not provide a business advantage to local competitors over their interstate rivals. The Seventh Circuit calls such laws "non-discriminatory" and so does not analyze them under *Pike*; other courts (like this one) say such laws cannot plausibly be challenged under the dormant commerce clause because they impose no special burdens on

interstate commerce. In either phrasing, the holding is obviously correct.

SkyWest proposes a very different rule. On its view, even if a state law imposes no special burdens on interstate commerce—indeed, even if its effect is to *disadvantage* local firms over interstate rivals—that law is still subject to challenge on the theory that the burden on commerce generally (including interstate commerce) is too great. That cannot be right. As Judge Easterbrook explained in *National Paint*, this view ends in pure *Lochner*ism. *See* 45 F.3d at 1131-32.

In fact, consider the following case. Suppose a few states pass laws providing that bakery workers cannot work more than 40 hours/week. *See Lochner v. New York*, 198 U.S. 45, 52 (1905). A nationwide grocery chain complains: Some of its stores bake their own bread; states define "bakery" differently; states (might) have different rules about who in a grocery store counts as a bakery worker; some of its workers with 60-hour weeks might only work in the bakery a few hours each day; and all of these complications make the law too burdensome to apply to this interstate firm. *Cf.* Pet. 32-34 (cataloging similar complaints). SkyWest's position is that—precisely because this law is "evenhanded" and imposes only "incidental" burdens on interstate commerce—*Pike* balancing *does* apply and judges are free to compare their assessments of the burdens on the national grocer against their views of how beneficial it is for government to limit a willing worker's hours. Surprise! It turns out the law does "enact Mr. Herbert Spencer's Social Statics." *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

Indeed, this case itself shows that the threat of *Lochner*ism from SkyWest's rule is all too real. The district court resolved this case *against plaintiffs* on a motion to dismiss, with no factual record whatsoever on the actual burdens SkyWest or other airlines would face from plaintiffs' proposed application of state law. And, much worse than that, the district court didn't acknowledge a *single local benefit* from the application of a city's local minimum wage law to local laborers who live in and are based out of that locality, let alone perform the necessary balancing of these incommensurate values. As this shows, applying *Pike* balancing to every law only invites district courts to substitute their own judgments about wise policy for local elected officials'.

Thus, the better rule is certainly not that *Pike* applies to every evenhanded regulation that incidentally burdens commerce. Instead, *Pike* applies to laws that impose unique burdens on *interstate* commerce, *provided* those burdens are the incidental products of an evenhanded regulation, and not evidence of outright protectionism. This explains why even this Court has clarified that "several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations." *See Tracy*, 519 U.S. at 298-99 n.12.

It also explains why it is all-but impossible to find modern examples of this Court striking down state laws because it would be too complicated for multi-state firms to comply with multi-state regulation. Indeed, the trend has been the exact opposite: This Court has been eliminating barriers to state regulation where it has previously thought multi-state compliance would be too hard, *see Wayfair*, 138 S. Ct. 2080 (2018), and it has

now centered dormant-commerce-clause analysis entirely around the goal of preventing protectionism. *See, e.g.*, *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) ("The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'") (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)). If anything, this Court has signaled deep skepticism towards using *Pike* to invalidate non-discriminatory state laws, "even [when] a *Pike* examination might generally be in order in this type of case." *Id.* at 353 (refusing to engage in *Pike* balancing because the "Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary"). In short, no case from this Court in decades provides support for the kind of free-form judicial balancing—unmoored from concerns of discrimination—SkyWest proposes here.

In fact, *Pike* itself does not support that approach. In *Pike*, Arizona passed a statute that regulated how melons grown in the state could be shipped, and forbade shipping unpacked melons. The point of the law was to ensure the good reputation of Arizona melons by preventing them from being packed in ways that concealed bad fruit. *See* 397 U.S. at 142-44. But the law had the incidental effect of forcing an Arizona grower that packed its melons in nearby Blythe, California to relocate its packing facilities to Arizona at huge expense. *Id.* at 145. Critically, this Court noted that the "*nature* of that burden is, constitutionally, more significant than its extent," emphasizing that it had "viewed with particular suspicion state statutes requiring business

operations to be performed in the home State that could more efficiently be performed elsewhere." *Id.* Put otherwise, it was because this law incidentally imposed a special burden on interstate commerce—a burden that would have been *per se* unlawful if imposed directly—that this Court held the application of the Arizona law invalid. *Id.* It was not because it would be complicated for nationwide firms who did pack their fruit in Arizona to comply with the packing requirements of all fifty states. *See id.* at 143 (noting that, "as applied to Arizona growers who package their produce in Arizona, we may assume the constitutional validity of the Act"). And it was not even based on a free-form balancing of the general economic burdens on the interstate grower against the benefits of the fruit-packing law.

Even putting all this aside, there is another insurmountable problem with SkyWest's approach. Plaintiffs' sole theory in this case was that a flight attendant's entire employment is governed by the local law of her domicile airport—for example, that Chicago-based flight attendants needed to be paid the Illinois minimum wage for all their work. *See supra* p.6. On that theory, the law is very easy for SkyWest to apply, and there is no risk whatsoever of conflicting regulations. SkyWest (and the district court) for some reason considered compliance burdens that *could* be imposed on SkyWest *if* states attempted to extend their prescriptive jurisdiction over flight attendants in *other* ways that the plaintiffs did not assert here. But this is an as-applied challenge: SkyWest itself argues that local minimum wage laws are invalid only as applied to their flight attendants, not to everyone. Accordingly, the only appropriate burdens to analyze are the burdens that arise from the law as the plaintiffs propose to apply it.

Because SkyWest has never developed any evidence that applying the law based exclusively on the domicile airport is difficult—and it would, in fact, be very easy—SkyWest cannot prevail, and this Court would be wading into the issue without any useful record at all.

B. Congress has authorized state regulation of airline employees' minimum wages.

The Seventh Circuit was also correct to conclude that Congress has expressly contemplated laws like those the plaintiffs relied on here. That is true both because of unique features of the FLSA, and because of the critical context provided by other federal laws.

As noted above, the FLSA does not merely save all state labor regulations from its own preemptive effects. Instead, it contains two specific indications that Congress intended airline workers in particular to remain protected by state minimum wage laws. First, in Section 213, Congress specifically identified the employees of air carriers as subject to the FLSA's minimum-wage regulations, but not its overtime rules. *See* 29 U.S.C. §213(a), (b)(3). Then, in Section 218, Congress specifically provided that neither the FLSA's federal minimum wage nor anything else in the statute would "excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter." 29 U.S.C. §218. This leads to the inexorable conclusion that Congress "affirmatively contemplate[d] [the] otherwise invalid state legislation," *see S.-Cent. Timber Dev., Inc.*, 467 U.S. at 91, concluding that—even though it had provided for a uniform minimum wage—states should still be able to impose a *higher* wage for *this specifically contemplated class* of employee among others.

Put another way, Congress decided in the FLSA to use its Commerce Clause power to *preempt* state minimum wage laws for flight attendants below the federal floor, but *not* state laws above it. That kind of Commerce Clause legislation demonstrates far more express contemplation and approval of the relevant local laws than a mere savings clause.

The broader context of the U.S. Code makes this even clearer. Congress knows that airlines and trucking companies have complaints about the difficulties of dealing with multistate regulation—the same complaints SkyWest and its *amici* are airing here. Having heard those cries, it crafted for these industries a hugely broad preemption clause, foreclosing any local legislation even "related to" a "price, route, or service" of such companies. *See supra* pp.5-6. But, even then, Congress decided not to cut off state laws related to these firms' employment practices. Particularly when this reality is combined with the express contemplation of state minimum wage laws in the FLSA, the only appropriate inference is that Congress has affirmatively contemplated, and decided not to foreclose, the application of higher state minimum wages to airline employees.

SkyWest's contrary position shows substantial chutzpah—and well demonstrates the wisdom with which this Court has limited dormant-commerce-clause interventions over recent decades. The judgment SkyWest seeks to impose upon this Court is not just better suited to Congress; it is one Congress *already made*—determining that the burdens on interstate commerce did not justify preempting state regulation of air carriers' employment practices. Having gone to Congress and failed to secure exemption from these state laws through (at least) two separate avenues, SkyWest and

its *amici* believe it appropriate for the Court to grant them the same exemption anyway under the Constitution. This disrespects the judgments of both state and local authorities and the federal Congress. If Congress thinks it necessary to preempt a field of state regulation, the Supremacy Clause permits that. But striking down a state law Congress has contemplated and appears to have approved, on the ground that Congress might later fix that constitutional error with a "clear statement" of its manifest contrary intent, ignores the constitutional injury to states in the interim, and likewise ignores the available evidence from the paramount constitutional authority as to its views on the matter.

Here, the right inference regarding congressional intent is unambiguous. The court of appeals' judgment was correct and does not merit review.

III. SkyWest Overstates the Importance of the Question Presented.

In a very brief discussion, SkyWest suggests that this case is important because the Seventh Circuit's analysis will authorize discriminatory state labor laws, while hamstringing the operations of interstate carriers. Both these concerns are vastly overstated. Among other things, SkyWest simply ignores the doctrines that can appropriately control for the horribles it puts on parade.

First, there is no basis for SkyWest's assertion that the burdens of compliance authorized by the holding below will put air carriers like SkyWest out of business or subject them to intolerable costs. Other airlines have created payroll systems that comply with applicable state and local minimum wage laws without serious trouble. C.A. App. 149, 368. Moreover, the application

of state and local law that the plaintiffs sought here was very straightforward: SkyWest was only obligated to ensure that Chicago-based flight attendants were paid Chicago minimum wage for their entire work day or multi-day trips, each of which began and ended in Chicago. The information necessary to carry out that calculation already appears on each flight attendant's schedule records. *See, e.g.*, *id.* at 144, 363. The principal compliance burden for SkyWest here involves a calculator.

Second, and relatedly, even if the issue were properly presented here, there is no reason to fear that the result of the Seventh Circuit's holding would be to subject air carriers to multiple overlapping state regulations as they flew through different states' airspace or the like. It is a commonplace issue in employment cases that employees often work in more than one state, and courts routinely resolve such issues—including in cases almost identical to this one—through ordinary choice-of-law analysis. *See, e.g.*, *Bostain*, 153 P.3d at 856 (choosing Washington law for Washington-based interstate drivers and noting "strong argument" that "that employer would not be required, under a choice of laws analysis, to comply with another state's wage and hour statutes as to that employee"); *Browne v. P.A.M. Transp. Inc.*, 2019 WL 333569, at *4-5 (W.D. Ark. Jan. 25, 2019) (choosing Arkansas law to govern minimum wage claims of Arkansas-based interstate drivers); *Caballero v. Healthtech Res., Inc.*, 2018 WL 949205, at *4 (D. Ariz. Feb. 20, 2018) (choosing Arizona minimum wage law over Pennsylvania's based on contract). SkyWest's argument asks the Court to cure with amputation a problem that arises only if one ignores all other, readily available remedies. Indeed, plaintiffs in this

case already cured SkyWest's problem by proposing to apply *only* the law governing each plaintiff's domicile airport. The brute-force remedy of field preemption under the dormant commerce clause is thus unnecessary.

Finally, SkyWest hypothesizes that, if the Seventh Circuit's FLSA analysis stands, states will use it as an excuse to enact minimum wage laws that favor their own citizens. *See* Pet. 3-4. But that is the archetypical violation of the Privileges and Immunities Clause. *See, e.g.*, *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (clause prohibits "discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State"). There is no reason to expand the reach of an unwritten constitutional doctrine to deal with a problem for which the Framers already crafted a solution.

IV. *Pike*'s Dubious Foundation Also Recommends Denying Certiorari.

The foregoing points at a final reason to deny certiorari. Several Justices of this Court have criticized the dormant commerce clause in general, and *Pike* balancing in particular, as replacing written constitutional provisions with an atextual and ill-suited grant of wide-ranging power to the judiciary. *See, e.g.*, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment) (*Pike* balancing "inquiry is ill suited to the judicial function and should be undertaken rarely if at all"); *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting) (*Pike* "invites us, if not compels us, to function more as legislators than as judges."); *Wayfair*, 138 S. Ct. at 2100-01 (Gorsuch, J., concurring) ("Whether and how much of

this can be squared with the text … or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day."). Indeed, even majorities of this Court have concluded that *Pike* cannot be applied to cases where it appears applicable because of the judiciary's limited competence. *See Davis*, 553 U.S. at 353. Expanding the murky bounds of *Pike* would run directly contrary to this trend.

Accordingly, if this Court grants certiorari, respondents will argue that the Seventh Circuit should be affirmed because *Pike*'s balancing test should be jettisoned—either entirely, or at least in cases where protectionism is not at issue. That raises the likely possibility that this case will end in a fractured opinion that does not resolve the questions presented. SkyWest presents only abstract, theoretical inquiries about how dormant-commerce-clause analysis should work, and disagreements among members of this Court about basic premises (like whether the dormant commerce clause exists) are particularly likely to confound such abstract queries. Thus, while granting here might allow the Court to consider finally interring at least part of *Pike*, it is more likely to result in no concrete result at all.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Gregory F. Coleman
Counsel of Record
Lisa A. White
Greg Coleman Law PC
800 S. Gay Street
Suite 1100
Knoxville, TN 37929
(865) 247-0080
greg@gregcolemanlaw.com

Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636

April 24, 2019