No. 21-____

In The

Supreme Court of the United States

AIR TRANSPORT ASSOCIATION OF AMERICA, INC. d/b/a AIRLINES FOR AMERICA,

Petitioner,

v.

THE WASHINGTON DEPARTMENT OF LABOR & INDUSTRIES, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Airline Deregulation Act ("ADA") expressly preempts any state law "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The question presented is whether that provision preempts neutral state laws only where those laws "bind" an airline to a "particular" price, route, or service (as the Ninth Circuit holds), or whether it preempts any state law that has a "significant impact" on carrier prices, routes, or services, even if that impact "is only indirect," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386, 390 (1992) (quotations omitted), as this Court and several courts of appeals have held.

PARTIES TO THE PROCEEDING

Petitioner Airlines for America is a trade association. Petitioner was plaintiff in the district court and appellant in the court of appeals.

Respondents are the Washington Department of Labor & Industries and Joel Sacks, the Department's Director. Respondents were defendants in the district court and appellees in the court of appeals.

Respondent Association of Flight Attendants-Communication Workers of America, AFL-CIO was an intervenor-defendant in the district court and appellee in the court below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Airlines for America has no parent corporation and does not issue stock. No publicly held company owns more than 10% of Airlines for America.

RELATED PROCEEDINGS

- *Air Transp. Ass'n of Am., Inc. v. Wash. Dept. of Lab. & Indus. et al.*, No. 19-35937 (9th Cir.), amended decision, filed July 29, 2021, available at 859 F. App'x 181.
- *Air Transp. Ass'n of Am., Inc. v. Wash. Dept. of Lab. & Indus. et al.*, No. 3:18-cv-05092-RBL (W.D. Wash.), decision filed October 11, 2019, Judgement Entered: October 15, 2019

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Airlines for America ("A4A") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The amended decision of the court of appeals is reported at 859 F. App'x 181, and reprinted in the Appendix to the Petition ("App.") at 1a-9a.[1] The decision of the district court granting respondents' motion for summary judgment and denying petitioner's motion for summary judgment is reported at 410 F. Supp. 3d 1162, and is reprinted at App. 10a-39a.

JURISDICTIONAL STATEMENT

The amended decision of the court of appeals was issued on July 29, 2021. App. 3a. That court denied rehearing en banc that same day. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The ADA's preemption clause provides, as relevant, that "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C.

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[1] The court of appeals' original opinion, which included a factual error that the court subsequently corrected, is reported at 2021 WL 2029186.

§ 41713(b)(1).

The relevant provisions of Washington's paid sick-leave law are reproduced at App. 40a-43a.

INTRODUCTION

Congress enacted the ADA because it concluded that "maximum reliance on competitive market forces" would best promote efficient and affordable national transportation services. *Morales*, 504 U.S. at 378 (quotations omitted). "To ensure that the States would not undo federal deregulation with regulation of their own," *id.*, Congress included in the ADA an express preemption provision that preempts any state law "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). This Court has always construed that provision broadly, holding that it preempts any state law with a significant impact on prices, routes, and services, even if that impact is only indirect. *Morales*, 504 U.S. at 386, 388-90; *see also Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370-71 (2008) (construing materially identical trucking deregulation provision).

The question presented here is whether that same rule applies to neutral state laws of general applicability. In truth, this Court has already answered that question—it has thrice held that the ADA preempts state laws of general applicability that have a significant effect on carrier prices, routes, or services. *See Morales*, 504 U.S. 374; *see also Nw., Inc. v. Ginsberg*, 572 U.S. 273 (2014); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). But the Ninth Circuit has outright rejected that rule. In a series of cases, including the decision below, that court has held that such laws are

preempted only when they "bind" carriers to "particular" prices, routes, or services. *See Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1141 (9th Cir. 2021), *petition for cert. docketed*, No. 21-260 (Aug. 23, 2021); *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 658 (9th Cir. 2021), *petition for cert. docketed*, No. 21-194 (Aug. 11, 2021); *Ward v. United Airlines, Inc.*, 986 F.3d 1234, 1243 (9th Cir. 2021). Under the "binds to" test, generally-applicable background laws are not preempted, no matter how significant their impacts, because such laws by their nature do not bind carriers to particular prices, routes, or services.

The Ninth Circuit's rule is irreconcilable with this Court's precedent. It also conflicts with the approach of several other circuits, which apply this Court's preemption test. The First Circuit has expressly rejected the "binds to" rule, and the Fifth, Seventh, and Eleventh Circuits have all held that the ADA preempts generally applicable state laws when they have a significant, even if indirect, effect on air carrier prices, routes, or services.

There is thus a square circuit conflict on an important question of federal law that warrants this Court's review: the scope of ADA preemption should not turn on the happenstance of geography, particularly when national regulatory uniformity was one of the principal purposes of the ADA in the first place. And the decision below, along with several recent district court decisions, demonstrates that the circuit conflict makes all the difference.

The state law at issue here is Washington's paid sick-leave law ("PSL"). A4A challenged that law on the ground (among others) that it is preempted under

the ADA as applied to flight crew (i.e., pilots and flight attendants). A4A's concern is not the aspect of the law that requires a minimum amount of paid sick leave—A4A's Member Carriers generally provide more generous leave than the PSL requires. The issue instead is that the PSL disables established mechanisms—oftentimes collectively bargained—that allow carriers to mitigate the effect of flight crew taking sick leave on very short (or no) notice. The evidence in the summary judgment record, including the experience of carriers attempting to comply with similar laws in other jurisdictions, showed that when airlines cannot employ such mechanisms, the logical and predictable result is flight delays and cancellations that ripple throughout an airline's national network and cause hundreds of thousands of passengers to be delayed per year. That is a significant effect on airline routes and services under any definition. But the Ninth Circuit held that this evidence was legally irrelevant because the PSL does not "bind the airlines to a particular price, route, or service," and, as a rule, "generally applicable labor regulations are too tenuously related to airlines' services to be preempted." App. 5a-6a.

While the Ninth Circuit's flawed interpretation of the ADA required rejecting A4A's challenge to the PSL, A4A and Delta Air Lines recently succeeded in defeating summary judgment in two nearly identical challenges to two nearly identical laws—the only difference was that the courts were in circuits that do not apply the "binds to" test. A Massachusetts district court recently denied the State's motion for summary judgment on a challenge to the Massachusetts paid

sick-leave law, rejecting the State's reliance on Ninth Circuit case law precisely because the tests for ADA preemption in the two circuits are irreconcilable. *See Air. Transp. Ass'n of Am., Inc. v. Healy*, 2021 WL 2256289 (D. Mass. June 3, 2021). And in New York, a district court recently *granted* Delta's motion for summary judgment on preemption grounds, and expressly rejected the City's reliance on the Ninth Circuit's "binds to" test, observing that "[n]o other circuit, including the Second Circuit, has adopted such a narrow standard." *Delta Air Lines, Inc. v. N.Y. City Dep't of Consumer Affairs*, --- F. Supp. 3d ----, 2021 WL 4582138, at *7 (E.D.N.Y. Sept. 30, 2021).

This case thus presents an ideal vehicle to resolve a circuit conflict on an exceedingly important question of federal law and to bring the Ninth Circuit's case law back in line with the Court's own ADA preemption precedents. As a matter of prudence, however, the Court might also wish to refrain from acting on this petition now, because it is currently considering a petition for certiorari presenting the same preemption-related question as applied to California's meal-and-rest-brake laws. *See Virgin Am., Inc. v. Bernstein*, No. 21-260 (docketed Aug. 23, 2021). If the Court does not wish to consider the cases in tandem on the merits, it might instead hold this petition for *Bernstein*. And if the Ninth Circuit's decision in that case is reversed, the Court should grant the petition here, vacate the decision below, and remand for further consideration in light of the standard announced in *Bernstein*.

STATEMENT OF THE CASE

A. Statutory Background

In 1978, Congress deregulated the airline industry. After years of experience with federal and state regulation, Congress determined "that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices'" as well as "variety and quality of air transportation services." *Morales*, 504 U.S. at 378 (quoting 49 U.S.C. App. §§ 1302(a)(4), (9) (alterations omitted)). "To ensure that States would not undo federal deregulation with regulation of their own," Congress included in the ADA a "broadly worded" and "deliberately expansive" express preemption provision. *Id.* at 378, 384 (quotations omitted). That provision preempts any state "law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

This Court has on several occasions considered the ADA's application to state laws of general applicability and each time this Court held that the law was preempted. The first was *Morales*, where the Court held that the ADA preempted application of a state's general consumer protection statute to allegedly deceptive fare advertisements, in part because it was "clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares." 504 U.S. at 388. Especially relevant here, the Court rejected the argument that the ADA "only pre-empts the States from actually prescribing rates, routes, or services." *Id.* at 385. And the Court rejected "the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of

general applicability." *Id.* at 386.

The Court reiterated this point twice more. First, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the Court held that the ADA preempted application of a state's general consumer fraud statute to an airline's frequent flier program. And most recently, in *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014), the Court held that the ADA preempted application of a state common-law breach-of-implied covenant claim arising from an airline's frequent flier program. All of these cases involved generally-applicable background laws and all were preempted.

The Federal Aviation Administration Authorization Act ("FAAAA") contains a similar preemption provision, 49 U.S.C. § 14501(c)(1), designed "to preempt state trucking regulation," and this Court has construed the ADA and FAAAA in a materially identical manner because of their materially identical language. *Rowe*, 552 U.S. at 364.[2] In *Rowe*, this Court reaffirmed *Morales*, holding "that the state laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services." *Id.* at 375 (quoting *Morales*, 504 U.S. at 390); *see also id.* at 370-71. The Court also rejected Maine's argument that the FAAAA's "related to" language applied differently to laws with a "public health

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[2] The scope of FAAAA preemption differs from the ADA only in that the FAAAA also requires a connection "to transportation of property." 49 U.S.C. § 14501(c)(1). This qualification "limits the scope of preemption" under the FAAAA, *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013) (quotations omitted), but it is not relevant here.

objective." *Id.* at 373-74. *Rowe* observed that allowing Maine to enforce its tobacco delivery law would necessarily "allow other States to do the same," which could "easily lead" to precisely the type of "regulatory patchwork" that Congress meant to prevent. *Id.* at 373.

All of that said, "the breadth of the words 'related to' does not mean the sky is the limit." *Dan's City*, 569 U.S. at 260. "[A]s many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Lab. Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). Thus, the Court has held that the ADA and FAAAA would not preempt "state laws against gambling and prostitution," *Morales*, 504 U.S. at 390, or "a prohibition on smoking in certain public places," *Rowe*, 552 U.S. at 375. Those types of laws "affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Id.* (quoting *Morales*, 504 U.S. at 390). But that does not mean that "generally applicable labor regulations," as a rule, "are too tenuously related to airlines' services to be preempted by the Act," App. 5a-6a, which is why this Court repeatedly has held generally applicable laws preempted. No matter the form of the law, the test is always the same: state laws that significantly impact prices, routes, or services are preempted, even if that impact is only indirect.

B. Factual Background

1. A4A Member Carriers[3] provide air transporta-

[3] These are Alaska, American, Atlas, FedEx, Hawaiian, JetBlue,

tion on an overwhelmingly interstate and international, rather than intrastate, basis. As of June 2018, for example, the vast majority of flights at American (94.7%), Delta (95.7%), JetBlue (96%), Southwest (94.2%), and United (93.5%) were interstate. ER329.[4] Meanwhile, Alaska Airlines—which is headquartered in Washington and offers the most non-stop service to and from Washington of A4A's Member Carriers—operates only 2.5% of its total routes within that State. *Id.* In 2017, moreover, all of its intrastate, non-stop flights transported passengers who began or ended their trips outside the State. ER331.

"Because of the mobile nature of their work, flight crew have unusual schedule structures that complicate the use of sick leave." App. 13a. Pilots and flight attendants spend the vast majority of their working time in federally- or internationally-regulated airspace, and not in any one state. Even for on-the-ground time, flight crew do not necessarily spend the majority of their time at their "base" or "domicile"—i.e., the airport where flight crew begin and end their work assignments. *See, e.g.,* ER540. Since 2016, Alaska's Sea-Tac-based flight attendants spent only about 17% of their on-duty time in Washington, compared to 26-30% in other states, and 54-58% in federally- and internationally-regulated airspace. ER340.

Flight crew do not work traditional daily schedules. Instead, they work "trip pairings"—i.e., a series of flights that typically begin and end at the same

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Southwest, United, UPS, and Delta.

[4] "ER" refers to the excerpts of record A4A submitted in the Ninth Circuit.

base or domicile airport. ER529; ER252; ER242. Trip pairings regularly traverse multiple cities and states, often over a few days, before returning to the base where they began. ER334-40. The "average" trip pairing is "one to three days." ER909.

Crewmembers' schedules also change frequently; they rarely fly the same schedules from month-to-month. *See* ER728-29, 731. Flight crew can trade, add, or drop trips after they receive their monthly schedule, without advance notice to or approval from the airline. ER541; ER283; ER271; ER252; ER243. The "frequency" with which this trip-trade right is utilized is "unique to the airline industry," providing "flight attendants and pilots enormous flexibility and control over their work schedules." ER494. Another unique aspect of airline scheduling is that flight crew rarely can resume their previously-scheduled assignment upon return from illness (because the plane may be in a different city). *See* App. 13a; ER285; ER359.

2. Commercial aviation's unique attributes present unique problems. Short-notice (or no-notice) sick leave and sick-leave abuse are two of the most vexing.

A4A Member Carriers' operations—their ability to take off and land on time, to provide efficient services to their customers, and to comply with federal regulations—depend on crewmembers' predictable attendance. Because FAA regulations set minimum staffing levels for all flights, "[i]f a flight has insufficient crew on board, the aircraft must wait at the gate until a sufficient number of crew members is assembled." ER537; *see, e.g.*, ER258. When airlines have adequate notice of leave, they can appropriately re-staff their flights to avoid delays or cancellations. But when

flight crew "call out sick, especially on short notice or in high volumes, delays and cancellations inevitably increase because [the airlines] must take the time to rearrange flight crew to adequately staff flights, or, if insufficient crew members are available, [they] must cancel flights." ER537.

Sick-leave abuse is also a serious problem, more so here than in other industries. Unscheduled or short-notice leave (as sick-leave abuse often is, ER224-25) is exceedingly difficult to manage, and can lead to delays or cancellations. And sick leave "call outs tend to spike on weekends, holidays, and the days before and after weekends and holidays," when airlines are busiest and already stretched thin. ER538; ER495; ER291; ER275; ER240; ER224; ER595-96.

The resulting delays and cancellations are magnified because of the inherently interconnected (and interstate) nature of air transport. "Given that A4A [Member Carriers] collectively operate over 13,000 mainline flights per day with [an] average of 131 passengers, even a relatively small (i.e., one percentage point) increase in delays will delay thousands of passengers each day." ER372; *see* ER449. Delays and cancellations, moreover, are not limited to a single flight; rather, they "can ripple through a carrier's network, causing further 'downstream' disruptions to passengers on other flights." ER360; *see* ER537; ER526; ER258-59; ER249. The effects are not limited to a single state: delays or cancellations on a single flight in Washington will impact hundreds (if not thousands) of passengers, "including many who are not even flying to/from Washington." ER451.

3. For decades, flight crew leave has predominantly been governed by Collective Bargaining Agreements ("CBAs"), which balance flight crews' interest in sick leave with the airlines' needs for predictable staffing. Each airline's CBA is nationwide in scope, ensuring that flight crew are treated uniformly, no matter the state in which they live, start or end their shifts, or are working on any given day.

These CBAs have long entitled flight crew to generous leave that in many respects exceeds the PSL's requirements. *See* App. 12a. In exchange, flight crew unions have allowed airlines critical tools to ensure predictable staffing. (The same is generally true at the few carriers where leave is not collectively bargained.) Airlines' principal tool to minimize short-notice leave is points-based reliability policies. Standard in the industry, these policies allow airlines to assess "points" for employee absences, with the point values reflecting the level of operational disruption caused by the absence. *See, e.g.*, ER287-88; ER245; ER533; ER254; ER549-50. Thus, flight crew receive minimal points for leave with adequate notice, while they receive the maximum amount of points for a no-show. *See, e.g.*, ER549; ER533; ER274; ER254; ER245. Points are not permanent, and flight crew can (and frequently do) use point-reduction programs (like the "Stuff Happens Pass" at Virgin America) to ensure these attendance policies accommodate even unexpected ailments. ER550; ER289; ER275; ER254.

Airlines cannot discipline or terminate an employee just because they use sick leave. Rather, points are one factor in the administration of progressive discipline policies. ER287-88; ER245; ER533;

ER254; ER549-50. Under these policies, employees must have extremely poor attendance to trigger discipline, which rarely progresses past a warning. ER287-88; ER245; ER533; ER254; ER549-50. But while airlines cannot subject crewmembers to meaningful discipline unless they greatly exceed the normal amount of sick leave or call out sick with short-notice repeatedly, points-based reliability policies impose accountability on crewmembers who might otherwise be tempted to abuse the system in that manner. *E.g.*, ER549.

Carriers are also permitted in some circumstances to request medical verification—a primary means to deter sick-leave abuse. ER544; ER532-33; ER285. Crewmembers are not automatically required to provide medical verification, but carriers generally reserve the right to request a doctor's note if they suspect sick-leave abuse. ER244; ER285; ER532-33.

4. The PSL precludes airlines from using the foregoing tools to mitigate the effects of sick leave. Depriving airlines of such mitigation efforts in turn results in substantial delays and cancellations. And such delays and cancellations ripple through airlines' national networks and thus cause further delays and cancellations throughout the country.

a. The PSL's "primary purpose" was "to give paid sick leave to employees who did not have [it]." ER63-64. That purpose does not apply to the airline industry because "CBAs for pilots and flight attendants [already] provide for sick leave accrual, banking, and roll-over that generally meet or exceed [PSL]'s requirements." App. 12a.

Even so, the PSL negates airlines' policies designed to ensure predictable attendance and therefore on-time flights. The PSL prohibits employers from counting sick-leave-related absences toward discipline, which effectively invalidates airlines' reliability policies. *See* RCW 49.46.210(3)-(4); WAC 296-128-770. The PSL also prohibits employers from requesting medical verification unless (among other things) the employee misses more than three consecutive days of work. WAC 296-128-660. Because flight crew are usually staffed on trips that are three days or shorter, ER909, the PSL effectively precludes medical verification for flight crew.

b. Laws like the PSL predictably result in flight delays and cancellations, as carriers' efforts to comply with similar paid sick-leave laws have repeatedly shown. Consider the following examples from the summary judgment record.

In April 2015 Virgin America attempted to comply with New York City's Earned Sick Time Law ("ESTA") by suspending its reliability policy. ER550; ER581. Sick leave surged among JFK-based flight attendants—"[b]y July 2015, the sick leave usage at JFK was nearly double that [at Virgin America's] SFO or LAX bases." ER551; *see* ER375. Virgin America even "observed flight attendants request base transfers into the airline's New York City base," which "strongly suggest[s] that flight attendants were transferring to a New York City base solely to take advantage of the Act." *Delta*, 2021 WL 4582138, at *9. Pre-ESTA, "it was exceedingly rare for Virgin America to delay or cancel flights due to cabin crew shortages." ER377. After, "there were three cabin crew

shortage cancellations and 103 cabin crew shortage delays." *Id*. (emphasis omitted). Even controlling for weather and other variables, the delays attributable to ESTA were "statistically significant" for Virgin America, while "cabin-crew shortage delays" were "statistically insignificant" for those airlines that "did not change their policies" at JFK, ER377-78, and for Virgin America at other airports, ER470. Ultimately, "[t]he adverse operational effects, high administrative burdens, and significant increase in overhead resulting from ESTA compliance contributed significantly to Virgin America's decision" to close its New York base. ER552; ER578-79.

Similarly, since American began complying with Massachusetts's sick-leave law, it "has seen a significant increase in the use of sick leave at [Boston], with sick leave call-outs especially concentrated around the weekends and winter holidays." ER239. "[S]ome flight attendants have" gone so far as to "request[] to have their base transferred to [Boston] just for the month of December." *Id*. The result is as predicted: "increased delays, cancellations, and other negative operational impacts at that station." *Id*.

American's experience was the same in Los Angeles, where it attempted to comply with similar rules for ground crew. ER224-26; ER381-83. Sick leave became "the biggest operational challenge for ground operations at LAX," "increasing on a year-to-year basis" and "spik[ing] on weekends and holidays, which also tend to be the busiest times for American's operations." ER224. American suffered "an increase in flight delays and service disruptions," and even "closed gates at LAX due to insufficient ground crew

available to unload baggage and clean, fuel, and service aircraft in between flights." ER224-25; *see also* ER381-83.

Southwest's experience shows the efficacy of medical verification requirements. In March and April 2017—which corresponded with school spring breaks—Southwest flight attendants called out sick at such a high rate that the airline was forced to declare a "sick leave emergency" to avoid "delaying and cancelling flights." ER778-79, 781, 784-85. The airline invoked verification, and even provided a doctor, with the result that the sick leave rates were cut "by about half." ER778-79.

5. As the above examples demonstrate, numerous states and localities have enacted paid sick-leave laws that are similar in their broad contours. But those laws differ in almost every conceivable particular, including choice-of-law test, permitted uses of leave, permitted use of medical verification, and so on. *See infra* at 30-31 (demonstrating conflict); ER865, ER796-827. Thus, if the PSL applies to flight crew, then airlines will also be required to comply with an ever-expanding patchwork of conflicting laws nationwide.

C. Procedural Background

A4A filed suit seeking a declaration that the PSL is preempted by the ADA as applied to flight crew and violates the Dormant Commerce Clause. On cross-motions for summary judgment, the district court granted respondents' motions and denied A4A's.

The Ninth Circuit affirmed. The court held that the ADA claim failed as a matter of law because the

PSL is a "generally applicable labor regulation[]" and such laws and regulations are "too tenuously related to airlines' services to be preempted by the Act." App. 5a-6a. Relying on its recent *Bernstein* decision, the court of appeals explained that "[t]he proper inquiry is whether the PSL itself 'binds the [airlines] to a particular price, route, or service,'" and generally-applicable background laws like the PSL do not bind airlines to specific prices, routes, or services. App. 6a. (quoting *Bernstein,* 990 F.3d at 1169-70). The court below thus did not consider any of A4A's summary judgment evidence showing the likely effect of the PSL on airlines' actual prices, routes, or services.

The Ninth Circuit also affirmed as to the Dormant Commerce Clause. In its initial opinion, the court below held there was no genuine fact dispute because even a "1.2 percent increase in delays … is not a substantial burden on interstate commerce." *Air Transp. Ass'n of Am., Inc. v. Wash. Dep't of L&I*, 2021 WL 2029186, at *2 (9th Cir. May 21, 2021). The court was factually mistaken: A4A's summary judgment evidence showed a 1.2 *percentage point* increase in delays, which translated to hundreds of thousands of passengers per year.[5] The court corrected itself on rehearing, yet it still held that delays affecting hundreds of thousands of passengers is not a substantial burden on interstate commerce. App. 7a. The court also held that airlines could navigate the ever-expanding patchwork of state and local sick-leave laws

[5] A simplified example illustrates the difference. Assuming a base rate of 10%, a one percent increase would yield 10.1%. By contrast, a one percentage point increase would yield 11%.

"by choosing to comply with the law that imposes the strictest requirements." App. 8a-9a.

On July 29, 2021, the court denied rehearing en banc. On August 25, 2021, the court granted A4A's motion to stay the mandate.

This petition followed.

REASONS FOR GRANTING THE WRIT

The court below rejected an ADA preemption challenge because of Ninth Circuit precedent holding that neutral laws of general applicability are not preempted under the ADA, even if they have a substantial effect on airline prices, routes, or services. That legal rule is irreconcilable with decades worth of this Court's precedent—and with the ADA preemption precedent of several other circuits—which hold that even neutral rules are preempted if they have a significant effect on prices, routes, or services. The proper scope of ADA preemption is an important question. And this case presents an ideal vehicle for this Court to resolve that question: applying the proper legal rule would indisputably require reversing the judgment below, as two recent decisions applying other circuits' rules to nearly identical sick-leave laws make clear.

The petition should be granted.

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE PROPER SCOPE OF THE ADA'S PREEMPTION PROVISION

A. The Decision Below Conflicts With The Precedents Of This Court And Of Other Circuits

1. *The Ninth Circuit's "binds to" test conflicts with this Court's precedents*

The decision below is incompatible with this Court's precedents. The ADA expressly preempts any state law "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). This Court has always construed this language "broadly," giving it "expansive sweep." *Morales*, 504 U.S. at 384-85 (quotations and alteration omitted); *see Rowe*, 552 U.S. at 370 (noting congressional approval of "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*" (quotations omitted)). The preemption test under this Court's cases is whether the state law has a "significant impact" on prices, routes, or services, "even if a state law's effects on rates, routes, or services is 'is only indirect.'" *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 386).

But that is not the test in the Ninth Circuit, at least for laws of general applicability. Instead of evaluating such a law's likely or inevitable effects, the Ninth Circuit's preemption test asks whether the law "*binds*" carriers to "*particular*" prices, routes, or services. App. 6a (second emphasis added); *supra* at 3. And because laws of general applicability do not bind carriers in that way, such laws are not preempted in

the Ninth Circuit, no matter how significant their effects. In other words, generally-applicable background laws that have a significant but indirect effect on airline prices, routes, or services are not preempted in the Ninth Circuit. For example, under the Ninth Circuit's rule, generally applicable meal-and-rest-break laws are not preempted even where they are certain to delay flights and increase prices. *See Virgin Am., Inc. v. Bernstein*, No. 21-260 (U.S.) (docketed Aug. 23, 2021).

That carve-out from ADA preemption for laws of general applicability is irreconcilable with decades of unbroken precedent from this Court. This Court held in *Morales* that the notion that "the ADA imposes no constraints on laws of general applicability" is inconsistent with the "sweep" of the ADA's broad language and would create "an utterly irrational loophole." *Morales*, 504 U.S. at 386. After all, "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Id.* That is why this Court has held laws of general applicability preempted by the ADA at least three times. S*upra* at 6-7.

A rule recognizing preemption only if the law has a "binding" effect on "particular" prices, routes, or services is no different than requiring direct regulation as a precondition to preemption. Indeed, the Ninth Circuit expressly holds that "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not *otherwise regulate* prices, routes, or services." *Bernstein*, 3 F.4th at 1141 (quotations omitted; emphasis added).

This Court has already reversed the Ninth Circuit for holding that "the prerequisite for preemption" is a state law that "force[s] the Airlines to adopt or change their prices, routes or services." *Ginsberg*, 572 U.S. at 279 (quotations and alteration omitted). *Morales* rejected that argument, too, holding that the ADA is not limited to state laws that "actually prescribe[] rates, routes, or services." 504 U.S. at 385. Yet that is somehow still the test in the Ninth Circuit.

2. *The Ninth Circuit's "binds to" test conflicts with the test in other circuits*

Unsurprisingly, then, the Ninth Circuit's "binds to" test "creates a circuit split." *Cal. Trucking*, 996 F.3d at 671 (Bennett, J., dissenting). As a district court correctly observed in the recent New York City sick-leave litigation, while the Ninth Circuit holds "that a state or local law is preempted only when it 'binds' an airline to a particular price, route, or service," "[n]o other circuit … has adopted such a narrow standard." *Delta*, 2021 WL 4582138, at *7. The First Circuit has expressly rejected it. And the Fifth, Seventh, and Eleventh Circuits have found state laws preempted based on their effects even when they do not bind the carrier to particular prices, routes, or services.

a. The First Circuit rejects a "binds to" preemption test, even for laws of general applicability. For example, that court has held that the ADA preempted skycaps' claim that, under Massachusetts's general tipping statute, an airline's curbside bag-check fee constituted a tip belonging to the skycaps, even though the law did not bind the airline to any particular price or service. *DiFiore v. Am. Airlines, Inc.*, 646

F.3d 81, 86-88 (1st Cir. 2011). And the court held that a neutral employee classification law was preempted where it would "logically be expected to have a significant impact on the actual routes followed for the pick-up and delivery of packages." *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 438-39 (1st Cir. 2016). The First Circuit has acknowledged that its precedent is "inconsistent with" *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 645 (9th Cir. 2014), which applied the "binds to" test in the Ninth Circuit. *Mass. Delivery Ass'n v. Healey*, 821 F.3d 187, 191-92 (1st Cir. 2016). And the Ninth Circuit itself has held that the First Circuit rule is "contrary to [Ninth Circuit] precedent." *Cal. Trucking*, 996 F.3d at 663.

b. The Fifth, Seventh, and Eleventh Circuits likewise apply preemption to laws of general applicability so long as they have a significant effect on prices, routes, or services.

For example, the Fifth Circuit held in *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004), that a plaintiff's negligence claim regarding seat layout was preempted because it would have had "the forbidden significant effect on … prices." *Id.* at 383 (quotation omitted). The Seventh Circuit held in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), that generally applicable tort law was preempted as applied to an airline's booking procedures—even though the state law did not bind the airline to particular prices or services. *Id.* at 1434; *see also United Airlines v. Mesa Airlines, Inc.*, 219 F.3d 605, 611 (7th Cir. 2000) (state-law tort claims preempted "when they would have a

significant effect on air carriers' rates, routes, or services"). And in *Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339 (11th Cir. 2005) (per curiam), the Eleventh Circuit held the plaintiff's breach-of-contract claim based on baggage-handling services preempted, even though that common-law claim did not bind the airline to particular prices, routes, or services. *Id.* at 1343-44; *see also Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1255 (11th Cir. 2003) (state law preempted "if it has a sufficient—i.e., significant—impact on … services").

Each of these state laws had a significant effect on carrier prices, routes, or services. But each of the preemption claims would nevertheless be rejected in the Ninth Circuit, merely because those laws are generally applicable and thus do not "bind" carriers to a "particular" price, route, or service. Thus, the basic rule for preemption under the ADA depends entirely on the happenstance of geography. That state of affairs is intolerable, especially when (as here) one of Congress's principal purposes in enacting the ADA was to ensure uniformity in regulation rather than local balkanization. *Morales*, 504 U.S. at 378; *see also Rowe*, 552 U.S. at 373. Only this Court can resolve the conflict and bring the lower courts back in line with its own preemption jurisprudence.

B. The Question Presented Is Exceptionally Important

1. The proper test for ADA preemption is an issue of exceptional public importance. The number of recent cases considering the scope of that provision and its FAAAA analogue reflects that importance. *See, e.g.*, *Bernstein*, 3 F.4th at 1141; *Cal. Trucking*, 996

F.3d at 658-59; *Ward*, 986 F.3d at 1243; App. 5a-6a; *Delta*, 2021 WL 4582138, at *5-11; *Healy*, 2021 WL 2256289, at *10-12. So too does the sheer number of amici who have criticized the Ninth Circuit's anomalous rule, including the federal government and more than a dozen states arguing in favor of preemption. *See* Br. for Georgia, et al. as *Amicus Curiae* ("States *Amicus* Br."), *Virgin Am., Inc. v. Bernstein*, No. 21-260 (U.S. Sept. 22, 2021); Br. for the United States as *Amicus Curiae* ("U.S. *Amicus* Br."), *Bernstein v. Virgin Am., Inc.*, No. 19-15382, 2019 WL 4307414 (9th Cir. Sept. 3, 2019).

Indeed, the importance of the ADA's preemptive scope is self-evident, both in general and as applied to laws like the PSL.

As a general matter, the Ninth Circuit's test—which, again, substantially narrows the ADA's preemption provision by removing generally applicable laws from its scope—undermines Congress's express purpose in enacting the ADA, i.e., to deregulate the commercial aspects of aviation so that prices, routes, and services would be set by "competitive market forces." *Morales*, 504 U.S. at 378. By all accounts, the ADA has been a resounding success. But by reducing the ADA's preemption provision to a virtual nullity and only prohibiting direct regulation, the panel's decision and the Ninth Circuit rule it perpetuates threaten to erase these gains, and will clearly frustrate Congress's goal of creating a uniform, efficient, and affordable system of interstate transportation.

That general concern is especially acute when it comes to state laws (like the PSL) that not only raise

airline prices, but that directly interfere with airline routes and services by forcing delays and cancelations. As the federal government has explained, "delays in one airport—due to any cause—can easily snowball into delays at other airports throughout the country." U.S. *Amicus* Br. at *21. If flights are delayed (or cancelled) in Washington (or other states) because of insufficient flight crew, the result will be delays nationwide. *Id.*; *see also* States Amicus Br. at 7-14 (expressing concern that Ninth Circuit's preemption test will harm commerce nationwide). If state laws are to have such far-reaching extraterritorial effects on interstate commerce, then it should be this Court that says so.

2. The importance of the question presented is heightened because of the Ninth Circuit's parallel construction of the Dormant Commerce Clause. If the ADA is to be so narrowly construed as to exclude generally applicable laws regardless of their effect on carrier prices, routes, and services, then the natural alternative to challenge such laws would be the Dormant Commerce Clause. After all, because of the inherently interstate and commercial nature of air transportation, a state law that has a substantial effect on air carrier prices, routes, or services will by definition have a substantial effect on interstate commerce. And the Dormant Commerce Clause invalidates even facially neutral state laws (like the PSL) when their burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). But as the decision below and others demonstrate, *see* Pet. for Certiorari, *Delta Air Lines, Inc. v. Oman*, No.

21-396 (Sept. 9, 2021), the Ninth Circuit has not only precluded ADA preemption claims for generally applicable laws but has at the same time made it all but impossible to prevail on a Dormant Commerce Clause challenge to those same laws. That parallel development makes it all the more important for this Court to ensure that the ADA is construed consistent with its broad scope.

This case demonstrates the point. A4A brought not only an ADA but also a Dormant Commerce Clause challenge to the PSL. A4A's summary judgment evidence showed that compliance with laws like the PSL resulted in a 1.2 percentage point increase in flight delays, translating into hundreds of thousands of delayed passengers nationwide. Yet the court below held that this increase in delays as a matter of law was "not a substantial burden on interstate commerce for dormant Commerce Clause purposes." App. 7a. That decision is irreconcilable with this Court's cases,[6] not to mention common sense. Delays affecting hundreds of thousands of passengers a year clearly represent a substantial burden on interstate commerce—especially at the summary judgment stage where the evidence must be construed in A4A's

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[6] *See, e.g.*, *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 674 (1981) (invalidating state law regulating truck length because it "engenders inefficiency and added expense"); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 438, 445-46 (1979) (similar); *S. Pac. Co. v. State of Ariz., ex rel. Sullivan*, 325 U.S. 761, 772 (1945) (invalidating state law restricting the length of trains passing through the state because it would "delay" interstate traffic, impede "efficient operation," and increase "operating costs").

favor.

In truth, though, there is no reason for courts to engage in a Dormant Commerce Clause analysis in this context. The whole point of an express preemption provision like the ADA's is to invalidate state laws that have a substantial effect on air carrier prices, routes, and services—that is, on interstate commerce—without any need to engage in *Pike* balancing. But the Ninth Circuit's exceedingly narrow approach to the Dormant Commerce Clause reinforces the importance of properly construing the ADA and ensuring that Congress's wildly successful effort to establish market competition and regulatory uniformity is not undermined by judicial fiat.

C. This Case Presents An Ideal Vehicle Through Which To Resolve The Conflict Over The Question Presented

This petition presents an ideal vehicle through which to resolve the question presented and the related circuit conflict. That is because the question presented is outcome-determinative. If the Court granted certiorari and adopted (for example) the First Circuit's standard, it would have to reverse.

Two recent district court decisions involving ADA preemption challenges to nearly identical sick-leave laws in other states—Massachusetts and New York City—demonstrate the outcome-determinative nature of the circuit conflict.

1. Like Washington here, Massachusetts argued that its paid sick-leave law was immune from ADA preemption because it did not "directly regulate[] how an airline provides services, sets prices, or chooses

routes (as opposed to merely regulating how airlines behave as employers)." *Healy*, 2021 WL 2256289, at *10. The district court rejected the State's argument precisely because the First Circuit's test for ADA and FAAAA preemption is to the contrary. *Id.*; *see also id.* at *12 (noting that the First Circuit had rejected "the attorney general's request for a categorical rule against preemption of background labor laws" like the Ninth Circuit's (quotations omitted)). And while the Ninth Circuit held under its "binds to" test that Washington was entitled to judgment as a matter of law, the Massachusetts district court denied summary judgment and set the case for trial so the court could evaluate the "impact" of the Massachusetts paid sick-leave law "on airline operations." *Id.* at *9, 12.

2. In the analogous New York City litigation, the district court went farther and granted the carrier summary judgment. Like Massachusetts, New York City argued that its paid sick-leave law was immune from preemption under the Ninth Circuit's "binds to" test, and expressly invoked the Ninth Circuit's "on point" decision in this case. *Delta*, 2021 WL 4582138, at *6-7. Like the Massachusetts court, the New York court rejected the argument. "The Court decline[d] to follow the Ninth Circuit's decision" because the Ninth Circuit's test conflicts with the test in other circuits and because it is "[in]consistent with the Supreme Court's holding in *Morales*." *Id.* at *7. Instead, the court held that the law was preempted because its "potential impact goes directly to the availability of flight attendants, and thus on-time flights, a core service of the airline," and because "the Act threatens to subject Delta to a patchwork of state laws that will

undermine its ability to compete in a deregulated marketplace, the purpose for which the ADA was enacted." *Id*. at *9, 11.

D. The Decision Below Is Incorrect

It should go without saying at this point that the decision below was also quite wrong. As explained above, the Ninth Circuit applied the wrong legal standard. *See supra* Part I.A.1. The question, even for laws of general applicability, is not whether the law "binds" carriers to any particular price, route, or service. Rather, the question is simply whether the PSL would have a "significant impact" on prices, routes, or services, "even if a state law's effects on rates, routes, or services is 'is only indirect.'" *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 386).

If the Ninth Circuit had applied the proper standard, it at least would have denied the State's motion for summary judgment, as the Massachusetts and New York City cases illustrate. A4A introduced substantial summary judgment evidence showing that the inevitable effect of applying the PSL to flight crew will be flight delays and cancellations. This evidence took the form of both expert and lay testimony and was based in part on natural experiments—namely, airlines' efforts to comply with similar laws in other jurisdictions. A4A's expert, for example, conducted multiple regression analyses and concluded that Virgin America's attempts to comply with New York's paid sick-leave law caused a statistically significant increase in crew-related flight delays and cancellations, ultimately leading Virgin America to close its New York base. *See supra* at 14-15; *see also* App. 7a (recognizing that Virgin America experienced a 1.2

percentage point increase in delays). And based on more than a century of combined personal experience, including experience with similar laws in other jurisdictions, A4A's fact witnesses testified that the PSL would have exactly these effects. *Supra* at 15-16.

A4A's summary judgment evidence also showed that subjecting airlines to an ever-expanding patchwork of state and local laws will massively burden airline operations. Just consider the following few examples. Oregon allows employers to request medical verification when they reasonably suspect abuse, ORS 653.626(3)(b), while Washington does not, WAC 296-128-750; *see also*, *e.g.*, Md. Code Lab. & Empl. § 3-1305(g)(1) (medical verification allowed after "two consecutive scheduled shifts"). While Washington sets the minimum increment of leave at one hour, WAC 296-128-630(4), San Diego sets it at two, S.D. Mun. Code § 39.0105(h), and Maryland sets it at four, Md. Code Lab. & Empl. § 3-1305(e)(2). Under the PSL, employees are entitled to use sick leave on the 90th day of their employment, WAC 296-128-630(2), but in New Jersey the rule is 120 calendar days, N.J.S.A. § 34:11D-2(a), in Connecticut the rule is 680 working hours, Conn. Gen. Stat. § 31-57s(b), and in Vermont the rule is one year, 21 V.S.A. § 482(b). In Washington, an employee can use paid sick leave to care for an ill sibling or grandparent, RCW 49.46.210(2)(e), (g), but that is not a permitted use in Massachusetts, 940 CMR 33.02. And so on—states and localities prescribe different rules for permitted uses, accrual, carryover, verification, notification, etc. ER796-827.

A4A's evidence showed that tracking whether,

when, and to whom each of these different state and local laws apply, and then tracking and monitoring the use of different paid sick-leave benefits under each jurisdiction's regime, for thousands of flight crew, will be as challenging as it sounds. *See* ER548; ER527; ER260-61; ER250; ER241; ER473-79. And assuming compliance is possible at all, compliance costs will be passed on in part to the flying public in the form of operational disruption or higher prices, ER356-57; ER466-68; ER526-28; ER239, 241-42, or will require an airline to "reduce the number of existing flights it operates or discontinue routes that realize only marginal profit," ER232; *see* ER232-33; ER356-57, 368-69, 380; ER480-85, 491-92. This threat is especially acute for remote communities (like Barrow, Nome, and Sitka, to name a few) for whom "Alaska Airlines is the only daily jet service provider of both passenger and cargo transportation, delivering essential medical supplies and specimens, food, [and] U.S. mail." ER264, ER 229-34. In other words, the record here shows that airlines will be subject to the very type of "regulatory patchwork" that *Rowe* held was "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." 552 U.S. at 373.

The Ninth Circuit did not consider any of this evidence in its preemption analysis because it considered it legally irrelevant. Under the "binds to" test, the panel explained, "generally applicable labor regulations are too tenuously related to airlines' services to be preempted by the Act." App. 5a-6a. "[B]ecause the

PSL does not regulate the airline-customer relationship or otherwise bind the airlines to a particular price, route, or service, it [was] not preempted by the ADA" *as a matter of law*, App. 6a, regardless of what the evidence showed. Or, as the *Delta* court put it, "the Ninth Circuit's opinion is completely silent on and indifferent to the 'services' that are potentially impacted by the Washington state law, including the actual impact the state law will have on services" because it "applie[d] a blanket rule that 'generally applicable labor regulations' are not preempted by the ADA." 2021 WL 4582138, at *7.

Certiorari should be granted and the decision below reversed.

II. THE COURT SHOULD IN THE ALTERNATIVE HOLD THIS PETITION PENDING RESOLUTION OF *BERNSTEIN*

For the reasons just explained, this case presents the Court with a perfect opportunity to address an important and outcome-determinative issue of federal law on a fully-developed record. Rather than acting on the petition now, however, the Court may wish to hold this case pending resolution of the petition for certiorari in *Virgin America, Inc. v. Bernstein*, No. 21-260. That case raises the same basic legal question as this one, but in the context of the California meal-and-rest-break statute rather than the Washington PSL. As A4A explained as amicus curiae in *Bernstein*, the "binds to" rule's application to meal-and-rest-break laws will result in major operational disruptions of the same sort as those described above. Br. for *Amici Curiae* Airlines for America and International Air Transport Association, *Virgin Am., Inc. v.*

Bernstein, No. 21-260 (U.S. Sept. 22, 2021). Because the *Bernstein* petition will be considered by the Court before the petition here, the Court may decide that the more prudent course is to hold this petition in light of *Bernstein*. And, if the Court grants certiorari and reverses the Ninth Circuit's decision in *Bernstein*, it should likewise grant the petition here, vacate the decision below, and remand for the Ninth Circuit to apply the correct legal standard under the ADA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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