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 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief as *amicus curiae* in support of Petitioners Penske Logistics, LLC, and Penske Truck Leasing Co., L.P. (together, "Penske").

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region in the country. Its members include motor carriers as well as customers of motor carriers, beneficiaries of the nationwide market that Congress deregulated in the motor carrier provisions of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), now codified at 49 U.S.C. § 14501.

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties received timely notice of the Chamber's intent to file this brief. Both petitioners and respondents consented to the filing of this brief. Copies of petitioners' and respondents' consents have been filed contemporaneously with this brief.

A principal function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The correct application of a federal preemption clause is just such an issue. Many of the Chamber's members transact business on a nationwide scale and benefit from the nationwide transportation market that Congress has protected not only under the FAAAA, but also under other statutes such as the Airline Deregulation Act of 1978 (ADA). The Chamber accordingly has submitted *amicus* briefs in this Court in numerous express preemption cases concerning the transportation industry. *See, e.g.*, *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014) (ADA preemption); *American Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (FAAAA preemption); *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008) (FAAAA preemption).

SUMMARY OF ARGUMENT

The decision below follows a line of Ninth Circuit cases that has markedly departed from the settled precedent of this Court interpreting

the preemption provisions of the FAAAA and the ADA to have broad effect.

In enacting the FAAAA, Congress enacted a preemption clause having the same expansive reach as the preemption clause in the ADA. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 (1995); *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 383-84 (1992). Later, when the Court enacted the FAAAA, the Court interpreted the FAAAA preemption clause *in pari materia* with the ADA preemption clause, based upon the common legislative intent to deregulate the transportation industry. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008). As recently as last year, the Court applied the same broad reading of the ADA preemption clause, citing *Morales* and *Wolens*. *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428-31 (2014). These four cases—*Morales*, *Wolens*, *Rowe*, and *Northwest*—constitute the relevant precedents governing FAAAA analysis.

The Ninth Circuit, however, in contrast to the First Circuit and other Circuits, has failed to follow this Court's precedents governing the FAAAA's preemption clause. Instead, that Circuit has constructed a novel test in the context of transportation deregulation: in order for a state law to be preempted, the law must "bind[] the air carrier to a particular price, route or ser-

vice." *See Air Transp. Ass'n of Am., Inc. v. City and County of San Francisco*, 266 F.3d 1064, 1072 (9th Cir. 2001) (ADA); *see also American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011) (FAAAA), *reversed in part on other grounds*, 133 S. Ct. 2096 (2013).

This Court should grant review because the Ninth Circuit's position is unfaithful to Congress's intent in enacting the FAAAA to construe the words "related to" broadly, contravenes this Court's decision in *Rowe* (FAAAA) as well as in *Morales* and *Wolens* (ADA), conflicts with the decision of other circuits, and because of the exceptional importance of the preemption issue for the transportation industry and the broader economy if the Ninth Circuit's decision were to remain in place.

ARGUMENT

The Supremacy Clause, U.S. CONST. art. VI, cl. 2, "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). Preemption may be express or implied, and where, as here, it is express, the relevant "federal statute expressly directs that state law be ousted." *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220

(2d Cir. 2008) (citation and internal quotation marks omitted). The question presented to this Court by Penske's petition is whether the FAAAA preempts enforcement of California's Meal and Rest Break (M&RB) laws.

I. CONGRESS INTENDED THE FAAAA TO DEREGULATE MOTOR-CARRIER TRANSPORTATION OF PROPERTY IN ORDER TO PROMOTE EFFICIENCY, COMPETITION, AND INNOVATION.

In 1887, Congress enacted the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), and established the Interstate Commerce Commission ("ICC") to regulate the country's railroads. After the Great Depression, Congress enacted the Motor Carrier Act of 1935, 49 Stat. 543, which granted the ICC authority to regulate the trucking industry as well. Congress enacted the Civil Aeronautics Act of 1938, 52 Stat. 973, three years later, creating the Civil Aeronautics Board to regulate air carriers. *See S.C. Johnson & Son, Inc. v. Transport Corp. of Am., Inc.*, 697 F.3d 544, 548 (7th Cir. 2012).

Several decades of bitter experience with heavy regulation of rail, motor, and air carriers spurred a deregulation movement, which began to make inroads in the 1970s. *See* Andrew Downer Crain, *Ford, Carter, and Deregulation*

in the 1970s, 5 J. TELECOMM. & HIGH TECH. L. 413 (2007). Those in favor of deregulation of the transportation industry believed that it would engender competition that would give rise to innovation to the benefit of consumers. *See* Stephen Breyer, *Afterword, Symposium: The Legacy of the New Deal: Problems and Possibilities in the Administrative State (Part 2)*, 92 YALE L.J. 1614, 1616 (1983).

In 1977, President Carter appointed one of the supporters of deregulation, Alfred Kahn, as the head of the CAB, and the CAB shortly thereafter "lifted restrictions on charter companies, allowed airlines much greater flexibility in setting fares, and eliminated rules requiring that first-class fares be 50% higher than coach fares." *Johnson*, 697 F.3d at 548 (quoting *Sharp Relaxing of Air-Fare Regulations Planned by CAB in Drive to Cut Controls*, WALL ST. J., Apr. 4, 1978, at 8).

Congress took up the cause, enacting the Air Cargo Deregulation Act of 1978, Pub. L. No. 95-163, 91 Stat. 1278, followed by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 ("ADA"). *See Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1775 (2013); *Johnson*, 697 F.3d at 548. Congress designed the ADA to promote "efficiency, innovation, and low prices" in the airline industry via "maxi-

mum reliance on competitive market forces and on actual and potential competition." *Northwest, Inc.*, 134 S. Ct. at 1428. Thus, Congress's intent in enacting the ADA was to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 378 (1992).

In 1980, the focus turned to trucking deregulation, beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, which "lifted most restrictions on entry, on the goods that truckers could carry, and on routes." *Johnson*, 697 F.3d at 548. That legislation, however, did not eliminate the requirement to file tariffs or the power of state regulatory commissions to limit entry and regulate prices.

And after more than a dozen years of continued tariff and price regulation of motor carriers, Congress enacted the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 (Title VI addressed "Intrastate Transportation of Property" by air and motor carriers), and the Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1673. Congress pursued this course "upon finding that state governance of intrastate transportation of property had become 'unreasonably burden[some]' to 'free trade,

interstate commerce, and American consumers.'" *Dan's City Used Cars*, 133 S. Ct. at 1775 (citation and internal quotation marks omitted). The FAAAA therefore eliminated state regulations that had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtail[ed] the expansion of markets." H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. And in 1995, Congress dissolved the Interstate Commerce Commission that had regulated the trucking industry at the federal level, ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, unleashing a new era of nationwide, free-market competition for the transportation of property by motor carrier. *See* H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760 (noting purpose was to deregulate motor carriers so that "[s]ervice options will be dictated by the marketplace[,] and not by an artificial regulatory structure.").

II. THE PREEMPTION CLAUSE IN THE FAAAA HAS AS BROAD A REACH AS THE PREEMPTION CLAUSE IN THE ADA AT THE TIME OF ENACTMENT.

The language of the FAAAA at issue in this case is as follows:

> (c) Motor carriers of property. (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service of any motor carrier* . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (emphasis added).

This provision is identical in relevant part to the preemption provision deregulating air carriers and motor carriers in the ADA in an effort to "create a completely level playing field" between motor carriers and air carriers. H.R. REP. NO. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757.[2] Before the FAAAA, air-based shippers had a large advantage over their more regulated, ground-based shipping competitors, based on the Ninth Circuit's decision in *Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), which held that the ADA preempted California's

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[2] The ADA expressly preempts state laws "related to a price, route, or service of an air carrier[.]" 49 U.S.C. § 41713(b)(1).

intrastate economic regulations as applied to Federal Express's shipping activities. *Id.* at 1077. Accordingly, Congress's enactment of the FAAAA was an attempt to re-balance that regulatory inequity. *See* H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. In light of this connection, courts construe the two provisions *in pari materia*. *See Rowe*, 552 U.S. at 370; *Tobin v. Federal Express Corp.*, No. 14-1567, 2014 U.S. App. LEXIS 24564, at *12 n.4 (1st Cir. Dec. 30, 2014).

In interpreting the scope of the key phrase "related to" in the ADA, this Court held that it expressed a "broad pre-emptive purpose," and that "related to" meant "a connection with, or reference to, airline 'rates, routes, or services.'" *Morales*, 504 U.S. at 384; *see also Northwest, Inc.*, 134 S. Ct. at 1428-29; *Wolens*, 513 U.S. at 223 (reaffirming the broad interpretation of the ADA preemption provision in *Morales*); *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 18 (1st Cir. 2014) (describing the "related to" test as "purposefully expansive"). Indeed, in *Morales*, the Court explicitly embraced the "sweep of the 'relating to' language," rejecting the petitioner's argument that the ADA preempted only state laws specifically addressing the airline industry. *Id.* at 386.

Three years later, this Court again took up the ADA preemption clause in *American Airlines, Inc. v. Wolens*, this time in the context of the airlines' frequent flier program. Again, the Court noted that in *Morales*, it had interpreted the words "relates to" an employee benefit plan as having "a connection with or reference to such a plan." *Wolens*, 513 U.S. at 223. In *Morales*, the Court explained, the "relating to" language in the ADA preemption clause was interpreted analogously as "having a connection with, or reference to, airline 'rates, routes, or services.'" 513 U.S. at 223 (quoting *Morales*, 504 U.S. at 384).

This Court has affirmed the breadth of the same preemption language in the FAAAA as well. *See Rowe*, 552 U.S. at 370. In *Rowe*, this Court held that the FAAAA preempted two provisions of a Maine tobacco law that regulated the delivery of tobacco to Maine customers. *Id.* at 367. As this Court noted, "the Congress that wrote the [preemption] language [in the FAAAA] copied the language of the air-carrier pre-emption provision of the [ADA] . . . [a]nd it did so fully aware of this Court's interpretation of that language as set forth in *Morales*." *Id.* at 370 (citing H.R. REP. NO. 103-677, at 82-85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754-57). The Court thus followed *Morales*, ex-

plaining, "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Id.* at 370 (citation and internal quotation marks omitted).

Last year, the Court once again reaffirmed its broad reading of "related to" in the ADA in *Northwest, Inc. v. Ginsberg*. In *Northwest*, the Court considered whether the ADA preempts a state-law claim for breach of the implied covenant of good faith and fair dealing and concluded that it does, provided the claim "seeks to enlarge the contractual obligations that the parties voluntarily adopt." 134 S. Ct. at 1426. Respondent Ginsberg became a member of Northwest's frequent flyer program and achieved "Platinum Elite" status based on his extensive travel. *Id.* Northwest terminated Ginsberg's membership, ostensibly because he had "abused" the program, but Ginsberg alleged that Northwest terminated his membership as a cost-cutting measure due to Northwest's merger with Delta Airlines. *Id.* at 1426-27. The district court held that the ADA preempted Ginsberg's breach of the covenant of good faith and fair dealing claim because it was "related to" Northwest's rates and services. *Id.* at 1427. The

Ninth Circuit reversed, holding that the claim did not fall within the ADA's preemption provision because it did not "interfere with the [ADA's] deregulatory mandate," did not "force the Airlines to adopt or change their prices, routes or services—the prerequisite for preemption," and did not have a "direct effect" on either "prices" or "services." *Id.* at 1428 (citations omitted).

This Court disagreed, noting its recognition in *Morales* that "the key phrase 'related to' expresses a broad pre-emptive purpose." *Id.* (citation and internal quotation marks omitted). The Court also noted that in *Wolens*, it had "reaffirmed *Morales*' broad interpretation of the ADA pre-emption provision. . . ." *Northwest, Inc.*, 134 S. Ct. at 1429. In reaching its determination, the Court once again interpreted the ADA's preemption provision broadly, stating that "[a] claim satisfies [the preemption clause's] requirement if it has 'a connection with, or reference to, airline' prices, routes or services," and that the claim at issue "clearly ha[d] such a connection." *Id.* at 1430.

These four precedents, *Morales*, *Wolens*, *Rowe*, and *Northwest*, form the pillars of FAAAA preemption analysis. *See S.C. Johnson & Son, Inc. v. Transport Corp. of Am., Inc.*, 697 F.3d 544, 549-52 (7th Cir. 2012); *DiFiore v.*

American Airlines, Inc., 646 F.3d 81, 86 (1st Cir. 2011) ("All . . . of the major Supreme Court cases endorsed preemption and read the preemption language broadly . . . and none adopted plaintiffs' position . . . that we should presume strongly against preempting in areas historically occupied by state law.").

III. THE NINTH CIRCUIT ERRONEOUSLY ESCHEWED THIS COURT'S ADA AND FAAAA PRECEDENTS.

The Ninth Circuit's decision in this case is the latest in a long line of decisions from that Circuit that have failed to apply this Court's precedents concerning the ADA and the FAAAA. The Ninth Circuit began to move in a different direction from Supreme Court ADA and FAAAA precedents and from other circuits in *Charas v. TWA, Inc.*, a 1998 en banc decision holding that Congress used the word "service" in the phrase "rates, routes, or service" to refer to "prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail," not to include "provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities." 160 F.3d 1259, 1261 (9th Cir. 1998).

In 2001, the Ninth Circuit continued its move away from this Court's ADA precedents in

Air Transport Association of America, Inc. v. City and County of San Francisco, another ADA case. 266 F.3d 1064 (9th Cir. 2001). There, the Court of Appeals held that "a local law will have a prohibited connection with a price, route or service *if the law binds the air carrier to a particular price, route or service* and thereby interferes with competitive market forces within the air carrier industry." *Id.* at 1072 (emphasis added).

And a decade later, in *American Trucking Assocations, Inc. v. City of Los Angeles*, the Ninth Circuit again said that its "binds" test is "the proper inquiry" for "borderline cases." 660 F.3d 384, 397 (9th Cir. 2011), *reversed in part on other grounds*, 133 S. Ct. 2096 (2013).[3]

In the decision now before this Court, the Ninth Circuit again stated that for "borderline cases in which a law does not refer directly to rates, routes, or services," the test "is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service and

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[3] As noted by Petitioners, Pet. 9, this Court unanimously reversed *Ginsberg v. Northwest, Inc.*, 695 F.3d 873, 877-81 (9th Cir. 2013), which had relied on *American Trucking*, 660 F.3d at 397. *See Ginsberg*, 134 S. Ct. at 1431.

thereby interferes with the competitive market forces within the industry." App. 14a (emphasis in original) (internal quotation marks omitted).

As Petitioner has explained, the "binds to" test directly conflicts with this Court's precedents, including *Morales*, *Rowe*, and *Ginsberg*, and with the approach adopted by other Courts of Appeals, including the First Circuit in the recent *Massachusetts Delivery Association* case.

IV. THE QUESTION PRESENTED IS ECONOMICALLY IMPORTANT.

Motor carriers transport trillions of dollars' worth of goods each year in the United States.[4] Inefficiencies and increased costs affect not just motor carriers, but also every other sector of the

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[4] "According to preliminary estimates from the 2012 Commodity Flow Survey (CFS), nearly 11.7 billion tons of freight, valued at $13.6 trillion, w[ere] transported about 3.3 trillion ton-miles in 2012 by shippers in manufacturing, wholesale trade, and mining in the United States." Michael Margreta et al., *U.S. Freight on the Move: Highlights from the 2012 Commodity Flow Survey Preliminary Data*, http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/special_reports_and_issue_briefs/special_report/2014_08 (hereinafter "2012 CFS Highlights").

economy. *See* JEAN-PAUL RODRIGUE & THEO NOTTEBOOM, THE GEOGRAPHY OF TRANSPORT SYSTEMS (3d ed. 2013), http://people.hofstra.edu/geotrans/eng/ch7en/conc7en/ch7c3en.html. As Dr. Rodrigue and Dr. Notteboom note, "[w]hen transport systems are efficient, they provide economic and social opportunities and benefits that result in positive multiplier effects such as better accessibility to markets, employment and additional investments." *Id.*, http://people.hofstra.edu/geotrans/eng/ch7en/conc7en/ch7c1en.html. Conversely, "when transport systems are deficient in terms of capacity or reliability, they can have an economic cost," so that "raising transport costs by 10% reduces trade volumes by more than 20%." *Id.*

The "transport system" in the United States predominantly consists of motor carriers driving over roads and highways. According to the 2012 Commodity Flow Survey (CFS) preliminary data, "truck shipments alone accounted for about $10 trillion worth of goods and 73.7 percent of the total value of all shipments."[5]

In enacting the FAAAA, Congress's unmistakable intent was to tear up the "patchwork of

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[5] 2012 CFS Highlights.

regulation" and to provide for a uniform nationwide market for interstate transportation of property by motor carrier. H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. The patchwork of state regulation of interstate motor carriers had resulted in "increased costs" to these carriers. H.R. REP. NO. 103-677 (1994), at 87, *reprinted in* 1994 U.S.S.C.A.N. 1715, 1759. Different state-by-state requirements also hinder carriers in responding and adapting to what the competitive national market demands. *See Rowe*, 552 U.S. at 373.

Congress was well aware of this when it passed the FAAAA. It expressly found that state regulations "(A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers." Pub. L. No. 103-305, § 601(a)(1), 108 Stat. 1605 (1994); *see also* H.R. REP. NO. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 ("State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtails the expansion of markets").

Hence, Congress barred the balkanization of the nationwide market for motor carrier transportation of property. As discussed at length in the Petition for a Writ of Certiorari, Pet. 22-26, California's M&RB laws are precisely the type of local regulation that frustrate Congress's intent to preserve a competitive national market for motor carrier services. As Petitioners note, California's M&RB laws would subject motor carriers to significant additional costs, which directly impacts the prices, routes, and services carriers can offer to customers in California and surrounding States. *Id.* The victims of increased costs and reduced services will be the American businesses in all sectors that rely on trucking services to bring raw materials to them for their production and manufacturing and to bring finished goods to market for sale; and, ultimately, the end-users and consumers who purchase those goods. *Id.*

Given the importance of California to the rest of the nation's economy,[6] the Ninth Circuit's decision will likely have widespread, negative

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[6] *See* Table: Real GDP by State, 2005-2013, Quarterly Gross Domestic Product by State (Prototype Statistics), U.S. Dep't of Commerce, Bureau of Economic Analysis, http://www.bea.gov/newsreleases/regional/gdp_state/qgsp_newsrelease.htm.

ramifications for motor carriers and their customers as noted above, with serious ripple effects that will negatively impact the broader economy,[7] in direct contravention of Congress's intent in enacting the FAAAA. *Rowe*, 552 U.S. at 371.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth by Petitioners, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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[7] *See* RODRIGUE & NOTTEBOOM, *supra* p. 22.