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

REPLY IN SUPPORT 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
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE SEVENTH CIRCUIT HAS GUTTED THE DORMANT COMMERCE CLAUSE 1

A. The Seventh Circuit Does Not Apply *Pike* Balancing Like Other Courts 1

B. The Seventh Circuit's Decision Is Wrong and Dangerous 4

II. THE SEVENTH CIRCUIT HAS VASTLY EXPANDED STATE AND LOCAL POWER UNDER THE FLSA 8

A. In the Seventh Circuit—and Only in the Seventh Circuit—a Saving Clause Justifies Discriminatory Laws 8

B. The Seventh Circuit's Mistaken View of the FLSA Has Serious Consequences 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Bibb v. Navajo Freight Lines, Inc.,
359 U.S. 520 (1959) 5, 6

Bostain v. Food Express, Inc.,
153 P.3d 846 (Wash. 2007) 1, 3, 6, 9

Brown & Williamson Tobacco Corp. v. Pataki,
320 F.3d 200 (2d Cir. 2003) 1, 2

Colon Health Ctrs. of Am., LLC v. Hazel,
733 F.3d 535 (4th Cir. 2013) 2

Ford Motor Co. v. Texas Dep't of Transp.,
264 F.3d 493 (5th Cir. 2001) 2

Fulton Corp. v. Faulkner,
516 U.S. 325 (1996) 12

Gen. Motors Corp. v. Tracy,
519 U.S. 278 (1997) 6

Int'l Franchise Ass'n v. City of Seattle,
803 F.3d 389 (9th Cir. 2015) 9

Kassel v. Consol. Freightways Corp. of Del.,
450 U.S. 662 (1981) 5

Lewis v. BT Inv. Managers, Inc.,
447 U.S. 27 (1980) 9

Nat'l Elec. Mfrs. Ass'n v. Sorrell,
272 F.3d 104 (1st Cir. 2001) 10

Oman v. Delta Air Lines, Inc.,
889 F.3d 1075 (9th Cir. 2018) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Park Pet Shop, Inc. v. City of Chicago,
872 F.3d 495 (7th Cir. 2017) ..... *passim*

Paul v. Virginia,
75 U.S. (8 Wall.) 168 (1868) 12

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) ..... *passim*

S.-Cent. Timber Dev., Inc. v. Wunnicke,
467 U.S. 82 (1984) 9, 11

S. Pac. Co. v. Arizona ex rel. Sullivan,
325 U.S. 761 (1945) 4, 6, 8

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 3, 9

Sporhase v. Nebraska ex rel. Douglas,
458 U.S. 941 (1982) 10

Sullivan v. Oracle Corp.,
254 P.3d 237 (Cal. 2011) 1, 3

United States v. Pub. Utils. Comm'n of Cal.,
345 U.S. 295 (1953) 9, 11

Wyoming v. Oklahoma,
502 U.S. 437 (1992) 10, 11

Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health,
654 F.3d 919 (9th Cir. 2011) 11

STATUTES

42 U.S.C. § 6929 10

Consider a flight attendant who lives in Vancouver, Washington, but works out of the airport across the river in Portland, Oregon. Under the Seventh Circuit's unusual view of the dormant Commerce Clause, it does not matter whether she is covered by Washington's wage-and-hour laws for all of her time, no matter where she actually works. *See Bostain v. Food Express, Inc.*, 153 P.3d 846 (Wash. 2007) (En Banc). Nor does it matter whether she is covered by California's laws for the time she spends there. *See Sullivan v. Oracle Corp.*, 254 P.3d 237 (Cal. 2011). Nor, finally, does it matter whether Oregon—or each of the many states along her ever-changing flight paths—would also apply its laws to all or part of her travels. In the Seventh Circuit's outlier opinion, this welter of conflicting obligations does not even trigger the mildest form of dormant Commerce Clause scrutiny. Indeed, it thinks that Congress authorized states and municipalities to *facially* discriminate against interstate commerce in wage legislation.

That "logistical nightmare" is no way to run the airplanes. App. 47a. This Court should intervene—or invite the Solicitor General to provide the United States' view.

I. THE SEVENTH CIRCUIT HAS GUTTED THE DORMANT COMMERCE CLAUSE

A. The Seventh Circuit Does Not Apply *Pike* Balancing Like Other Courts

1. As SkyWest explained, other circuits have subjected to *Pike* balancing a host of laws that did not discriminate against interstate commerce but nonetheless incidentally affected it. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200,

216-17 (2d Cir. 2003) (prohibiting in-state and out-of-state cigarette shippers from selling directly to customers); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 545-49 (4th Cir. 2013) (requiring in-state and out-of-state firms to secure a "certificate of need" before constructing new medical facilities or adding new equipment to existing ones); *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 503-04 (5th Cir. 2001) (prohibiting in-state and out-of-state manufacturers from selling cars).

These courts would also apply *Pike* balancing to the wage-and-hour claims here. Instead of paying flight attendants like Respondents under the terms in their collective bargaining agreements, airlines facing such claims must determine the scope of each state's laws, track time spent within each state, apply various (sometimes inconsistent) calculation methods, and do it all again every month to adjust for everyone's varying flight schedules. App. 43a-47a. And that's just for wage claims; wage-payment, wage-statement, meal-break, and rest-break laws could impose more burdens still.

These harms fall more heavily on interstate transportation (and aviation in particular) than on commerce generally. Whatever difficulties there are in running "Wal-Mart or a tiny mom-and-pop store," BIO 15, they do not include keeping up with the dizzying application of wage-and-hour laws to employees who constantly cross state lines. The Seventh Circuit nevertheless refused to apply *Pike* because, in that circuit, "*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application." App. 10a (emphasis in original).

2. Respondents brush this disagreement aside, claiming that the Seventh Circuit's "actual holding" does not create a conflict because no circuit has yet rebuffed the novel application of wage-and-hour laws to airline employees. BIO 14-15. But a case's holding includes "not only the result" but also the necessary portions of the "rationale" justifying that result. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). The Seventh Circuit's diminishment of *Pike*—an approach that applies across the board—thus squarely conflicts with other courts' law. And as Respondents tacitly concede, *see* BIO 23-24, it even conflicts with *Respondents*' cases, which upheld (markedly different) wage claims only *after* applying *Pike*. *See, e.g.*, *Bostain*, 153 P.3d at 855-56 (minimum-wage law applied to out-of-state hours worked by a Washington trucker after "balancing … under *Pike*"); *Sullivan*, 254 P.3d at 244 (applying California's minimum-wage laws to a Colorado training instructor who worked a week in California after applying *Pike*).

Respondents next assert that there is no split because, for 25 years, the Seventh Circuit has simply used the word "discriminatory" in a bizarre fashion: in Chicago, it refers not just to facial discrimination, or even to that plus neutral legislation with significant disparate effects on interstate commerce, but also to even-handed laws with "mild" disparate effects—that is, to laws covered by *Pike*. BIO 17-18. However Judge Easterbrook once meant to use this term, the Seventh Circuit *now* limits *Pike* in ways that other courts do not. One Seventh Circuit judge has recognized as much: by applying *Pike* only where the challenged law "gives local firms a[] competitive advantage over those located elsewhere," the Seventh

Circuit's discrimination-only rule violates *Pike*. *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 504, 506 (7th Cir. 2017) (Hamilton, J., dissenting in part) (internal quotation marks omitted).

This case itself proves that the Seventh Circuit's approach differs in "substance," not just "wording." *Contra* BIO 20. Again, the same circuits that applied *Pike* to a neutral certificate-of-need requirement and a neutral ban on sales by manufacturers would not ignore it entirely when it came to state laws that gum up interstate airline operations. *See supra* 1–2. Yet that is precisely what the Seventh Circuit did, all because it did not find "discrimination." App. 10a.

Finally, Respondents assert that the real confusion centers on which facially neutral laws must hurdle strict scrutiny and which face only *Pike*. BIO 18-20. Whatever disagreement there might be on that issue, here the Seventh Circuit refused to apply even the lowest form of dormant Commerce Clause review. That result is irreconcilable with other courts' approach to *Pike* balancing. *See* Pet. 13-19; *supra* 1-2.

B. The Seventh Circuit's Decision Is Wrong and Dangerous

1. *Pike* balancing clearly applies to Respondents' wage-and-hour claims under this Court's precedents. Before and after *Pike*, this Court has balanced the local interest in neutral state laws affecting transportation with the burdens those laws place on the instrumentalities of interstate commerce. *See S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 781-82 (1945) (invalidating neutral train-length limit because it "increase[d] the danger of accident" while

having an "adverse effect on transportation efficiency"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 530 (1959) (striking down a "nondiscriminatory" mudguard requirement because of its "clear burden on commerce"); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 671, 678 n.26 (1981) (plurality op.) (striking down a non-"discriminat[ory]" trailer restriction under *Pike*). The burden Respondents' wage-and-hour claims would place on interstate traffic is the same—the "logistical nightmare" of trying to comply with a swarm of ever-changing, often-conflicting requirements over things like the calculation of minimum wages, the timing of wage payments, and the content of wage statements.

Respondents do not address these cases. Instead, they assert that applying them would lead to *Lochner*ism, because (on their reading) SkyWest thinks *Pike* balancing applies to every law. *See* BIO 24-25. But SkyWest believes that *Pike* balancing applies only where this Court and other courts have applied it: where a state law imposes non-discriminatory burdens *on interstate commerce*—that is, burdens on interstate commerce that do not rise to a level triggering strict scrutiny. That is the approach of every court of appeals besides the Seventh Circuit; each would apply *Pike* balancing to Respondents' claims, because the incidental burdens they would impose fall more heavily on interstate commerce, even if those burdens don't rise to the level that the Seventh Circuit now requires to show "discrimination."

Respondents also claim that it would be wrong to apply *Pike* here because the dormant Commerce Clause now turns "entirely [on] … preventing protectionism." BIO 26. This is an argument to overturn

Pike and its relatives, not to apply them. While some of these cases may have involved economic protectionism, others invalidated "genuinely nondiscriminatory" state laws because the burdens imposed "undermined a compelling need for national uniformity." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997). Indeed, *Pike*'s namesake test says so: "[w]here the 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." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added).

Finally, Respondents assert that *Pike* balancing is inappropriate because their "sole theory … was that a flight attendant's entire employment is governed by the local law of her domicile airport," making it "very easy" for SkyWest to comply. BIO 27. But states have not defined their wage-and-hour laws as Respondents propose: Illinois' minimum-wage law applies only to "*Illinois* employees for conduct occurring in Illinois," California applies its overtime laws to certain California work by out-of-state employees, and Washington applies its minimum-wage law to out-of-state work by Washington residents. App. 41a (emphasis added) (collecting cases); *see Bostain*, 153 P.3d at 848. Courts assessing Respondents' claims *must* consider the burdens such claims threaten in light of other states' laws. *See, e.g.*, *S. Pac.*, 325 U.S. at 773-74 (noting potential conflicts with other states' rules); *Bibb*, 359 U.S. at 527-28 (same).

2. Allowing Respondents' wage-and-hour claims to proceed will seriously jeopardize interstate trans-

portation. *See* American Trucking Associations Br. 11-19; Airlines for America Br. 10-22. Respondents insist these harms will not come to pass, first asserting that other airlines have somehow figured out how to comply. *See* BIO 30. Other plaintiffs don't think so. *See, e.g.*, *Ward v. United Airlines, Inc.*, No. CGC-19-575737 (Cal. Super. Ct.) (filed Apr. 26, 2019); *Fowers v. Am. Airlines, Inc.*, No. RG19003762 (Cal. Super. Ct.) (filed Jan. 18, 2019). Indeed, the very airline they cite as an example finds itself in the crosshairs of a lawsuit. *Compare* BIO 30 (citing C.A. App. 149, 368), *with Oman v. Delta Air Lines, Inc.*, 889 F.3d 1075, 1078 (9th Cir. 2018) (certifying whether California's minimum-wage law applies to flight attendants based elsewhere who worked "hours and minutes, not days, in California" to the California Supreme Court). And even then, the way Respondents suggest other airlines have "complied" is by simply paying high enough wages to comply with *every* state's laws. *See* C.A. App. 149, 369. That proves SkyWest's point, not Respondents'.

Respondents reiterate that compliance will be easy because their claims apply only the laws of each flight attendant's base airport. *See* BIO 31. Respondents self-serving limitations cannot bind other plaintiffs, who are already bringing the more expansive claims discussed above. Moreover, Respondents' proposed limits are illusory anyway. *See supra* 6.

Respondents also suggest that choice-of-law principles will solve the transportation industry's headaches. *See* BIO 31. This suggestion is hard to take seriously. Modern choice-of-law analysis is notoriously unclear, and forcing employers to guess how it will shake out (on pain of damages) itself burdens

interstate commerce. And what happens when the states disagree? Will this Court develop constitutional law to specify when California may provide overtime for work there, or whether Illinois may apply its wage-statement laws to those who reside in states with differing rules but work out of O'Hare?

Finally, Respondents suggest that the Seventh Circuit's misapplication of the dormant Commerce Clause should stand because Congress has preempted other kinds of claims involving airlines. *E.g.*, BIO 29-30. Again, this is an invitation to overturn settled precedent, not to enforce it. Congress has "undoubted power" to "exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce," but it has "general[ly] … left it to the courts to formulate the rules … interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn." *S. Pac.*, 325 U.S. at 769, 770.

II. THE SEVENTH CIRCUIT HAS VASTLY EXPANDED STATE AND LOCAL POWER UNDER THE FLSA

The Seventh Circuit also held—as to Respondents' minimum-wage claims alone, *contra* BIO 23—that Congress authorized states to facially discriminate against interstate commerce. App. 11a. That mistaken conclusion deserves review too.

A. In the Seventh Circuit—and Only in the Seventh Circuit—a Saving Clause Justifies Discriminatory Laws

1. A statute that merely "define[s] the extent of … federal legislation's pre-emptive effect on state law" does not authorize dormant Commerce Clause

violations, *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 48-49 (1980), because it lacks the requisite "unmistakably clear" indication, *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984), that Congress "desire[d] to alter the limits of state power otherwise imposed by" that Clause, *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 304 (1953).

Other lower federal courts have followed this rule. *See* Pet. 26-28 (collecting cases). But the Seventh Circuit concluded that the FLSA "expressly authoriz[es]" discriminatory minimum-wage laws simply because it states that "[n]o provision of 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." Pet. App. 10-11a (quoting 29 U.S.C. § 218(a)).

2. Respondents complain that this disagreement is not a circuit split because no other court has specifically addressed the FLSA. *See* BIO 20. That absence reflects only the outlandishness of the Seventh Circuit's holding. Indeed, if the Seventh Circuit were right, Respondents' own favorite cases engaged in utterly unnecessary dormant Commerce Clause analyses because, in fact, Congress has authorized discrimination. *See, e.g.*, *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 399-407 (9th Cir. 2015) (minimum-wage ordinance applied to franchisees); *Bostain*, 153 P.3d at 854-56 (minimum wage for hours worked out-of-state by in-state resident).

Moreover, a case's "holding" includes the reasoning "necessary to th[e] result." *Seminole Tribe*, 517 U.S. at 67. That reasoning here was straightforward: a saving clause alone—which was all the panel cit-

ed—shows "express[] authorization" for discriminatory conduct. App. 10-11a. A later Seventh Circuit panel faced with the saving clauses in the other circuits' cases would thus have no choice but to find express authorization.

Finally, Respondents suggest that there is no split because, supposedly unlike other saving clauses, the FLSA "expressly contemplates *minimum wage laws* where those minimum wages are *higher* than the FLSA requirement." BIO 22 (emphasis in original). This is baffling. The point of a saving clause is to let states enact different—usually tougher—standards. In fact, many expressly preserve more "stringent" state laws. 42 U.S.C. § 6929. Courts have nonetheless routinely held that such laws do not thereby exhibit the "unambiguous [congressional] intent" required to "shield" state regulation from "dormant Commerce Clause scrutiny." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (1st Cir. 2001). Only the Seventh Circuit disagrees.

B. The Seventh Circuit's Mistaken View of the FLSA Has Serious Consequences

1. The Seventh Circuit's FLSA holding is also wrong. *See* Pet. 23-26. Respondents first insist that this Court has not required clear evidence of Congress's intent to confer such extraordinary power on states. BIO 21. But the Court can speak for itself: "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve … a violation of the Commerce Clause." *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *see also, e.g.*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982) ("In the instances in which we have

found such consent, Congress' intent and policy to sustain state legislation … was expressly stated."). Thus, while this Court has not required "talismanic" words, *Wunnicke*, 467 U.S. at 91, it has required a "clear statement," *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 933 (9th Cir. 2011).

Respondents next paper over the holes in the decision below, pointing to provisions other than the saving clause to show that Congress authorized facially discriminatory state wage laws. *See* BIO 28 (noting that the FLSA's maximum-hour rules do not apply to airline employees); BIO 29 (noting preemption provisions in other statutes).

This argument is more baffling still. How could Congress's decision *not* to guarantee maximum airline hours—or to preempt other airline-related regulation—somehow demonstrate that the FLSA is one of those "unique" federal statutes that authorizes *discriminatory* state legislation? *Pub. Utils. Comm'n*, 345 U.S. at 431. Respondents do not say, other than to suggest that this patchwork shows that Congress "affirmatively contemplated … the application of higher state minimum wages to airline employees." BIO 29. Perhaps, but that is not the test. Because every saving clause "affirmatively contemplates" stricter state regulation, courts inquire instead whether Congress "permit[ted] … *discrimination against interstate commerce*." *Wyoming*, 502 U.S. at 458 (emphasis added). Respondents have not identified a scrap of evidence fitting that bill.

2. The Seventh Circuit's decision will wreak havoc. Authorization allows state and local governments to pass facially discriminatory laws. And be-

cause the Seventh Circuit's rationale applies to any saving clause, governments may discriminate anywhere that Congress spared state law, not just wage legislation. The possibilities for mischief are endless.

Respondents tell the Court not to worry: the rarely used Privileges and Immunities Clause might prevent these obvious violations. BIO 32. That is cold comfort. For 150 years, "corporations [have not been] citizens" under that clause. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868). By dint of draftsmanship, then, state and local governments will be able to pursue the very "economic Balkanization that [this Court's] dormant Commerce Clause jurisprudence has long sought to prevent." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 n.3 (1996).

* * *

Respondents and the Seventh Circuit don't like this Court's centuries-old dormant Commerce Clause jurisprudence. *See* BIO 32-33; App. 9a & n.4 (questioning the doctrine's "continued validity"). But under the law as it stands, the proper result here was clear: the Seventh Circuit should have applied *Pike* balancing like other circuits would have, and it should have upheld the district court's dismissal of Respondents' burdensome claims.

CONCLUSION

The Court should grant the petition.

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
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioners

MAY 13, 2019