No. 21-627

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

REPLY BRIEF FOR PETITIONER

ADAM P. KOHSWEENEY
KRISTIN MACDONNELL
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111
(415) 984-8700

HARRY J.F. KORRELL
JOHN HODGES-HOWELL
DAVIS WRIGHT TREMAINE LLP
950 Fifth Ave., Ste. 3300
Seattle, WA 98104
(206) 622-3150

ANTON METLITSKY
Counsel of Record
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
ametlitsky@omm.com
(212) 326-2000

ROBERT A. SIEGEL
JASON ZARROW
O'MELVENY & MYERS LLP
400 S. Hope St., 18th Fl.
Los Angeles, CA 90071
(213) 430-6005

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REPLY BRIEF FOR PETITIONER

The question presented is whether the Airline Deregulation Act's ("ADA") express preemption provision, 49 U.S.C. § 41713(b)(1), preempts neutral state laws only where those laws "bind" an airline to a "particular" price, route, or service. The Court has called for the Solicitor General's views on the same question in *Virgin America, Inc. v. Bernstein*, No. 21-260.[1] The Court should await the Solicitor General's response in that case and either hold this case for *Bernstein* or, in the alternative, grant certiorari here.

Even respondent has recognized that "this petition is not likely to be considered by the Court before it hears from the Solicitor General." Respondent's Motion to Extend Time to File a Response (Nov. 18, 2021). Yet respondent now argues that the Court should not wait for the Solicitor General's views because (respondent says) the Ninth Circuit's "binds to" rule is not outcome determinative here. The basis for respondent's new argument is not anything in the decision below, but rather the district court's summary-judgment-stage factfinding that applying aspects of Washington's paid sick-leave law ("PSL") to interstate flight crew would not "significantly impact" airline prices, routes, or services, which is the preemption test set out in *Morales v. Trans World Airlines, Inc.*,

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[1] The Court has also called for the Solicitor General's views in *California Trucking Association, Inc. v. Bonta*, No. 21-194, which presents a similar question under the materially-identical trucking-related preemption provision in the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1).

504 U.S. 374 (1992), and *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008). Far from justifying the denial of certiorari, the district court's finding illustrates precisely why the Ninth Circuit's "binds to" test calls out for this Court's review.

The district court found on summary judgment that there was no "causal link between laws like [the PSL] and substantial performance impacts." Pet. App. 38a. But that factfinding, which contradicted substantial evidence offered by petitioner, was improper at the summary-judgment stage, as petitioner argued on appeal. Indeed, these flaws were later confirmed when two other courts in analogous cases evaluating substantially similar summary-judgment records either found a triable question of fact, *Air Transp. Ass'n of Am., Inc. v. Healey*, 2021 WL 2256289 (D. Mass. June 3, 2021), or granted summary judgment for the airline outright, *Delta Air Lines, Inc. v. N.Y. City Dep't of Consumer Affairs*, __ F.Supp.4th __, 2021 WL 4582138 (E.D.N.Y. Sept. 30, 2021).

If the Ninth Circuit had nevertheless accepted the district court's factfinding, respondent might have a point. But it did not. Rather, the court below rejected petitioner's argument *only* because facts are categorically irrelevant under the Ninth Circuit's "binds to" test: because the PSL does not bind airlines to particular prices, routes, or services, it was not preempted as a matter of law regardless of its actual, real-world impact on prices, routes, or services. The outcome below thus turned entirely on the legal question presented here, making this case an ideal vehicle to re-

solve that question and a perfect complement to *Bernstein*.

The petition should be granted, or held in light of *Bernstein*.

A. The Decision Below Conflicts With This Court's Precedent And That Of Other Circuits

This Court held in *Morales* that state law is preempted where its application would have a "significant impact" on carrier prices, routes, or services, even if that impact is "only indirect." 504 U.S. at 386, 390 (quotations omitted); *see also Rowe*, 552 U.S. at 370-71. Most courts of appeals apply this straightforward test. *See* Pet. 21-23. But not the Ninth Circuit. There, generally-applicable state laws are preempted only when they "bind" carriers to "particular" prices, routes, or services, Pet. 2-3, 19-21, which means in effect that no such laws are preempted. This decisional conflict warrants this Court's review.

1. a. Respondent's main argument is that the Ninth Circuit does not, in fact, apply a "binds to" test—at least across the board. In respondent's telling, the "binds to" test is reserved "only" for so-called "'borderline cases' in which a law does not refer directly to rates, routes, or services." BIO 20. But that is just another way of saying that the Ninth Circuit applies a special "binds to" test for generally-applicable laws. Such laws—like the meal-and-rest-break law in *Bernstein* or the paid sick-leave law here—by their nature do not "refer directly to rates, routes, or services." *Id.* That is what makes them generally ap-

plicable. So respondent's reformulation simply confirms that the Ninth Circuit does, in fact, apply a "binds to" test for background laws. As the Ninth Circuit (incorrectly) held in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), "Congress did not intend to preempt generally applicable state … rules that do not otherwise regulate prices, routes, or services." *Id.* at 644. That reading of the ADA conflicts directly with *Morales*. 504 U.S. at 385-86 (no carve-out for "laws of general applicability" or requirement that the law "*regulate* rates, routes, and services").[2]

b. Backtracking, respondent argues that the Ninth Circuit does not apply its "binds to" test "to *all* generally applicable" laws but only a subset—namely, "only those generally applicable background regulations that are several steps removed from prices, routes, or services." BIO 20 (quotations omitted; emphasis amended). "[W]hat matters," respondent says, "is not solely that the law is generally applicable, but where in the chain of a carrier's business it is acting to compel a certain result and what result it is compelling." *Id.* (quoting *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 656 (9th Cir. 2021) (cleaned up)). But whether the Ninth Circuit applies a special "binds to"

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[2] Respondent observes (BIO 20) that one Ninth Circuit panel has recognized that the "binds to" test conflicts with this Court's cases and thus cannot be correct. *See Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1025 (9th Cir. 2020). But the Ninth Circuit's more recent decisions, including this case and *Bernstein*, have settled the "binds to" test as the law of the circuit. *See* Pet. App. 6a; *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1141-42 (9th Cir. 2021). In fact, petitioner flagged this inconsistency in its petition for rehearing en banc, but the Ninth Circuit denied rehearing.

rule to all background laws or only some of them, the problem is the same: the only test for preemption under the ADA is whether the law significantly impacts prices, routes, or services. Neither the ADA's text nor this Court's cases permits courts to depart from that test for some laws, even if they do not do so for others. And anyway, respondent's characterization of the Ninth Circuit's test is not even right. In *Bernstein*, for example, the court found no preemption under the "binds to" test without any mention of the supposed limitation advanced by respondent here and even though the law at issue will directly impact customers. 3 F.4th at 1141.

c. Respondent ultimately acknowledges that the Ninth Circuit does have a "binds to" test for generally-applicable laws, but dismisses it as "just one analytical tool for determining whether a generally applicable labor law is too attenuated from prices, routes, or services to warrant preemption." BIO 22. That is a mischaracterization: the "binds to" test is not an "analytical tool," but a hard-and-fast rule, as this case and *Bernstein* illustrate. *See* Pet. App. 6a ("The proper inquiry is whether the PSL itself *binds* the airlines to a particular price, route, or service." (alteration omitted; quoting *Bernstein*, 3 F.4th at 1141-42)). But even if that were not true, the "binds to" test would still be an "analytical tool" that finds no support in the ADA's text or any of this Court's ADA cases.

d. Recognizing as much, respondent turns to ERISA. *See* BIO 21. Indeed, the Ninth Circuit's "binds to" test was originally adopted from ERISA precedents "[b]y analogy." *Air Transp. Ass'n of Am. v.*

City & Cnty. of S.F., 266 F.3d 1064, 1072 (9th Cir. 2001). The analogy no longer holds. In *Rowe*, this Court rejected these ERISA precedents' application to the ADA and FAAAA by reaffirming *Morales* and declining to adopt petitioner's argument that "[t]he Court should use the ERISA cases as a guide," Br. for Pet'r, *Rowe v. N.H. Motor Transp. Ass'n*, 2007 WL 2428380 (U.S. No. 06-457), at *29; *see id.* at *40 ("As with the ERISA cases, because the state law neither requires nor binds the carriers to do anything, there is no preemption."). Besides, respondent overreads this Court's ERISA cases. While this Court has held that a binding relationship is sufficient for ERISA preemption, it has never held that such a relationship is necessary—as the Ninth Circuit does in the ADA preemption context. *See* Pet. for Certiorari, *Cal. Trucking*, No. 21-194, at 28-30.

2. The Ninth Circuit's approach also conflicts with the preemption test in the First, Fifth, Seventh, and Eleventh Circuits, all of which apply this Court's "significant impact" test without any sort of "binds to" add-on. Respondent all but admits a conflict exists. It acknowledges that there is a "difference" among the circuits "in the labeling of the analytical tools to determine the degree of relatedness," BIO 24, which is just a convoluted way of saying that different circuits apply different tests.

Respondent's more specific arguments fare no better.

a. Respondent argues that the First Circuit has not rejected the Ninth Circuit's approach because its decisions "do not even mention the 'binds to' language." BIO 24. That's the point. They don't mention

the "'binds to' language" because that is not the test in the First Circuit. And even the Ninth Circuit has held that the difference is outcome determinative. *See Cal. Trucking*, 996 F.3d at 663; *see also Healey*, 2021 WL 2256289, at *10-12.

Respondent nevertheless argues that the First Circuit's cases are actually consistent with the Ninth Circuit's. According to respondent, one First Circuit case "examined whether the state law 'mandat[ed]' a result that would interfere with services," BIO 25 (quoting *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 439 (1st Cir. 2016)), which, respondent says, is the same as the Ninth Circuit's "binds to" test "using different nomenclature," *id.* at 26. Nonsense. The Ninth Circuit will only find preemption where a generally-applicable law mandates (or binds carriers to) *particular* prices, routes, or services. In *Schwann*, the state law did not mandate particular prices, routes, or services. It was mandatory (in the way that all laws are mandatory) in that Massachusetts's employment test would have required FedEx to classify certain drivers as employees. 813 F.3d at 439; *see also id.* at 437. But the law was preempted because reclassifying drivers would have a "significant impact" on who delivered packages and the "actual routes followed." *Id.* at 438-39. That is not enough under the Ninth Circuit's "binds to" test, as *Cal. Trucking* expressly held. 996 F.3d at 663 ("indirect consequences" in *Schwann* too tenuous in Ninth Circuit).

Respondent also says that *DiFiore v. American Airlines, Inc.*, 646 F.3d 81 (1st Cir. 2011), is consistent

with Ninth Circuit case law because the court "examine[d] whether the law regulates an airline's relationship to its customers." BIO 25. But unlike the Ninth Circuit, the First Circuit has never held that regulating the airline-customer relationship is a *necessary* condition for preemption absent direct regulation of prices, routes, or services. In fact, *DiFiore* found preemption based on direct price and service regulation, which obviously has a "significant impact," 646 F.3d at 86-88 (quotations omitted); the law's effect on the airline-customer relationship played no independent role in the court's decision. And the First Circuit, in cases like *Schwann*, has found preemption absent either showing.

b. Respondent similarly tries to rewrite decisions from the Fifth, Seventh, and Eleventh Circuits. For instance, respondent says that the Fifth Circuit's decision in *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004), turned on the fact that the claim would have "impacted the relationship between an airline and its customer at the point-of-service." BIO 26. Not so. *Witty* held that the plaintiff's claim, which would have "reduce[d] the number of seats on the aircraft," was preempted because it had "the forbidden significant effect" on price. 366 F.3d at 383 (quotations omitted). And respondent's suggestion that *Witty* would have come out the same way in the Ninth Circuit is belied by *Bernstein*, which held that a state law with exactly the same effect was not preempted. *See* Pet. for Certiorari, *Bernstein*, No. 21-260; *see also DiFiore*, 646 F.3d at 87.

Respondent also claims that "[t]he Seventh Cir-

cuit's cases … align with Ninth Circuit precedent" because the Seventh Circuit recognizes that state laws with a tenuous relation to prices, routes, or services are not preempted and that "generally applicable labor laws are not preempted simply by imposing higher costs." BIO 27. No one disagrees with those uncontroversial propositions, but they are irrelevant here. The relevant point is that the Seventh Circuit applies the "significant impact" test, not any form of a "binds to" test. *See, e.g.*, *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1055-57 (7th Cir. 2016). Respondent's efforts to rewrite Eleventh Circuit case law fail for similar reasons. BIO 27-28.

c. Recent experience in the lower courts demonstrates beyond doubt that the circuit conflict is outcome determinative. Respondent argues that "most courts have held that background employment laws lack a significant connection to rates, routes, and services." BIO 28. That may be true, but that is because most background laws do not have the necessary significant effect on prices, routes, or services.

Laws like the PSL, however, do. Pet. 8-16, 29-32. The District of Massachusetts, applying the First Circuit precedent described above, concluded that a record substantially similar to the one below sufficed to survive summary judgment. *Healey*, 2021 WL 2256289, at *10-12. And a federal district court in New York held that a substantially similar record required summary judgment *for the airline*. *Delta*, 2021 WL 4582138, at *8-12. The only difference was the legal standard—both courts expressly "decline[d] to follow" the Ninth Circuit's "binds to" test, because "[n]o other circuit, including the [First and] Second

Circuit[s], has adopted such a narrow standard." *Delta*, 2021 WL 4582138, at *7; *see Healey*, 2021 WL 2256289, at *12.

Respondent attempts to distinguish *Healey* on the ground that the court there "found only that disputed issues of material fact existed about whether impacts from the sick-leave law would be significant enough to warrant preemption." BIO 29. Exactly right. In the First Circuit, evidence of the law's impact matters. *See Healey*, 2021 WL 2256289, at *12. In the Ninth Circuit, it does not, at least if the law is generally applicable.

Respondent says that *Delta* is distinguishable because the New York City law would have applied to all airlines operating in New York, whereas Washington's law (in respondent's opinion) would apply only to Alaska Airlines. BIO 29-30. That does not matter. The extraterritorial reach of New York City's law certainly "bolster[ed]" the court's conclusion that the law was preempted, but it was not the basis for its preemption holding. *See Delta*, 2021 WL 4582138, at *9-12. And Washington's law is extraterritorial too—it applies to Alaska flight attendants when they are outside Washington and will delay flights entirely in other states. *See* Pet. 25; BIO 6; *Delta*, 2021 WL 4582138, at *11 (citing same features).

Most important, the New York court explained that the reason it departed from the decision below is that it rejected the "binds to" test. That does not mean, contrary to respondent's suggestion, that rejection of the Ninth Circuit rule would lead to preemption of most employment laws. *See Delta*, 2021 WL

4582138, at *10-11 (explaining why "anti-discrimination laws, minimum wage laws, and whistleblower laws" are "distinguishable"). What it does mean is that materially-identical laws significantly impacting airline routes and services are preempted in some jurisdictions and not preempted in others. That state of affairs is intolerable, and only this Court can resolve the conflict.

B. The Question Presented Is Exceptionally Important And This Case Is A Perfect Complement To *Bernstein*

Respondent does not dispute that the proper test for ADA preemption is exceptionally important. Nor could it. This Court would not have called for the Solicitor General's views in *Bernstein* (and *Cal. Trucking*) if it weren't, and more than a dozen states would not be arguing in favor of preemption if the issue did not matter, *see* Br. for Georgia, et al., as *Amicus Curiae*, *Bernstein*, No. 21-260.

Respondent argues instead that this case is a bad vehicle because the district court found on summary judgment that applying the PSL to flight crew would not have a "significant impact." BIO 34-35 (citing Pet. App. 37a). But as petitioner explained to the Ninth Circuit, the district court impermissibly found facts at the summary-judgment stage. *See* CA9 Brief at 51-55, 60-61. In fact, petitioner responded point-by-point to the evidence that respondent cites (*see* BIO 30-32) and explained why this evidence, at most, demonstrated factual disputes that could only be resolved at trial, if petitioner was not entitled to judgment outright, *see* CA9 Reply 6-14—exactly as the Massachu-

setts and New York courts held on substantially similar records.

But the Ninth Circuit never addressed petitioner's argument because its "binds to" test rendered the law's real-world effect on routes and services entirely irrelevant. *See* Pet. App. 5a-6a. The whole problem, in short, is that the Ninth Circuit's decision was *not* "factbound," BIO 16, but was instead dictated by an erroneous legal rule that conflicts with this Court's precedents, has divided the circuits, and requires this Court's review and correction.

The Court has at least two opportunities to do so: in *Bernstein*, in which case this petition should be held; or in this case. Either way, the "binds to" test should be rejected.

CONCLUSION

The Court should hold the petition for *Bernstein* or grant certiorari.

Respectfully submitted,

ADAM P. KOHSWEENEY
KRISTIN MACDONNELL
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111
(415) 984-8700

HARRY J.F. KORRELL
JOHN HODGES-HOWELL
DAVIS WRIGHT TREMAINE LLP
950 Fifth Ave., Ste. 3300
Seattle, WA 98104
(206) 622-3150

ANTON METLITSKY
Counsel of Record
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
ametlitsky@omm.com
(212) 326-2000

ROBERT A. SIEGEL
JASON ZARROW
O'MELVENY & MYERS LLP
400 S. Hope St., 18th Fl.
Los Angeles, CA 90071
(213) 430-6005

Counsel for Petitioner

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