No.

IN THE

Supreme Court of the United States

J.B. HUNT TRANSPORT, INC.,

Petitioner,

v.

GERARDO ORTEGA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAAA) provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

The questions presented are:

1. Whether the Ninth Circuit correctly held—like the Eleventh Circuit, but contrary to decisions from this Court and the First and Seventh Circuits—that a state law of general applicability is not preempted by the FAAAA unless it "binds" a motor carrier to "specific" prices, routes, or services.

2. Whether the Ninth Circuit correctly held—like the Third Circuit, but contrary to the First, Second, Fifth, Seventh, and Eleventh Circuits—that the FAAAA's use of the terms "price, route, or service" refers only to "point-to-point transport."

3. Whether the Ninth Circuit correctly held that California's wage and labor laws, which prohibit motor carriers from using industry-standard incentive-based pay structures, are not preempted by the FAAAA, in conflict with the First Circuit's holding that Massachusetts's wage and labor laws, which similarly restrain the way that motor carriers incentivize their drivers, are preempted by the FAAAA.

RULE 14.1(b) STATEMENT

Petitioner is J.B. Hunt Transport, Inc., defendant-appellee below.

Respondents are Gerardo Ortega and Michael Patton, class representatives and plaintiffs-appellants below.

RULE 29.6 STATEMENT

Petitioner J.B. Hunt Transport, Inc., is a wholly owned subsidiary of J.B. Hunt Transport Services, Inc. J.B. Hunt Transport Services, Inc., is a publicly held corporation; no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-4a) is unreported but is available at 694 F. App'x 589. The court of appeals' order denying rehearing (App. 44a-45a) is unreported. The order of the district court granting J.B. Hunt's motion for summary judgment (App. 26a-43a) is unreported but is available at 2014 WL 2884560. The order of the district court granting J.B. Hunt's motion for judgment on the pleadings (App. 5a-25a) is unreported but is available at 2013 WL 5933889.

JURISDICTION

The court of appeals' judgment was entered on July 31, 2017. The petition for rehearing was denied on November 7, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Supremacy Clause of the U.S. Constitution and the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501, et seq., are reproduced at App. 46a-50a.

STATEMENT

This case raises important questions regarding the scope of preemption under the Federal Aviation Administration Authorization Act (FAAAA). Twice in recent terms, this Court has reversed the Ninth Circuit's narrow approach to preemption under the FAAAA and the closely related Airline Deregulation Act (ADA). See *Northwest, Inc.* v. *Ginsberg*, 134 S.

Ct. 1422 (2014); *Am. Trucking Ass'ns, Inc.* v. *City of Los Angeles*, 569 U.S. 641 (2013). Nevertheless, the Ninth Circuit continues to narrow the scope of FAAAA preemption. The decision below creates or deepens multiple conflicts with decisions from this Court and other circuits, and strikes directly at Congress's intent to promote efficiency through broad deregulation of interstate trucking.

A. The FAAAA

Congress enacted the FAAAA in 1994 to prevent state and municipal governments from undermining federal deregulation of interstate trucking. The FAAAA provides that a State or political subdivision "may not enact or enforce a 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. § 14501(c)(1).

Congress copied that language from the ADA to implement "'the broad preemption interpretation [of the ADA] adopted by the United States Supreme Court in'" *Morales* v. *Trans World Airlines*, *Inc.*, 504 U.S. 374 (1992). *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (quoting H.R. Conf. Rep. No. 103-677, at 83 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1755). The scope of FAAAA preemption is therefore (as relevant here) coextensive with this Court's expansive interpretation of the ADA's preemption clause. *Id.* at 370-71. Congress's overarching goal in the FAAAA was to help "ensure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices, as well as

'variety' and 'quality.'" *Id.* at 371 (quoting *Morales*, 504 U.S. at 378).

This Court has emphasized the "broad pre-emptive purpose" of the "related to" language in the FAAAA and ADA preemption clauses. *Morales*, 504 U.S. at 383. Thus, a state law is preempted if it has "'*a connection with*" a carrier's prices, routes, or services, even if the law's effect "is only indirect.'" *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 384, 386). State laws with a "significant impact" on carrier prices, routes, or services or those that "have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives" are also preempted. *Id.* at 370-71, 375 (quoting *Morales*, 504 U.S. at 388, 390). If the state law's effect on prices, routes, or services is only "tenuous, remote, or peripheral," however, the law is not expressly pre-empted. *Morales*, 504 U.S. at 390.

State statutes, regulations, and common-law rules are preempted alike. *Ginsberg*, 134 S. Ct. at 1429. "What is important, therefore, is the effect of a state law, regulation, or provision, not its form." *Id.* at 1430. In particular, the preemption provision is interpreted expansively to avoid a patchwork of state laws, rules, and regulations because such a "state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, 552 U.S. at 373.

B. California's Labor Laws

This case involves the application of two sets of California laws to motor carriers: (1) its meal- and rest-break laws, and (2) its rule prohibiting

employers from averaging the higher wages paid for high-value activities with the lower wages paid to the same employees for less efficient activities.

1. California's meal- and rest-break laws affect the routes run every day by motor carriers. Its meal-break law requires employers to provide employees who work more than five hours a day with a 30-minute meal break, and those who work more than ten hours with a second 30-minute meal break. Cal. Labor Code § 512(a). The first break must be provided before the end of the fifth hour of work, and the second before the tenth hour. *Brinker Rest. Corp.* v. *Superior Court*, 273 P.3d 513, 537-38 (Cal. 2012). California's rest-break law also requires that employers provide a ten-minute rest break for every four hours of work "or major fraction thereof," and that those rest breaks should be taken, as much as practicable, in the middle of the work period. Cal. Code Regs. tit. 8, § 11090(12)(A) ("Wage Order No. 9"); see Cal. Labor Code § 516.[1]

Providing these breaks is required; an employer may not choose "between providing *either* meal and rest breaks *or* an additional hour of pay." *Kirby* v. *Immoos Fire Prot., Inc.*, 274 P.3d 1160, 1668 (Cal. 2012). And an employee may not perform any work during any required break period. Cal. Labor Code § 226.7. Thus, the practical implication of the laws for truck drivers is that, for each meal or rest break, the driver must be able to deviate from his route at

[1] Wage Order No. 9 regulates "wages, hours, and working conditions," including breaks, specifically in the "transportation industry."

the appointed time, find a legal place to park, leave his truck for the required break, and then return to his route.

Although California's meal- and rest-break laws apply to many industries, they also contain specific provisions applicable only to the trucking industry. The laws include, for example, exemptions for unionized commercial drivers. See Cal. Labor Code § 512(e), (f)(2), (g)(1).

2. California's wage and labor laws require employers to pay employees a minimum wage. See Cal. Labor Code §§ 221-223, 1194, 1197. This case, however, is not about *how much* California law requires motor carriers to pay their employees. It is about *how* motor carriers must pay employees.

In *Armenta* v. *Osmose, Inc.*, 135 Cal. App. 4th 314, 323-24 (2005), the court held that, under state law—unlike federal law—employers must separately compensate employees for *all* hours worked at the minimum statutory rate. No part of that rate may be used as a credit against the minimum-wage obligation. Thus, even if *average* hourly compensation exceeds the minimum-wage rate, an employer violates California law if it does not provide the minimum wage for *each* hour worked. *Ibid*.

California courts have extended *Armenta* to require motor carriers paying their employees a "piece-rate" (*i.e.*, a fee per task) to compensate drivers separately for each hour worked, including non-productive hours. *Cardenas* v. *McLane FoodServices, Inc.*, 796 F. Supp. 2d 1246, 1249-53 (C.D. Cal. 2011); *Gonzales* v. *Downtown LA Motors, LP*, 215 Cal. App. 4th 36, 49 (2013); *Bluford* v. *Safe-*

way Stores, Inc., 216 Cal. App. 4th 864, 872 (2013). Those rules have been codified at Cal. Labor Code § 226.2, which provides that a piece rate covers only "productive" work (*i.e.*, actual driving), and that employees must be *separately* paid the minimum wage for each hour of non-productive work.

Because the rates for piece work tend to be above the minimum wage (if that work were compensated on an hourly basis), and employers could lower them, the "*Armenta* rule" does not require an employer to pay an employee a *higher* wage. Rather, it requires an employer to pay an employee *differently*—thus affecting an employer's ability to incentivize certain high-value activities. Employers must also implement operational changes to track productive time and non-productive time, calculate a weekly average rate at which rest breaks must be separately paid, and provide all of that information on employee pay statements. See Cal. Labor Code § 226.2.

C. This Litigation

1. This is a class action of current and former drivers for petitioner J.B. Hunt, one of the largest transportation companies in North America. App. 27a-28a. To promote efficiency and compete with other motor carriers, J.B. Hunt compensates its drivers using an Activity-Based-Pay system rather than a pure hourly wage. The Activity-Based-Pay system pays drivers a rate per mile driven, as well as other piece rates for specific non-driving activities, such as delivering a load of freight. App. 28a. Drivers receive hourly pay in certain circumstances such as waiting during customer delays, but may not receive separate compensation for other activities,

such as completing paperwork, because that work is covered by the mileage rate. App. 28a-29a.

The plaintiffs here claim that (1) J.B. Hunt failed to authorize and permit them California-compliant meal and rest breaks, and (2) the Activity-Based-Pay system denied them the minimum hourly wage for various non-driving activities, in violation of the *Armenta* rule.

2. The district court entered judgment in favor of J.B. Hunt, holding that both claims are preempted by the FAAAA.

The district court first granted judgment on the pleadings against plaintiffs' meal- and rest-break claims. It concluded that those laws "significantly impact the routes a driver may travel, and reduce the number of miles a driver may possibly travel in a single day." App. 20a. It further concluded that "the restrictions would also unavoidably impact prices and hinder the full extent of competitive market forces within the transportation industry." App. 18a. Because the meal- and rest-break laws are "related to a motor carrier's prices, routes, or services," the court explained, the plaintiffs' claims are preempted. App. 19a.

The district court next granted summary judgment on the Activity-Based-Pay claims. The extensive and uncontested evidentiary record demonstrated that requiring J.B. Hunt to overhaul its Activity-Based-Pay system to comply with the *Armenta* rule would result in "decreased efficiency and productivity" in J.B. Hunt's operations. App. 38a. The court concluded that complying with the *Armenta* rule would have a "significant" effect on

J.B. Hunt's services and prices, and "would undoubtedly disrupt 'maximum reliance on competitive market forces'"—contrary to the FAAAA's deregulatory purpose. App. 40a (quoting *Rowe*, 552 U.S. at 370). Thus, the court held, the *Armenta* rule is preempted. *Ibid.*

3. The Ninth Circuit summarily vacated both decisions.

With respect to the meal- and rest-break claims, the Ninth Circuit stated only that "[t]he district court did not have the benefit of our decision in *Dilts,* and that decision compels the conclusion that the district court erred in granting J.B. Hunt's motion for judgment on the pleadings on Plaintiffs' meal and rest break claims." App. 3a.

The cited case, *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), held that California's meal- and rest-break laws are not preempted by the FAAAA. In reaching that conclusion, the Ninth Circuit applied its rule that, for generally applicable "background" state laws, "the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service." *Id.* at 646. *Dilts* held that the break laws were not preempted because they did not "'bind' motor carriers to specific prices, routes, or services." *Id.* at 647. It further held that, even though the meal- and rest-break laws would require drivers to deviate from their routes, such deviations are irrelevant because they do not alter "point-to-point transport"—*i.e.*, a driver's starting and end points. *Id.* at 649.

As to the plaintiffs' Activity-Based-Pay claims, the Ninth Circuit stated that, "[i]n *Mendonca*, we

held that . . . [w]hile [California's prevailing wage law] in a certain sense is 'related to' [the plaintiff's] prices, routes and services, . . . the effect is no more than indirect, remote, and tenuous." App. 3a (quoting *Californians for Safe & Competitive Dump Truck Transp.* v. *Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998)) (alterations in original). The Ninth Circuit also stated that *Dilts* "reiterated that the FAAAA does not preempt state wage laws." App. 3a-4a.

Mendonca held that a California law requiring public-sector contractors to pay prevailing wages to their employees is not preempted. *Mendonca*, 152 F.3d at 1186. The Ninth Circuit concluded that the law does not "frustrate[] the purpose of deregulation by *acutely* interfering with the forces of competition." *Id.* at 1189. *Mendonca* did not address the rule from *Armenta*, which was issued seven years later, or an Activity-Based-Pay system at all. Rather, it simply addressed whether the FAAAA preempted California's requirement to pay certain employees the prevailing hourly wage.

REASONS FOR GRANTING THE PETITION

The decision below creates and exacerbates multiple conflicts regarding important and recurring issues of federal law.

First, by incorporating the reasoning of *Dilts*, the decision below applied a unique "binds to" test for FAAAA preemption of generally applicable state or local laws. That test conflicts with this Court's precedents and those of other circuits, which hold that the FAAAA preempts any law that has a "connection with" prices, routes, or services—even if it

doesn't "bind" a carrier to *specific* prices, routes, or services.

Second, again incorporating *Dilts*, the decision below held that only state laws affecting "point-to-point" transport are preempted—a rule that has been embraced by the Third Circuit, but rejected by the First, Second, Fifth, Seventh, and Eleventh Circuits.

Third, the Ninth Circuit's holding that the Activity-Based-Pay claims are not preempted conflicts with the First Circuit's holding that similar claims are preempted by the FAAAA.

On each question presented, the Ninth Circuit erred in addition to contradicting other circuits. But those errors are all of a piece: They reflect a continued campaign to redraw and narrow the scope of preemption under the FAAAA dramatically, contrary to Congress's broad preemptive purpose and this Court's decisions. This Court should grant certiorari to bring the Ninth Circuit's FAAAA decisions back in line with those of other circuits—and of this Court.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS AND THOSE OF OTHER CIRCUITS

A. The Ninth Circuit's "Binds To" Test Conflicts With This Court's Precedents And Creates A Circuit Split

For decades, the Ninth Circuit has applied a unique and more forgiving preemption test to what it labels "borderline" FAAAA cases, "in which a law does not refer directly to rates, routes, or services." *Dilts*, 769 F.3d at 646. The Ninth Circuit asks whether such a law "'*binds* the carrier to a particular

price, route or service.'" *Ibid.* (quoting *Am. Trucking Ass'ns, Inc.* v. *City of Los Angeles*, 660 F.3d 384, 395-96 (9th Cir. 2011), rev'd on other grounds, 569 U.S. 641 (2013)). In *Dilts*, the Ninth Circuit held that the FAAAA does not preempt California's meal- and rest-break laws because they do not "bind motor carriers to specific prices, routes, or services." *Id.* at 647. The court applied that holding to this case. App. 2a.

1. The Ninth Circuit's "binds to" test conflicts with this Court's decisions.

The "key phrase" in the ADA's (and FAAAA's) preemption clause is "relating to"—words that "express a broad pre-emptive purpose." *Morales*, 504 U.S. at 383. In *Morales*, this Court held that all state or local laws "having a connection with" rates, routes, or services are preempted. *Id.* at 384. This Court reaffirmed in *Rowe* that state laws having a "connection with" rates, routes, or services are pre-empted even if those laws' effect on rates, routes, or services "is only indirect." 552 U.S. at 370 (internal quotation marks omitted).

The "binds to" test applied by the Ninth Circuit squarely conflicts with the "connection with" test articulated by this Court. In *Morales* itself, Texas argued that the ADA "only pre-empts the States from actually *prescribing* rates, routes, or services," and therefore did not preempt enforcement of state consumer-protection laws affecting airlines' fare advertisements. 504 U.S. at 385 (emphasis added). That interpretation, this Court explained, "simply reads the words 'relating to' out of the statute." *Ibid.* "Had the statute been designed to pre-empt state law in such a limited fashion," the Court continued, "it

would have forbidden the States to '*regulate* rates, routes, and services'"—and it didn't. *Ibid.*

But the Ninth Circuit's requirement that a law "bind" a carrier to "specific" rates, routes, and services is just another way of saying that it must "prescribe" or "regulate" rates, routes, and services—the test this Court rejected in *Morales*. Indeed, in *Dilts*, the Ninth Circuit used the same language rejected in *Morales*, stating that the FAAAA does not "preempt generally applicable" rules "that do not otherwise *regulate* prices, routes, or services." *Dilts*, 769 F.3d at 644 (emphasis added).

This Court applied the "connection with" test to *all* state laws, including generally applicable laws. In *Morales*, this Court explained that "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." 504 U.S. at 386. That approach would create "an utterly irrational loophole." *Ibid.* The ADA therefore preempted the enforcement of consumer-protection laws against airlines because those laws had a connection with fares—irrespective of whether they "actually prescrib[ed]" rates, routes, or services. *Id.* at 385.

In *Ginsberg*, the Court applied the "connection with" test to a claim for breach of the implied covenant of good faith and fair dealing. The Ninth Circuit, consistent with its decades of erroneous precedent, had held that the claim was not preempted by the ADA because "Congress intended the preemption language only to apply to state laws *directly regulating* rates, routes, or services," *Ginsberg* v. *Northwest, Inc.*, 695 F.3d 873, 881 (9th

Cir. 2012) (emphasis added). This Court reversed. The plaintiff's claim for reinstatement in an airline's frequent-flyer program was preempted because the frequent-flyer program was "connected to" the airline's rates and services. *Ginsberg*, 134 S. Ct. at 1430-31. Yet the Ninth Circuit continues to apply its "binds to" test as if *Ginsberg* had never been decided.

2. The courts of appeals are also divided on the "binds to" standard.

The Ninth Circuit articulated its "binds to" test in *Air Transport Association* v. *San Francisco*, 266 F.3d 1064 (2001), an ADA case. It imported the preemption standard from cases interpreting the Employee Retirement Income Security Act (ERISA). Those cases, the Ninth Circuit said, suggested that, for a state law to be preempted, it "must compel or bind an ERISA plan administrator to a particular course of action." *Id.* at 1071-72 (citing *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001); *Cal. Div. of Labor Standards Enf't* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 333 (1997); *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645 (1995)). "By analogy," the court continued, a state law will be preempted by the ADA only if it "binds the air carrier to a particular price, route or service." *Id.* at 1072.

The Eleventh Circuit made the same move in *Amerijet International, Inc.* v. *Miami-Dade County, Florida*, 627 F. App'x 744 (2015). That case addressed whether a Florida wage law was preempted by the ADA because it would raise the prices of an air carrier's services. Quoting an ERISA decision, the Eleventh Circuit held that the state law was not preempted, because it did "not 'bind' air

carriers to 'any particular choice and thus function as a regulation of [air carriers' services].'" *Id.* at 751 (quoting *Travelers*, 514 U.S. at 659-60).

Other courts of appeals, however, have rejected the "binds to" test adopted by the Ninth and Eleventh Circuits—and have refused to graft ERISA's preemption standard onto the FAAAA. The First Circuit, for example, rejected the argument that the FAAAA preempts only those laws that "seek to set, control or manipulate" rates, routes, or services. *United Parcel Serv., Inc.* v. *Flores-Galarza*, 318 F.3d 323, 335 (2003).

In applying this Court's "connection with" standard, the First Circuit rejected the government's argument that the FAAAA's use of "related to" should be given the narrow construction that this Court adopted in ERISA cases after the FAAAA was enacted. "While the *Morales* Court undoubtedly took its interpretive cues from the ERISA preemption jurisprudence then in existence," the court explained, "it does not follow that any change in ERISA law necessitates a parallel change in the law affecting air carriers." *Id.* at 335 n.19.

The First Circuit also rejected the Ninth Circuit's narrow preemption test for generally applicable laws in *Massachusetts Delivery Association* v. *Coakley*, 769 F.3d 11 (2014) ("*MDA*"), which arose under the FAAAA. The government invited the court to adopt the *Dilts* rule for "'background' labor laws"—namely, that "'generally applicable background regulations that are several steps removed from prices, routes, or services . . . are not preempted.'" *Id.* at 18-19 (quoting *Dilts*, 769 F.3d at 646). But, the First Circuit explained, that special approach for laws of

general applicability "runs counter to Supreme Court precedent broadly interpreting the 'related to' language in FAAAA." *Id.* at 19.

The Seventh Circuit also has rejected use of the ERISA standard under the FAAAA and ADA. In *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605 (2000), the Seventh Circuit held that the ADA preempted common-law claims for tortious interference, breach of fiduciary duty, and fraudulent inducement. The court acknowledged that recent ERISA decisions from this Court "hold that state laws of general applicability are not preempted just because they have economic effects on pension or welfare plans." *Id.* at 608. But that is no reason to apply the more restrictive test for ERISA preemption to the ADA: "[I]f developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. Our marching orders are clear: follow decisions until the Supreme Court overrules them." *Ibid.*

The Ninth and Eleventh Circuits, however, have missed or defied those marching orders. They apply *ERISA*'s narrow "binds to" requirement to the *FAAAA*—which, unlike ERISA, is meant to prevent States from undoing federal deregulation of interstate transportation—in conflict with the First and Seventh Circuits. This Court should grant certiorari to resolve the split.

B. The Courts Of Appeals Are Divided On The Question Whether "Price, Route, Or Service" Refers Only To "Point-to-Point" Transport

The Ninth Circuit did not dispute that California's meal- and rest-break laws require drivers to suspend their services and deviate from their routes for both types of breaks. See *Dilts*, 769 F.3d at 648, 649. Under the plain language of the FAAAA, therefore, the laws "relate to" routes.

According to the Ninth Circuit, however, "routes" refers only to "'point-to-point transport.'" *Id.* at 649 (quoting *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc)). The court therefore held in *Dilts* that, because the state-law "requirement that a driver briefly pull on and off the road during the course of travel" does not alter "point-to-point transport," California's meal- and rest-break laws do *not* relate to "routes" within the meaning of the FAAAA. *Ibid.* It then treated *Dilts* as dispositive in the decision below.

In doing so, the Ninth Circuit applied the rule that it first developed in *Charas*, an ADA case. There, the en banc court held that "'rates' and 'routes' generally refer to the point-to-point transport of passengers"—"as in, 'This airline provides service from Tucson to New York twice a day.'" *Charas*, 160 F.3d at 1255-66. It also held that "services" refers to the frequency and scheduling of transportation, not specific services provided *en route*, such as flight-attendant assistance, food-and-drink service, and the like. *Ibid.*

Because the Ninth Circuit still follows *Charas*, it is as true today as 18 years ago that "[t]he Courts of Appeals . . . have taken directly conflicting positions on this question of statutory interpretation." *Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058, 1058 (2000) (O'Connor, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari). On the one hand, the Third Circuit—which acknowledged that the rulings of the circuits "have not been consistent"—adopted the narrow "approach espoused by the Court of Appeals for the Ninth Circuit in *Charas*." *Taj Mahal Travel, Inc.* v. *Delta Airlines, Inc.*, 164 F.3d 186, 192, 194 (1998).

On the other hand, the First, Second, Fifth, Seventh, and Eleventh Circuits have interpreted "services" more broadly to include "matters incidental to and distinct from the actual transportation of passengers," including services provided *en route* between the origin and destination points.[2] For example, the Second Circuit held that a state law requiring airlines to provide food, water, and electricity during delays—services that do not fall within the Ninth Circuit's strict "point-to-point transport" limitation—"related to" air-carrier services. *Cuomo*, 520 F.3d at 223.

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[2] *Air Transp. Ass'n* v. *Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) (per curiam) (citing *Travel All Over the World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Hodges* v. *Delta Airlines, Inc.*, 44 F.3d 334, 336-38 (5th Cir. 1995) (en banc); *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003); *Smith* v. *Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998)).

The split has only gotten worse in *Charas*'s two-decade reign of error. As the First Circuit has explained, the Ninth Circuit's rule "has been superseded by controlling Supreme Court case law—namely, by *Rowe*'s expansive treatment of the term 'service'" in 2008. *DiFiore* v. *Am. Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011); see also *Bower* v. *Egyptair Airlines Co.*, 731 F.3d 85, 94 (1st Cir. 2013) (noting that, in *Rowe*, this Court "has treated service more expansively" than the Ninth Circuit). The Second Circuit has likewise recognized that "*Charas*'s approach . . . is inconsistent with . . . *Rowe*." *Cuomo*, 520 F.3d at 223.

But the Ninth Circuit refuses to align its case law with *Rowe*. To the contrary, it has expressly rejected the First and Second Circuits' determinations "that *Rowe* is inconsistent with [its] *Charas* definition" of rates and services. *Nat'l Fed'n of the Blind* v. *United Airlines Inc.*, 813 F.3d 718, 728 (9th Cir. 2016) (citing *Cuomo* and *DiFiore*).

This Court should grant certiorari to resolve the circuit split on the meaning of "price, route, or service." That circuit split is case-dispositive here. It is undisputed that California's meal- and rest-break laws require drivers to deviate from their planned routes and take longer to travel those routes (and thus provide less service overall). If the terms "routes" and "services" include effects *during* transport (as the First, Second, Fifth, Seventh, and Eleventh Circuits hold), then those deviations are "related to" prices, routes, and services. This case is therefore an appropriate opportunity to resolve a persistent and widely recognized circuit split of 20 years' duration.

C. The Ninth Circuit's Activity-Based-Pay Holding Conflicts With Decisions From The First Circuit

J.B. Hunt's Activity-Based-Pay system compensates drivers with a rate per mile driven, a piece rate for deliveries, and an hourly wage for some (but not all) other tasks. Plaintiffs here allege that that compensation system violates California's *Armenta* rule. The Ninth Circuit held that plaintiffs' piece-rate claims are not preempted because, in *Mendonca*, it had concluded that California's prevailing-wage law had only an "'indirect, remote, and tenuous'" effect on rates, routes, and services. App. 3a (quoting *Mendonca*, 152 F.3d at 1189). The decision below conflicts with decisions from the First Circuit.

Massachusetts law distinguishes between employees and independent contractors. An "employee" designation triggers various legal requirements under the State's wage and employment laws, including the right to a minimum wage, work breaks, and reimbursement for expenses. In *Schwann* v. *FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016), FedEx contractors alleged that the carrier should have paid them as employees under state law. The First Circuit held that an aspect of the State's labor laws—the determination whether a service is performed outside the usual course of business of the employer—was preempted by the FAAAA.

The court explained that FedEx used a system in which its employees performed some functions, while independent contractors performed others. Contractors "received compensation based on a formula that accounted for the number of packages

delivered," and could decide for themselves what route to follow when making deliveries. *Id.* at 439. That arrangement, the court explained, provided "an economic incentive to keep costs low," and "to deliver packages efficiently." *Ibid.*

The Massachusetts law, however, precluded FedEx from classifying and paying those drivers as independent contractors—and therefore would require FedEx to compensate those drivers differently. The First Circuit therefore held that the FAAAA preempted the state law, as applied to FedEx contractors, because it had a significant impact on both the delivery services FedEx provided and "the actual routes followed for the pick-up and delivery of packages." *Id.* at 439.

California's *Armenta* rule, which prevents J.B. Hunt from employing its Activity-Based-Pay system, impermissibly affects motor carriers' services and routes in the exact same way. Indeed, the First Circuit said as much. The plaintiffs in *Schwann* had argued that FedEx was not in fact bound to its particular payment system, and could instead "use an incentive-based arrangement by paying employee drivers, for instance, on a 'per-package' or 'per-stop' basis or providing them with performance-based bonuses." *Schwann*, 813 F.3d at 439. That, of course, *is* the Activity-Based-Pay system that J.B. Hunt uses for its employees here—and that the First Circuit held that the State *could not mandate*.

If *requiring* a carrier to pay employees, rather than contractors, using an Activity-Based-Pay system is preempted by the FAAAA (as the First Circuit held), then *prohibiting* a carrier from paying its employees using an Activity-Based-Pay system (as

California law does) must also run afoul of the FAAAA. Plaintiffs here want J.B. Hunt to change the *manner* in which it pays its workers—a choice that J.B. Hunt made to incentivize efficient delivery. As in *Schwann*, "Plaintiffs' suggestion that [J.B. Hunt] change the manner in which it incentivizes efficient delivery simply highlights the tangible manner in which Plaintiffs' proposed application [of the *Armenta* rule] would significantly affect how [J.B. Hunt] provides good and efficient service." 813 F.3d at 439. The Ninth Circuit's contrary holding—that the *Armenta* rule does *not* "relate to" prices, routes, or services, even—cannot be squared with *Schwann*.

Indeed, on the same day that it issued *Schwann*, the First Circuit entered judgment in a companion case involving J.B. Hunt. See *Remington* v. *J.B. Hunt Transp., Inc.*, No. 15-1252 (1st Cir. Feb. 22, 2016). The plaintiffs there argued that they were underpaid by J.B. Hunt because they were incorrectly classified as independent contractors. Applying its decision in *Schwann*, the First Circuit held that the plaintiffs' claim was preempted. Thus, the conflicting holdings from the Ninth and First Circuits do not just create conflicting legal regimes in theory; they apply those conflicting regimes to the same motor carrier.

The decision below conflicts with decisions from the First Circuit in other ways, too. In *Mendonca* the Ninth Circuit held—again drawing on *ERISA* case law—that state laws "having no more than an *indirect effect*" are *not* preempted under the FAAAA. *Mendonca*, 152 F.3d at 1188 (citing *Travelers*, 514 U.S. at 661-62). Applying that construction, it held

that the FAAAA did not preempt California's prevailing-wage law. In the decision below, the Ninth Circuit applied *Mendonca* to the plaintiff's Activity-Based-Pay-based claims.

In *MDA*, however, the First Circuit recognized that under this Court's cases "the phrase 'related to' embraces state laws 'having a connection with or reference to' carrier 'rates, routes, or services,' whether directly or indirectly." 769 F.3d at 17 (quoting *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 260 (2013)). The First Circuit's holding in *MDA*—which also involved Massachusetts' independent-contractor law—is consistent with this Court's repeated holdings that "pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect.'" *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 386). The Ninth Circuit's contrary holding, however, has placed it squarely in conflict with decisions from this Court.[3]

Other courts have recognized that there is a "split between the First Circuit and the Seventh, Ninth, and Eleventh Circuits, concerning the limit of federal preemption over state wage laws" generally. *Lupian* v. *Joseph Cory Holdings, LLC*, 240 F. Supp. 3d 309, 314 (D.N.J. 2017). This Court should grant certiorari to resolve the conflict created by the Ninth Circuit's piece-rate decision in this case.

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[3] As noted, in *MDA* the First Circuit also rejected the Ninth Circuit's rule that "'generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted.'" 769 F.3d at 19 (quoting *Dilts*, 769 F.3d at 646).

D. The Case For Certiorari Here Is Stronger Than It Was For *Dilts*

This Court denied certiorari in *Dilts*. *Penske Logistics, LLC* v. *Dilts*, 135 S. Ct. 2049 (2015). This case is more certworthy than *Dilts*, for several reasons.

To begin with, the decision below addressed California's *Armenta* rule, which was not at issue in *Dilts*. This Court therefore had no occasion to consider the split between the Ninth and First Circuits regarding the Activity-Based-Pay claims (the basis of the third question presented here). Nor did it consider the Ninth Circuit's holding that the FAAAA does not preempt laws having an "indirect effect" on rates, routes, or services, *Mendonca*, 152 F.3d at 1188—a holding that conflicts with this Court's decisions and those of the First Circuit.

The Ninth Circuit's meal- and rest-break holding is also in urgent need of review—and more so than in *Dilts*. The splits of authority pertaining to the second and third questions presented here have deepened since the Ninth Circuit issued *Dilts*. Since *Dilts*, the Eleventh Circuit has joined the Ninth in applying ERISA's "binds to" test to FAAAA and ADA cases. And since *Dilts*, the Ninth Circuit has expressly rejected the decisions from the First and Second Circuits stating that this Court's opinion in "*Rowe* is inconsistent with" the Ninth Circuit's persistent and narrow interpretation of prices, routes, and services. *United Airlines Inc.*, 813 F.3d at 728.

What is more, this case differs from *Dilts* in several key respects. In *Dilts*, the three-judge panel

emphasized its belief that defendants were engaged in "intrastate" transport only. 769 F.3d at 649. Because the drivers there worked "exclusively within the state of California," the court explained, the carrier was "not confronted with a 'patchwork' of hour and break laws." *Id.* at 648 n.2. District Judge Zouhary, concurring to emphasize the limited reach of the panel's decision, wrote that *Dilts* was not a "case about FAAAA preemption in the context of interstate trucking." *Id.* at 651.

Here, however, petitioner J.B. Hunt is an *interstate* carrier. J.B. Hunt transports freight and property "nationwide," App. 6a, and the class of plaintiffs here includes drivers who cross state lines (and who transport freight destined for states outside California). Thus, J.B. Hunt *does* directly face a "state regulatory patchwork" that is "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, 552 U.S. at 373; cf. *Am. Trucking Ass'ns*, 569 U.S. at 655 (Thomas, J., concurring) (stating that the Constitution does not give Congress the power to regulate intrastate commerce).

Indeed, although the United States submitted an amicus brief in *Dilts* stating its belief that the FAAAA does not preempt California's meal- and rest-break laws as applied to the drivers in that case, it went on to note that "the preemption analysis might be substantially different if California applied the law to drivers who cross state lines," because "[m]eal and rest requirements may differ from one state to another." Brief for the United States at 24, *Dilts*, 769 F.3d 637 (No. 12-55705), 2014 WL 809150, at *24.

That is the case here. Thus, while we disagree with the government's position in *Dilts*, this case is distinguishable.

In addition, in *Dilts* the defendants "submitted no evidence to show that the break laws in fact would" affect rates, routes, or services. *Dilts*, 769 F.3d at 649; see *id.* at 650 (Zouhary, J., concurring) (defendants did not offer "specific evidence" of prohibited effects). That critique is inapplicable to the meal- and break-law issues in this case, which the district court decided on the pleadings as a matter of law. And it is inapplicable to the wage-law issue, which, as discussed further below, the district court decided on a detailed factual record showing that the California laws significantly affected petitioner's rates, routes, and services. See App. 37a-40a.[4]

This case therefore presents new and deeper conflicts than *Dilts* and shows that the Ninth Circuit has been giving *Dilts* and its other errant precedents the broadest possible reading. The decision below applied both *Dilts* and *Mendonca* to a materially distinguishable case. And it did so in a summary three-paragraph memorandum. The Ninth Circuit's eagerness to extend its out-of-step approach to FAAAA preemption, substituting state re-regulation for the deregulation Congress intended, makes this case an ideal vehicle for review of the long-

[4] Unlike the Ninth Circuit, the First Circuit has "rejected the contention that empirical evidence is necessary to warrant preemption, and allowed courts to look[] to the logical effect that a particular scheme has on the delivery of services or the setting of rates." *MDA*, 769 F.3d at 21.

simmering conflicts between the Ninth Circuit and decisions of other courts of appeals and this Court.

II. THE DECISION BELOW IS WRONG

The Ninth Circuit held that neither California's meal- and rest-break laws nor its *Armenta* rule is preempted. It was wrong on both counts.

1. California's meal- and rest-break laws are preempted by the FAAAA because they have a "connection with" a motor carrier's prices, routes, and services—and undermine "maximum reliance on competitive market forces." *Morales*, 504 U.S. at 384, 378.

California's break laws have a "connection with" routes because, as the district court explained, they "undoubtedly limit the number of routes available" and "reduce the number of miles a driver may possibly travel in a single day." App. 18a, 20a. Under California law, an employer must provide a driver five separate meal and rest breaks within a single 12-hour shift—all at specific intervals delineated by statute. App. 17a-18a. Each time, the driver would need to pull her truck off her planned route, find an adequate and permissible place to park, and then rest or eat without any job-related duties—no easy feat for a driver of an eighteen-wheeler. If a route does not offer adequate locations for stopping nearby—*five times*—an employer may not require the driver to take that route, even if it is the most efficient one.

For that reason, the district court concluded that, "although Defendant's drivers would not be bound to a *single* route, they would certainly be bound to *fewer* routes than otherwise." App. 18a. Other district

courts have likewise found that California's break laws restrict—and accordingly affect—the routes available to truck drivers. See, *e.g.*, *Aguiar* v. *California Sierra Express, Inc.*, No. 11-02827, 2012 WL 1593202, at *1 (C.D. Cal. May 4, 2012); *Campbell* v. *Vitran Express, Inc.*, No. 11-05029, 2012 WL 2317233, at *4 (C.D. Cal. June 8, 2012).

The Ninth Circuit acknowledged that "compliance with California's meal and break laws may require some minor adjustments to drivers' routes" and "restrict the set of routes available." *Dilts*, 769 F.3d at 649. But it nevertheless held that the laws do not "bind" motor carriers to *specific* routes. *Id.* at 646, 649. As noted above, however, the Ninth Circuit's "binds to" test cannot be squared with this Court's precedents, in part because it makes the *type* of state law the touchstone of preemption. That approach conflicts with this Court's holding that "[w]hat is important . . . is the *effect* of a state law, regulation, or provision, not its form." *Ginsberg*, 134 S. Ct. at 1430 (emphasis added).

The Ninth Circuit in *Dilts* acknowledged that the meal- and rest-break laws would force drivers to "pull over and stop for each break period," and thus deviate from their routes. To avoid that inconvenient truth, the Ninth Circuit observed that the laws do not alter a carrier's "point-to-point transport"—*i.e.*, its ability to "select its starting points, destinations, and routes." *Dilts*, 769 F.3d at 649.

Even if true, that is completely irrelevant. What matters is that California's meal- and rest-break laws have a "significant impact," *Rowe*, 552 U.S. at 371, on rates and services. As the district court

found, the laws interfere with "competitive market forces" in the transportation industry by preventing J.B. Hunt from "deliver[ing] cargo as quickly as it could." App. 18a. Preemption of such efficiency-defeating, market-distorting state laws is at the core of what the FAAAA was passed to accomplish, easily within its text, and compelled by this Court's precedents. Only the Ninth Circuit's outlier case law, and unsupported assumptions about what might happen in the marketplace and on the road, converted this case from an easy one *for* preemption to an easy one *against* preemption.

The Ninth Circuit conceded that "mandatory breaks mean that drivers take longer to drive the same distance, providing less service overall"—thus increasing costs and requiring carriers to "hire additional drivers or reallocate resources." *Dilts*, 769 F.3d at 648. It also acknowledged that the break laws "require motor carriers to schedule services in accordance with state law, rather than in response to market forces." *Id.* at 649. But, the court explained, the state laws nevertheless escape preemption because they have "nothing to say about *what* services an employer does or does not provide," and do not bind carriers to *specific* rates or services. *Id.* at 648, 649.

But the break laws plainly affect *how* carriers set their rates and services, even if the laws do not set *particular* rates or services. And that is all that is required under this Court's precedents, which hold that a state law is preempted if it has a "connection with" or "significant impact" on rates, routes, or services. *Rowe*, 552 U.S. at 370-71. Under the Ninth Circuit's logic, California could require breaks—and

even driver changes—every hour, so long as the starting and end points remained the same.

The Ninth Circuit justified its "binds to" requirement for "background" laws of general applicability by pointing to the FAAAA's enumerated exceptions to preemption for state transportation safety regulations and insurance rules. See *Dilts*, 769 F.3d at 646 (citing 49 U.S.C. § 14501(c)(2)). According to the Ninth Circuit, those exceptions define the type of laws that Congress identified as "*not* related to prices, routes, or services"—and thus support its narrow reading of "related to" to exclude laws that do not "bind" carriers to "specific" prices, routes, or services. *Ibid.*

But that is exactly backwards. If Section 14501(c)(1)'s preemption clause did not already encompass the types of laws enumerated in Section 14501(c)(2)'s exceptions, then those exceptions would not have been needed in the first place. Thus, as this Court has made clear, "[t]he exceptions to § 14501(c)(1)'s general rule of preemption identify matters a State may regulate when it would *otherwise be precluded from doing so*" under the preemption clause—and not, as the Ninth Circuit assumes, matters that a State would otherwise be *allowed* to regulate under that clause. *Pelkey*, 569 U.S. at 264 (emphasis added).

Finally, *Rowe* made clear that state laws are preempted where "state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations." *Rowe*, 552 U.S. at 373. Here, J.B. Hunt faces precisely such a patchwork, because different States have different meal- and rest-break requirements. For example, California

requires an employer to provide a ten-minute rest break for every four hours of work, Cal. Code Regs. tit. 8, § 11090(12)(A); Maine requires a thirty-minute rest break after six hours of work, 26 Me. Rev. Stat. § 601; and Washington requires a ten-minute rest break after three hours of work, *Wingert* v. *Yellow Freight Systems, Inc.*, 50 P.3d 256 (Wash. 2002) (interpreting Wash. Admin. Code § 296-126-092).[5]

The decision below is wrong because it applied *Dilts*'s cramped "binds to" preemption test, rather than the broader interpretation of "relates to" that this Court has adopted. That legal error is compounded by the fact that *Dilts* considered preemption in the context of *intrastate* motor carriers, see *Dilts*, 769 F.3d at 648 n.2, whereas J.B. Hunt indisputedly engages in *interstate* transport. That is a critical distinction between this case and *Dilts*—and one that compels preemption here *even if* the Ninth Circuit had correctly decided *Dilts*. By treating *Dilts* as dispositive here, the Ninth Circuit has shown that it will compound its errors at every opportunity, rather than follow statutory text, statutory purpose, or this Court's decisions. The cavalier extension of prior erroneous precedents in an unpublished decision only confirms the urgent need for this Court's correction, in a class action seeking enormous damages against petitioner, and in the

[5] In addition to California, at least nineteen States have laws requiring meal and/or rest period for employees. See U.S. Dep't of Labor, Minimum Length of Meal Period Required under State Law for Adult Employees in Private Sector (2018), https://www.dol.gov/whd/state/meal.htm#foot3.

context of class actions throughout California against virtually every interstate motor carrier.

2. The *Armenta* rule is preempted by the FAAAA because complying with the *Armenta* rule—which would require J.B. Hunt to provide hourly pay for all "non-productive" activity—would have a "significant impact," *Rowe*, 552 U.S. at 371, on J.B. Hunt's rates, routes, and services.

Under its Activity-Based-Pay system, J.B. Hunt pays its drivers a rate per mile driven, plus an hourly wage for some tasks and a flat piece rate for others, such as deliveries. Compensating drivers on a per-delivery basis incentivizes drivers to make more deliveries, thus increasing efficiency and productivity. That is true both as a matter of logic, and based on the extensive factual record in this case, which shows that switching to the Activity-Based-Pay system significantly increased driver efficiency, as well as driver pay. App. 38a-40a. Thus, complying with California's *Armenta* rule would result in "decreased efficiency and productivity"—undermining the very purpose of the Activity-Based-Pay system. App. 38a. The result, as the district court stated, is "'either an increase in the price charged to the customer[] or a discontinuation of some service offerings.'" App. 37a (quoting expert testimony). That is a "significant" effect on rates and services.

In an hourly-pay system, moreover, drivers have less incentive to minimize the time spent on non-productive activities (than they would under the Activity-Based-Pay system's per-mile compensation system). By removing that incentive, the *Armenta* rule would alter the routes taken by drivers, and

would require J.B. Hunt to schedule fewer stops per day to compensate for efficiency losses. Again, the evidence here shows that an Activity-Based-Pay system increases driver productivity—and driver compensation. App. 38a-40a. Thus, contrary to the FAAAA's deregulatory purpose, the *Armenta* rule "undoubtedly disrupt[s] 'maximum reliance on competitive market forces'" and inhibits the ability of carriers "to effectively provide services to its customers and therefore effectively compete in the marketplace." App. 40a, 42a-43a (quoting *Rowe*, 552 U.S. at 370).[6]

The district court's holding that plaintiffs' piece-rate claims are preempted was based on its factual finding that "there is no genuine issue" that the Activity-Based-Pay system increases efficiency and productivity. App. 40a. In the decision below, however, the Ninth Circuit did not even *address*—much less give deference to—that finding, or the extensive factual record. Instead, it simply stated that *Mendonca* held that the effect of California's wage law was "'no more than indirect, remote, and tenuous.'" App. 3a (quoting 152 F.3d at 1189).

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[6] California's *Armenta* rule also creates a "patchwork" of state regulation inconsistent with the broad preemptive purpose of the FAAAA. *Rowe*, 552 U.S. at 373. As noted, carriers in Massachusetts are allowed to use the very Activity-Based-Pay system that California law forbids. And carriers paying drivers a piece rate may run afoul of Washington-specific compensation requirements. See *Henderson* v. *JB Hunt Transport, Inc.*, No. 17-2-14673-1 KNT (Wash. Sup. Ct. filed June 17, 2007) (alleging that J.B. Hunt's piece-rate system does not adequately compensate employees for rest periods).

As the district court explained, however, *Mendonca* is distinguishable because in this case there was ample evidence that "forcing Defendant to change its [Activity-Based-Pay] compensation system would have greater effect than in *Mendonca*." App. 42a. In *Mendonca*, the court held that a wage law relating to government contractors was not preempted because the increased labor costs, standing alone, had only an "indirect" effect on rates, routes, or services. 152 F.3d at 1188. But here, switching to the Activity-Based-Pay system "would also reduce Defendant's efficiency and productivity, thus inhibiting Defendant's ability to effectively provide services to its customers." App. 42a-43a.

That is a far cry from the alleged effects in *Mendonca*. Thus, unlike state laws such as gambling or prostitution, which "affect fares in only a tenuous, remote, or peripheral . . . manner," *Rowe*, 552 U.S. at 371, the *Armenta* rule strikes at the heart of how a carrier organizes its operations, "affect[ing] [J.B. Hunt's] services and prices" in a "significant" way, App. 40a. *Mendonca* was decided on a motion to dismiss, but here the district court relied on extensive and not materially disputed evidence of the impact of the *Armenta* rule on rates, routes, and services. The Ninth Circuit's erroneous rules of law allowed it to treat all that evidence as irrelevant, even though it goes to the heart of why the FAAAA preempts state laws. Review by this Court is warranted.[7]

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[7] *Mendonca* considered only whether a law requiring government contractors to pay a minimum wage was preempted by the FAAAA. The question here, however, is not

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

Congress enacted the FAAAA "to ensure that the Sates would not undo federal deregulation with regulation of their own." *Rowe*, 552 U.S. at 378 (internal quotation marks omitted). In doing so, it found that "State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets." H.R. Conf. Rep. No. 103-677, at 87. Yet the California laws shielded from preemption by the decision below create the very evils that Congress sought to prevent by enacting the FAAAA.

As noted, at least twenty States have laws requiring meal- and/or rest-breaks for employees—laws that vary significantly from State to State. And other States also have piece-rate laws similar to California's, or wage laws that, if applied to motor carriers, could prohibit incentive-based payment

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whether that law, or a minimum-wage requirement generally, is preempted. Rather, the question is whether the *Armenta* rule is preempted. That distinction is critical: The minimum-wage requirement concerns only the *amount* that employees must be paid; the *Armenta* rule concerns *how* the carrier must pay its employees. The former merely increases the cost of doing business; the latter changes the *manner* in which carriers provide services. The Ninth Circuit wrongly conflated the two rules by relying entirely on a decision that did not concern the claims—or laws—at issue in this case. Only its blinkered view of what "relates to" a "service" allowed that error.

systems such as the Activity-Based-Pay system at issue here. Such incentive-based systems are widely used in the nationwide trucking industry to incentivize driver efficiency.[8]

Motor carriers therefore face "a patchwork of state service-determining laws, rules, and regulations," *Rowe*, 552 U.S. at 373, that significantly affect their prices, routes, and services—and their ability to compete. Complying with those requirements in California alone causes significant inefficiencies for motor carriers. Complying with them in the Ninth Circuit—which encompasses vast swaths of the Nation's interstate transport system, and contains several commercial ports that receive cargo for interstate distribution—will have even greater costs. And motor carriers risk exposure to—and have indeed faced—class actions just by doing business in the Ninth Circuit.[9]

The trucking industry plays a critical role in our national economy because nearly every business depends on it.[10] Thus, the victims of the patchwork

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[8] See U.S. Gov't Accountability Off., GAO-11-198, Commercial Motor Carriers (Jan. 2011) 30, https://www.gao.gov/new.items/d11198.pdf (64.7% of drivers are paid by mileage, 25.7% on another incentive basis, and only 2.7% hourly).

[9] Since 2011, a dozen district court decisions in California alone have addressed whether the FAAAA preempts California's meal- and rest-break laws. See *Dilts*, 769 F.3d at 641 n.1 (collecting cases).

[10] Trucks move nearly 70% of the nation's freight by weight, generating $726 billion in gross revenues. See http://www.trucking.org/News_and_Information_Reports_Industry_Data.aspx.

of laws regulating motor carriers—laws upheld by the decision below—are not just the carriers themselves. Rather, the victims include the businesses that rely on trucking services to bring them raw materials and to deliver finished goods to market, and ultimately the consumers who purchase those goods.

More generally, the decision below illustrates just how far the Ninth Circuit has drifted from this Court's precedents. In the face of Congress's "broad pre-emptive purpose," *Morales*, 504 U.S. at 383, the Ninth Circuit has effectively rewritten the FAAAA as a vanishingly narrow and almost random preemption of a few poorly drafted state laws. If Ninth Circuit case law allows that court to reverse a district court's uncontested *factual conclusion* that (beyond genuine dispute) a state law has an *actual* effect on rates, routes, and services—and to reverse that conclusion as a matter of law and summarily—then this case is the ultimate proof that the Ninth Circuit is flouting statutory text, the deregulatory policy embodied in the statute, *and* this Court's decisions.

Only this Court can correct the Ninth Circuit's flawed approach and resolve the multiple splits of authority regarding the scope of FAAAA preemption. This case presents a perfect opportunity to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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