No. 17-1111

IN THE

Supreme Court of the United States

J.B. HUNT TRANSPORT, INC.,

Petitioner,

v.

GERARDO ORTEGA, ET AL.,

Respondents.

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

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND 22 STATE TRUCKING ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 1,800 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 Arizona Trucking Association, Arkansas Trucking Association, California Trucking Association, Colorado Motor Carriers Association, Delaware Motor Transport Association, Florida Trucking Association, Georgia Motor Trucking Association, Indiana Motor Truck Association, Iowa Motor Truck Association, Kansas Motor Carriers Association, Maine Motor Transport Association, Maryland Motor Truck Association, Massachusetts Motor Transportation Association, Mississippi Trucking Association, Nebraska Trucking Association, New Jersey Motor Truck Association, Trucking Association of New York, Ohio Trucking

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* After timely notification, petitioner and respondent consented to the filing of this brief. See Rule 37.2(a). Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Association, Rhode Island Trucking Association, South Carolina Trucking Association, Virginia Trucking Association, and Washington Trucking Associations are the ATA-affiliated associations that represent the voice of the trucking industry in their respective states, and are each dedicated to supporting and advocating for safety and productivity across all sectors of the industry.

Amici and their members have a strong interest in ensuring that Congressional policy establishing a deregulated trucking industry is not undermined by a patchwork of state-level impediments to the safe and efficient flow of commerce. Moreover, ATA has special familiarity with the issue of preemption under the Federal Aviation Administration Authorization Act (FAAAA), because it 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 has 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 the materially identical preemption provision of the Airline Deregulation Act (ADA), including *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422 (2014); *American Trucking Associations, Inc.* v. *City of Los Angeles*, 569 U.S. 641 (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 carrier 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, whether directly or indirectly, 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").

Petitioner has explained in detail how the holdings below, and the Ninth Circuit's faulty approach to FAAAA preemption, violate the plain language of the statute and conflict with this Court's decisions and those of other circuits. Amici submit this brief to further explain how the Ninth Circuit's FAAAA

jurisprudence frustrates the Congressional policy of a market-driven, deregulated trucking industry by preventing motor carriers from taking advantage of logistical efficiencies tailored to nationally uniform rules, and the serious implications of the decision below for the trucking industry and the businesses and consumers who rely on it every day to deliver goods and materials.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW INTERFERES WITH CONGRESS'S DECISION TO PROMOTE INTERSTATE COMMERCE BY ENABLING MOTOR CARRIERS TO ADOPT NATIONALLY UNIFORM BUSINESS PRACTICES.

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). 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.

A. In Deregulating the Trucking Industry, Congress Prohibited States from Displacing Market Forces with Their Policy Preferences.

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

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").

B. The Ninth Circuit Undermines Congress's Deregulatory Goals by Refusing to Adhere to the Statutory Text.

The Ninth Circuit, however, has consistently resisted Congress's command and this Court's interpretations of it, and once again in the decision below persists in setting a high bar for preemption under the FAAAA. In particular, the Ninth Circuit employs an idiosyncratic test when a state law "does not refer directly to rates, routes, or services." *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014). In such cases, as the Ninth Circuit would have it, "'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, 569 U.S. 641 (2013)). In *Dilts*, the Ninth Circuit held that California's meal and rest break rules were not preempted because they did not bind the defendant in that case to any particular prices, routes, or services, 769 F.3d at 647, and the decision below treated that holding as dispositive of the meal and rest break question in this case, Pet. App. 3a.

That analysis, however, fails to give full effect to Congress's command, and cannot be squared with this Court's consistent holdings on FAAAA preemption. The language of the test is patently more deferential to state regulation of the trucking industry than the "expansive" language of the statute, *Morales*, 504 U.S. at 384. After all, laws that *bind* a carrier to a *particular* price, route or service will necessarily be a smaller set of laws than those that—in the language of the statute—simply *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.

II. THE EXCEPTIONAL IMPORTANCE OF THE RECURRING ISSUES PRESENTED IN THIS CASE WARRANT THE COURT'S REVIEW.

There can be no serious question that the issues presented by this case are important and recurring. Since 2007—the year the present case commenced—amici are aware of no fewer than 73 cases involving the application of state break rules or state piece-rate rules like those at issue here to commercial drivers.[1]

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[1] See *Cooley* v. *Indian River Transport Co.*, No. 17-cv-932 (C.D. Cal.); *Ayala* v. *US Xpress Enterprises, Inc.*, No. 16-cv-137 (C.D. Cal.); *Eilerman* v. *McLane Co.*, No. 16-cv-5303 (W.D. Wash.); *Hogue* v. *YRC, Inc.*, No. 16-cv-1338 (C.D. Cal.); *Leitzbach* v. *Atlas Van Lines, Inc.*, No. 16-cv-08790 (C.D. Cal.); *Montgomery* v. *New Prime, Inc.*, No. 16-cv-02131 (C.D. Cal.); *Robles* v. *Schneider National Carriers, Inc.*, No. 16-cv-02482 (C.D. Cal.); *Vargas* v. *Central Freight Lines, Inc.*, No. 16-cv-00507 (S.D. Cal.); *Mendis* v. *Schneider Nat'l Carriers Inc.*, No. 15-cv-0144 (W.D. Wash.); *Moss* v. *USF Reddaway, Inc.*, No. 15-cv-0151 (C.D. Cal.); *Robles* v. *Comtrak Logistics, Inc.*, No. 15-cv-02228 (W.D. Tenn.); *Valdez* v. *CSX Intermodal Terminal, Inc.*, No. 15-cv-05433 (N.D. Cal.); *Gravestock* v. *Abilene Motor Express, Inc.* No. 14-cv-00170 (C.D. Cal.); *McCowen* v. *Trimac Transp. Servs. (Western)*, No. 14-cv-02694 (N.D. Cal.); *Shook* v. *Indian River Transp. Co.*, No. 14-cv-1415 (E.D. Cal.); *Yoder* v. *Western Express, Inc.*, No. 14-cv-2273 (C.D. Cal.); *Discenzo* v. *Hardin Trucking, Inc.*, No. 13-

cv-512 (S.D. Cal.); *Miller* v. *CEVA Logistics USA, Inc.*, No. 13-cv-01321 (E.D. Cal.); *Parker* v. *Dean Transp., Inc.*, No. 13-cv-02621 (C.D. Cal.); *Rodriguez* v. *Old Dominion Freight Line Inc.*, No. 13-cv-891 (C.D. Cal.); *Taylor* v. *FedEx Freight, Inc.*, No. 13-cv-1137 (E.D. Cal.); *Taylor* v. *Shippers Trans. Express, Inc.*, No. 13-cv-02092 (C.D. Cal.); *Wright* v. *Renzenberger, Inc.*, No. 13-cv-06642 (C.D. Cal.); *Zamora* v. *Ryder Integrated Logisitics, Inc.*, No. 13-cv-02679 (S.D. Cal.); *Aguirre* v. *Genesis Logistics*, No. 12-cv-00687 (C.D. Cal.); *Alvarez* v. *YRC Inc.*, No. 12-cv-01374 (C.D. Cal.); *Burnham* v. *Ruan Logistics Corp.*, No. 12-cv-0688 (C.D. Cal.); *Gorom* v. *Old Dominion Freight Line Inc.*, No. 12-cv- 08374 (C.D. Cal.); *Helde* v. *Knight Transp., Inc.*, No. 12-cv-0904 (W.D. Wash.); *Petrone* v. *Werner Enterprises, Inc.*, No. 12-cv-00307 (D. Neb.); *Villalpando* v. *Exel Direct Inc.*, No. 12-cv-04137 (N.D. Cal.); *Aguiar* v. *Cal. Sierra Express, Inc.*, No. 11-cv-02827 (E.D. Cal.); *Campbell* v. *Vitran Express, Inc.*, No. 11-cv-05029 (C.D. Cal.); *Carillo* v. *Schneider Logistics Inc.*, No. 11-cv-08557 (C.D. Cal.); *Corban* v. *McLane Foodservice Inc.*, No. 11-cv-841 (C.D. Cal.); *Esquivel* v. *Vistar Corp.*, No. 11-cv-07284 (C.D. Cal.); *Mendez* v. *R+L Carriers, Inc.*, No. 11-cv-2478 (N.D. Cal.); *Reinhardt* v. *Gemini Motor Transp., L.P.*, No. 11-cv-1944 (E.D. Cal.); *Amador* v. *Logistics Express, Inc.*, No. 10-cv-04112 (C.D. Cal.); *Burnell* v. *Swift Transp. Co.*, No. 10-cv-00809 (C.D. Cal.); *Cardenas* v. *McLane Foodservices, Inc.*, No. 10-cv-473 (C.D. Cal.); *Colon* v. *Con-Way Freight, Inc.*, No. 10-cv-02749 (C.D. Cal.); *Garcia* v. *Gordon Trucking, Inc.*, No. 10-cv-0324 (E.D. Cal.); *Gatdula* v. *CRST International, Inc.*, No. 10-cv-00058 (E.D. Cal.); *Krumbine* v. *Schneider Nat'l Carriers, Inc.*, No. 10-cv-04565 (C.D. Cal.); *Ramirez* v. *United Rentals, Inc.*, No. 10-cv-04374 (N.D. Cal.); *Swain* v. *Ryder Integrated Logistics, Inc.*, No. 10-cv-04192 (N.D. Cal.); *Moore* v. *C.R. England, Inc.*, No. 09-cv-01814 (N.D. Cal.); *Moore* v. *Roadway Express, Inc.*, No. 09-cv-01588 (C.D. Cal.); *Morrison* v. *CRST Van Expedited, Inc.*, No. 09-cv-5638 (C.D. Cal.); *Quezada* v. *Con-Way Freight, Inc.*, No. 09-cv-03670 (N.D. Cal.); *Robertson* v. *FedEx National LTL, Inc.*, No. 09-cv-05016 (C.D. Cal.); *Bickley* v. *Schneider Nat'l Carriers, Inc.*, No. 08-cv-05806 (N.D. Cal.); *Bustillos* v. *Bimbo Bakeries USA, Inc.*,

In all likelihood the actual number is higher, as other cases may have escaped amici's attention. While many of those cases remain pending, those that have settled or reached a verdict have resulted in awards totaling in the hundreds of millions of dollars.

But as significant as that litigation exposure is, it is dwarfed by the negative productivity impacts entailed by the Ninth Circuit's decision in this case—impacts that directly frustrate Congress's deregulatory aims, and whose effects will be felt throughout the supply chain. This Court's review is essential to enable the interstate trucking industry to continue the efficient, nationally uniform business practices Congress authorized.

No. 08-cv-3553 (N.D. Cal.); *Cole* v. *CRST Inc.*, No. 08-cv-01570 (C.D. Cal.); *Dilts* v. *Penske Logistics, LLC*, No. 08-cv-0318 (S.D. Cal.); *Jasper* v. *C.R. England, Inc.*, No. 08-cv-5266 (C.D. Cal.); *Johnson* v. *Interstate Distributor Co.*, No. 08-cv-05309 (N.D. Cal.); *Ridgway* v. *Wal-Mart Stores, Inc.*, No. 08-cv-5221 (N.D. Cal.); *Soto* v. *Diakon Logistics (Del.), Inc.*, No. 08-cv-0033 (S.D. Cal.); *Bibo* v. *Federal Express, Inc.*, No. 07-cv-2505- TEH (N.D. Cal.); *Munoz* v. *UPS Ground Freight Inc.*, No. 07-cv-00970 (N.D. Cal.); *Smith* v. *Cardinal Logistics Management Corp.*, No. 07-cv-02104 (N.D. Cal.); *Valdivia* v. *Waste Management Inc.*, No. 07-cv-02293 (N.D. Cal.); *Armstrong* v. *Ruan Transp. Corp.*, No. CIVSD1605897 (San Bernadino Cty. Sup. Ct.); *Chavez* v. *Angelica Corp.*, No. 37-2010-00086997-CU-OE-CTL (San Diego Cty. Sup. Ct.); *Godfrey* v. *Oakland Port Services Corp.*, No. RG08379099 (Alameda Cty. Sup. Ct.); *Loa* v. *Cemex Inc.*, No. CGC-07-461740 (San Francisco Cty. Sup. Ct.); *Martin Marine* v. *Interstate Distrib. Co.*, No. RG07358277 (Alameda Cty. Sup. Ct.); *Rodriguez* v. *H.F. Cox, Inc.*, No. BC653164 (Los Angeles Cty. Sup. Ct.); *Ryan* v. *JBS Carriers, Inc.*, No. BC624401 (Los Angeles Cty. Sup. Ct.); *Stone* v. *Sysco Corp.*, No. ICSI-CVCV-2016-59516 (Inyo Cty. Sup. Ct.); *Wheeler* v. *Safeway Inc.*, No. CV-UBT-2016-0000176 (San Joaquin Cty. Sup. Ct.).

A. Layering State Meal and Rest Breaks on Top of the Nationally Uniform Federal Rules Governing Driver Hours Dramatically Reduces Motor Carrier Productivity.

"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 time commercial drivers may spend driving or performing other work, under a Congressional mandate to ensure the 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). A driver may restart that seven- or eight-day period after taking at least thirty-four consecutive hours off duty. *Id.* § 395.3(d).

Under the current federal HOS rules, 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 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).[2]

In short, the evolving federal HOS regulations strike a nationally uniform balance between the primary concerns of highway safety and driver welfare, 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

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[2] The current federal HOS regulations also eliminate a provision of the pre-2003 regulations that permitted a driver to extend the on-duty window 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. at 22,471. Thus, under the pre-2003 regime, off-duty break periods 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 that period. Under the current rules, 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 could provide within that framework.

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.

The decision below, however, displaces this nationally uniform, trucking-specific federal policy in favor of California's general policy regarding employee breaks. The impacts are enormous. To illustrate, take the example of a driver who starts her day at 7 a.m. and, operating solely under the constraints of the uniform federal rules, would finish her work at 5 p.m.—a ten-hour day. Such a driver typically must take a single 30-minute break *any time* between 9 a.m. and 3 p.m., and also has the right under federal law to take a break any time she feels she cannot work safely without one, with protection against coercion or retaliation by her employer or customers. See 49 C.F.R. §§ 395.3(a)(3)(ii), 392.3, 390.6.

If California's break rules also applied to that driver, however, her carrier would need to provide her with two additional off-duty 10-minute breaks and one additional off-duty 30-minute break. (And if these extra breaks were to push the driver into working past 5 p.m., that would trigger the motor carrier's obligation to provide a third 10-minute break.) See Cal. Labor Code § 512(a), Cal. Code Regs. Tit. 8 § 11090(12)(A). Particularly when combined with the time necessary to pull off the highway, find safe and legal parking, and shut down the truck—and then start up and get back on the highway at the conclusion of the break—these additional breaks represent a significant portion of the driver's day. Conservatively estimating 5 minutes of "overhead" on each end of a break to get to and from parking, this would mean the

motor carrier must plan to devote an additional 80 minutes of the driver's 10-hour day to California-prescribed breaks.[3]

ATA's economists have determined that the imposition of California's break rules on top of the federal HOS rules will translate to 2.5 billion truck-miles in lost productivity in California each year. See B. Costello, Impact of California Meal & Rest Break Rules on Motor Carrier Operations, *available at* http://trck.ng/MealRest. Using a large sample of GPS data from California tractor-trailers provided by the American Transportation Research Institute to determine the duty periods and stopping behavior of trucks operating in California, and conservatively estimating deviations of one mile and five minutes each way per extra break, ATA estimates that California's break rules mean nearly 30,000 driver-hours annually devoted to breaks and associated route deviations, beyond what the uniform federal rule requires. See *id.* at 2. To make up for this loss of productivity and haul the same amount of freight

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[3] To be sure, California law does not require employees to take the breaks it specifies—it requires only that the employer make the breaks available. See *Brinker Restaurant Corp.* v. *Sup. Ct.*, 273 P.3d 513, 537 (Cal. 2012). From the perspective of a motor carrier planning its services, however, this is a distinction without a difference. A motor carrier who plans a route without break facilities available at the appointed times, or assigns a delivery schedule without building in time for the breaks, would risk liability for failing to make the breaks available. In other words, whether or not the driver ultimately takes the optional breaks, the motor carrier cannot plan to fully use the driver productivity that the federal rules allow.

would require putting more than 23,000 extra trucks on the road in California. *Id.* at 1.[4]

And because the Ninth Circuit's approach to preemption under the FAAAA means any state is free to impose similar break rules on interstate truckers, ATA estimated what the impact would be if all of them did so. The result would be staggering: $43.3 billion in lost revenue and additional operating expenses, and a need for over 212,000 additional tractors—at a cost of $26 billion—to make up for the productivity loss. *Id.* at 1-2.

These (conservatively estimated) direct productivity impacts represent only part of the true costs of imposing California's policy preferences here. Other costs are less amenable to estimation but are sure to be significant. Simply adapting routes and schedules to accommodate the demands of California rules is a major undertaking in an industry where carefully engineered logistical networks are crucial to the efficient movement of freight. In many cases, those networks include terminals or other facilities whose location is chosen specifically so that driver breaks can efficiently coincide with other activities, such as dock workers loading or unloading the truck. But carriers who located their facilities with the federal rules in mind might need to acquire or construct additional facilities, or relocate existing ones, for them to provide the same function within the framework of the California rules.

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[4] It would also entail burning some 43.3 million additional gallons of diesel fuel annually in California, to reach break areas and return to the highway—at the expense of nearly $115 million in fuel costs and associated emissions. See *id.* at 1, 3.

And perhaps most importantly, any number of services that the market regularly demands—and which motor carriers are free to provide under the federal rules—could not be offered under California's rules. For example, a just-in-time shipment that would require a driver to work continuously for five hours would be permissible under the federal rules. A motor carrier that assigned a driver to such a task, however, would violate California's rules, which would require the carrier to provide at least one 10-minute and one 30-minute break in that time frame.

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. California's 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 rules 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.*

B. State Restrictions on Activity-Based Pay Deprive Motor Carriers of an Industry Standard Productivity Incentive.

California's rules limiting the use of activity-based, piece-rate pay would also have a substantial, market-distorting productivity impact on the trucking industry. Many motor carriers compensate drivers based on the work that they do—rather than simply the time they spend at work—because doing so serves as an incentive to work efficiently in an industry

where carriers have limited opportunities to closely supervise and monitor their drivers. In addition, the opportunity to earn incentive-based pay will tend to attract drivers who are confident in their ability to work productively—precisely the kinds of drivers that carriers want working for them. See Brenda Lantz, *Piecework: Theory and Applications to the Motor Carrier Industry*, Upper Great Plains Transportation Institute (1992) at 3, *available at* https://www.ugpti.org/pubs/pdf/SP107.pdf.

No surprise, then, that in most sectors of the industry, few drivers are paid solely by the hour. See, *e.g.*, Government Accountability Office, Report to the Ranking Member, Subcommittee on Highways and Transit, Committee on Transportation and Infrastructure, House of Representatives, GAO-11-198 (Jan. 2011), at 30 (finding that 64.7% of surveyed drivers were paid according to mileage, 25.7% on a percentage incentive basis, and only 2.7% by the hour); James C. Hardman, *Motor Carrier Service and Federal and State Overtime Wage Coverage*, 35 Transp. L. J. 1, 22 (2008) ("In the truckload segment of the industry, hourly wages are virtually null or limited to drivers used on local hauls.").

The productivity-enhancing effects of activity-based pay were substantiated in the proceedings below. In the district court, petitioner introduced evidence that activity-based pay increased driver productivity on the order of 7% compared to hourly pay, and the court found that "the evidence in the record demonstrates that there is no genuine issue that Defendant's ABP system allows for greater efficiency and productivity." Pet. App. 40a. Amici are aware of no similar assessment quantifying the productivity effects of activity-based pay across the

trucking industry; but given its ubiquity, whatever the precise magnitude, any state policy restricting activity-based pay is certain to have a wide and substantial productivity impact. And it would have the additional effect of displacing the "standard way of doing business" that Congress wanted to allow motor carriers to adopt, H.R. Conf. Rep. No 103-677 at 87, in favor of forcing carriers to modify their pay systems every time a driver crosses the border of a state with different rules, with all the associated complexity and expense.

The upshot is to strongly discourage the use of activity-based pay altogether, in favor of pure hourly pay—particularly as other states impose similar restrictions on its use. See, *e.g.*, *Demetrio* v. *Sakuma Bros. Farms, Inc.*, 355 P.3d 258, 264 (Wash. 2015) (Washington law requires employers to "pay a wage separate from the piece rate for time spent on rest breaks"); *Helde* v. *Knight Transp., Inc.*, 2016 U.S. Dist. LEXIS 56162 at *10-*12 (W.D. Wash. Apr. 26, 2016) (applying *Sakuma Bros.* to interstate motor carriers). This again supplants Congress's vision for a productive trucking industry shaped by market forces with one shaped instead by state policy preferences.[5]

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[5] Moreover, the productivity losses and costs to the supply chain identified above would not be offset by any gains to driver welfare: as explained above, the rules would not result in allowing drivers any rights to take breaks when they think they need them that federal law does not already allow. See p. 14, *supra*. Nor would it require any motor carrier to pay any driver an additional dime, because even if California's activity-based-pay rule were preempted, an employee would always be entitled to total compensation at least as great as he or she would be entitled to if paid by the hour at the relevant hourly minimum wage rate. See Pet. 6. The impacts

C. The Ninth Circuit's Decision Insulates Any State or Local Law That Does Not Target the Trucking Industry from the Scope of the FAAAA.

More fundamentally, the Ninth Circuit's approach to FAAAA preemption in the decision below (and the decisions it relies on) creates a massive, atextual exception to the statute that goes far beyond the two rules directly at issue here, and thus opens up limitless opportunities for states to impose their own policy preferences on the trucking industry and undermine Congress's deregulatory aims.

The decision below does this in two ways. First, relying on *Dilts* and *Californians for Safe & Competitive Dump Truck Transportation* v. *Mendonca*, 152 F.3d 1184 (9th Cir. 1998)—a case involving preemption of a local prevailing wage ordinance under the ADA—the court below held, as a categorical matter, "that the FAAAA does not preempt state wage laws." Pet. App. 3a-4a. Contrary to the words of the statute, the Ninth Circuit will not deem a state or local wage law preempted under the FAAAA, no matter its relationship to prices, routes, or services.

Second, as petitioner describes in detail, the Ninth Circuit uses an atextual test in FAAAA preemption challenges to laws of general applicability, under which it looks not at whether the law relates to prices, routes, or services, but rather at whether it "*binds* the carrier to a particular price, route, or service." *Dilts*, 769 F.3d at 646; see also Pet. 10-13. As noted above, this test is, on its face, narrower than the test

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to the trucking industry and the national economy it supplies are pure deadweight loss.

Congress actually put in the statute. See pp. 8-9, *supra*. As a practical matter, the test is not merely narrow—it admits no daylight at all. After all, it is difficult to imagine how a background law that "does not refer directly to rates, routes, or services," *Dilts*, 769 F.3d at 646, could possibly bind a carrier to any *particular* price, route, or service. The Ninth Circuit's "binds to" test boils down to preemption immunity for generally applicable laws. This Court has recognized that such immunity is inconsistent with the statute, because "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 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).

The upshot is that, under the Ninth Circuit's approach to preemption under the FAAAA, state and local governments are free not just to regulate the breaks of drivers working in interstate commerce and limit the ways in which carriers pay them, but to impose *any* policy they choose, so long as they do so under the guise of a wage law, or make sure not to single out the trucking industry. This rule-swallowing carveout threatens to completely undermine Congress's decision to leave the trucking industry, where not federally regulated, to market forces, and urgently requires this Court's review.

CONCLUSION

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

Respectfully submitted.

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