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 Writ of Certiorari to the
Unites States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE J.B. HUNT TRANSPORT, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

This brief *amicus curiae* in support of Petitioner Penske Logistics, LLC, and Penske Truck Leasing Co., L.P. is submitted by J.B. Hunt Transport, Inc. pursuant to Rule 37 of this Court. *Amicus* urges that the Court grant the requested petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

J.B. Hunt Transport, Inc.

Amicus J.B. Hunt Transport, Inc. is one of the largest transportation logistics companies in North America. It provides safe and reliable transportation services to a diverse group of customers throughout the continental United States, Canada and Mexico. It regularly operates in California and is defendant in litigation that, *inter alia*, challenges the ways in which it structures its prices, routes and services. This includes *Ortega v. J.B. Hunt Transport, Inc.*, 22 Wage & Hour Cas. 2d (BNA) 1560 (2014), in which the United States District Court for the Central District of California ruled that challenges to its pay system and operations by California's meal and rest

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[1] Counsel of record for all parties received timely notice of the intent to file this brief under Rule 37.2. Blanket consent has been given by all parties to the Petition per Rule 37.2. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

break ("M&RB") laws were preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA").

SUMMARY OF ARGUMENT

The purpose of the FAAAA is to allow free-market forces to produce the most efficient systems of national interstate transportation. This purpose is entirely consistent with the policies underpinning the Interstate Commerce Clause in the Constitution.

In this case, California's regulatory labyrinth undermines these competitive forces by imposing burdens on employers conducting business in California. These burdens massively affect prices, routes and services for motor carriers nationally. The burdens operate both directly and indirectly upon carriers, requiring them to forego routes that would otherwise be lawful and efficient to operate, with concomitant impacts on prices and services.

The Ninth Circuit's decision in *Penske Logistics, LLC, et al. v. Dilts, et al.,* 769 F.3d. 637 (9th Cir. 2014) ("*Dilts*") extends legally untenable exceptions to the FAAAA's preemption requirements. The Court of Appeals' exceptions include the following: (1) excluding from preemption "generally applicable background regulations;" (2) requiring that a carrier be "bound" to specific prices, routes, and services before preemption will apply; and (3) ignoring state regulation affecting routes unless the regulation affects "point-to-point" navigation. None of these

proposed exclusions is supported by the FAAAA. All conflict with the decisions of this Court and those of other Circuits.

The Ninth Circuit has defined the law in a way that is irreconcilable with the FAAAA's broad deregulatory purpose. The result, if not addressed here, will be a re-regulation of the motor carrier industry using state employment laws covering the entire West Coast, including all the commerce flowing through it. Moreover, if the regulations at issue were deemed to be valid and other States elected to impose regulations covering similar matters, the impact on competitive forces would multiply exponentially, eventually undoing the very positive impacts of competition that have been fostered by the FAAAA.

Amicus urges this Court to accept this Petition and resolve this conflict.

ARGUMENT

I. THE NINTH CIRCUIT'S EXCEPTION FOR "BACKGROUND REGULATIONS" CONTRAVENES THE INTENT OF CONGRESS

Underpinning the Ninth Circuit's holding is its misapprehending the intent of Congress to require a balancing of state and federal interests, rather than broad preemption of all state "law, regulation, or other provision having the force and effect of law." The rationale for this was a statement from the FAAAA's legislative history. *See Dilts,* 769 F.3d. at

644-45, H.R. Conf. Rep. No. 103-677 at 84, *reprinted at* 1994 U.S.C.C.A.N. 1715, 1755. Listing specific state laws regulating safety, financial responsibility, vehicle size and weight, and hazardous materials routing of air carriers, the reporting conferees had noted that the list "is not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." *Dilts,* 769 F.3d. at 644; H.R. Conf. Rep. No. 103-677 at 83, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755.

The Ninth Circuit takes this legislative history out of context to justify a broad and vaguely defined exception from the FAAAA preemption for "generally applicable background regulations:"

> On the other hand, 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, *even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide*.

Dilts, 769 F.3d. at 646 (emphasis added).

The full context of the quotation relied upon by the Ninth Circuit, makes clear that Congress intended no such broad exception.

> There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and services, may instead attempt to regulate

> intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. *The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority*.

H.R. Conf. Rep. 103-677 at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755 (emphasis added).[2]

As Petitioners point out, *see* Brief of Petitioner at 9-15, *Penske Logistics, LLC, et al., v. Mickey Lee Dilts, et al.*, No. 14-801 (9th Cir. Jan. 9, 2015), such an exception is contrary to this Court's decision in *Northwest Airlines, Inc. v. Ginsberg*, 134 S. Ct. 1422 (U.S. 2014). An exception for "background regulations" was also rightly rejected by the First

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[2] The example subsequently given by the conferees further clarifies the limited nature of these exceptions. Even within these enumerated areas, such state regulation could only exist where no contrary federal regulation applied. "For example, if a State exercises authority over the routing of hazardous materials shipments by motor carriers, it must exercise that authority consistent with Federal standards on routing pursuant to Federal law governing transportation of hazardous materials (49 U.S.C. Sections 5101-5127)." H.R. Conf. Rep. 103-677 at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755. The same would be true in this case. California's M&RB laws are inconsistent with, and more restrictive than, the federal Hours of Service Regulations, which prescribe, among other things, a commercial driver's right to a meal break. *See* 49 CFR 395.3(a)(3)(i).

Circuit in *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 20 (1st Cir., 2014) ("*Coakley*"). In doing so, the First Circuit quoted this Court's holding in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) ("*Morales*"):

> Besides creating an utterly irrational loophole (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), this notion similarly ignores the sweep of the 'relating to' language.

Coakley, supra at 20 (*quoting Morales, supra* at 386).

If there is any doubt concerning whether Congress ever intended to limit the breadth of preemption described in *Morales,* that doubt is dispelled by the same Conference Report from which the Ninth Circuit fashioned its "background regulation" exception. "In particular, the conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 199 L.Ed. 157, 112 S.Ct. 2031 (1992)." H.R. Conf. Rep. 103-677 p. 73 *reprinted in* 1994 U.S.C.C.A.N. at 1755.

II. CALIFORNIA'S M&RB LAWS DIRECTLY AND AGGRESSIVELY REGULATE THE MOTOR CARRIER INDUSTRY

Petitioner correctly argues that the Ninth Circuit's "binds to" requirement for laws that do not "directly regulate" prices, routes and services

conflicts with the decisions of this Court. Brief of Petitioner, *supra* 9-15. However, even if such a reduced scrutiny for "indirect" effects were warranted, it cannot be applied here. Properly understood, California's M&RB laws *directly* regulate prices, routes and services in the motor carrier industry. The Ninth Circuit's "binds to" standard should never have been applied in the first place.

California Wage Order 8 specifically regulates commercial drivers in the transportation industry. *See* Cal. Code Regs. tit. 8, § 11090. Although Wage Order 8 resembles those applicable to other industries in some respects, there are areas in which California reaches out to regulate commercial drivers specifically. For example, although it provides an overtime exemption for drivers of certain trucks regulated by federal Hours of Service Rules, *see* Cal. Code Regs. tit. 8, § 11090(3)(L), the regulation inflexibly regulates meal and rest periods in excess of the requirements of federal Hours of Service requirements. *Compare* Cal. Code Regs. tit. 8, § 11090(11)-(12) (requiring meal period before the end of the fifth hour of work), *with Hours of Service of Drivers*, 76 FR 81134-01 (Dec. 27, 2011) (amending 49 CFR 395.3(a)(3)(i) to require 30 minute break after 8 hours).[3]

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[3] The fact that the Department of Transportation has regulated less restrictive meal break requirements does not suggest that California's M&RB laws are not preempted. It makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation. *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 370 (2008) (*citing Morales*, 504 U.S. 374 at 386-387).

California's parallel statutory meal break requirement also specifically regulates motor carriers by creating inconsistent and more flexible meal break standards for commercial drivers operating under certain collective bargaining agreements. Cal. Lab. Code § 512(f)(2). California thus directly forbids routes driven by one category of commercial drivers that may lawfully be driven by another category.

California courts have further intervened, interpreting the M&RB law to force motor carriers to change industry established practices. As the California Supreme Court has held, what will suffice to "provide" a meal break in California "may vary from industry to industry." *Brinker Restaurant Corporation v. Superior Court,* 53 Cal. 4th 1004, 1040 (2012). What has already occurred, and will continue unless this Court intervenes, is an evergreen resource-consuming judicial venture to determine how various motor carriers can structure their routes and services, with an inevitable impact on prices, routes and services.

For example, in *Bluford v. Safeway Inc.*, the California Court of Appeal ruled that the M&RB law requires additional wage payments for drivers for rest breaks who are paid under mileage based pay systems. 216 Cal. App. 4th 864 (Cal. App. 3d Dist. 2013). Such mileage pay systems have been held by at least one court to benefit both carriers and drivers by increasing efficiency and competition, resulting in better wages for drivers, precisely the goal at which the FAAAA is directed. *Ortega v. J.B. Hunt*

Transport, Inc., 22 Wage & Hour Cas. 2d (BNA) 1560 (2014).[4]

Neither can the M&RB laws be fairly characterized as simply an employee compensation law, analogous to the prevailing wage statute approved in *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir 1998). As the Ninth Circuit recognized, the M&RB laws are not wage laws. *Dilts,* 769 F.3d. at 642; *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244, 1255 (2012) (Labor Code section 226.7 is not aimed at protecting or providing employees' wages). The laws contain penalty provisions of $50 to $100 per missed break that far exceed the likely wage loss to any affected driver. Cal. Lab. Code § 558(a). The State may collect these penalties itself, or through private attorneys in a quasi *qui tam* action under California's Private Attorney General Act. Cal. Lab. Code § 2698 *et seq.* The purpose of this penalty statute is expressly regulatory, not simply a remedy for recovery of wages like the prevailing wage statute at issue in *Mendonca*. *Home Depot*

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[4] Similar employment regulation has created inconsistent application, thwarting uniform nationwide operation in the trucking industry. For example, in *Harris v. Pac Anchor Transportation, Inc.,* 59 Cal. 4th 772 (2014), the California Supreme Court allowed the use of California's unfair competition law (Bus. & Prof. Code § 17200 *et seq.*) to regulate the use of owner-operator drivers, another common practice in the motor carrier industry. This decision is contrary to the approach taken by the First Circuit in *Coakley*, 769 F.3d 11, which held a provision of the Massachusetts independent contractor statute to be preempted by the FAAAA.

U.S.A. Inc. v. Superior Court, 191 Cal. App. 4th 201 (Cal. App. 3d Dist. 2010).

As petitioner points out, the inevitable result has been massive statewide litigation directed at the trucking industry by the State and its Private Attorney General surrogates to determine how M&RB laws must be applied in the industry. Brief of Petitioner, *supra* 6.This has created with a vengeance precisely the regulatory burden that the FAAAA was enacted to prevent.

III. CALIFORNIA'S M&RB LAWS RELATE TO PRICES, ROUTES AND SERVICES

Amicus concurs with Petitioners' argument that the Court should resolve the "recognized and well established conflict among the circuits" presented by the Ninth Circuit's continued reliance and expansion of its decision in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998)(*en banc*). *See* Brief of Petitioner, *supra* 12-22; *Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000) (O'Connor, J. dissenting from denial of certiorari). In *Dilts* the Ninth Circuit has retrenched preemption further than ever before by limiting the FAAAA's "related to routes" language only to "point-to-point" transfer . . . and courses of travel." *Dilts,* 769 F.3d. at 649.

However, *Dilts* should not survive even under the broad exception fashioned by the Ninth Circuit. On their face, the M&RB laws *do* proscribe actual routes. Most obviously, no "point-to-point" route of over three and a half hours continuous driving may be scheduled in California without authorizing the

driver to stop for ten minutes. *See Brinker,* 53 Cal. 4th at 1029. No route of over five hours may be scheduled without either swapping out the driver, or lengthening it temporally by 30 minutes. *See* Cal. Lab. Code 512(a). Routes calling for continuous driving for these periods are neither rare nor impermissible under federal safety regulations. *See* 49 CFR 395.3(a)(3)(ii).

Practical examples are obvious. For example, because it takes over five hours to drive from Los Angeles to San Francisco, all of the numerous routes scheduled by all carriers between these two "point-to-point" routes are now *directly and inescapably* regulated by M&RB Law. Although such routes can easily and lawfully be run directly consistent with federal HOS Regulations (and indeed are routinely driven by motorists in passenger cars), the routes must now be lengthened by 30 minutes of unpaid "meal break" time as well as by multiple stops for "rest breaks" at prescribed intervals.

Accordingly, the Ninth Circuit in *Dilts* applies California M&RB laws to regulate routes directly from the bench. Responding to Petitioners' argument that M&RB laws directly regulate service, the Ninth Circuit responds that "Defendants are at liberty to schedule service whenever they choose. They simply must hire a sufficient number of drivers and stagger their breaks for any long period in which continuous service is necessary." *Dilts,* 769 F.3d. at 648. This is equivalent to saying that a 400 yard race is not affected by turning it into a 4 by 100 relay. The baton may start and end at the same place, but three

runners must be delivered to separate locations in order to complete it.

The Ninth circuit characterizes these obvious changes in routes as "minor deviations," finding that "we see no indication that this is the sort of "route control" that Congress sought to preempt. *Dilts,* 769 F.3d. at 648. The Ninth Circuit avoids the obvious further implications of this by failing to address "whether a federal law can ever preempt state law on an "as applied" basis." *Id.* at 649 n.2. Noting that the routes run in the *Dilts* case were not covered by federal Hours of Service regulations, the Court decides that "short-haul" routes "*in particular* are not confronted with a 'patchwork' of hour and break laws, even a 'patchwork' permissible under the FAAAA." *Id.* (emphasis in original).

The fallacy here is obvious if one attempts to apply it to airlines under the Airline Deregulation Act, a law with a parallel preemption provision. *See* 49 U.S.C. § 1371 *et seq.* Under the Ninth Circuit's analysis, would a flight of over five hours piloted by a California-based pilot require that he stop flying for a half hour? Would the Airline be required to provide additional flight crew on the plane to relieve the crew? The Pilot would likely meet the requirement for a California "on-duty" meal break, *if* he agreed to one in writing. *See* 8 CCR § 11090(11)(C) (permitting "on duty" paid meal breaks under specified conditions). Or perhaps pilots would be deemed to no longer be California employees when the plane leaves California air space?

The obvious and inevitable result, easy to infer even at the pleadings stage in this case, is that

foreshortening continuous periods of driving for "*each individual employee,*" *Dilts,* 769 F.3d. at 648, will inevitably and significantly affect prices, routes and services as a whole.

CONCLUSION

The instant case is of paramount importance to this Nation's transportation industry. The deregulation begun with the ADA and extended by the FAAAA has contributed materially to the Nation's economic success and continued competitiveness. Moreover, it is and remains the law of the land. The Ninth Circuit's increasingly complex and convoluted web of exceptions to the FAAAA's plain deregulatory imperative must be reversed.

Respectfully submitted,

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