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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAAA) provides that "a State [or] political subdivision . . . 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).

The questions presented are:

1. Whether a state law of general applicability is not preempted by the FAAAA unless it "binds" a motor carrier to "specific" prices, routes, or services.

2. Whether the FAAAA's use of the terms "price, route, or service" refers only to "point-to-point transport."

3. Whether California's wage and labor laws, which prohibit averaging employee work hours to demonstrate compliance with minimum-wage rules, are not preempted by the FAAAA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and regulations

Legislative materials

INTRODUCTION

The Federal Aviation Administration Authorization Act preempts state laws "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). In the unpublished decision below, the court of appeals held that California's meal- and rest-break rules, as well as its law governing the proper payment of minimum wages, were not sufficiently "related to" the prices, routes, or services of a specific motor carrier to justify preemption.

In reaching that conclusion, the court faithfully applied this Court's precedents. Those cases teach that the FAAAA preempts state laws that explicitly refer to motor carriers' rates, routes, or services, or that have an indirect but substantial effect on them. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370–71 (2008). But this Court has also made clear that the FAAAA does *not* preempt state laws that affect rates, routes, or services in a "tenuous, remote, or peripheral" manner. *Id.*

In an effort to make an unremarkable, fact-bound application of this Court's precedents appear certworthy, J.B. Hunt mischaracterizes the decision below. This leads it to formulate "questions presented" that are not actually presented here—and to allege circuit splits that either dissolve upon inspection or have no bearing at all on this appeal. J.B. Hunt also tries, and fails, to distinguish this case from *Dilts v. Penske Logistics*, 769 F.3d 637, 643 (9th Cir. 2014), which involved near-identical issues and which this Court recently declined to review. *See* No. 14-801, 135 S. Ct. 2049 (2015) (denying certiorari). Finally, since J.B. Hunt filed its petition, the House of Representatives has passed a bill that, if enacted, could dramatically alter the applicable legal analysis.

For these reasons, it is unnecessary for the Court to review this splitless, fact-bound, unpublished decision.[1]

STATEMENT

A. The applicable state law

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 must be authorized and permitted a meal break of thirty minutes for each five-hour work period, subject to waivers under certain circumstances, and a rest break of ten minutes for every four-hour work period.

In 2012, the California Supreme Court made it clear that employers have substantial flexibility in determining

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[1] This Court has recently denied review in several other cases presenting similar questions about FAAAA preemption of generally applicable state laws. *See Oakland Port Servs. Corp. v. Godfrey*, No. 14-1464, 136 S. Ct. 318 (2015) (denying certiorari where the petitioner sought review of a state court decision concluding that California's meal- and rest-break laws are not preempted by the FAAAA); *Overka v. Am. Airlines*, No. 15-315, 136 S. Ct. 372 (2015) (denying certiorari where the petitioner posed the question whether the Airline Deregulation Act can preempt "generally applicable background labor laws"); *Nationwide Freight Sys., Inc. v. Ill. Commerce Comm'n*, No. 15-103, 136 S. Ct. 223 (2015) (denying certiorari where the petitioner posed a question about the proper standard for determining FAAAA preemption of state law).

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. California 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 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.* State courts recognize that "[w]hat will suffice may vary from industry to industry." *Id.* at 537.

2. California law has also long required an employer "to pay its employees at least the designated minimum wage," and has forbidden an employer from withholding wages or secretly paying less than what it agreed to pay. App. 32a (citing Cal. Labor Code §§ 221–23, 1194, 1197). California appellate courts have held that "the minimum wage standard applies to each hour worked by [an employee]." *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 324 (2005). In other words, employers may not

underpay employees for some hours worked and overpay them for others, even if the overall average complies with the minimum wage. *See id.*; *see also* App. 33a.

B. The district court proceedings

1. Respondents Gerardo Ortega and Michael Patton are former drivers for the petitioner J.B. Hunt, a transportation company. They filed this class-action lawsuit in November 2007, alleging that J.B. Hunt had a policy and practice of failing to comply with California's meal- and rest-break laws, as well as its minimum-wage requirements.

As to the former, the respondents alleged that they were not permitted to take meal and rest breaks in a manner consistent with California law as definitively interpreted by *Brinker*, 273 P.3d at 520. And as to the latter, they alleged that J.B. Hunt's "Activity-Based-Pay" system (or "ABP system") violated the requirement that the minimum wage be paid for each hour worked. In particular, the respondents alleged that J.B. Hunt did not pay them while they waited in lines at intermodal terminals for periods of less than two hours[2]; performed pre- and post-trip inspections; fueled vehicles; waited for dispatch to issue assignments; and hooked and unhooked trailers. The respondents further alleged that J.B. Hunt failed to provide them with itemized wage statements in writing, as required by state law.

From the beginning, the respondents defined the relevant class by reference to individuals engaged exclusively or overwhelmingly in *intra*-state commerce. *See* Dkt. 37 at 8 (class definition in the operative complaint).

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[2] An intermodal terminal facility allows the safe and efficient transfer of cargo—contained in "intermodal containers"—between different transportation modalities (e.g., trains, ships, and trucks).

Consistent with that understanding of the respondents' claims, the district court certified the following class: "All of Defendant's California-based, local and regional intermodal and regional DCS drivers who worked for Defendant [in the relevant period]." Dkt. 64 at 27. Critically, "[t]his definition excludes over-the-road drivers." *Id.* at 28.[3] Thus, while the class does include some drivers "who cross state lines," Pet. 24, these drivers typically return to California the same day (or, in relatively infrequent cases, remain out-of-state for one night). Simply put, by virtue of this class definition, the decisive focus of the relevant activity is all *within* California.[4]

2. At the pleading stage, the district court lacked any evidence about where the class members travel for work or what economic effects might result from compliance with state law. Nonetheless, reviewing only the complaint, it dismissed the respondents' wage and rest break claims as preempted by the FAAAA.

The district court divided this analysis into two parts. It first rejected J.B. Hunt's contention that California's meal- and rest-break regulations "explicitly and directly relate to how routes and services are scheduled." App. 17a. That argument, it reasoned, was an "overstatement"

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[3] Intermodal drivers generally deliver freight to and from railways. Dedicated Contract Services (DCS) drivers are usually assigned to deliver freight for one particular customer. Unlike local and regional drivers, "over-the-road" drivers often travel between states, traversing long distances on a regular basis.

[4] This remains a contested factual dispute on which there has been no definitive resolution in the lower courts. Although J.B. Hunt contended at length in its opposition to class certification that the class contains some individuals who engage in a substantial amount of interstate commerce, *see* Dkt. 60, the district court ultimately rejected its arguments and approved the proposed class, *see* Dkt. 64.

and could not survive "a cursory read of the provisions." *Id.* The court, however, speculated that compliance with California's meal- and rest-break requirements could "add a layer of complexity to a motor carrier's schedule planning." App. 18a. On that basis, it concluded that these laws are preempted by the FAAAA because they might conceivably have a "significant" impact on J.B. Hunt's "routes" and "prices." *Id.*

3. Following a period of fact and expert discovery, the district court granted summary judgment to J.B. Hunt on the respondent's minimum-wage claims. It reasoned that requiring compliance with state law would affect J.B. Hunt's "labor costs," and might "consequently [affect] the price of the services it provides." App. 37a. Extending this logic, the district court then suggested that *all* laws affecting employee compensation may be similarly preempted: "Common sense instructs that any increase to driver compensation would ultimately result in increased prices as well." *Id.* Ultimately, the district court believed that J.B. Hunt's ABP system creates desirable incentives, and that requiring J.B. Hunt to comply with state law would therefore have a substantial effect on its services and prices. *See id.* at 38a-40a.

C. The intervening appeal in *Dilts*

While the district court was considering the respondent's claims, the Ninth Circuit heard argument in *Dilts v. Penske Logistics*, 769 F.3d at 637 (9th Cir. 2014). With respect to the meal- and rest-break claims, *Dilts* was virtually identical to this litigation. There, too, a class of delivery drivers alleged that their employer had violated California law. And there, too, the district court dismissed the drivers' claims as preempted by the FAAAA. Indeed, the district court in this case relied heavily on the district court opinion in *Dilts*—and specifically

rejected arguments that *Dilts* could be distinguished in any material respect. See App. 20a-22a.

1. To assist its review in *Dilts*, the Ninth Circuit invited the United States to submit an amicus brief. In that brief—signed by both the U.S. Department of Transportation and the Federal Motor Carrier Safety Administration—the government observed that "[t]he general standards for determining whether a state law 'relates to' prices, routes, or services and is thus preempted under the FAAA Act are well settled." Br. for United States as Amicus Curiae, *Dilts v. Penske Logistics*, 2014 WL 809150, at 14 (9th Cir. Feb. 18, 2014). It also explained—in detail—why "the FAAA Act does not preempt the state meal and rest break law." *Id.* at 10.

To start, the government emphasized that California's meal- and rest-break statute "is a law of longstanding, general applicability and does not reflect any state effort to regulate motor carriers directly." *Id.* at 11. Put differently, this law "does not focus on the trucking industry, and its application does not turn on any express connection to trucking prices, routes, or services . . . [it] is not intended to regulate motor carriers in any capacity other than their general role as employer." *Id.* at 16.

Turning to the heart of the dispute, the government then advised that California's law does not have "an indirect but significant effect on prices, routes, or services." *Id.* at 11. It noted two grounds for this conclusion.

First, although "state-mandated breaks reduce the number of hours an employee is available for duty, such effects are common to all employers and thus bear too tenuous and remote a connection to the core deregulatory purposes of the FAAA Act to warrant preemption." *Id.* at 11. The government added that a contrary conclusion would be disruptive and would expand FAAAA

preemption far beyond congressional design: "A state income tax, workers' compensation scheme, or minimum wage law could all have a large impact on a motor carrier's cost of doing business and thus its prices and capacity to deliver services. But there is nothing to suggest that, in legislating to promote maximum reliance on competitive market forces, Congress intended to insulate motor carriers from the ordinary incidents of state regulation applicable to every employer." *Id.* at 19–20.

Second, the government explained that "the break law's potential impact on a carrier's choice of routes is too speculative and remote to warrant preemption." *Id.* at 21. Here, it identified "[s]everal factors" that militated against preemption. To start, although California's rule might in some cases make it more expensive to adhere to a preferred route, "the state in no way applies its coercive regulatory power to dictate changes in routes or services." *Id.* at 21. Further, the government saw "no basis for concluding that compliance costs" would be substantial enough to justify preemption. *Id.* at 22.[5]

2. The Ninth Circuit panel in *Dilts* agreed with the government's position and held that California's meal- and rest-break rules are not preempted by the FAAAA.

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[5] The government noted that the drivers "were apparently charged with making many local stops and deliveries during the course of a day," and could thus "presumably take a break before or after one of these many scheduled stops." Br. of United States, *Dilts*, 2014 WL 809150, at 22. With respect to long-haul drivers, they were "presumably using interstates or other major highways where periodic rest stops capable of accommodating a large truck are available." *Id.* at 23. Moreover, because "federal hours of service regulations already require periodic rest breaks," the government counseled that "the obligation to choose a route with adequate rest stops cannot be traced solely to state law." *Id.*

To begin, the Ninth Circuit carefully and comprehensively reviewed the governing preemption framework. *See* App. 59a–70a. Summarizing this Court's description of the "history behind the FAAAA," the court 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." App. 63a. Therefore, the Ninth Circuit agreed, "the analysis from [*Morales v. Trans World Airlines*, 504 U.S. 374 (1992)] and other Airline Deregulation Act cases is instructive for our FAAAA analysis as well." *Id.* The Ninth Circuit reiterated this Court's warning that the FAAAA's "statutory 'related to' text is 'deliberately expansive' and 'conspicuous for its breadth.'" App. 61a (quoting *Morales*, 504 U.S. at 383–84).

Turning to relevant principles of preemption, the Ninth Circuit carefully followed this Court's opinion in *Rowe*. There, the Court identified "four principles of FAAAA preemption" and instructed courts "to apply to our FAAAA cases the settled preemption principles developed in Airline Deregulation Act cases." App. 66a. 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." *Id.* (citing 504 U.S. at 385–86, 390). To help "draw a line" between preempted and permissible state laws, 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.'" *Id.* (quoting *Rowe*, 552 U.S. at 375) (emphasis in original).

Applying these principles, the Ninth Circuit determined that California's meal- and rest-break requirements "plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt." App. 70a. Consistent with other circuits that have considered similar "generally applicable background" laws, the Ninth Circuit explained that these rules 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." App. 68a (internal quotations and alterations omitted) (citation omitted).

For such 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." App. 75a. The court held that the defendant there—Penske Logistics—had failed to carry its burden. To support its preemption argument, Penske had offered six hypothetical examples of how California's requirements "are 'related to' routes or services, 'if not prices too.'" App. 72a. The Ninth Circuit considered and rejected each example in turn. *See id.* at 73a–76a.[6]

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[6] 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." App. 75a. 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 [relevant] accounts, or would meaningfully decrease the availability of routes to motor carriers in California." *Id.* Instead, Penske "submitted only very general information about the difficulty of finding parking for commercial trucks in California." *Id.* at 75a-76a. That proffer, the Ninth Circuit concluded,

After the Ninth Circuit published its opinion in *Dilts*, Penske filed a petition for rehearing en banc. No judge in active service requested a vote on that petition. Penske then filed a petition for certiorari, supported by many of the amici who have filed briefs here. On May 4, 2015, this Court denied review of that petition without dissent.

D. The unpublished decision below

In April 2017, the Ninth Circuit issued an unpublished, four-paragraph opinion reversing the district court's judgment in this case. First, it concluded that *Dilts* "compels the conclusion that the district court erred in granting J.B. Hunt's motion for judgment on the pleadings on Plaintiffs' meal and rest break claims." App. 3a. And second, it determined that the district court erred in granting summary judgment in J.B. Hunt's favor on the respondent's minimum-wage claims. *See id.* J.B. Hunt's position, the court explained, was foreclosed by *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998), which held that "[w]hile [California's prevailing wage law] in a certain sense is 'related to' [the plaintiff's] prices, routes and services, . . . the effect is no more than indirect, remote, and tenuous."

After the panel released this decision, J.B. Hunt sought rehearing en banc. No judge requested a vote on that request, which was subsequently denied.

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came nowhere close to satisfying Penske's burden.

REASONS FOR DENYING THE PETITION

I. The criteria for certiorari are not satisfied.

A. The petition's first question is not actually presented here, does not involve a split, cannot be distinguished from *Dilts*, and may soon be rendered moot by pending legislation.

The first question presented by J.B. Hunt's petition for certiorari is whether the Ninth Circuit correctly held "that a state law of general applicability is not preempted by the FAAAA unless it 'binds' a motor carrier to 'specific' prices, routes, or services." For four separate reasons, the Court should deny review of that question.

1. The most basic problem with the first "question presented" is that it's not actually presented here. The premise of this question is that the Ninth Circuit has created and applied something called the "'binds to' test." Pet. 10. But this "test"—supposedly imported from the Court's ERISA cases—is a figment of J.B. Hunt's imagination. Because the "'binds to' test" does not exist in *any* circuit's FAAAA preemption jurisprudence, it would be passing strange for this Court to grant review of it.

J.B. Hunt imputes the "'binds to' test" to *Dilts*. It is therefore helpful to start by comparing the number of times that the phrase "binds to" appears in *Dilts* (zero) and the opinion below (zero) with the number of times that it appears in J.B. Hunt's petition (fourteen).

That is not a coincidence. In *Dilts*, the Ninth Circuit briefly discussed the possibility that a state law could "bind[] motor carriers to specific services," but only to highlight one species of state law that would *undoubtedly* be preempted by the FAAAA. App. 74a. This Court made the very 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; *see also* App. 66a (quoting this language from *Rowe*).

Thus, in rejecting the claim that California's meal- and rest-break rules interfere with the FAAAA's deregulatory purposes, *Dilts* described "binding" motor carriers to specific services as one of *several* possible "impermissible effect[s]" that would trigger preemption:

> [T]he mere fact that a motor carrier must take into account a state regulation when planning services is not sufficient to require FAAAA preemption, so long as the law does not have an impermissible effect, *such as* binding motor carriers to specific services, making the continued provision of particular services essential to compliance with the law or interfering at the point that a carrier provides services to its customers.

App. at 74a (citations omitted) (emphasis added); *see also id.* at 76a (yet again describing a state law that "indirectly bind[s]" carriers to routes, services, or prices as merely one kind of law preempted by the FAAAA).

Indeed, if J.B. Hunt were correct and the Ninth Circuit actually held that state laws can be preempted only if they "bind" carriers to specific routes, services, or prices, then it is difficult to understand why *Dilts* treated so many other potential effects as relevant to its lengthy, detailed preemption analysis. A "binds to" test would be quick and easy to apply. The thorough analysis in *Dilts*—which largely tracks the government's amicus brief in that case—disproves the existence of a "'binds to' test."

Simply put, neither *Dilts* nor the decision below required that a state law coercively bind a defendant to be preempted. Far from it. Consistent with this Court's

precedent, *Dilts* required only that the party raising the affirmative defense of preemption carry its burden in showing that the state law "meaningfully interfere[s]" with its routes, services, or prices. App. 75a.[7] The opinion below applied that rule—not a "'binds to' test"—and thus does not present J.B. Hunt's first question.

2. After erroneously imputing a "'binds to' test" to the Ninth Circuit, J.B. Hunt contends that this test is the subject of a circuit split. That claim, too, is mistaken.

To begin, J.B. Hunt repeats its basic error in suggesting that another circuit—the Eleventh—has adopted its alleged "'binds to' test." Pet. 13–14. The only case cited here is a single, unpublished (and thus non-precedential) Eleventh Circuit decision. *See Amerijet Int'l, Inc. v. Miami-Dade Cty., Fla.*, 627 F. App'x 744 (11th Cir. 2015). That fact alone defeats any suggestion of a split.

And yet the error runs deeper. *Amerijet* concluded only that Miami's "living wage" ordinance is not preempted by the Airline Deregulation Act as applied to air carriers. *See id.* at 745. The phrase "binds to" appears nowhere in this opinion. Further, when *Amerijet* does refer to state laws "bind[ing]" air carriers, it does so only to identify one possible reason—among others—why a state law could be preempted. *See id.* at 750 (assessing,

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[7] At times, J.B. Hunt asserts that the "'binds to' test" was established in *Air Transport Association v. San Francisco*, 266 F.3d 1064 (9th Cir. 2001). *See, e.g.*, Pet. 13. But that case was decided over a decade before *Dilts* and addressed an entirely different issue—namely, whether the Airline Deregulation Act preempts a city ordinance requiring airport contractors to comply with anti-discrimination requirements. *See id.* at 1068–70. As a more recent case addressing the precise issue here, *Dilts* is controlling. And as we have already explained, it is simply incorrect to assert that *Dilts* limits FAAAA preemption to state laws that "bind" motor carriers.

under *Rowe*, whether Miami's living wage ordinance is preempted because it has a "significant effect on an air carrier's services," and identifying several possible ways in which the ordinance might have such an effect).[8]

Accordingly, neither the Ninth Circuit nor the Eleventh Circuit has adopted or applied the "'binds to' test" at the heart of J.B. Hunt's first question presented.

Nor have the First Circuit or the Seventh Circuit embraced interpretations of the FAAAA inconsistent with the Ninth Circuit's analysis in *Dilts* and the Eleventh Circuit's non-precedential reasoning in *Amerijet*.

It makes sense to start with *Massachusetts Delivery Association v. Coakley*, 769 F.3d 11 (1st Cir. 2014) (*MDA*). J.B. Hunt characterizes this case as one in which Massachusetts tried—and failed—to persuade the First Circuit "to adopt the *Dilts* rule." Pet. 14. But that is incorrect. What the First Circuit "expressly rejected" in *MDA* was the state's erroneous characterization of *Dilts* as creating a "categorical rule exempting from preemption all generally applicable state labor laws." 769 F.3d at 20.

In fact, directly contrary to J.B. Hunt's description, *see* Pet. 14, the First Circuit emphasized that *Dilts* did *not* create such a categorical rule and instead read *Dilts*

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[8] To be sure, *Amerijet* quotes from this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 659 (1995), which assessed ERISA preemption by asking whether state laws "bind plan administrators." But in the paragraph where that quote appears—and in the very next sentence—the Eleventh Circuit considers respects *other than* binding air carriers in which a state law could be preempted by the Airline Deregulation Action. *See Amerijet*, 627 Fed. App'x 751.

as consistent with its own analysis. *See* 769 F.3d at 20. "[I]n *Dilts*," *MDA* explained, "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.'" *Id.* (emphasis added). The First Circuit further explained that, 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.* And, in the First Circuit's view, the Ninth Circuit had done just that—concluding that the effect of California's meal-and-rest break laws was "insufficient to trigger federal preemption," by "engag[ing] with the real and logical effects of the state statute." *Id.* at 19–20.

J.B. Hunt also cites *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) (*UPS*). Pet. 14. But there, the First Circuit held only that the test for preemption under ERISA is far narrower than the test for preemption under the FAAAA. *See id.* at 335. This analysis is perfectly consistent with Ninth and Eleventh Circuit jurisprudence—as evidenced by the absence of any hint in *MDA*, a far more recent decision, that *Dilts* was in tension with existing First Circuit precedent.

Finally, J.B. Hunt briefly nods toward *United Airlines v. Mesa Airlines*, 219 F.3d 605, 610 (7th Cir. 2000), which followed the unbroken trend of declining to create a categorical exemption from FAAAA preemption for state laws of general applicability. For the reasons given above, *United Airlines* is consistent with *Dilts*, *Amerijet*, and the opinion below—none of which create a categorical exemption for general laws, none of which apply a "'binds to' test" derived from ERISA precedent, and all

of which follow this Court's directive to test state laws for an improper effect on routes, prices, and services.[9]

3. Still another reason to deny J.B. Hunt's petition is that the Court has *already* denied review of the Ninth Circuit's holding that the FAAAA does not preempt California's meal- and rest-break laws. After it lost in the Ninth Circuit, Penske asked this Court to grant certiorari in *Dilts*. Its petition presented the following question:

> Did the Ninth Circuit err by holding that California's [meal- and rest-break] laws are not preempted under the FAAAA, applying a preemption test that conflicts with the decisions of this Court and other circuits and has consistently produced flawed results?

See Pet. for Cert., *Penske Logistics, LLC. v. Dilts*, No. 14-801, at i. Here, J.B. Hunt presents the same essential question that the Court declined to review in 2015. The only difference is that J.B. Hunt has introduced additional reasons *not* to grant review by formulating its question through reference to a non-existent "'binds to' test."

At pages 23 to 26 of its petition, J.B. Hunts attempts to distinguish this case from *Dilts*—a departure from its

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[9] Subsequent to *United Airlines*, the Seventh Circuit has discussed and relied on *Dilts* without offering any indication that it views *Dilts* as inconsistent with its own jurisprudence. *See Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1054 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2289 (2017). Moreover, writing for a unanimous *en banc* panel of the Eighth Circuit and declining to offer any suggestion that these cases are inconsistent, Judge Colloton recently cited *Dilts* alongside opinions from the First and Seventh Circuits to describe a coherent, workable doctrine of when the Airline Deregulation Act preempts background state employment laws. *See Watson v. Air Methods Corp.*, 870 F.3d 812, 818–19 (8th Cir. 2017) (en banc).

position in the district court. *See* Def. J.B. Hunt's Motion for Judgment on the Pleadings, Dkt. 97-1, No. 2:07-cv-8336 (C.D. Cal. Nov. 19, 2007) (observing that "this case is exactly like the situation presented in *Dilts v. Penske Logistics*," and emphasizing that the district court decision in "*Dilts* could not be more on point"). But with respect to the first question, the petition alleges only three differences from *Dilts*—none of which holds water.

First, J.B. Hunt contends that the split has "deepened." Pet. 23. Its only support for that claim is *Amerijet*, an unpublished Eleventh Circuit decision that doesn't even purport to apply the "'binds to' test" at the center of the supposed split. As already explained, there is no split for the non-precedential *Amerijet* ruling to "deepen[]."

Second, J.B. Hunt contends that *Dilts* concerned "'intrastate' transport only" and that this case involves an "*interstate* carrier." Pet. 24 (emphasis in original). Both premises of that distinction, however, are mistaken.

To begin, although a visiting district court judge treated this fact as noteworthy in his concurrence, *see* 769 F.3d at 651 (Zouhary, J.), *Dilts* was not limited solely to intrastate transportation. Indeed, *Dilts* referred to the intrastate nature of the transport at issue only once, identifying it as one among several considerations that led it to reject one of Penske's six arguments for preemption. *See id.* at 649. The logic of *Dilts* was fully applicable even to carriers who engage in limited interstate commerce, so long as California law does not impose a substantial burden on their interstate activity. The government recognized this point in its amicus brief, which did not ask whether the activity was *exclusively* intrastate, but instead rejected preemption where the plaintiffs were—as here—"*primarily* short-haul, motor vehicle

drivers operating within California." Br. at 25 (emphasis added).

Consistent with both *Dilts* and the government's view, here the Ninth Circuit found no preemption where the plaintiffs operate overwhelmingly within California. Although J.B. Hunt repeatedly emphasizes that it is an "interstate carrier," it declines to mention that the same was true of Penske Logistics, LLC.[10] More important, J.B. Hunt ignores the fact that this case involves a narrow class of plaintiffs specifically defined to exclude "over-the-road drivers." Instead, the class consists only of "California-based, local and regional intermodal and regional DCS drivers who worked for Defendant [in the relevant period]." Given that the respondents' meal-and rest-break claims were decided on the pleadings—and that there is no evidence demonstrating either significant interstate activity or a substantial compliance cost for J.B. Hunt—there is no basis for distinguishing this case from *Dilts*, which the Court did not deem certworthy.[11]

Third, and relatedly, J.B. Hunt suggests that this case is unlike *Dilts* because the defendants there had an opportunity to submit evidence of an economic burden and didn't do so, whereas here the defendant didn't have a chance to submit evidence because it prevailed on the pleadings. Pet. 25. This is an admirably creative effort to

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[10] *See* Penske, *Homepage*, www.penske.com ("We are a closely-held, diversified, on-highway, transportation services company whose subsidiaries operate in a variety of industry segments . . . in more than 3,300 locations and employing over 50,000 people world-wide.").

[11] J.B. Hunt may assert that some or most of the conduct here is inter-state rather than intra-state. To the extent it takes that factual position, the respondents strongly dispute it and emphasize that the meal and rest break claims were dismissed at the pleading stage.

wring virtue from a vice. But it does not succeed. In both cases—though for different reasons—the carrier did not show that complying with state law would substantially burden its routes, services, or prices. Accordingly, there is no tenable distinction to be drawn; the reasons why *Dilts* was not certworthy apply with full force here.

4. A final reason not to grant review is that Congress is currently considering legislation that would change the substantive law applicable to this case. On April 27, 2018, the House of Representatives passed the FAA Reauthorization Act of 2018. *See* H.R. 4, 115th Cong. (2018). This bill included the so-called Denham Amendment, which would amend the FAAAA to expressly and retroactively preempt, *inter alia*, all state meal- and rest-break laws. *See id.*[12] If that legislation is ultimately enacted into law without modification, it could have a material effect on the respondents' meal- and rest-break claims. This ongoing legislative activity constitutes yet another reason to deny review.

B. The petition's second question is not actually presented here, invokes a split that is not implicated by the facts of this case, and may soon be rendered moot by pending legislation.

The second question presented is whether the Ninth Circuit correctly held "that the FAAAA's use of the terms 'price, route, and service' refers only to 'point-to-point transport.'" Review of this question should be denied for three separate reasons.

1. Once again, the most basic difficulty for J.B. Hunt is that its question isn't actually presented here. It is true, as J.B. Hunt says, that the Ninth Circuit has

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[12] The full text of the Denham Amendment can be accessed at this link: https://www.congress.gov/bill/115th-congress/house-bill/4.

previously interpreted "route" in the FAAAA (and the Airline Deregulation Act) as encompassing "point-to-point transport." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc). But the Ninth Circuit has never extended this definition of "route" to the terms "price" or "service."

To the contrary, the court of appeals has repeatedly assigned separate meaning to these terms, including in *Charas*. *See id.* at 1265–66 (separately defining "price," "routes," and "service" under the Airline Deregulation Act). And the Ninth Circuit adhered to that practice in *Dilts*, where it separately analyzed whether California's meal- and rest-break laws affect routes and services—and nowhere defined "service" as "point-to-point transport." *See, e.g.*, 769 F.3d at 647 (emphasizing that California's meal- and rest-break rules "do not set prices, mandate or prohibit certain routes, *or* tell motor carriers what services they may or may not provide, either directly or indirectly" (emphasis added)); *id.* at 648 ("[C]arriers may have to hire additional drivers or reallocate resources in order to maintain a particular service level, but they remain free to provide as many (or as few) services as they wish."); *id.* ("[C]arriers may schedule transportation as frequently or as infrequently as they choose, at the times that they choose, and still comply with the law.").

J.B. Hunt's formulation of this question thus rests on a mischaracterization of Ninth Circuit precedent. The Ninth Circuit has never held, or even hinted, "that the FAAAA's use of the terms 'price, route, and service' refers only to 'point-to-point transport.'" Pet. i. Only by conflating precedent addressing "route" and "service" can J.B. Hunt suggest the existence of such a rule. Accordingly, through its second question presented, the

petition seeks review of a doctrine that not only doesn't exist, but is contradicted by Ninth Circuit law.

2. A similar error—conflating analysis of "service[s]" with analysis of "route[s]"—infects J.B. Hunt's effort to describe a circuit split implicated by its second question.

In a series of opinions issued between 1995 and 2008, the circuits have adopted different views of what qualifies as a "service" under the Airline Deregulation Act. Some courts take a narrow view. *See Taj Mahal Travel, Inc. v. Delta Airlines, Inc.,* 164 F.3d 186, 193–94 (3d Cir. 1998); *Charas*, 160 F.3d at 1261. Many other courts take a broader view. *See Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336–38 (5th Cir. 1995) (en banc). In most of these cases, the question was whether the application of state tort or anti-discrimination law imposed a forbidden burden on an airline's "service." Despite numerous opportunities to clarify applicable doctrine, this Court declined to do so. *See Nw. Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000) (O'Connor, J., dissenting from the denial of certiorari).

That decades-old circuit split, however, is not remotely implicated here. Neither *Dilts* nor the unpublished decision below relied on the disputed definition of "service" at issue in those cases. *Dilts* cited *Charas*'s definition of "service" only once, and did so for an unrelated reason: to explain that Penske's argument in reliance on *Charas* misunderstood the nature and operation of the requirements that California's meal and rest break rules impose on carriers. *See* 769 F.3d at 648. This single

invocation of *Charas* hardly imported wholesale its airline-specific definition of "service"—and certainly did not do so in a way that affected the outcome of the case.[13]

J.B. Hunt all but admits as much. The very first paragraph of its argument for granting this question contends that California's meal- and rest-break laws "'relate to' routes." Pet. 16. After some further discussion of "routes"—unaccompanied by any suggestion of a split on the meaning of *that* term—it then abruptly switches to discussing the definition of "service." *See* Pet. 16 (final sentence). Relying entirely on this pivot, which conflates routes and services, it launches into an exposition about *Charas*'s "two-decade reign of error." Pet. 18. Here it relies *solely* on cases about air-carrier services—even though some of these cases affirmatively *disclaim* any interpretation of the term "route." *See, e.g.*, *Branche*, 342 F.3d at 1254 n.4. At the very end, J.B. Hunt then swings back around, suggesting (incorrectly) that the Ninth Circuit has given a single interpretation to "route" and "service." On this basis, it seeks to impute the unrelated, stale split over the definition of air-carrier "service" to *Dilts*, which didn't take sides in that debate and which didn't describe motor-carrier "route[s]" or "service[s]" in a manner at odds with any case cited by J.B. Hunt.[14]

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[13] As noted above, *Dilts* took a far-reaching view of Penske's services and the ways in which they could conceivably be affected by the operation of California law. Thus, even under the broadest definition of "service" adopted by courts—all in relation to airlines—this case would come out the same way. That said, it is not self-evident that cases about providing in-flight snacks and disability-friendly check-in kiosks at airports can be readily transplanted here.

[14] J.B. Hunts asserts that it is "undisputed that California's meal- and rest-break laws require drivers to deviate from their planner routes and take longer to travel those routes (and thus provide less service overall)." Pet. 18. To be clear, this point *is*

3. Finally, as explained above, an additional reason to deny review of this question is that Congress is currently considering legislation that would change applicable law.

C. The petition's third question raises an issue that the Ninth Circuit has addressed only in an unpublished opinion, on which there is no split, and which may soon be rendered moot by pending legislation.

The third question presented is whether "the Ninth Circuit correctly held that California's wage and hour laws, which prohibit motor carriers from using industry-standard incentive-based pay structures, are not preempted by the FAAAA." Pet. i. This holding is allegedly "in conflict with the First Circuit's holding that Massachusetts's wage and labor laws, which similarly restrain the way that motor carriers incentivize their drivers, are preempted." *Id.* Here, too, three separate considerations support the denial of review.

1. To start, this part of the unpublished decision below does not follow directly from a published opinion. It is a fact-bound, non-precedential application of circuit precedent to a new context. And it does not merit review.

Only once has the Ninth Circuit addressed FAAAA preemption of minimum-wage laws in a published opinion: in *Mendonca*, 152 F.3d at 1184. There, consistent with this Court's cases, the Ninth Circuit acknowledged that a state law can be preempted when it has an "indirect" effect on routes, prices, and services. *See id.* at 1188–89. On the facts before it, however, the court held that the application of minimum-wage requirements to public contractors had only an "indirect, remote, and

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disputed. In fact, the Ninth Circuit rejected identical contentions when they were advanced by Penske. *See Dilts*, 769 F.3d at 648–49.

tenuous" effect. *Id.* at 1189. Its reasoning was brief: it directly addressed the challenged law in only two short paragraphs. There, the Ninth Circuit allowed that some minimum-wage laws can be preempted by the FAAAA but concluded that the law at issue was not. *See id.*[15]

Since it was published, *Mendonca* has been cited by numerous courts of appeals—including the First Circuit—without any hint of disagreement. *See, e.g.*, *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am.*, 697 F.3d 544, 558 (7th Cir. 2012); *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 87 (1st Cir. 2011); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 773 (2d Cir. 1999).

This case, of course, is different than *Mendonca*. It does not involve the validity of a generic minimum-wage ordinance as applied to a motor carrier. Instead, it turns on the application of settled preemption principles to California's rule against averaging employee work hours to demonstrate compliance with minimum-wage requirements. *See Armenta*, 135 Cal. App. 4th at 324.

Accordingly, the decision below necessarily involved a fact-specific extension and application of circuit precedent. But that application of *Mendonca* occurred in an unpublished opinion addressing idiosyncratic facts—namely, the consequences of applying California's averaging rule to J.B. Hunt's unique ABP system. This decision does not satisfy any of the standards for review.

2. The alleged 1-1 split between the Ninth Circuit and the First Circuit does not exist, since the relevant Ninth Circuit opinion is unpublished. Moreover, the split that J.B. Hunt describes is not a true disagreement. The First Circuit has not articulated any principle of law

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[15] This Court was asked to review the decision in *Mendonca* but denied the petition for certiorari. *See* 526 U.S. 1060 (1999).

inconsistent with Ninth Circuit doctrine. Instead, as in many other cases addressing how the FAAAA interacts with state wage requirements, the material differences here reflect variation in state law. *See Costello*, 810 F.3d at 1054 (describing general agreement in appellate courts regarding applicable law and noting that preemption determinations often hinge on the structure and operation of state law); *MDA*, 769 F.3d at 18–19 (explaining the consistency of First Circuit opinions with Ninth and Seventh Circuit cases).

J.B. Hunt sees a split between published First Circuit cases preempting Massachusetts's law defining who qualifies as an independent contractor and this unpublished Ninth Circuit case upholding California's rule against averaging hourly payments. *See* Pet. 19–22 (discussing *MDA* and *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016)). It bases this claim on the theory that the First Circuit, supposedly unlike the Ninth Circuit, recognizes that state laws can substantially affect prices, routes, or services by modifying carriers' ability to create incentives for their workers. *See* Pet. 21. But *Schwann* addressed that point only *after* identifying an independently sufficient basis for preemption: that the unusual Massachusetts independent contractor law "expressly references" motor-carrier services and would thwart "Congress's purpose to avoid a patchwork of state service-determining laws, rules, and regulations." 813 F.3d at 438 (citations omitted). Further, neither in *Mendonca* nor in the unpublished opinion below did the Ninth Circuit indicate any disagreement with the First Circuit's view. Perhaps for that reason, neither *MDA* nor *Schwann* noted any disagreement with Ninth Circuit preemption cases (or that of any other court).

3. Finally, as explained above, an additional reason to deny review of this question is that Congress is currently considering legislation that could change applicable law. Although the bill that recently passed the House does not address minimum wage laws by name, it would amend the FAAAA to expressly preempt state laws that "prohibit[] employees whose hours of service are subject to regulation by the Secretary under section 31502 [of title 49] from working to the full extent permitted or at such times as permitted under such section, or *imposing any additional obligations on motor carriers* if such employees work to the full extent or at such times as permitted under such section." (emphasis added). Under this legislation, motor carriers would presumably argue that state employment laws—including minimum-wage requirements—qualify as "any additional obligations."

II. The non-precedential decision below faithfully applied this Court's FAAAA precedents.

With no split in sight, J.B. Hunt spends a substantial part of its petition arguing that the Ninth Circuit's unpublished decision is wrong on the merits. Notably, this part of J.B. Hunt's discussion has little to say about precedent and a great deal to say about the facts of the case. This only confirms that J.B. Hunt's true complaint is aimed at the Ninth Circuit's application of settled legal principles to a unique factual setting—rather than at the Ninth Circuit's interpretation of the FAAAA or understanding of motor-carrier preemption.

First consider California's meal- and rest-break laws. As the government explained at length in its amicus brief in *Dilts*, and as the Ninth Circuit held in that case, Supreme Court precedent makes clear that these laws are not preempted by the FAAAA. This conclusion

follows from settled premises of the doctrine and from a careful analysis of how California law affects carriers.

In *Northwest, Inc., v. Ginsberg*, 134 S. Ct. 1422, 1430 (2014), the Court emphasized the need for a practical approach that accounts for the "real-world consequences" of state laws. Here, the Ninth Circuit did just that. As indicated by its reliance on *Dilts*, the court determined—through a realistic analysis—that California's meal- and rest-break laws did not significantly interfere with J.B. Hunt's services, routes, or prices. Put differently, it concluded that the state laws have too "tenuous, remote, or peripheral" an effect to support preemption. *Morales*, 504 U.S. at 390. Although J.B. Hunt objects to this outcome, all of the arguments that it advances were considered (and rejected) by the Ninth Circuit in *Dilts*.

The Ninth Circuit's conclusion is in lockstep—not out of step—with this Court's guiding case law. To start, the decision below does not conflict with *Morales*. 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.

J.B. Hunt's heavy reliance on *Rowe* fares no better. Pet. 27–30. There, the Court considered a state law that, like in *Morales*, was *not* a background law of general applicability; it specifically regulated delivery services and hence 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 truck-drivers 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 critically, the Court concluded that Maine's law was "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 of motor carriers deals a fatal blow to J.B. Hunt's assertion that the Ninth Circuit is defying Supreme Court precedent. This Court has repeatedly made clear—including in the cases on which J.B. Hunt 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. That is just what the Ninth Circuit did in *Dilts* and what it did again here.

These same principles explain why the Ninth Circuit properly concluded that the FAAAA does not preempt California law governing the payment of a minimum wage. Many background labor and employment laws might conceivably have some indirect effect on a carrier's price or services. But it is settled—and properly so—that laws with such an indirect effect are often too "tenuous, remote, or peripheral" to trigger preemption. *See Costello*, 810 F.3d at 1054; *Mendonca*, 152 F.3d at 1187 (discussing FAAAA legislative history that favors a narrow view of when minimum-wage laws are preempted).

That is true "even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide." *Dilts*, 769 F.3d at 646; *accord Rowe*, 552 U.S. at 375 (holding that a state law is not preempted when it "prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public"). As the Ninth Circuit explained in *Dilts*:

> [M]any of the laws that Congress enumerated as expressly *not* related to prices, routes, or services—such as transportation safety regulations or insurance and liability rules, 49 U.S.C. § 14501(c)(2)—are likely to increase a motor carrier's operating costs. But Congress clarified that this fact alone does not make such laws "related to" prices, routes, or services. Nearly every form of state regulation carries some cost. The statutory text tells us, though, that in de-

> regulating motor carriers and promoting maximum reliance on market forces, Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability.

769 F.3d at 646. Thus, the fact that California's law prohibits J.B. Hunt from relying on its ABP system to compensate the respondents for their overwhelmingly intrastate activity does not, by itself, compel preemption. And here, as the respondents detailed in their briefs below, there is a fact-intensive dispute between the parties concerning the practical consequences of complying with the *Armenta* rule. Although J.B. Hunt describes such compliance as world-altering, there are powerful reasons to think it would have few, if any, effects on J.B. Hunt's operations. *See* Pl's Br., *Ortega v. J.B. Hunt Transport*, No. 14-56034 (9th Cir.), Dkt. 32, at 40–57.

In concluding that *Mendonca* and *Dilts* support the outcome in this case—and that applying the *Armenta* rule will not have a substantial effect on J.B. Hunt's operations—the Ninth Circuit reasonably applied this Court's precedent to undeniably unusual facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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