NO. 21-396

In the
Supreme Court of the United States

DELTA AIR LINES, INC.,

Petitioner,

v.

DEV ANAND OMAN, TODD EICHMANN, ALBERT FLORES, AND MICHAEL LEHR,

Respondents.

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

REPLY BRIEF FOR PETITIONER

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
JULIE M.K. SIEGAL
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

November 30, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authority

REPLY BRIEF

The Ninth Circuit approved California's express extension of its wage-and-hour laws beyond California's territorial jurisdiction into areas governed by federal law and its deregulatory preferences. The Ninth Circuit not only condoned California's overtly extraterritorial regulation, but blessed California's fashioning of a special rule for "interstate transportation workers" who are so actively engaged in interstate commerce that they spend only a tiny fraction of their workweek in any one state. The Ninth Circuit's deeply flawed decision relies on an unduly narrow reading of the Commerce Clause and cannot be reconciled with this Court's decisions precluding such extraterritorial regulation.

Respondents do not dispute that flight attendants are quintessential employees involved in interstate commerce, that interstate air travel requires uniform national rules, that federal law reflects a deregulatory policy, or that the legal questions here are important. They instead double down on the Ninth Circuit's view that the Commerce Clause poses no obstacle to California's expressly extraterritorial regulation here or to any non-price regulation. But precedents of this Court (and the majority of circuits) firmly recognize extraterritorial regulation, price or otherwise, as beyond the states' authority. Respondents also insist that extending California's wage-and-hour laws to flight attendants who concededly spend most of their workweek outside of California is unproblematic because no other state imposes conflicting regulations on "interstate transportation workers." But the absence of such conflicting state laws is explained by

the federal policy of deregulation and constitutional limits on extraterritorial regulation. That situation will not persist if the Ninth Circuit's decision stands, as other states will follow California's lead and impose conflicting requirements based on competing theories for regulating "interstate transportation workers" who do not spend a majority of their time in any one jurisdiction. Indeed, Washington state has already imposed its own problematic requirements on flight attendants with the Ninth Circuit's approval.

The Ninth Circuit has declared an open season for state re-regulation of interstate airlines by reading both the Commerce Clause and Airline Deregulation Act (ADA) unduly narrowly. Respondents complain that Delta did not raise a distinct ADA preemption argument below, but the Ninth Circuit's misguided ADA test rendered any such argument futile. Moreover, the Commerce Clause and ADA objections are closely related, as evidenced by Respondents' effort to invoke the absence of conflicting state regulations—itself a product of ADA preemption—as defeating Delta's Commerce Clause argument. As a result, this case presents an excellent companion to the pending petitions attacking the Ninth Circuit's ADA preemption test, which have already precipitated a call for the Solicitor General's views. This Court should either grant this petition outright or, at a minimum, hold it pending resolution of those petitions. One way or another, however, the Ninth Circuit's misguided reading of the Commerce Clause should not stand.

I. The Decision Below Is Profoundly Wrong.

A. California unabashedly created a special rule for "interstate transportation workers" and extended "California wage and hour laws to flight attendants who work primarily outside California's territorial jurisdiction." App.10, 5; *Ward v. United Airlines, Inc.*, 466 P.3d 309, 321, 324 (Cal. 2020). The Ninth Circuit's decision embracing that rule cannot be squared with the Commerce Clause or this Court's jurisprudence interpreting it. The extension of California's wage-and-hour laws to interstate transportation workers who spend the vast majority of their workweek elsewhere violates the principles that this Court identified in *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336-37 (1989). *See* Pet.28-31.

Respondents offer no defense of the Ninth Circuit's application of *Healy*. Instead, they contend that California's extraterritorial rule does not really regulate commerce and that *Healy* only applies in price-control cases. They claim "there will be no effect on the flow of goods or people in commerce" if Delta just does what California tells it to do. BIO.19. That is both wrong and beside the point. California cannot adopt a special rule for "interstate transportation workers" designed to fill a perceived regulatory gap created by the conceded fact that they are so pervasively involved in interstate commercial activity that they do not spend the majority of their workweek in any one state, and then disclaim any effect on interstate commerce. The whole point of California's special rule is to regulate interstate activity and to extend California's wage-and-hour laws "outside California's territorial jurisdiction." The former

plainly affects interstate commerce and the latter is unconstitutional even apart from any documented effect on interstate commerce.

Doubling down on the Ninth Circuit's constricted reading of *Healy*, Respondents insist that the prohibition on extraterritorial regulation applies only to price controls. BIO.19-20; App.2-3. That argument is wrong and implicates an acknowledged circuit split. This Court has never limited *Healy* to price-control cases. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2471 (2019) (citing *Healy* with approval); *Granholm v. Heald*, 544 U.S. 460, 487 (2005) (reaffirming that direct regulation of interstate commerce is "generally struck down … without further inquiry"). Indeed, this Court has recognized that the territorial limit on state legislative authority is not some narrow Commerce Clause doctrine, but a fundamental tenet of our federal system. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996) (citing *Healy*).

Respondents point to three circuit court decisions that adopt their view that *Healy* applies only to state statutes that dictate the price of out-of-state goods. BIO.22. None of those cases involved the explicit extension of state law "outside [the state's] territorial jurisdiction," let alone the fashioning of special rules to fill a perceived gap in the regulation of "interstate transportation workers." Moreover, at least two circuits have expressly rejected the argument that the Commerce Clause prohibition on extraterritorial legislation is limited to price regulation. *See Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 670 (4th Cir. 2018); *North Dakota v. Heydinger*, 825 F.3d 912, 919

(8th Cir. 2016); *see also Mayer v. Ringler Assocs., Inc.*, 9 F.4th 78, 85 (2d Cir. 2021) (rejecting interpretation of California Insurance Code that would extend Code to commerce that takes place wholly outside California's borders). Thus, at best, Respondents have underscored that their principal defense of the constitutionality of California's special extraterritorial rule for interstate transportation workers depends on a legal proposition on which the circuits are divided. *See*, *e.g.*, *Ass'n for Accessible Meds.*, 887 F.3d at 670 (Maryland's effort to limit *Healy* to price regulations, "while adopted by two of our sister circuits, is too narrow"). Resolving that acknowledged conflict among the circuits is just another reason to grant review. [1]

B. Even apart from the virtually *per se* rule against extraterritorial legislation, California's special rule for "interstate transportation workers" runs afoul of the Commerce Clause because it impermissibly burdens interstate commerce by imposing burdens on interstate commerce that clearly exceed the vanishingly small local benefits. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). In *Ward v. United*

[1] Respondents suggest that the decision below is in accord with the Seventh Circuit's decision in *Hirst v. Skywest, Inc.*, 910 F.3d 961 (2018), *cert. denied*, 139 S.Ct. 2745 (2019), but *Hirst* did not involve any comparable effort to regulate extraterritorially. Instead, *Hirst* involved an effort to apply the minimum-wage laws of the state where flight attendants were based to the hours worked *in that state*. That underscores the potential for conflict created by the decision below, which expressly extends California law extraterritorially to non-California residents, like Respondent Lehr, and to time worked outside California.

Airlines, the Ninth Circuit suggested that California has an interest in ensuring that employees "receive the information they need to determine whether they have been paid correctly." 986 F.3d 1234, 1241 (9th Cir. 2021). But California's interest in providing that information to an out-of-state resident who works for an out-of-state employer and spends over 85% of his workweek out of state is trivial at best. Indeed, the California Supreme Court acknowledged that California generally does not have a sufficient regulatory interest in an employee unless she spends more than half her workweek in California. App.10; *see also Ward*, 466 P.3d at 320. That the court fashioned a special exception for employees who spend all their time in interstate commerce, but a majority of their time in no one state, underscores the exception's disproportionate—indeed, exclusive—burdening of interstate commerce.

That California exempts public employees, most of whom spend all their time within California's territorial jurisdiction, from Sections 204 and 226 reinforces its *de minimis* interest in extending those provisions to "interstate transportation workers." Respondents downplay the significance of the public-employee exemption, insisting it follows a general presumption that state laws do not apply to governmental agencies. BIO.24. But the Section 226 carve-out is statutory, *see* Cal. Lab. Code §226(i), and California extends other provisions of its wage-and-hour laws to public employees, despite the supposed presumption. The reality is that California deems compliance with Sections 204 and 226 of such minimal interest that it exempted hundreds of thousands of public employees, while the California Supreme Court

fashioned a special rule to extend those same provisions in a manner that forces Delta to reconfigure its pay practices for employees who spend only a small fraction of their workweek in California.

Respondents insist that California "has a great interest in regulating employment in the state." BIO.23. But California generally draws the line on that interest at employees who spend a majority of their workweek in California. That rule sensibly reflects the notion that a state's interest in regulating employment is limited to those who actually work within the territorial jurisdiction of the state. The state's interest in interstate transportation workers who merely start their multi-state rotations in California but spend the majority of their workweek elsewhere is vanishingly small.

At the same time, the burden on interstate commerce is substantial, especially given that the dominant theme of the federal regime is deregulation. The decision below requires Delta to bifurcate its national workforce into those employees who begin their rotations in California and everyone else, and to continue to monitor employees to ensure they are on the correct side of that divide. For those flight attendants who must now receive a California-compliant paystub, compliance is not simply a matter of printing information that Delta already has. *Contra* BIO.2, 13-14. Delta uses four different formulas to calculate pay, and pays on a credit-based system, not an hourly one. App.30. Working backwards to produce a report about hours worked at rates of pay that do not reflect how Delta actually calculates pay would plainly require an overhaul of Delta's payroll

system, if not its entire credit-based system (not to mention the confusion it would cause to show hourly wages that do not correspond to the way wages are calculated). These burdens are substantial, especially when judged against the preference for deregulation reflected in the ADA. While federal law leaves Delta free to adopt pay policies (and paystubs) tailored to the unique dynamics of interstate air travel, where flights (and thus shifts) can be canceled and rescheduled due to the vagaries of everything from weather to federal restrictions on landing at particular airports, California law imposes requirements that require artificial calculations that ignore the unique dynamics of a uniquely interstate industry.

C. Respondents do not dispute that the Ninth Circuit failed to account for the distinctively federal nature of interstate air travel. Nor could they. The Ninth Circuit's insistence that Sections 204 and 226 do not "regulate[] in an area that requires national uniformity," *Ward*, 986 F.3d at 1242, ignores Congress' contrary judgment in the ADA and this Court's precedents about airlines and other interstate transportation industries. Respondents attempt to mitigate the concern by emphasizing the absence of conflicting obligations that effectively "prohibit" compliance with Sections 204 and 226. BIO.15 (emphasis omitted). But the dearth of other state laws regulating the wage statements of flight attendants and other "interstate transportation workers" is a product of respect for Congress' deregulatory policies and the prohibition on extraterritorial state regulation. In other words, the gap in state regulation of flight attendants who spend the majority of their time in interstate commerce is not a void that invites

California's gap-filling effort, but a reflection of a federal policy that deliberately favors deregulation.

If the decision below is allowed to stand, there is no reason to think that California alone will attempt to fill the gap. Not surprisingly, the re-regulatory impulse has already been indulged by other states within the Ninth Circuit. Washington, for example, has already subjected flight attendants and pilots to sick-leave requirements, with the Ninth Circuit's blessing in a decision subject to another pending petition. *See Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of Lab. & Indus.*, 859 F.App'x 181 (9th Cir. 2021), *petition for cert. filed*, No. 21-627 (U.S. Oct. 27, 2021).

Moreover, if states are given a green light to regulate employees who spend a majority of their workweek in no one state, there is no reason to think states will not adopt competing and inconsistent regulatory footholds. For example, Respondent Lehr is based at SFO, but lives in Nevada. Nevada could rationally determine that its paystub regulations apply to all state residents, with the consequence that Lehr's paystub would be simultaneously regulated by California and Nevada law. Georgia, in turn, could reasonably assert jurisdiction over the pay stubs issued by a Georgia-based employer. With workers spreading their time across multiple states, the possibility for conflicting state regulations is substantial. Congress, of course, can express a preference for the law of a particular state and has done so elsewhere. *See* Pet.24 n.1. But in this context, Congress has expressed a preference for deregulation, not the conflicting possibilities for re-regulation unleashed by the decision below.

II. The Question Presented Is Important And Warrants The Court's Review In This Case.

The decision below opens the door for expressly extraterritorial regulation of flight attendants and pilots in contravention of both the Commerce Clause and the deregulatory policies of the ADA. The Court should intervene now to correct the Ninth Circuit's erroneous jurisprudence and to stop California from directly regulating interstate transportation workers who concededly spend the vast majority of their workweek elsewhere. There is no need to wait for further percolation, because the decision below already conflicts with this Court's precedents, and Respondents' principal defense implicates an issue that has already divided the circuits. That acknowledged split on the scope of this Court's extraterritoriality decisions is an issue only this Court can resolve.

This case presents a clean vehicle for resolving the question presented. It involves a purely legal question that was thoroughly explored in the decisions below and is dispositive in this case. There is no doubt that California is extending its wage-and-hour laws extraterritorially to workers who spend the majority of their time working outside the state. That was the essential premise of the California Supreme Court's decision to apply California "wage and hour laws … outside California's territorial jurisdiction." App.5.

Respondents' claim that more record evidence about the burden is needed is doubly unconvincing. *See* BIO.16. First, there is no need to examine the degree of burden on interstate commerce when a state

avowedly regulates extraterritorially as California has done here. *E.g.*, *Brown-Forman*, 476 U.S. at 579. And both the burdens on Delta's pay practices and the virtual absence of any legitimate "local" interest in "interstate transportation workers" who spend most of their workweeks outside the state are obvious.

Finally, it bears emphasis that the decision below does not stand alone, but is part of a pattern of Ninth Circuit decisions interpreting both the Commerce Clause and the ADA narrowly and paving the way for substantial state re-regulation of the interstate airline industry. *See, e.g.*, *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127 (9th Cir. 2021), *petition for cert. filed*, No. 21-260 (U.S. Aug. 19, 2021); *Air Transp. Ass'n*, 859 F.App'x 181. Respondents counter that the petitions in those cases focus on ADA preemption and Delta did not raise an independent ADA preemption argument below. But raising such an argument below would have been futile given the Ninth Circuit's well-established narrow test for ADA preemption. Moreover, the Commerce Clause and ADA preemption issues are closely intertwined, as Respondents themselves unwittingly underscore by emphasizing that other states have yet to adopt conflicting standards. As noted, the explanation for that reticence—and the resulting regulatory gap that impelled the California Supreme Court to extend California law extraterritorially—is the ADA and its deregulatory preferences. In addition, the full impact of the Ninth Circuit's misguided analysis of state efforts to re-regulate the interstate airline industry is not its unduly narrow approach to extraterritoriality or its unduly demanding requirements for ADA preemption, but the combined effect of the two.

Respondents do not address, much less dispute, the combined effect of the recent Ninth Circuit decisions, which provide a blueprint for state regulation of matters of national concern where the congressional policy favors deregulation. Perceiving obvious problems with this regime, this Court recently called for the views of the Solicitor General in *Bernstein* and *California Trucking Association v. Bonta*, 996 F.3d 644 (9th Cir. 2021), *petition for cert. filed*, No. 21-194 (U.S. Aug. 9, 2021). Orders in Pending Cases, 595 U.S. __ (Nov. 15, 2021). At a minimum, therefore, this Court should hold this petition pending the Solicitor General's response and the Court's disposition of those petitions. This case could present a useful companion case so that the Court can consider the various legal obstacles to state efforts to re-regulate an industry Congress has chosen to deregulate. It may be that when, as here, the state attempts to re-regulate via avowedly extraterritorial regulation, the Commerce Clause (and related doctrines foreclosing extraterritorial legislation) provides the proper remedy. On the other hand, a broad interpretation of the ADA's preemption provision might preclude comparable state efforts. But one way or another, the Ninth Circuit's hostility toward the deregulatory preference expressed by federal law cannot stand.

CONCLUSION

The Court should grant the petition or, at a minimum, hold the petition pending resolution of the petitions in *Bernstein* and *California Trucking Association*.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
JULIE M.K. SIEGAL
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

November 30, 2021