No. 14-801

IN THE

Supreme Court of the United States

PENSKE LOGISTICS, LLC,
AND PENSKE TRUCK LEASING CO., L.P.,

Petitioners,

v.

MICKEY LEE DILTS, RAY RIOS, AND DONNY DUSHAJ,

Respondents.

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

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AND AIRLINES FOR AMERICA AS AMICI CURIAE SUPPORTING PETITIONERS

DAVID A. BERG
ROBERT DELUCIA
Airlines for America
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004
(202) 626-4000

Counsel for Amicus Curiae
Airlines for America

RICHARD PIANKA
Counsel of Record
ATA Litigation Center
PRASAD SHARMA
American Trucking
Associations, Inc.
950 North Glebe Road
Arlington, VA 22203
(703) 838-1889
rpianka@trucking.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF THE AMICI CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 2,000 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

The Air Transport Association of America, Inc., d.b.a. Airlines for America (A4A), is the trade association of the principal United States airlines. Together with their affiliates, those airlines transport more than ninety percent of U.S. airline passengers and cargo traffic. As part of its mission, A4A seeks to identify and challenge laws and policies that impose inappropriate regulatory burdens on airlines.

---

* Petitioners have filed blanket consent to amicus curiae briefs with the Clerk's office, and have received timely notification of amici's intent to file this brief. After timely notification, respondents consented to the filing of this brief, and their consent letter has been filed with the Clerk's office. Pursuant to Rule 37.6, amici state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Amici and their members have a strong interest in ensuring that Congressional policy establishing deregulated trucking and airline industries is not undermined by a patchwork of state-level impediments to the safe and efficient flow of commerce. Moreover, ATA and A4A have special familiarity with the issue of preemption under the Federal Aviation Administration Authorization Act (FAAAA) and the Airline Deregulation Act (ADA), because they actively participated in the formulation of Congress's policy of deregulating the trucking and airline industries. See, *e.g.*, H.R. Conf. Rep. No. 103-677, at 88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760. Since that time, ATA and A4A have been involved, either as a party or an amicus, in many of the decisions of this Court interpreting and applying the preemption provisions of the FAAAA and ADA, including *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422 (2014); *American Trucking Associations, Inc.* v. *City of Los Angeles*, 133 S. Ct. 2096 (2013); and *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364 (2008).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Aviation Administration Authorization Act (FAAAA) preempts any state law "related to a price, route, or service of any motor carrier" or any "air carrier * * * transporting property * * * by motor vehicle." 49 U.S.C. § 14501(c)(1). This provision reflects Congress's determination to leave decisions concerning their prices, routes, and services, "where federally unregulated, to the competitive marketplace." *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373

(2008). Congress recognized that, even after largely deregulating the trucking industry at the federal level, "[t]he sheer diversity of [state] regulatory schemes [remained] a huge problem for national and regional carriers attempting to conduct *a standard way of doing business*." H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 (emphasis added). It passed the FAAAA to ensure that motor carriers could implement efficient, standard business practices nationwide, subject to a set of uniform federal regulations focused on highway safety and driver welfare. And this Court has repeatedly explained that the preemption provision of the FAAAA (and the materially identical provision of the ADA) is broad in scope, extending to all state measures that relate to a carrier's prices, routes, or services, unless the relationship is no more than "tenuous, remote, or peripheral." *Rowe*, 552 U.S. at 375. See also, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (explaining that the words of the ADA's preemption provision "express a broad pre-emptive purpose").

Petitioners have explained in detail how the faulty analysis employed by the Ninth Circuit violates the plain language of the statute and this Court's precedents. Amici file this brief to further explain (1) how the decision below frustrates Congressional policy of a market-driven, deregulated trucking industry by preventing motor carriers from taking advantage of logistical efficiencies tailored to nationally uniform rules governing driver hours; and (2) the serious implications the decision has for FAAAA and ADA preemption analysis, beyond the immediate context of state-mandated meal and rest breaks. For those reasons, this Court's review is urgently required.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with This Court's Precedents, and Fails to Give Full Effect to the FAAAA's Preemption Provision.

Congress enacted the FAAAA's broad preemption provision in 1994 with the goal of eliminating the patchwork of burdensome state trucking regulations that had previously developed, and to ensure that states would not undo federal deregulation of the trucking industry with impediments of their own. As this Court has observed, 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. To achieve its goal, Congress expressly incorporated the preemptive language and effect of the Airline Deregulation Act (ADA), 49 U.S.C. § 41713(b)(1), as this Court had broadly interpreted it in *Morales*, 504 U.S. at 374. Accordingly, like the ADA, the FAAAA preempts all laws, regulations, and enforcement actions that affect a price, route, or service of any motor carrier—whether that effect is direct or indirect. See *Rowe*, 552 U.S. at 370.

FAAAA preemption is an essential component of the broad federal policy of *uniform* regulation of interstate motor carriers. As this Court has explained, "Congress' overarching goal" in enacting the ADA and FAAAA preemption provisions was to "help[] assure 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.'" *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378).[1] That Congressional policy permits motor carriers to implement efficient, standard business practices nationwide. And those standard practices—along with the timely, efficient, and cost-effective delivery of goods they enable—in turn are essential not only to carriers themselves but also to the customers who rely on them for timely shipments and, by extension, to the national economy as a whole.

1. Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, Congress made a commitment to deregulate the motor carrier industry. At that time, Congress found that "[t]he existing regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and ha[d] failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. Rep. No. 96-1069, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2292; see also, *e.g.*, Michael J. Norton, *The Interstate Commerce Commission and the Motor Carrier Industry—Examining the Trend Toward Deregulation*, 1975 Utah L. Rev. 709, 709 (reporting that federal motor carrier "regulation has recently come under attack for causing inefficiency and wastefulness, and for repressing technological advances in the industry"). Thus, in order to remove obstacles to innovation and to encourage efficiency, Congress significantly deregulated the industry at the federal level.

It soon became clear, however, that federal deregulation could not achieve its objectives so long

---

[1] Congress set similar policy objectives for airline deregulation. See 49 U.S.C. § 40101(a)(6), (12).

as burdensome and inconsistent state regulation persisted. As ATA testified when it urged Congress to broadly preempt states from imposing their public policies on motor carriers, efficiency in the trucking industry "requires that certain uniform practices, rules and other requirements be maintained on a national level." Hearing Before Subcomm. on Surface Transp. of the S. Comm. on Commerce, Sci., and Transp. at 85, 103d Cong., 2d Sess. (July 12, 1994) (statement of Thomas J. Donohue), 1994 WL 369290. Congress agreed, concluding that "the regulation of intrastate transportation of property by the States" continued to "impose[] an unreasonable burden on interstate commerce;" "impede[] the free flow of trade, traffic, and transportation of interstate commerce;" and "place[] an unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605. Specifically, Congress found that state regulation "causes significant inefficiencies," "increase[s] costs," and "inhibit[s] * * * innovation and technology." H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759.[2] Indeed, despite deregulatory efforts at the federal level, "[t]he sheer diversity of [state] regulatory schemes [remained] a huge problem for national and regional carriers attempting to conduct *a standard way of doing business*." *Ibid.* (emphasis added). Therefore, in order to free carriers from this burdensome "patchwork" of state regulation, Congress concluded that "preemption legislation [was] in the public interest

[2] *See also City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440–41 (2002) (referring to the same Conference Report for guidance as to Congressional intent in interpreting the preemption language).

as well as necessary to facilitate interstate commerce." *Ibid.*

2. To achieve its deregulatory goals, Congress purposefully copied the preemptive language of the ADA. H.R. Conf. Rep. No. 103-677 at 83. Like the ADA, the FAAAA preempts any "law related to a price, route, or service of any * * * carrier." 49 U.S.C. § 14501(c)(1); see also *id.* § 41713(b)(4)(A). Further, Congress specifically intended to incorporate "the broad preemption interpretation adopted by the Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83; see also *Morales*, 504 U.S. at 383 (these "words * * * express a broad pre-emptive purpose"). Under *Morales*, any state law that affects a price, route, or service of any carrier is preempted. 504 U.S. at 388. As this Court has repeatedly made clear, state laws are preempted even if such effects are "only indirect." *Rowe*, 552 U.S. at 370; *Morales*, 504 U.S. at 384. And the Court expressly recognized that the preemption threshold is a low one: so long as a state law has an effect on prices, routes, or services that is not "tenuous, remote, or peripheral," it is preempted. *Rowe*, 552 U.S. at 375. See also, *e.g.*, *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1428 (2014) (rejecting Ninth Circuit's holding that a claim for breach of the implied covenant of good faith and fair dealing is "too tenuously connected to airline regulation to trigger preemption").

3. The Ninth Circuit, by contrast, persists in setting a high bar for preemption under the FAAAA and ADA. In this case, while there was no dispute that the state break requirements affected carrier routes and services, Pet App. 44a, the Ninth Circuit did not inquire whether that effect was merely "tenuous, remote, or peripheral." Instead, the court

below employed an idiosyncratic test it applies when a state law "does not refer directly to rates, routes, or services." Pet. App. 14a. In such cases, the Ninth Circuit held, "'the proper inquiry is whether the provision * * * *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, 397 (9th Cir. 2011), rev'd in part and aff'd in part, 133 S. Ct. 2096 (2013)).

That analysis—which no other circuit has adopted—fails to give full effect to Congress's command, and cannot be squared with this Court's consistent instructions regarding FAAAA preemption. The language of the test is patently narrower than the "expansive" language of the statute, *Morales*, 504 U.S. at 384: laws that *bind* a carrier to a *particular* price, route or service will necessarily be a small subset of laws that—in the language of the statute—*relate to* a carrier's price, route, and service. The "binds to" test, on its face, fails to give full effect to the language of the statute. And this Court long ago rejected the contention that the ADA (and, by the same token, FAAAA) "only pre-empts the States from *actually prescribing* rates, routes, or services," because that would "simply read[] the words 'relating to' out of the statute." *Morales*, 504 U.S. at 385 (emphasis added). Nevertheless, that is precisely what the Ninth Circuit has done yet again.

4. Had the Ninth Circuit applied the analysis dictated by the language of the statute and this Court's precedents, it would have had no choice but to conclude that the FAAAA preempts the application of California's meal and rest break requirements to motor carriers. As the petition

explains in detail, even the plaintiffs acknowledged the impact that the break requirements have on motor carrier routes and services. Pet. 23-24. As the district court put it, "[b]oth parties agree that the M&RB laws impact the number of routes each driver/installer may go on each day, and Plaintiffs do not oppose Penske's argument that the laws impact the types of roads their drivers/installers may take and the amount of time it takes them to reach their destination." Pet. App. 44a.

Given that the break requirements indisputably *relate* to Penske's routes and services, the next and final inquiry under this Court's precedents is whether that relationship is merely "tenuous, remote, or peripheral." *Rowe*, 552 U.S. at 375. But the Ninth Circuit failed to engage in this inquiry, to which the only possible answer is "no." It is undisputed that, at a minimum, California's meal and rest breaks reduce the services a carrier could otherwise provide, and limit the routes it could otherwise travel. Pet. App. 43a-44a. That alone makes the relationship far more than tenuous, remote, or peripheral. And as we explain in greater detail below, the break requirements also have the serious consequence of impeding crucial operational flexibility and disrupting complex logistical practices that motor carriers have carefully engineered for efficiency. See pp. 14-16, *infra*. The Ninth Circuit was only able to reach the result it did by avoiding this inquiry altogether, and instead substituting its atextual "binds to" test.

5. The Ninth Circuit's disregard for the Congressional policy embodied in the FAAAA is underscored by its glib treatment of the undisputed impact of California's break requirements on carrier

routes and services. For example, the court below acknowledged that the requirements would cause what it characterized as "minor adjustments to drivers' routes," but dismissed that concern because "drivers already must incorporate into their schedule fuel breaks, pick ups, drop offs and, in some cases, time to install products." Pet App. 22a. But this elides the important distinction between operational decisions a carrier makes to efficiently service its customers, and those a carrier makes to comply with state laws. With the FAAAA, Congress expressly preempted the latter so that they would not interfere with the former.

Similarly, the Ninth Circuit dismissed concerns that break requirements would meaningfully affect a carrier's services because carriers could simply "hire additional drivers or reallocate resources in order to maintain a particular service level." Pet App. 19a. That assertion admits that the requirements "relate to" prices, routes, and services, while at the same time overlooking the fact that multiplying the labor costs of a service will in many cases mean that services sought by customers cannot be provided at all—particularly in a competitive, labor-intensive, low-margin industry like trucking. See *Am. Trucking Ass'ns*, 660 F.3d at 399 (state laws preempted if they "*impose costs* that compel the carrier to change rates, routes, or services" (emphasis added)). But more fundamentally, requiring motor carriers to tailor their labor force and operations to state break rules—rather than to productivity and customer requirements—profoundly undermines Congress's goal of promoting market-driven efficiency through the FAAAA's preemption provision.

II. The Question Presented Is Significant and Recurring.

A. The Decision Below Undermines Congress's Goal of Promoting Market-Driven Efficiency in the Trucking and Airline Industries.

If not preempted, California's meal and rest break requirements would significantly interfere with Congress's goal of national uniformity and market-driven efficiency in the trucking industry. Petitioners explained the significant (and undisputed) effects of California's meal and rest break requirements on their operations. Pet. 22-26. Translated across the trucking industry, the magnitude of the potential disruption is enormous, particularly against the background of nationally uniform hours-of-service regulations promulgated by the Department of Transportation, at Congress's instructions.

1. "The federal government has regulated the hours of service (HOS) of commercial motor vehicle operators since the late 1930s, when the Interstate Commerce Commission * * * promulgated the first HOS regulations under the authority of the Motor Carrier Act of 1935." *Owner-Operator Indep. Drivers Ass'n* v. *Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 193 (D.C. Cir. 2007). At present, the Federal Motor Carrier Safety Administration (FMCSA) comprehensively regulates the number of hours truck drivers may spend on the road, under a Congressional mandate to ensure safe operation of commercial motor vehicles and prevent adverse health effects on drivers. See 49 U.S.C. §§ 31136, 31502; 49 C.F.R. § 395.

FMCSA's current HOS regulations limit the hours of drivers of property-carrying commercial motor vehicles in two primary ways: First, following ten consecutive hours off duty, a driver may not drive more than eleven hours total or beyond the fourteenth hour after coming on duty. 49 C.F.R. § 395.3(a)(1)-(2). Second, a driver may not drive beyond his sixtieth hour on duty over the course of a seven-day period, or beyond his seventieth hour on duty over the course of an eight-day period. *Id.* § 395.3(b). Once per week, a driver may restart the seven- or eight-day period after taking at least thirty-four consecutive hours off duty. *Id.* § 395.3(d).[3]

Under a modification to the HOS rules that went into effect last year, most drivers are required to take a 30-minute break at a time of their choosing, within eight hours of going on duty. 49 C.F.R. § 395.3(a)(3)(ii). In addition, "drivers are free * * * to take rest breaks at any time" as necessary for safe operation of their vehicles, but otherwise have

[3] The current federal HOS regulations also eliminate a provision of the pre-2003 regulations that permitted a driver to extend the on-duty period during which his allotted daily driving time could be completed by taking "off-duty" breaks during the day. *See* Hours of Service of Drivers, 68 Fed. Reg. 22,456, 22,471 (Apr. 28, 2003). Thus, under the pre-2003 regime, break periods mandated by state law would not have reduced the total driving time or on-duty time allowed by federal law; although they would have interrupted (and likely disrupted) the driver's duty period, they also would have extended the period by the length of the breaks. Under the current regime, however, application of California's break requirements would simply eat into the time that federal law permits drivers to complete their work, and thus directly limit the services carriers can provide within that framework.

discretion as to when to drive within the broad parameters of the HOS rules. See Hours of Service of Drivers, 68 Fed. Reg. 22,456, 22,466 (Apr. 28, 2003). This flexibility is crucial "in a business requiring fluctuating hours of employment." *Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44, 48 (1943).

In short, the evolving federal HOS regulations strike a nationally uniform balance between the primary concerns of highway safety and driver health, and the nation's dependence on the efficient movement of goods by truck. Operational flexibility is a key ingredient of that balance. See, *e.g.*, *Levinson* v. *Spector Motor Serv.*, 330 U.S. 649, 657-62 (1947); Hours of Service of Drivers, 70 Fed. Reg. 49,978, 49,981 (Aug. 25, 2005) ("The operational and scheduling flexibility of an 11-hour limit, even when it is not utilized fully, is both economically and socially valuable."). As this Court has explained, "Congress * * * relied upon the [HOS rules] to work out satisfactory [hours] for employees charged with the safety of operations in a business requiring fluctuating hours of employment." *Southland Gasoline*, 319 U.S. at 48.

To protect the uniform balance of the HOS rules from disruption by even *federal* law, Congress exempted drivers from the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* See *Southland Gasoline*, 391 U.S. at 48-49 (Congress sought "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers"); *Levinson*, 330 U.S. at 657 (noting that Congress exempted certain employees in the motor carrier industry from the Fair Labor Standards Act because the economic incentives that overtime pay creates may not always be compatible with the HOS rules).

The FLSA exception reflects Congressional intent to maintain a uniform regulatory environment for the trucking industry in general, and in particular to prevent generally applicable federal wage and hours laws from displacing federal HOS regulations. The FAAAA's preemption provision furthers that goal with respect to state law.

2. California's meal and rest break requirements relate to motor carrier services and routes, and are thus preempted under the FAAAA, because they prevent carriers from providing services and employing routes that would otherwise be available to them under the nationally uniform rules established by FMCSA at Congress's instruction.

a. To take one simplified (but by no means unrealistic) example: suppose a shipper has a load ready for pickup at 9:00 a.m. at point A, and needs it delivered to point B—six hours away—no later than 3:30 p.m. Under the federal hours-of-service regulations, a motor carrier could comfortably offer to provide that service. If the carrier were further subject to California's break rules, however, it could not. The driver would have to be provided with both a 10-minute and a 30-minute off-duty break during that 6-and-a-half hour delivery window. Even setting aside the time necessary to locate a safe rest area, pull the truck off the road to reach it, and then get back on the road (which could easily add 10 or more minutes to each end of each break), that would render the service impossible to provide.

b. Real-world trucking operations are typically far more complex, involving carefully engineered logistical networks to reap efficiency—and all the more subject to serious disruption by state-level break requirements. In many cases, carriers' operations are timed carefully to take advantage of the full flexibility offered by the federal HOS rules. Application of California's break requirements would make that impossible.

For example, in order to maximize speed of service and driver efficiency, a carrier might schedule its drivers' meal periods to take place at the carrier's facilities, after they have delivered an inbound load there. Dock workers can then unload and process the inbound load, and prepare and load a new outbound load, while the driver takes his or her meal period. The timing limitations of California's break requirements, however, might force a driver to take a break *before* reaching the carrier's facilities with an inbound load, which would, in turn, delay outbound deliveries. And inefficiencies can be further compounded when drivers are scheduled to load or unload at multiple locations during the course of a single day.

California's break requirements would similarly disrupt the use of so-called "turn drivers", who meet at specified points to exchange loads. For example, drivers from Los Angeles and Sacramento might meet at an intermediate point to exchange loads. Turn drivers typically break for a meal at the meeting point (which might be their carrier's terminal), exchange loads, and then depart for a delivery point. If, however, one driver cannot reach the meeting point within five hours, California's meal break requirement would require him or her to stop *before* meeting up with the other driver, thereby introducing an additional, unnecessary stop into the route and also delaying the other driver.

To take another example, some carriers deliver products to regional customers in the morning, and

make pickups from regional shippers in the afternoon. These pickups are precisely timed so that the trucks can return to their terminals late in the day and just in time to load their shipments onto long-haul trucks scheduled to depart for various destinations. By mandating a second meal break (as well as multiple rest breaks), California's requirements would invalidate routes that were calculated to maximize productivity under the uniform federal rules.

Application of California's break requirements would also disrupt carriers' ability to get loads to distribution points in time to begin morning deliveries to local retail businesses that depend on daily shipments. For example, a driver may be scheduled to deliver a truckload of small shipments to a carrier's distribution facility in Los Angeles by 6:00 a.m. so that they can be unloaded and then reloaded onto smaller trucks for delivery within the area beginning at 9:00 a.m. That driver likely would be scheduled to drive through the night to reach the carrier's Los Angeles facility, at which point he or she would likely take a meal break. If, however, the driver is required by California law to make a stop for a meal period *before* reaching the facility, the carriers' ability to meet distribution schedules will be disrupted. The unloading and reloading process would be delayed, as would the local drivers scheduled to make deliveries in the city. In some cases, this would mean that the carrier is simply unable to make deliveries within the time frame promised to customers—a time frame that the uniform federal HOS regulations would have permitted.

c. The result is a cascade of inefficiencies that would significantly reduce the services a carrier can offer under the uniform federal regulations—precisely the sort of state interference with motor carrier services that the FAAAA was designed to prevent. The California break rules would result in a "direct substitution of * * * governmental commands for 'competitive market forces' in determining (to a significant degree) the services motor carriers will provide." *Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378). The break requirements would require motor carriers to offer more limited services that "differ significantly from those that, in the absence of regulation, the market might dictate." *Ibid.*

3. Because courts interpret the materially identical language of the FAAAA and ADA in lockstep, *Rowe*, 552 U.S. at 370, the decision below promises to disrupt the airline industry as well. The decision's flawed preemption analysis will continue to be applied in the many contexts in which ADA preemption arises in the Ninth Circuit. Indeed, one district court has already applied *Dilts* to conclude that the ADA does not preempt application of a local Port Authority's rules that set hiring and training standards, compensation, time off, and compliance, reporting and enforcement requirements for certain airline and airline-contractor employees at Seattle International Airport. See *Air Transp. Assoc. of Am.* v. *Port of Seattle*, No. C14-1733 (W.D. Wash. Dec. 19, 2014). Thus, notwithstanding the contorted view expressed by the United States in its amicus brief below concerning the application of California's meal and rest break requirements to airline employees, Brief for the United States as Amicus Curiae at 25, *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637 (9th Cir.

2014) (No. 12-55705), airlines will be directly and adversely impacted by the decision below and the Ninth Circuit's continuing effort to "rely[] on pre-*Wolens* Circuit precedent," *Northwest*, 134 S. Ct. at 1428, to limit the "broad pre-emptive purpose" of ADA and FAAAA preemption, *Morales*, 504 U.S. at 383.

B. The Ninth Circuit's Decision Will Result in Precisely the State-by-State Patchwork of Regulation That the FAAAA Was Designed to Prevent.

Since the FAAAA's enactment, carriers have been able to schedule their operations in order to become as efficient as possible by tuning their complex logistics to a single, uniform set of HOS parameters. As explained above, those efficiencies are seriously undermined even by the application of a single state's meal and rest break requirements, when layered on top of the nationally uniform hours of service rules.

But the decision below goes far further, by giving *all* states the green light to restrict the services a motor carrier can provide, and the routes it can travel, within the parameters of the federal HOS limits. In other words, as the Ninth Circuit would have it, motor carriers must reengineer their business practices not just to take into account California's break requirements (on top of federal HOS limits), but potentially as many as fifty sets of varying state break requirements. The resulting patchwork would render Congress's goal of allowing carriers "to conduct a standard way of doing business", H.R. Conf. Rep. No. 103-677 at 87, a dead letter. See also *Rowe*, 552 U.S. at 373 (a "state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.").

1. This concern was shared by the United States, in the amicus brief submitted by the Department of Transportation and the Department of Justice below. The government argued against preemption *in this case*, based on its understanding that the case involved only "short-haul drivers who . . . make frequent stops during the course of their ordinary work day," all within the borders of the state of California. Brief for the United States as Amicus Curiae at 11, *Dilts*, *supra*. On that contention, they were wrong. The government's attempt to carve out this one category—drivers who do not cross state borders—cannot be squared with the language of the statute, which preempts state laws that "relate to a price, route, route, or service of *any motor carrier*", 49 U.S.C. § 14501(c)(1) (emphasis added). That Congressional command is not amenable to the sort of carrier-by-carrier (much less driver-by-driver) approach the government argues for. See also Pet. 29-30 (explaining that DOT's conclusion depended on accepting the flawed analysis employed by the Ninth Circuit).

2. But even while it argued against preemption in this particular case, the United States cautioned that "preemption might be established in other contexts," in particular, where "[a] carrier's obligation to track and comply with a patchwork of disparate state law requirements would arguably impose *precisely the type of burden* on routes and services that Congress sought to avoid when it deregulated the motor carrier industry." Brief for the United States at 24-25 (emphasis added).

The decision below leaves no room for such distinctions. To the contrary, the Ninth Circuit's opinion unequivocally stated that its holding is *not* tied to the purported short-haul, single-state nature of these drivers' work: After holding that state rest break requirements do not run afoul of the FAAAA because they do not relate to prices, routes, or services in the first place, the court below observed merely that "Defendants *in particular* are not confronted with a 'patchwork'" insofar as they "work on short-haul routes and work exclusively within the state of California." Pet. App. 19a n.2 (emphasis in original).

To be sure, Judge Zouhary, who joined the opinion below in full, wrote a concurring opinion asserting, *inter alia*, that "this case [is not] about FAAAA preemption in the context of interstate trucking." Pet. App. 25a (Zouhary, J., concurring). But the Ninth Circuit emphasized that the case did *not* turn on the fact that these particular drivers worked only in California, and that its holding extends to *all* drivers and motor carriers, whatever the geographical nature of their operations. Predictably enough, lower courts have already recognized the broad applicability of the decision below, relying on its holding and flawed analysis in cases involving long-haul drivers and national carriers, and expressly concluding that the decision's "rule on FAAAA preemption applies generally to motor carriers; [the majority opinion] does not limit this rule to motor carriers conducting business entirely within the state of California." *Shook* v. *Indian River Transp. Co.*, 2014 U.S. Dist. LEXIS 174395 at *8 n.2 (E.D. Cal. Dec. 15, 2014). See also *id.* at *8 ("[t]he court reads footnote two of the Dilts majority opinion as rejecting Judge Zouhary's

narrow reading of the majority holding"); *Godfrey v. Oakland Port Servs. Corp.*, 179 Cal. Rptr. 3rd 498, 510 (Cal. Ct. App. 2014) ("the *Dilts* majority made clear . . . that its decision did *not* rely on the intrastate nature of the defendants' operations or on the fact that the routes were short-haul"); *Robles* v. *Comtrak Logisitics, Inc.*, 2014 U.S. Dist. LEXIS 175696 (E.D. Cal. Dec. 18, 2014).

C. The Ninth Circuit's Flawed Holding Immunizes All State Laws of General Applicability from Preemption Under the FAAAA and ADA.

The implications of the Ninth Circuit's decision go far beyond subjecting motor carriers to state break requirements that Congress intended to preempt—though that alone would be a sufficient blow to Congress's deregulatory goals to warrant the Court's review. In fact, the Ninth Circuit's holding puts motor carrier and air carrier deregulation in even greater jeopardy, by effectively immunizing any law that does not *single out* trucking (or airlines) from preemption under the FAAAA (or ADA).

The Ninth Circuit ignored this Court's repeated instructions that the proper inquiry under the FAAAA is whether a state law relates to the prices, routes, or services of a motor carrier, and, if so, whether that relationship is merely "tenuous, remote, or peripheral." *Rowe*, 552 U.S. at 375. Instead, the Ninth Circuit inquires whether a state law "*binds* the carrier to a particular price, route or service" when the law "does not refer directly to rates, routes, or services." Pet App. 14a. As discussed above, this anomalous "binds to" test is inconsistent with the text of the FAAAA, and with this Court's

prior decisions interpreting it and the materially identical language of the ADA. See pp. 7-8, *supra*.

Moreover, the "binds to" test is, for all practical purposes, impossible to satisfy. The test is only invoked in cases where the challenged law "does not directly regulate (or even specifically reference) rates, routes, or services." *Am. Trucking Ass'ns*, 660 F.3d at 396. And the opinion below indicates that the "binding" must be specific and restrictive: the Ninth Circuit rejected the district court's holding that California's break requirements indirectly bound Penske by, for example, "bind[ing] motor carriers to a smaller set of possible routes." Pet. App. 42a; see also *id.* at 22a. But it strains the imagination to envision a law that does not so much as *reference* rates, routes, or services but, at the same time, sufficiently *binds* a carrier to a *particular* rate, route, or service to meet the Ninth Circuit's standard.

By employing a no-win test to preemption challenges based on indirect effects, the Ninth Circuit's decisions have effectively limited the scope of FAAAA and ADA preemption to laws with a *direct* effect on prices, routes, or services. That, in turn, insulates laws of general applicability—whose effects on carrier prices, routes and services will inevitably be indirect—from FAAAA and ADA preemption, even if the effects are far greater than "tenuous, remote, or peripheral." But as this Court has explained, "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." *Morales*, 504 U.S. at 386 (holding that the ADA preempts claims under generally-applicable state consumer protection law). See also *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995) (ADA preempts claims under generally-applicable Illinois Consumer Fraud Act); *Northwest*, 134 S. Ct. at 1433 (ADA preempts claims for breach of generally-applicable common law covenant of good faith and fair dealing). If the decision below is allowed to go unreviewed, the Ninth Circuit will have effectively carved out an atextual exception to the FAAAA and ADA, insulating a vast category of state laws from their scope and dramatically undercutting Congress's aims in enacting those preemption provisions.

CONCLUSION

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

Respectfully submitted.

DAVID A. BERG
ROBERT DELUCIA
Airlines for America
1301 Pennsylvania Ave., N.W. Suite 1100
Washington, D.C. 20004
(202) 626-4177

Counsel for Amicus Curiae Airlines for America

RICHARD PIANKA
Counsel of Record
ATA Litigation Center
PRASAD SHARMA
American Trucking Associations, Inc.
950 North Glebe Road
Arlington, VA 22203
(703) 838-1889
rpianka@trucking.org

Counsel for Amici Curiae

February 2015