No. 18-1097

IN THE

Supreme Court of the United States

SKYWEST, INC., ET AL.,
Petitioners,

v.

ANDREA HIRST, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Airlines for America (A4A) is the nation's oldest and largest airline trade association, representing passenger and cargo airlines throughout the United States. In 2018, A4A's passenger carrier members and their marketing partners accounted for 71% of all U.S. scheduled passenger airline capacity and carried over 623 million passengers, and A4A's all-cargo and passenger members together carried 86% of the total cargo shipped on U.S. airlines.

As part of its core mission, A4A works to foster a business and regulatory environment that ensures a safe, secure, and healthy U.S. air transportation industry—including stable, uniform, and predictable legal rules to govern it. Thus, throughout its seventy-five-plus-year history, A4A (formerly known as the Air Transport Association of America) has been actively involved in the development of the federal law applicable to commercial air transportation.

The decision below compromises the ability of A4A's members to operate efficiently across jurisdictional lines. A4A's members fly to, from, and over numerous States and cities each day. These operations cannot be administered effectively when the wage-and-hour laws—that is, the laws that dictate how employers must pay their employees—applicable to flight attendants (and pilots) change

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief. All parties have consented to the filing of this brief.

every time a jurisdictional line is crossed. Yet that is precisely the effect of the decision below, which holds that the dormant Commerce Clause poses no barrier to non-discriminatory state laws, even if they excessively burden interstate commerce. Ensuring the proper scope of dormant Commerce Clause protection—including by limiting state and local wage-and-hour regulation of airlines—is vitally important to A4A's members, and can only be accomplished through this Court's review of the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commerce Clause grants Congress the authority "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. This Court has long held that this Clause has a dormant aspect that precludes state regulation of those subjects that, by their very nature, "imperatively deman[d] a single uniform rule, operating equally on the commerce of the United States." *Cooley v. Bd. of Wardens of Port of Phila. ex rel. Soc'y for Relief of Distressed Pilots*, 12 How. 299, 319 (1851). This "negative" aspect of the Commerce Clause means, among other things, that a state or local law violates the Constitution when it imposes a burden on interstate commerce that "is clearly excessive in relation to [its] putative local benefits," even if it does not facially discriminate against interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

That is precisely the situation here: The plaintiff flight attendants seek to benefit from state and local minimum wage and other employment laws. Applying such laws to airlines would put them in an

untenable situation, however, because flight attendants necessarily work in many States nearly every workday. Airlines would thus have "to track each minute pre- or post-flight" a flight attendant spent in the State, as well as "the amount of turn time between flights" in each State. Pet. App. 40a.

The burden on commerce that follows from forcing an industry (like the airline industry) that necessarily operates across jurisdictional lines to comply with different wage-and-hour laws is severe. To begin, "different states use different measures for calculating minimum wage." *Id.* 41a-42a. Moreover, some wage laws "may apply to all hours worked by an employee who is employed within a state, even if some hours are worked out of state; others apply only to employees who work predominantly in one state for hours they work in that state, while still others apply to all hours worked by an employee in a state, even if the employee predominantly works or is employed elsewhere." *Id.* 41a. If these state and local laws applied to airline flight crews, airlines would have to comply with multiple sets of wage-and-hour laws simultaneously, just to pay *one employee* who works across jurisdictional lines.

In short, the application of state and local wage-and-hour laws to airline crew members would put airlines in an "impossible" position. *Id.* 14a. "[T]his is precisely the kind of onerous burden on interstate commerce that the Commerce Clause prohibits, even in the face of weighty state interests." *Id.* 43a. The district court thus correctly concluded that the dormant Commerce Clause precludes applying state and local minimum wage laws to SkyWest's flight attendants.

The Seventh Circuit did not disagree with the district court's balancing of benefits and burdens. Rather, that court concluded that the dormant Commerce Clause does not apply *at all*, because (according to that court) the dormant Commerce Clause applies only to laws that discriminate against out-of-state commerce. *See* Pet. App. 8a-11a. It believed that, since "[a]ll airlines—indeed all employers—are subject to [wage-and-hour] laws, regardless of state citizenship," these laws could not possibly be discriminatory. *Id.* 10a. And even if these laws did discriminate against interstate commerce, the Seventh Circuit determined that they would be permissible because Congress "expressly authorized" them when it enacted the Fair Labor Standards Act (FLSA). *Id.* 10a-11a.

Thus, in the Seventh Circuit, airlines are obligated to comply with state and local wage-and-hour laws without the protection of the dormant Commerce Clause. That decision not only conflicts with the law in other circuits, Pet. 16-19, but also runs contrary to decades of this Court's jurisprudence. That jurisprudence makes clear that "States may not impose regulations that place an undue burden on interstate commerce, *even where those regulations do not discriminate between in-state and out-of-state businesses*." *United States v. Lopez*, 514 U.S. 549, 579-80 (1995) (emphasis added); *see also Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008); *Pike*, 397 U.S. at 142. This Court reaffirmed this principle just last year. *See S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-91 (2018). And for good reason: Laws that do not facially discriminate against interstate commerce but are so burdensome

as to render compliance nearly impossible work just the same harm as facially discriminatory laws. They both fundamentally impede the Nation's ability to operate as one "economic unit." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949).

Nor did Congress authorize such burdensome state regulation in the FLSA. While Congress can authorize States to engage in activities that, but for the authorization, would contravene the dormant Commerce Clause, this Court's precedents require it to do so expressly, and the FLSA does not come close to satisfying the express-authorization requirement. Rather, it merely authorizes local governments to establish higher minimum wage rates than those set by the FLSA; it in no way suggests that such local wage laws can apply to employees who work outside the jurisdiction.

The Seventh Circuit's breaking with this Court's dormant Commerce Clause jurisprudence—as well as the jurisprudence of every other court of appeals to address the issue, *see* Pet. 16-19—is reason enough for this Court's review. But this Court's review is especially important because of the adverse practical consequences that the Seventh Circuit's decision, if allowed to stand, would impose on one of the Nation's most important industries. As the district court recognized, if the airline industry were subject to numerous local regulatory schemes on all manner of subjects—even when any local benefits of such schemes were overwhelmed by their burden on commerce—that industry and the commerce it supports would grind to a halt. And that is especially true here, where state and local wage-and-hour regulation provides little if any benefit to flight crews,

who already are generally protected by collective bargaining agreements and other industry-wide practices meant to account for the unique, interstate nature of their work. The Seventh Circuit's decision authorizing such burdens on commerce *without even asking whether those burdens outweigh any local benefits* allows exactly the sort of harm that the dormant Commerce Clause is designed to prevent.

The petition should be granted, and the decision below reversed.

ARGUMENT

A. The Decision Below Is Wrong

As the petition explains, the decision below implicates two separate but related legal questions. First, contrary to that decision, the dormant Commerce Clause prohibits States from imposing excessive burdens on interstate commerce, even when the state law at issue does not discriminate against interstate commerce. This prohibition is especially important in the context of interstate air travel because of the critical role that air transportation plays in our national economy. And second, Congress has never authorized local wage-and-hour laws that excessively burden interstate commerce. The decision below created circuit conflicts as to each of these questions. Pet. 16-19, 26-28. It is also flatly wrong.

1. *The Dormant Commerce Clause Precludes Non-Discriminatory Laws That Excessively Burden Interstate Commerce*

This Court has explained that state regulation may violate the dormant Commerce Clause in two ways. First, when a state law "directly regulates or

discriminates against interstate commerce," the Commerce Clause generally requires that the law be "struck down . . . without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). Second, and particularly relevant here, when "a statute has only indirect effects on interstate commerce and regulates even-handedly," the Commerce Clause *still* requires invalidating the law if "the burden on interstate commerce clearly exceeds the local benefits," even if "the State's interest is legitimate." *Id.*

In assessing a local law that falls in the second category, courts ask whether the law imposes costs on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). As to the law's harm to interstate commerce, a court must carefully consider "facts such as the nature of the regulation, the character of the business, [and] the regulation's actual effect on interstate commerce." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 553 (1949). And as to the law's putative local benefits, a court must test the "assertion[s]" in the record to determine whether the state regulation in fact meaningfully advances the State's goals. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 (1978).

The foregoing discussion suffices to demonstrate the obvious error in the decision below, which turns this straightforward dormant Commerce Clause jurisprudence on its head. According to the Seventh Circuit, "*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application." Pet. App. 10a. (quoting *Park Pet Shop, Inc. v. City of Chi.*, 872 F.3d

495, 502 (7th Cir. 2017) (emphasis in original)). That holding was dispositive—the court of appeals believed that SkyWest had "failed to allege any discrimination against interstate commerce," and thus held that "application of the dormant Commerce Clause to the Flight Attendants' state and local claims" was precluded. *Id.*

That cannot be right. Discriminatory state laws certainly violate the dormant Commerce Clause—indeed, they are essentially per se invalid. *See Brown-Forman*, 476 U.S. at 579. But *the whole point* of *Pike* is that even a state law that regulates even-handedly to effectuate a legitimate local interest—i.e., a law that does *not* discriminate—may nevertheless violate the dormant Commerce Clause if the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The Seventh Circuit's contrary decision simply cannot be reconciled with this Court's precedent, and should be reversed.

2. *The FLSA Does Not Authorize Otherwise Unconstitutional State Legislation*

Similarly misguided is the Seventh Circuit's alternative holding that state and local minimum wage laws cannot violate the dormant Commerce Clause because Congress expressly authorized them when it enacted the FLSA. Pet. App. 10a.

It is certainly true that Congress *can* authorize state regulation that would otherwise run afoul of the dormant Commerce Clause. *See Ne. Bancorp, Inc. v. Bd. of Gov'rs of Fed. Res. Sys.*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to con-

stitutional attack under the Commerce Clause."). But the key is that Congress must "*plainly* authorize" such actions. *Id.* (emphasis added); *see also S.-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) ("[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear.").

The FLSA contains no such plain authorization. Section 218(a) of the FLSA provides: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter." 29 U.S.C. § 218(a). This Section says absolutely nothing about the Commerce Clause. And while it authorizes the imposition of higher minimum wage rates than those established in the FLSA, it says nothing about the application of local laws to employees who spend only a portion of their work time within those localities. As such, Section 218(a) hardly provides the sort of clear statement that this Court has required to approve state or local regulation that would otherwise violate the dormant Commerce Clause. *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982) (requiring an express congressional declaration "to sustain state legislation from attack under the Commerce Clause" (quotations omitted)). Indeed, this Court has rejected arguments that similar savings clauses authorized state and local regulations that discriminated against interstate commerce. *See, e.g.*, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 47-49 (1980).

As with the primary dormant Commerce Clause question, courts of appeals other than the Seventh Circuit have rejected arguments that savings clauses immunize state laws from invalidation under the dormant Commerce Clause. *See* Pet. 26-28. This Court should grant review to return uniformity to these crucial areas of law.

B. If Left To Stand, The Decision Below Will Allow State And Local Laws To Substantially Burden The Nation's Airlines, And Thus The Nation's Commerce, Without Any Substantial Corresponding Benefit

The airline industry is critical to the Nation's commerce. As Congress has recognized, the "public interest" requires "a complete and convenient system" of "interstate air transportation." 49 U.S.C. § 40101(a). By making travel "fast, safe, efficient, and convenient," air transportation promotes the "general welfare, economic growth and stability, and security of the United States." *Id.* § 101(a).

When States impose substantial burdens on the airline industry, they necessarily substantially burden interstate commerce. This Court has thus repeatedly recognized that the airline industry by nature requires a uniform regulatory scheme to function properly, and such uniformity would be impossible to achieve if non-discriminatory but substantially burdensome state laws were immune from dormant Commerce Clause scrutiny. *See, e.g.*, *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 625 (1973) (recognizing that air transportation is "in [its] nature national," and "imperatively de-

mand[s] a single uniform rule, operating equally [throughout] the United States" (quotations omitted)); *see also Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 107 (1948) (describing airlines as "[a] way of travel which quickly escapes the bounds of local regulative competence," and thus "called for a more penetrating, uniform and exclusive regulation by the nation . . .").

Even seemingly slight burdens can be significant in the context of the airline industry. Because this industry crosses multiple jurisdictional lines every day, burdens rapidly accumulate. *See, e.g.*, *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 444 (1960) ("[A] state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary."); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527 (1959) (explaining that "prompt movement may be of the essence" in the interstate transportation industry).

That is particularly true with respect to wage-and-hour laws applied to flight crew members, who do not normally work principally in one State. Although these laws are facially non-discriminatory towards interstate commerce, they provide a concrete—and troubling—example of the adverse practical consequences of excluding neutral laws from the reach of the dormant Commerce Clause. As the district court recognized, applying local wage-and-hour laws to flight attendants would impose "impossible" practical burdens on airlines. *See* Pet. App. 14a. And it would do so in a manner that undermines core dormant Commerce Clause values by subjecting airlines to a multitude of confusing and

conflicting state regulatory schemes, and by allowing States with the strictest laws effectively to regulate extraterritorially, without any substantial corresponding local benefit.

1. Courts balancing state and national interests must first weigh the costs of the "confusion and difficulty" that result from a "varied system of state regulation." *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 774 (1945). A direct conflict between the laws of different jurisdictions is not necessary to show a serious burden on commerce, *see Raymond Motor*, 443 U.S. at 446, but it strongly suggests one exists, *see Bibb*, 359 U.S. at 526.

Applying state and local wage-and-hour laws to airlines would introduce exactly the sort of complications into airline regulation and interstate transportation that the dormant Commerce Clause prohibits. Airlines would not have the option of applying just the law of a crew member's principal place of work or any other single State. *See Bernstein v. Virgin Am., Inc.*, 227 F. Supp. 3d 1049, 1059 (N.D. Cal. 2017). Rather, airlines could potentially be obligated to comply with the wage-and-hour laws of (1) the State of its own headquarters, (2) the crew member's State of residence, (3) the place of payment, (4) the crew member's place of work, or (5) any State in which the crew member performs some work. *Id.* at 1059-64.

To comply with each of these jurisdictions' wage-and-hour requirements, an airline would need to determine what law applies to each crew member at any given time. For the reasons described in the previous paragraph, multiple laws are likely to be potentially applicable. If multiple laws potentially

apply, airlines must conduct a choice-of-law analysis to determine which State's law governs. And because choice-of-law analysis is often complicated for even highly skilled jurists, airlines will be left to guess at how best to comply with the myriad laws. *Cf. New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 207 (2d Cir. 2006) (Sotomayor, J.) (noting, in a different statutory context, that "[t]he choice-of-law question is a complicated one that has led our sister circuits to reach different answers").

Complicating matters further, airlines generally cannot predict where crew members will actually work, and thus which wage-and-hour laws might potentially apply. Crew members' scheduled flights vary month-to-month. They bid for and are awarded different flights depending on their seniority. Moreover, the flights a crew member actually works can differ significantly from those he or she was scheduled to work. Schedules change for reasons within and beyond crew members' control—for example, crew members may voluntarily trade flights or be involuntarily reassigned due to cancellations or delays. Finally, a given flight worked by a given crew member could pass through different States on different journeys; flight paths sometimes change because of weather patterns, for example. Accordingly, if all state and local wage-and-hour regulations applied to crew members, airlines would have to track the exact movements of their tens of thousands of crew members to be able to comply with the relevant regulations—if compliance were even possible.

And compliance with all the relevant regulations often will *not* be possible because these regulations are not only highly "varied," *S. Pac.*, 325 U.S. at 774,

but inconsistent. Requiring airlines to comply with them with respect to crew members would produce significant "confusion and difficulty," *id.*, severely burdening interstate commerce.

Minimum Wage Requirements: Different jurisdictions have different minimum-wage requirements. To cite just a few examples, the minimum wage ranges from the federal rate of $7.25 (which is the minimum in 21 States and Puerto Rico), to $7.50 in New Mexico, to $8.25 in Illinois, Nevada, and Guam, to $8.55 in Ohio, to $9.86 in Minnesota, to $9.89 in Alaska, to $10.78 in Vermont, to $11 in Arizona, California, and Maine, to $12 in Massachusetts and Washington. *See* Wage and Hour Division, U.S. Dep't of Labor, Minimum Wage Laws in the States.[2] In many jurisdictions, the minimum wage is indexed for inflation, such that it increases each year. *See* Econ. Policy Inst., Minimum Wage Tracker.[3]

Forty-one local governments have adopted minimum wages above the applicable state minimum wage. *See id.* Many of these localities have major airports, and many of their minimum wage laws are still evolving. For example, the minimum wage in Chicago is currently $12 ($3.75 more than Illinois's minimum wage); Chicago's minimum wage will increase to $13 on July 1, 2019. *See* Chi. Minimum Wage Ordinance, Ch. 1-24, 1-24-010 *et. seq.* Similarly, the minimum wage in San Francisco is currently $15 ($4 more than California's minimum wage); it will increase to $15.59 on July 1, 2019. *See* S.F.

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[2] https://www.dol.gov/whd/minwage/mw-consolidated.htm.

[3] https://www.epi.org/minimum-wage-tracker/.

Admin. Code § 12R.4. And Birmingham, Alabama had a higher minimum wage than the rest of the State for one day in 2016, until the governor signed into law a new statute preempting all local minimum wage ordinances. *See Lewis v. Gov'r of Ala.*, 896 F.3d 1282 (11th Cir. 2018), *rehearing en banc granted*, 914 F.3d 1291 (11th Cir. 2019). Litigation over Birmingham's minimum wage law is still ongoing.

Different jurisdictions also have different rules about measuring compliance with minimum wage laws. At the federal level and in many States, an employer complies with minimum wage laws if the employee's *average* hourly wage over the course of the work week meets the minimum. *See* Pet. App. 6a-7a; *Innis v. Tandy Corp.*, 7 P.3d 807, 816 (Wash. 2000) (en banc). But other States require employers to use a wage formula under which an employee must receive the minimum wage for each hour of work, regardless of his or her overall compensation. *See Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005).

Timing of Wage Payments: Different localities also have different requirements as to how often wages are paid. Some require payment once a month. *See, e.g.*, Del. Code Ann. tit. 19, § 1102. Some require payment twice a month. *See, e.g.*, Ky. Rev. Stat. Ann. § 337.020. Others require payment either every two weeks or every week, though an employee or employer may elect less frequent payments in some circumstances. *See, e.g.*, Mass. Gen. Laws Ann. ch. 149, § 148; N.H. Rev. Stat. Ann. § 275:43. Others require weekly payment. *See* Vt. Stat. Ann. tit. 21, § 342. Still other States require payment at unconventional intervals. *See* Ariz. Rev.

Stat. § 23-351.A (16 days); Me Rev. Stat. tit. 26, § 621-A.1 (same); N.M. Stat. Ann. § 50-4-2.A (same); Or. Rev. Stat. § 652.120(2) (35 days).

States similarly disagree about how long after the end of a pay period employers have to pay wages. *See, e.g.*, Vt. Stat. Ann. tit. 21, § 342 (6 days); Del. Code Ann. tit. 19, § 1102 (7 days); Haw. Rev. Stat. § 388-2(b) (7 days); Conn. Gen. Stat. § 31-71b(b) (8 days); Me. Rev. Stat. tit. 26 § 621-A.1; 28 R.I. Gen. Laws § 28-14-2 (9 days); Colo. Rev. Stat. Ann. § 8-4-103(1)(a) (10 days for most employees); D.C. Code Ann. § 32-1302 (10 days); Iowa Code Ann. § 91A.3(1) (12 days); 820 Ill. Comp. Stat. 115/4 (13 days); Mo. Rev. Stat. § 290.080 (16 days); Wis. Stat. Ann. § 109.03(1) (31 days).

Payment for Terminated Employees: States also have different rules regarding final payment for employees who are terminated or leave their jobs. For example, Kentucky requires employers to pay workers who are fired or quit on the next normal payday or 14 days after separation, whichever is *later*. Ky. Rev. Stat. Ann. § 337.055. Idaho requires employers to pay workers who are fired or quit on the next regular payday or within 10 days of termination, whichever is *earlier*. Idaho Code Ann. § 45-606(1). Other States have fixed deadlines for paying employees who are separated from their employment: For example, Alaska requires that workers who are fired or quit be paid within three working days of termination. *See* Alaska Stat. Ann. § 23.05.140(b). Wyoming requires that such workers be paid within five days. *See* Wyo. Stat. Ann. § 27-4-104. And Arkansas requires that employees who are fired be paid within seven days. Ark. Code Ann. § 11-4-405.

Overtime: States also differ in when they require overtime pay and how much they require. Although many States simply follow the FLSA, some States require overtime in circumstances other than when the FLSA requires it (i.e., in addition to times when an employee works forty hours in a week). For example, Alaska generally requires overtime pay for any time worked over eight hours in a workday. Alaska Stat. Ann. § 23.10.060(b). California generally requires overtime pay when an employee works more than eight hours in a day and for the first eight hours of the seventh day worked in a week. Cal. Labor Code § 510(a). Double pay is required for any hours worked over twelve hours in a day or over eight hours in any seventh day of a workweek. *Id.* Colorado requires overtime pay when an employee works over twelve hours in a day or over twelve consecutive hours. 7 Colo. Code Regs. 1103-1. Minnesota generally requires overtime only after 48 hours are worked in a week. Minn. Stat. Ann. § 177.25.

Issuance of Wage Statements: The vast majority of States and many municipalities require the issuance of wage statements, but some do not. *See* 4 Employment Coordinator Compensation, ch. 37 (Westlaw Mar. 2019 update) (citing jurisdictions that have adopted each rule).

The States that do require wage statements disagree about the form they must take. For example, some allow electronic statements. *See, e.g.*, Ariz. Rev. Stat. Ann. § 23-351. Some allow electronic statements only if the employee has access to a printer. *See* Iowa Code Ann. § 91A.6; Ky. Rev. Stat. Ann. § 337.070; Minn. Stat. Ann. § 181.032(a). And some require paper statements. *See, e.g.*, N.M. Stat.

§ 50-4-2. Other jurisdictions, by contrast, leave the choice to the employee. Some require employers to provide electronic statements by default but allow their employees to opt *out of* electronic statements, Minn. Stat. Ann. § 181.032(c), while others require employers to provide paper statements by default but allow their employees to opt *into* electronic statements, Haw. Rev. Stat. § 388-7(4).

Where paper wage statements are provided, jurisdictions disagree about the form they must take. For example, in Delaware, an employer must in certain cases provide the statement "on a separate slip." Del. Code Ann. tit. 19, § 1108. But in Wyoming, the employer must provide the statements on a "detachable part of the check." Wyo. Stat. Ann. § 27-4-101.

States also impose widely varying requirements concerning the contents of wage statements. For example, Arizona requires only that the employer list the employee's earnings and payroll deductions. Ariz. Rev. Stat. § 23-351(E), (F); *see also* Idaho Code § 45-609 (similar). By contrast, Alaska requires wage statements to list the employee's (1) rate of pay, (2) gross wages, (3) net wages, (4) beginning and end dates for the pay period, (5) straight time and overtime hours actually worked during the period, (6) federal income tax deductions, (7) federal insurance contribution act deductions, (8) Alaska Employment Security Act contributions, (9) boarding and lodging costs, (10) advances, and (11) any other authorized deductions. Alaska Admin. Code, tit. 8, § 15.160(h). There is a great deal of variation among States between these extremes. *See, e.g.*, Cal. Labor Code § 226 (9 requirements); D.C. Code § 32-1008 (7 requirements); Colo. Rev. Stat. Ann. § 8-4-103(4) (6

requirements); Conn. Gen. Stat. Ann. § 31-13a (5 requirements); Ind. Code § 22-2-2-8(a) (3 requirements).

Meal and Rest Breaks: States also disagree about how much meal and rest break time employers must give employees. Thirty-five jurisdictions do not require meal breaks. By contrast, California and Colorado require a half-hour break if the employee works more than 5 hours per day. Connecticut and Delaware require half-hour breaks only if the employee works seven and a half consecutive hours or more. Illinois requires a break of at least 20 minutes, no later than five hours after the start of the work period, if the employee works seven and a half consecutive hours. Kentucky simply requires a "reasonable" break between the third and fifth hour of work. Oregon requires a half-hour break for each work period of six to eight hours, between the second and fifth hours worked for a work period of seven hours, or between the third and sixth hour of work for a period longer than seven hours. Other States have yet other requirements. *See* Wage and Hour Division, U.S. Dep't of Labor, Minimum Length of Meal Period Required under State Law for Adult Employees in Private Sector.[4]

Eight States also require paid rest breaks. California, Colorado, Nevada, Oregon, and Washington require a ten-minute rest period for each four hours worked or major fraction thereof; the break must, to the extent practicable, be in the middle of each work period. Minnesota simply requires an "adequate"

[4] https://www.dol.gov/whd/state/meal.htm#foot4.

paid rest period for each four consecutive hours worked. Vermont similarly requires that employees be given "reasonable opportunities" during work periods to eat and use the restroom. Some States exempt employees covered by collective bargaining agreements from these requirements; others do not. *See* Wage and Hour Division, U.S. Dep't of Labor, Minimum Paid Rest Period Requirements under State Law for Adult Employees in Private Sector.[5]

* * *

In short, complying with all relevant state legislation is often "impossible," as the district court here recognized. Pet. App. 14a. For example, it is not possible for an employer to have both opt-in and opt-out regimes for electronic wage statements. *Compare* Minn. Stat. Ann. § 181.032(c); *with* Haw. Rev. Stat. § 388-7(4). Similarly, it is not possible for employers to pay workers who are fired or quit on the next normal payday or 14 days after separation, whichever is *later*, Ky. Rev. Stat. Ann. § 337.055, and to pay employees who are fired or quit on the next regular payday or within 10 days of termination, whichever is *earlier*, Idaho Code Ann. § 45-606(1).

Even ignoring the contradictions between the applicable wage-and-hour laws, compliance with all their requirements would be incredibly burdensome. As explained above, States and localities vary considerably in the requirements they impose on employers with respect to the mechanics of paying employees. The "confusion and difficulty" of trying to

[5] https://www.dol.gov/whd/state/rest.htm.

comply with this "varied system of state regulation," *S. Pac.*, 325 U.S. at 774, is exactly the sort of burden on interstate commerce that contravenes the dormant Commerce Clause—particularly in the airline industry, where crew members cross state lines on a daily basis as a matter of course.

2. Moreover, requiring airlines to comply with wage-and-hour laws with respect to all crew members would effectively result in the airlines following the most restrictive jurisdiction's laws nationally. This result is not "speculative"; rather, the "practical effect" of applying state and local wage-and-hour laws to airlines would inevitably be to "project [one State's] legislation into" others. *Brown-Forman*, 476 U.S. at 583 (quotations omitted). And this outcome would directly violate the dormant Commerce Clause's limitation on the scope of a State's power. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid."). Indeed, this Court has routinely invalidated state and local laws with just this sort of extraterritorial effect. *See, e.g.*, *id.* at 335-40; *Brown-Forman*, 476 U.S. at 583-84; *Edgar v. MITE Corp.*, 457 U.S. 624, 641-46 (1982).

This Court has invalidated such laws even when they did not not *directly* regulate out-of-state commerce, but instead incidentally affected extraterritorial conduct. *See S. Pac.*, 325 U.S. at 773-75 (invalidating Arizona law limiting freight trains to seventy cars). Such laws are evaluated under *Pike* and invalidated where "the burden imposed on [interstate] commerce is clearly excessive in relation to the puta-

tive local benefits." *Pike*, 397 U.S. at 142. But according to the Seventh Circuit, there is no need to even ask whether applying state and local wage-and-hour regulations to airlines would be permissible under *Pike*. That is not the law.

3. Nor would application of local wage-and-hour laws to crew members provide any substantial benefit, because such regulation is unnecessary to protect them from sub-standard pay. A4A's members extensively negotiate pay and other benefits with flight crew unions. The resulting collective bargaining agreements (CBAs) are *specifically designed* to protect crew members who might sit at home on reserve one month, and then cross twenty jurisdictional lines the next month. CBAs provide protection by *not* linking pay strictly to hours worked.

For example, United Airlines pays pilots according to a complex formula that includes flight advances (which reflect the pilot's anticipated compensation at the end of the bid period) and a minimum pay guarantee for each day the pilot is scheduled to work. Similarly, Alaska Airlines compensates flight attendants based on "trips for pay," which are based on the distance of a flight, not days or hours worked. Flight attendant pay also fluctuates monthly according to (among other variables) the number of duty periods in a sequence in a bid month, whether a flight attendant voluntarily swaps trips, the position in the aircraft the flight attendant works (which can change from flight to flight), whether flights are flown internationally, whether flights are delayed or cancelled, and whether the flight attendant duty day exceeds a specified period of time.

Requiring airlines to compensate crew members under minimum-wage laws would undo these carefully-negotiated arrangements. It would also likely produce at least temporary disruption in air transportation as unions and airlines negotiated how to square the block pay requirements of CBAs with the hourly wage requirements of various jurisdictions. Strikes, grievances, and state court law suits would all likely follow. "Congress has long concerned itself with minimizing" just these types of "interruptions in the Nation's transportation services" through fostering uniform labor laws for interstate transportation providers. *Int'l Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682, 687 (1963) (footnotes omitted). This same concern for minimizing disruption to interstate transportation services counsels against application of state and local wage-and-hour laws to airline crew members. At the very least, concern about application of these laws to airlines calls for this Court to evaluate those laws under *Pike*, contrary to the Seventh Circuit's decision.

CONCLUSION

The petition should be granted and the decision below reversed.

Respectfully submitted,

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