Nos. 14-801, 14-819

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.

VITRAN EXPRESS, INC., A PENNSYLVANIA CORPORATION FORMERLY KNOWN AS VITRAN EXPRESS WEST, INC., A NEVADA CORPORATION,
Petitioner,

v.

BRANDON CAMPBELL AND RALPH MALDONADO,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

The Federal Aviation Administration Authorization Act (FAAAA) provides that "a State . . . may not enact or enforce a 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). In the decision below, the court of appeals concluded that century-old general state labor laws governing employee meal and rest breaks were not sufficiently "related to" prices, routes or services of motor carriers to warrant preemption under the FAAAA—at least in the context of short-haul truck drivers who operate entirely within state lines and where the carriers "submitted no evidence to show that the break laws in fact would decrease the availability of routes" for them, or even that the laws "would meaningfully decrease the availability of routes to motor carriers" generally. Pet. App. 21a.

In reaching this conclusion, the court below faithfully applied this Court's precedents (under both the FAAAA and the parallel Airline Deregulation Act), which explain that the "statutory 'related to' text 'is deliberately expansive' and 'conspicuous for its breadth,'" but at the same time "does not go so far as to preempt state laws that affect prices, routes, or services 'in only a tenuous, remote, or peripheral manner, such as state laws forbidding gambling.'" Pet. App. 8a (quoting *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) and *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008)).

The court was also aided in its analysis by the U.S. Department of Transportation, which explained in a brief below that the state laws at issue, in the context of purely intrastate trucking, have no preempted effects. And the court's conclusion is consistent with the Federal

Motor Carrier Safety Administration's decision to reject Penske's petition for preemption in 2008. Characterizing Penske's arguments as unduly "far-reaching," the agency explained that the state break laws "are simply one part of California's comprehensive regulations governing wages, hours, and working conditions"—regulations the agency has "for decades" required motor carriers to follow. *Notice of Rejection of Petition for Preemption*, 73 Fed. Reg. 79,204, 79,206 (Dec. 24, 2008).

In an effort to make a wholly unremarkable application of this Court's precedents appear certworthy, Penske mischaracterizes the decision below. It repeatedly claims that the decision applied an unyielding "binds to" test, under which "any law that does not single out a motor carrier presents a 'borderline case,' in which the Ninth Circuit will find preemption only if 'the provision, directly or indirectly, binds the carrier to a particular price, route or service.'" Pet. 13. Not so. That characterization is belied by the opinion itself, which never applies such a test and discusses the possibility that state law could "bind" carriers to specific services just once, to highlight what laws would undoubtedly have an "impermissible effect" and therefore be preempted. Pet. App. 20a.

Penske's attempt to manufacture a circuit split fares no better. As the very case on which Penske stakes its claim of a split explained, Penske's argument "is contradicted by the very cases on which [Penske] relies." *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 20 (1st Cir. 2014). Indeed, in rejecting a proposed "categorical rule against preemption of 'background'" laws, *id.* at 18, the First Circuit emphasized that such a rule was contradicted by the decision below, which recognized that just the opposite is true: "[I]n *Dilts*," the court observed,

"the Ninth Circuit recognized that generally applicable statutes, 'broad laws applying to hundreds of different industries,' *could be preempted* if they have a 'forbidden connection with prices, routes, and services.'" 769 F.3d at 19 (emphasis added).

The problem for Penske here is that it simply failed to "offer specific evidence" that "the actual effects of the California law on [its] own routes or services" were significant. Pet. App. 24a (Zouhary, J., concurring). That case-specific failing does not warrant this Court's review.

STATEMENT[1]

1. "For the better part of a century, California law has guaranteed to employees wage and hour protection, including meal and rest periods intended to ameliorate the consequences of long hours." *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 520 (Cal. 2012). The State's rules on rest and meal periods were issued in 1916 and 1932, respectively, and "have long been viewed as part of the remedial worker protection framework." *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 291 (Cal. 2007). These rules are virtually identical across all industries. *See* Cal. Code Regs., tit. 8, §§ 11010–11170. Employees are permitted a meal break of 30 minutes for each five-hour work period, subject to waivers under cer-

[1] Unless otherwise noted, all references are to the petition and appendix in No. 14-801. On the day that the court of appeals decided *Dilts v. Penske*, it also issue a three-paragraph unpublished decision in *Campbell v. Vitran Express, Inc.*, 582 Fed. App'x 756 (9th Cir. 2014). "In light of our holding in *Dilts*," the panel concluded, on indistinguishable facts, that California's meal-and-rest-break laws are not preempted by the FAAAA. *Id.* The defendant in *Campbell* has filed a follow-on petition (No. 14-819). This response opposes both petitions.

tain circumstances, and a rest break of 10 minutes for every four-hour work period.

In 2012, the California Supreme Court made clear that employers have substantial flexibility in determining when to allow their employees to take meal and rest breaks. *Brinker*, 273 P.3d 513. Where "the nature of the work prevents an employee from being relieved of all duty," employers and employees may waive the right to an off-duty meal period. IWC Order 9, Section 11. In these circumstances, the period "shall be considered an 'on duty' meal period and counted as time worked." *Id.* Absent a waiver, the California Labor Code "requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." *Brinker*, 273 P.3d at 537. The law imposes no additional timing requirements. *Id.*

A similarly flexible approach applies to rest periods; they need not be taken at precise times nor must they be taken before or after the meal period. *Id* at 530. The California Supreme Court has explained that "[t]he only constraint on timing is that rest breaks must fall in the middle of work periods 'insofar as practicable.' Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible." *Id.* "What will suffice may vary from industry to industry." *Id.* at 537.

2. Penske Logistics provides warehouse, distribution, and inventory-management services to businesses throughout California. Pet. App. 27a. Between 2004 and 2009, respondents Mickey Dilts, Ray Rios, and Donny Dushaj were employed by Penske, working out of the

company's Ontario, California facility and assigned to its Whirlpool account. They typically worked shifts exceeding ten hours, delivering large Whirlpool kitchen appliances (dishwashers, refrigerators, ovens) to customers at their homes and businesses and then installing them on site. Hourly workers assigned to the Whirlpool account were classified as either "drivers/installers" (like Dilts) who hold commercial driver's licenses, or "installers" (like Rios and Dushaj), who generally do not hold such licenses but assist in the unloading and installation of appliances. Pet. App. 27a–28a. The plaintiffs are not long-haul truckers. Their work took place exclusively within California—not far from the Ontario facility—and much of it comprised the installation of heavy appliances.

In 2008, Dilts, Rios, and Dushaj filed a putative class action in state court, alleging that Penske had violated state law by failing to provide meals and rest breaks, pay overtime, reimburse business expenses, and pay wages due to its drivers and installers. Pet. App. 27a. Penske responded that it was subject to—and complying with—California's meal-and-rest-break rules throughout the relevant time period.

Because Penske "expected" its workers to take meal breaks, the company employed "a systematic policy of automatically deducting 30-minutes of work time [to account for those] daily meal periods." Pet. App. 28a. "The deduction was taken without inquiry into whether the employee was actually provided with a timely 30-minute uninterrupted and duty-free meal period or not." *Id.* Penske "provided no means for the employee to override the 'auto-deduction' for any day that a meal period was not provided." 9th Cir. RE 64. In addition, Penske created "an environment that uniformly discouraged [employees] from taking meal and rest breaks. Because many

[drivers and installers] regularly work[ed] overtime hours, the common impact of the 'auto-deduction' was magnified because it result[ed] in the direct loss of 'premium' or 'overtime' wages." *Id.* Employees could not indicate that they had not taken a meal break and Penske never paid a premium wage for a missed break. 9th Cir. RE 77. "Moreover there seems to be no debate that [Penske's] policies did not account for the statutorily mandated second meal break." 9th Cir. RE 77.

After Penske removed the case from state to federal court, the district court certified a class of 349 delivery drivers and installers who worked for Penske in California and were assigned to the Whirlpool account. Pet. App. 3a. Penske then moved for summary judgment on the meal-and-rest-break claims, arguing that they are preempted by the FAAAA and impliedly preempted by the Federal Motor Carrier Safety Administration's (FMCSA) hours-of-service regulations. Pet. App. 30a.[2]

3. The district court granted partial summary judgment as to respondents' claims under California's meal-and-rest-break laws, holding that the FAAAA preempts those laws because they are "related to" motor carrier prices, routes, and services. Pet. App. 50a. In the court's view, "no factual analysis [was] required to decide

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[2] Because the district court decided the case on the basis of express preemption, it declined to reach Penske's implied-preemption argument based on the hours-of-service rule. Pet. App. 30a n.4. Of course, "FMCSA has determined this rule would not have a substantial direct effect on States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation." *Hours of Service of Drivers*, 76 Fed. Reg. 81,134, 81,183 (Dec. 27, 2011); *see also* 75 Fed Reg. 82,170, 82,195 (Dec. 29, 2010) (same).

this question of preemption" and the court therefore did not consider the evidence offered by Penske. Pet. App. 45a.[3] The district court interpreted California law as imposing "fairly rigid" timing requirements on motor carriers, dictating "exactly when" and "for exactly how long" drivers must take breaks throughout the workday, and thereby preventing drivers from taking "any route that does not offer adequate locations for stopping, or by forcing them to take shorter or fewer routes." Pet. App. 42a, 45a. The court cited no California authority for its interpretation of the laws' timing requirements and no evidence that any of the routes Penske used to deliver Whirlpool appliances from its Ontario facility—or any California route—lacked "adequate locations for stopping" within a five-hour period.

The district court also concluded that that the meal-and-rest-break laws have a "significant impact on Penske's services" because compliance would "reduce the amount of on-duty work time allowable to drivers," and hence reduce the number of deliveries each driver can make daily. Pet. App. 42a–43a. The court cited no evidence that Penske could not make up for any reduction in on-duty time by hiring additional drivers or installers. Instead, the court concluded that the effects on routes and services "contribute to create a significant impact

[3] Penske attempted to rely on declarations by two of its employees speculating about the potential impact of state law. Respondents raised evidentiary objections, moved to strike the declarations, and requested additional discovery in the event that the court decided to admit them. Pet. App. 30a. The district court denied the motion to strike and the objections as moot, concluding that declarations "were not necessary to resolve the instant motion." Pet. App. 45a.

upon prices" precisely because Penske would have to bear "the cost of additional drivers." Pet. App. 44a.

4. The court of appeals reversed. In a thorough opinion, it held that, "as applied" to Penske, California's meal-and-rest-break laws did not "meaningfully interfere" with, and so did not "relate to," Penske's "prices, routes, or services" within the meaning of the FAAAA's express preemption clause. Pet. App. 24a, 21a, 2a.

To begin, the court of appeals carefully reviewed the governing FAAAA preemption framework. *See* Pet. App. 7a–17a. Summarizing this Court's description of the "history behind the FAAAA," the Ninth Circuit explained that, "[b]y using text nearly identical to the Airline Deregulation Act's, Congress meant to create parity between freight services provided by air carriers and those provided by motor carriers." Pet. App. 9a–10a. Therefore, the Ninth Circuit agreed, "the analysis from *Morales* and other Airline Deregulation Act cases is instructive for our FAAAA analysis as well." Pet. App. 10a. The court reiterated this Court's observation that the FAAAA's "statutory 'related to' text is 'deliberately expansive' and 'conspicuous for its breadth.'" Pet. App. 8a (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 383–84 (1992)).

Turning to the preemption principles applicable to FAAAA cases, the court followed *Rowe*. *Rowe* identified the "four principles of FAAAA preemption," and "instructs [courts] to apply to our FAAAA cases the settled preemption principles developed in Airline Deregulation Act cases." Pet. App. 12a. That approach "include[s] the rule articulated in *Morales* that a state law may 'relate to' prices, routes, or services for preemption purposes even if its effect is only indirect, . . . but that a state law connected to prices, routes, or services in 'too tenuous,

remote, or peripheral a manner' is not preempted." Pet. App. 12a–13a (citing 504 U.S. at 385–86, 90). To help "draw a line" between preempted laws and those that are not, the Ninth Circuit explained, *Rowe* "reminds us that, whether the effect is direct or indirect, 'the state laws whose effect is forbidden under federal law are those with a *significant* impact on carrier rates, routes, or services.'" Pet. App. 13a (quoting *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 375 (2008)) (emphasis in original).

Applying these principles to California's meal-and-rest-break laws here, the court of appeals determined that these laws "plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt." Pet. App. 17a. Consistent with other circuits that have considered similar "generally applicable background" laws, the Ninth Circuit explained that these laws operate "several steps removed from prices, routes, or services," and "apply[] to hundreds of different industries" with "no other forbidden connection with prices, routes, and services." Pet. App. 15a–16a (internal quotations and alterations omitted) (citing *Air Transp. Ass'n of Am. v. City and County of San Francisco,* 266 F.3d 1064, 1072 (9th Cir. 2001)).

For these laws, the Ninth Circuit observed, the party favoring preemption "bear[s] the burden" of proving that they "are significantly 'related to' prices routes or services." Pet. App. 21a, 18a. The court held that Penske failed to carry its burden. To support its preemption argument, Penske offered six hypothetical examples of how California's meal-and-rest-break laws "are 'related to' routes or services, 'if not prices too.'" Pet. App. 19a. The court rejected all of them. First, Penske failed to demonstrate that these "normal background" laws would

"'bind' motor carriers to specific prices, routes, or services," "'freeze into place' prices, routes, or services[,] or 'determin[e] (to a significant degree) the [prices, routes, or] services that motor carriers will provide.'" Pet. App. 17a (quoting *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011) and *Rowe*, 552 U.S. at 372). But beyond that, none of Penske's examples established that California's meal-and-rest-break laws would even come close to "meaningfully interfer[ing]" with Penske's routes, services, or prices. Pet. App. 21a.

For instance, Penske argued that "finding routes that allow drivers to comply with California's meal and rest break laws will limit motor carriers to a smaller set of possible routes." *Id.* But, as the court of appeals explained, Penske "submitted no evidence to show that the break laws in fact would decrease the availability of routes to serve the Whirlpool accounts, or would meaningfully decrease the availability of routes to motor carriers in California." Pet. App. 21a–22a. Instead, Penske "submitted only very general information about the difficulty of finding parking for commercial trucks in California." Pet. App. 22a. That proffer, the Ninth Circuit concluded, comes nowhere close to satisfying the burden.

5. Judge Zouhary concurred in the judgment, writing separately to "emphasize several aspects of th[e] case." Pet. App. 24a. First, like the majority, he reiterated that, although the party asserting preemption "bears the burden of proof on its preemption defense," Penske here failed to "offer specific evidence of (for example) the actual effects of the California law on Penske's own routes or services." *Id.* Instead, he explained, Penske "relied on a general hypothetical likelihood" that some of its drivers would be "restricted to certain routes." *Id.* That abstract contention came nowhere close to estab-

lishing that California's laws "meaningfully interfere" with Penske's routes, and so, Judge Zouhary emphasized, Penske "failed to carry its burden." Pet. App. 24a–25a (explaining that even Penske's estimate of a "3.4 percent increase in annual pricing" was "minimal" and therefore an "insufficient basis for preempting the decades-old meal and rest break requirement").

Finally, Judge Zouhary "note[d] what this case is *not* about." Pet. App. 25a (emphasis in original). It was "not an occasion" to "reexamine prior precedent" and it presented no question "about FAAAA preemption in the context of interstate trucking" even though "one gets the sense that various *amici* wish it were." *Id.* Ultimately, Judge Zouhary explained, "[o]n this record, and in the intrastate context, California's meal and rest break requirements are not preempted." *Id.*

REASONS FOR DENYING THE WRIT

I. There Is No Split.

Penske's theory that the decision below is "starkly out of sync with the preemption analysis applied in other circuits" relies principally on three cases, two from the First Circuit—*Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11 (1st Cir. 2014) and *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81 (1st Cir. 2011)—and one from the Seventh—*S.C. Johnson & Son, Inc. v. Transp. Corp. of Am.*, 697 F.3d 544 (7th Cir. 2012). *See* Pet. 18-20. The soundness of this theory is perhaps best summed up by the First Circuit itself: it "is contradicted by the very cases on which [Penske] relies." *Massachusetts Delivery*, 769 F.3d at 20.

Penske claims that, in *Massachusetts Delivery*, the First Circuit "flagged the approach taken by the Ninth Circuit" here and "expressly rejected" it. Pet. 18. That is

wrong. What the First Circuit "expressly rejected" was Penske's mistaken *characterization* of the Ninth Circuit's decision here.

The First Circuit declined the Massachusetts Attorney General's proposal to erect a "categorical rule against preemption of 'background'" laws, 769 F.3d at 18—the very rule that Penske attributes to *Dilts*. Pet. 18. But, in doing so, the First Circuit emphasized that this proposed categorical rule was "contradicted" by *Dilts* itself, which recognized that just the opposite is true: "[I]n *Dilts*," the court observed, "the Ninth Circuit recognized that generally applicable statutes, 'broad laws applying to hundreds of different industries,' *could be preempted* if they have a 'forbidden connection with prices, routes, and services.'" 769 F.3d at 19 (emphasis added). Hence, under this Court's FAAAA case law, a court must "carefully evaluate even generally applicable state laws for an impermissible effect on carriers' prices, routes, and services." *Id.* at 20. And, in the First Circuit's view, the Ninth Circuit did just that: it concluded that the effect of California's meal-and-rest break laws on prices, routes, or services was "insufficient to trigger federal preemption," by "engag[ing] with the real and logical effects of the state statute." *Id.* at 19, 20.

Indeed, even setting aside this alignment between the First Circuit and Ninth Circuit on preemption methodology, the two courts are also in agreement on the specifics. *Massachusetts Delivery* held the Massachusetts Independent Contract Law, which requires that courier drivers be classified as employees rather than as independent contractors, preempted by the FAAAA. The Massachusetts law dictated that delivery companies must provide courier services through employees, and prohibited them from providing such services through

independent contractors. The Ninth Circuit reached an indistinguishable conclusion in *American Trucking*, which held that the port authority's "employee-driver" provision was preempted by FAAAA (and fell outside of a "market participant" exception to preemption). 660 F.3d at 407-08. The law of the Ninth Circuit is thus in perfect harmony with *Massachusetts Delivery*.

That other laws, like the one "governing tips for service employees" in *DiFiore*, have been found preempted by the FAAAA does not strengthen Penske's case. Pet. 19 (quoting *DiFiore*, 646 F.3d at 87). Instead, cases like *DiFiore* only demonstrate that some laws will fall on the preemption side of the "dividing line" where it is shown that, "as applied," they "directly regulate" some element of price, route, or service. *DiFiore*, 646 F.3d at 87, 88. In *DiFiore*, the case went all the way to trial, where the record established that the Massachusetts tips law, "in its application to the present circumstances," could "easily affect" both price and service. *Id.* at 89. The First Circuit found preemption because the state law—as specifically applied to the skycaps at Logan Airport—had the impermissible effect of "directly regulat[ing] how an airline service is performed and how its price is displayed to customers—*not merely how the airline behaves as an employer* or proprietor." *DiFiore*, 646 F.3d at 88 (emphasis added). On those facts, avoiding a state-law determination of curbside fees as a "service charge" would have required "changes in the way the service is provided or advertised." *Id.* The Court concluded that the tip law had "the same potential impact on American's practices as a guideline condemning the same conduct explicitly." *Id.*

But even there, the First Circuit refused to "endorse [the airline's] view that state regulation is preempted

wherever it imposes costs on airlines." *Id.* Instead, the court clarified that FAAAA preemption hinges on the particular "application" of a background state law and a careful analysis of its record-based effect on the regulated entity. *Id.* Penske's other cases make the same point. *See United States v. Mesa Airlines*, 219 F.3d 605, 610 (7th Cir. 2000) (concluding that state claims aimed at an airline's "routes and divisions of revenues" would have a "significant effect on rates, routes, or services"); *Onoh v. Northwest Airlines, Inc.*, 613 F.3d 596 (5th Cir. 2010) (same, regarding claim aimed at airline's service).[4]

The Ninth Circuit's faithful application of the governing FAAAA framework in *Dilts* explains why the First Circuit perceives no conflict. It also explains why Penske is wrong that *Dilts* "stands in stark contrast" with Seventh Circuit's decision in *S.C. Johnson & Son*. Pet. 20. For starters, the First Circuit in *Massachusetts Delivery* also rejected this characterization. It looked at both opinions and found them of a piece—both accurately applied the governing FAAAA framework and rejected a "categorical rule exempting from preemption all generally applicable" state laws. *See Massachusetts Delivery*, 769 F.3d at 20. In both cases, the First Circuit explained, the courts considered whether certain "background" state laws were preempted under the FAAAA. *See id.* at 18. And, in both, the courts determined that the state

[4] Penske suggests that the Second Circuit's decision in *Air Transport Ass'n of Am. v. Cuomo* adds to the split, but that case involved a law directly regulating airlines' service. *See* 520 F.3d 218, 223 (2d Cir. 2008) (explaining that the state law at issue—titled the New York Passenger Bill of Rights—"requir[ed] airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays" and so did regulate " the service of an air carrier").

laws were not preempted because, after "careful analysis," it could not be said that they had a sufficient effect on prices, routes, or services. *Id.* at 18, 20 (explaining that, in *S.C. Johnson & Son*, the analysis showed that the laws had "a tenuous effect on prices, routes, and services," and, in *Dilts*, the laws' effect was "insufficient to trigger federal preemption").

The First Circuit's disagreement with Penske's characterization of *S.C. Johnson & Sons* is unsurprising. When the Ninth Circuit decided *Dilts*, it relied on the Seventh Circuit's decision and followed its lead. Pet. App. 15a. In resolving whether the state laws were preempted under the FAAAA, the Seventh Circuit explained that FAAAA preemption is not "a simple all-or-nothing question." *See S.C. Johnson & Son*, 697 F.3d at 550. "[I]nstead, the court must decide whether the state law at issue falls on the affirmative or negative side of the preemption line." *Id.* This inquiry is informed by the recognition that "background" state laws, like "minimum wage laws, worker-safety laws, anti-discrimination laws," operate "one or more steps away from" the point of contact between the carrier and the customer. *Id.* at 558. For the Seventh Circuit, those several steps meant that the state laws were "too tenuously related to the regulation of the rates, routes, and services in the trucking industry to fall within the FAAAA's preemption rule." *Id.* at 559. The Ninth Circuit here took the same view. *See* Pet. App. 15a (explaining that, consistent with *S.C. Johnson & Sons*, California's break laws are "several steps removed from prices, routes, or services" and not preempted).

II. The Decision Below Faithfully Applied This Court's FAAAA Precedents.

With no split in sight, Penske spends the bulk of the petition arguing that the Ninth Circuit's decision here is "hopelessly out of step" with, and failed to "conform its FAAAA preemption analysis to," this Court's precedents. Pet. 11, 12. But consider Penske's own description of this Court's FAAAA preemption analysis: it is a "'practical approach' [that] accounts for the 'real world consequences' of state laws." Pet. 14 (quoting *Northwest, Inc., v. Ginsberg*, 134 S. Ct. 1422, 1430 (2014)). The Ninth Circuit did just that: it determined, as a practical matter, that California's meal-and-rest-break laws did not significantly interfere with Penske's services, routes, or prices. *See* Pet. App. 21a (explaining that Penske "submitted no evidence to show that the break laws in fact would decrease the availability of routes"). That conclusion is lockstep—not out of step—with this Court's guiding case law.

For instance, and contra Penske, the Ninth Circuit's decision does not "directly conflict[]" with *Morales*. *See* Pet. 13. Unlike the generally applicable background state laws here, *Morales* involved a multi-state effort to directly regulate core aspects of how air or motor carriers provided their services (the title of the at-issue effort was "Air Travel Industry Enforcement Guidelines"). 504 U.S. at 379. Those guidelines imposed "detailed standards governing the content and format of airline advertising, the awarding of premiums to regular customers (so-called 'frequent flyers'), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights." *Id.* Given the direct nature of this regulatory effort, the Court had no difficulty concluding that the laws "quite obviously" had a "significant effect"

on airlines' fares and rates. *Id.* at 387. But even there, the Court was careful to cabin its conclusion: it did not intend to "set out on a road" where all state laws that in some way affect pricing or rates would be preempted, and it quite plainly expected that lower courts would have to "draw the line" in "borderline" cases. *Id.* at 390.

Penske's reliance on *Rowe* fares no better. There, the Court considered a state law that, like *Morales*, was *not* a background law of general applicability; it specifically regulated delivery services and so directly "focus[ed] on trucking and other motor carrier services." 552 U.S. at 371 (explaining that the Maine law was "not general" and did not "broadly prohibit[] certain forms of conduct" that affected truckdrivers only incidentally). Maine's law was preempted because it "aim[ed] directly at the carriage of goods" and had a "significant" impact because it "requir[ed] motor carrier operators to perform certain services, thereby limiting their ability to provide incompatible alternative services." *Id.* at 376. But the Court was careful to stress that Maine could likely achieve its legitimate public-health objectives by enacting "laws of general (noncarrier specific) applicability." *Id.* at 376-77. And, the Court saw Maine's law as "no more 'borderline' than [in] *Morales*." *Id.* at 376.

That neither of these two cases dealt in any way with a state law of general applicability several steps removed from a direct regulation deals a fatal blow to Penske's claim of intentional recalcitrance. This Court has repeatedly made clear—including in the cases on which Penske relies—that, for background laws of general applicability, any FAAAA preemption analysis will require a court to carefully analyze the law's "real-world" impact on the regulated entity to determine if that impact triggers preemption. *See, e.g.*, *Ginsberg*, 134 S. Ct. at 1430 (inter-

nal quotation omitted). That is just what the Ninth Circuit did here.[5]

Undeterred, Penske trumpets a claim that the Ninth Circuit imposed a "heightened standard," Pet. 15, for FAAAA preemption by (supposedly) fashioning an "anomalous 'binds to' test" for addressing "so-called 'borderline' cases.'" Pet. 12-13. This claim is pure fiction. For starters, compare the number of times the phrase "binds to" appears in the Ninth Circuit opinion (zero) with its appearance in the petition (13). This Court would be hard-pressed to review a "preemption test," Pet. I, that is never applied in the lower court's opinion.

At a more fundamental level, though, Penske's "heightened standard" catchphrase misunderstands the court of appeals' analysis. The Ninth Circuit discussed the possibility that a state law could "bind[] motor carriers to specific services," but only to highlight what laws would undoubtedly have an "impermissible effect" and therefore be preempted. Pet. App. 20a. This Court made

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[5] Penske's rambling claim (at 15-17) that the Ninth Circuit's analysis "specifically relied" on *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc), to impermissibly "narrow[] Congress's use of 'routes' and services'" is also wrong. *See* Pet. 15-16. The Ninth Circuit cited *Charas* exactly twice: once simply to describe its holding, *see* Pet. App. 20a, and once for the unremarkable proposition that "'[r]outes' generally refers to point-to-point transport and courses of travel." Pet. App. 21a (alterations omitted). As Penske itself admits, that general understanding has never been questioned, Pet. 17, but Penske's focus on *Charas* also misses the point. The Ninth Circuit's conclusion that, as applied to Penske's routes, California's meal-and-rest-break laws fall on the "no preemption" side of the line flows from Penske's failure to carry its burden in demonstrating that these laws "meaningfully interfere" with its "routes." Pet. App. 21a.

the same point in *Rowe*, explaining that the FAAAA would surely preempt laws that would "freeze into place services that carriers might prefer to discontinue in the future." 552 U.S. at 372. But, the Ninth Circuit here did not *require* that a state law bind a defendant to be preempted. Far from it. It required only that the party urging preemption—Penske here—carry its burden in demonstrating that the state law "meaningfully interfere" with its routes, services, or prices. Pet. App. 21a. And Penske "failed to carry its burden." Pet. App. 24a (Zouhary, J., concurring).

* * * *

All in all, because the Ninth Circuit faithfully followed this Court's FAAAA preemption framework, Penske's re-branding effort should be rejected.

III. Neither Petition Presents a Suitable Vehicle.

Ultimately, Penske's quarrel is not that the Ninth Circuit diverged in its understanding of the governing FAAAA preemption framework—a point that the First Circuit felt compelled to make explicitly—or even that the lower court's decision conflicts with this Court's precedent. Instead, Penske disagrees with the result: it disputes that the effect of California's break laws on its prices, routes, or services is insufficient to trigger preemption. *See* Pet. 14 (arguing that the "practical impact" of California's meal-and-rest-break laws should justify preemption). But that disagreement is a product of its own making: As Judge Zouhary explained, Penske failed to "offer specific evidence" that "the actual effects of the California law on [its] own routes or services" were significant. Pet. App. 24a. The Ninth Circuit's conclusion that California's meal-and-rest-break laws did not significantly interfere with Penske's services, routes,

or prices flowed directly from this fact. *See* Pet. App. 21a (The defendants "submitted no evidence to show that the break laws in fact would decrease the availability of routes"); *see also* Pet. App. 13 *in* Case No. 14-819 (finding preemption "as a matter of law," without resort to evidence). Failing to "carry its burden" however, is no basis for this Court's review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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