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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

The question presented in this case is whether the Airline Deregulation Act's ("ADA") express preemption provision preempts neutral state laws only where those laws "bind" an airline to a particular price, route, or service. That is also the question presented in *Virgin America, Inc. v. Bernstein*, No. 21-260, in which this Court called for the views of the Solicitor General.

On May 24, the Solicitor General filed an amicus brief in *Bernstein* expressing the views of the United States. The Solicitor General agrees with Virgin America that the Ninth Circuit's evaluation of ADA preemption was "misguided" because the court focused on the laws' form, whereas the proper "inquiry naturally entails an analysis of the *effects* of the challenged state law on the particular industry." Br. for United States (No. 21-260) at 10 ("SG *Bernstein* Br.").

The Solicitor General nevertheless suggests certiorari be denied in *Bernstein*. Its principal argument is that California's meal-and-rest-break laws might somehow permit flight attendants to take breaks while on duty. SG *Bernstein* Br. 14-16. Petitioner respectfully suggests that no court could reasonably construe California law that way, and there is no suggestion in the *Bernstein* opinion that the Ninth Circuit did. *See* Supp. Br. of Virgin America in *Virgin America, Inc. v. Bernstein*, No. 21-260 (filed June 7, 2022), at 1-3, 7-12.[1]

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[1] Indeed, even the United States does not really believe that the Ninth Circuit might have construed California law in a manner

The Solicitor General also offered two other bases for denying certiorari: that other Ninth Circuit panels have not applied the same "misguided" approach to ADA preemption—i.e., that the "binds to" test, which the government itself thinks is wrong, is not actually the rule in the Ninth Circuit—and that there is no outcome-determinative circuit conflict on the question presented. This petition demonstrates that those two points are wrong. In this case (as in *Bernstein*), the court of appeals rejected petitioner Airlines for America's ("A4A") preemption argument *only* because it did not satisfy the "binds to" test; to the extent earlier Ninth Circuit panels applied a different test, they no longer do so. Moreover, this and materially identical cases in other circuits demonstrate beyond any doubt that the circuit conflict presented in *Bernstein* (and here) is outcome-determinative—this case came out differently than materially identical cases brought in the First and Second Circuits only because of the difference in the applicable legal standards.

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that ameliorates the substantial interference with interstate commerce that the United States had previously believed applying California meal-and-rest-break law to airlines would cause. The body of the Solicitor General's brief insists that the Ninth Circuit's opinion will cause no problems for air commerce, but the brief also includes an extraordinary footnote in which the Solicitor General promises that the Department of Transportation and Federal Aviation Administration will work with interested stakeholders to solve the very real and obvious effects on air carrier routes and services that will result from the Ninth Circuit's opinion, *see* SG *Bernstein* Br. 15 n.*—the very sorts of problems the ADA was enacted to prevent.

The Court should thus grant certiorari in *Bernstein* to resolve the square circuit conflict. But if the Court believes that certiorari is unwarranted in *Bernstein* for other reasons, this case also presents a suitable vehicle to consider and resolve the circuit split and return uniformity to this crucially important area of law.

1. The Solicitor General contends that the Ninth Circuit does not actually apply a "binds to" test for ADA preemption. SG *Bernstein* Br. 17-19. That is incorrect. Relying on longstanding circuit precedent, the court in *Bernstein* held that "the proper inquiry [under the ADA] is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route, or service." *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1141 (9th Cir. 2021) (quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014)). The Ninth Circuit could not have been clearer on that point. But if any further proof were required, one need look no further than this case, where the court of appeals' only reason for rejecting A4A's preemption argument was the "binds to" test, relying on *Bernstein*. App.6a ("The proper inquiry is whether the PSL itself '*binds* the [airlines] to a particular price, route, or service.'" (quoting *Bernstein*, 3 F.4th at 1141)); *ibid.* ("[B]ecause the PSL does not regulate the airline-customer relationship or otherwise bind the airlines to a particular price, route, or service, it is not preempted.").

The Solicitor General observes (at 18-19) that earlier Ninth Circuit panels did not always apply the "binds to" test. But each of the cases the Solicitor General cites predate *Bernstein* (and this case). *See*

Ward v. United Airlines, Inc., 986 F.3d 1234 (9th Cir. 2021); *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (9th Cir. 2020); *Cal. Trucking Ass'n v. Su*, 903 F.3d 953 (9th Cir. 2018). What matters is not whether the Ninth Circuit used to apply a different test, but rather the test that it applies now. And now, the principal precedent in that court is *Bernstein*, as the panel decision in this case demonstrates. App. 6a.

The Solicitor General suggests that this Court need not grant review because "disagreement between Ninth Circuit panels" can be resolved through the en banc process. SG *Bernstein* Br. 20. Again, to the extent the Ninth Circuit used to apply a different rule, it no longer does. That is, in any event, what the Ninth Circuit itself appears to think. In both *Bernstein* and this case, petitioners sought rehearing en banc and noted the apparent inconsistency in Ninth Circuit case law, but the court twice denied review. It is implausible that the Ninth Circuit would believe that the scope of ADA preemption is insufficiently important to warrant en banc review. So the only reason that court could have had for repeatedly denying en banc review is that it disagreed with the Solicitor General's suggestion that the legal rule in that court was unsettled. Rather, the Ninth Circuit evidently believes that *Bernstein* (the last-published decision on point) settled the "binds to" test as the law of the circuit, which is why the court applied that test, citing *Bernstein*, in denying A4A's claim in this case.

2. The Solicitor General also argues that *Bernstein* does not implicate an outcome-determinative circuit split. SG *Bernstein* Br. 20. To the extent the

Solicitor General believes that is so because "the Ninth Circuit has not actually adopted" a "binds to" test, *id.*, that is wrong for the reasons explained. And to the extent the Solicitor General's argument rests on the suggestion that decisions in other circuits are distinguishable because none "involved the application of state labor laws similar to the California meal- and rest-break laws to employees similarly situated to respondents," *id.*, this case demonstrates the Solicitor General's error.

As explained at length in the petition here, A4A has brought two materially identical legal challenges to materially identical paid sick-leave laws—the challenge to the Washington law at issue in this case, and a challenge to a nearly identical law in Massachusetts. Pet. 27-28. Delta Airlines, meanwhile, challenged another nearly identical law in New York. Pet. 28-29.

In this case, the Ninth Circuit affirmed the district court's grant of summary judgment against A4A by applying the *Bernstein* "binds to" test. App. 6a. But the district court in Massachusetts—applying the ADA standards in the First Circuit, which is the principal court on the other side of the circuit conflict here, *see* Pet. 21-22; *Bernstein* Pet. 17-19—*denied* summary judgment based on a substantially similar summary judgment record as in this case. *Air Transp. Ass'n of Am., Inc. v. Healey*, 2021 WL 2256289 (D. Mass. June 3, 2021). When two cases challenging materially identical laws on materially identical factual records come out differently, that can only be because the legal standards are different.

That is what the New York district court expressly

held in granting Delta summary judgment in its challenge. The court there "disagree[d] with the Ninth Circuit that a state or local law is preempted only when it 'binds' an airline to a particular price, route or service," noting 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*, 564 F. Supp. 3d 109, 118 (E.D.N.Y. 2021).

This case and the identical cases brought in other circuits thus demonstrate the Solicitor General is simply wrong—there is an outcome-determinative circuit conflict as to the proper application of the ADA to laws of general applicability like the sick-leave law at issue here (and the meal-and-rest-break laws at issue in *Bernstein*). That state of affairs would be intolerable with respect to any important issue of federal law, but it is especially so when the question is the scope of preemption applicable to the airline industry—an area of law that self-evidently calls out for uniformity.

3. *Bernstein* provides the Court with an ideal vehicle for resolving the circuit conflict at issue. But if the Court believes that *Bernstein* is somehow a poor vehicle for resolving the circuit conflict, this case has no such problems—the validity of the "binds to" test is squarely presented and outcome-determinative. So if the Court denies certiorari in *Bernstein*, it should grant certiorari here.

CONCLUSION

The Court should grant certiorari in *Bernstein*. In the alternative, if the Court concludes that review in *Bernstein* is unwarranted, the Court should grant this petition and reverse the decision below.

Respectfully submitted,

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