No. 21-____

# In the Supreme Court of the United States

VIRGIN AMERICA, INC., AND ALASKA AIRLINES, INC.,
PETITIONERS

*v.*

JULIA BERNSTEIN, 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 state laws that are "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). This "deliberately expansive" language broadly preempts state laws that affect airline prices, routes, and services—even if the state law is "not specifically designed to affect" airlines, and even if its "effect is only indirect," as long as it is not "too tenuous, remote, or peripheral." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-86, 390 (1992) (citations omitted). The ADA thus preempts a state law that has "a 'significant impact'" on carriers' rates, routes, or services. *Rowe v. N. H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (quoting *Morales*, 504 U.S. at 390).

The Ninth Circuit rejects that standard. It holds that the ADA does not preempt generally applicable "background" rules unless they "*bind*[] the carrier to a particular price, route, or service." App. 20a (citation omitted). Applying that categorical rule here, the Ninth Circuit held that the ADA does not preempt applying California's meal-and-rest-break laws to flight attendants. In doing so, it refused even to consider the significant impact of state-mandated breaks—which conflict with FAA regulations governing flight attendants' responsibilities and rest breaks—on airline prices, routes, and services.

The question presented is:

Does the ADA preempt generally applicable state laws that have a significant impact on airline prices, routes, and services, as this Court and four circuits have held, or does it preempt such laws only if they *bind* an airline to a particular price, route, or service, as the Ninth Circuit has held?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Virgin America, Inc., and Alaska Airlines, Inc. Virgin America, Inc., has merged with and into Alaska Airlines, Inc. Alaska Airlines, Inc., is owned by Alaska Air Group, Inc., which is a publicly held corporation. There are no other corporations to disclose under Rule 29.6.

Respondents are Julia Bernstein, Esther Garcia, and Lisa Marie Smith, on behalf of themselves and others similarly situated.

## RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Bernstein, et al., v. Virgin America, Inc.; Alaska Airlines, Inc.*, Nos. 19-15382, 20-15186 (9th Cir. filed July 20, 2021); and
- *Bernstein, et al., v. Virgin America, Inc.; Alaska Airlines, Inc.*, No. 15-cv-02277-JST (N.D. Cal. filed Feb. 4, 2019).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Virgin America, Inc., and Alaska Airlines, Inc. (together, Virgin), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The court of appeals' opinion (App. 1a-28a) is reported at 3 F.4th 1127. The relevant opinion of the district court (App. 29a-78a) is reported at 227 F. Supp. 3d 1049.

## JURISDICTION

The judgment of the court of appeals was entered on February 23, 2021, and amended on March 8, 2021, and again on July 20, 2021. App. 1a-28a. The court of appeals denied both parties' petitions for rehearing en banc on July 20, 2021. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution (art. VI, cl. 2) provides in part that "the laws of the United States … shall be the supreme law of the land." The relevant provision of the Airline Deregulation Act, 49 U.S.C. § 41713, is reproduced at App. 102a-03a. California Labor Code sections 226.7 and 512 are reproduced at App. 104a-10a.

## STATEMENT

Federal law assigns flight attendants a host of important safety duties that they must be ready to handle at all times during flight. Flight attendants must remain constantly on call and vigilant to help passengers in case of emergency. Federal law thus extensively regulates their duty and break periods.

While flight attendants are often seated on flights, and have time to sit and eat in between their work tasks, federal regulations do not allow them to go "off duty" while an airplane is operating.

In the decision below, the Ninth Circuit nevertheless held that flight crews are subject to California's strict meal-and-rest-break rules. Those rules require completely "off duty" breaks for flight attendants every three-and-a-half to five hours, even during flights. During those breaks, flight attendants must be "free to leave the premises"—an impossibility in mid-air—and may not be on call, even for emergencies. Because airplanes cannot operate while flight attendants are taking "off duty" breaks, imposing those breaks under state law will cause massive delays. Planes will be forced to idle on the ground as they wait for mandatory break periods to end, leaving other planes to circle in the air as they await a gate. The cascading effects will cast air traffic into disarray.

Despite those problems, the Ninth Circuit rejected Virgin's argument—endorsed by the United States—that the Airline Deregulation Act (ADA) preempts mandatory state-law breaks. Indeed, the court turned a blind eye to the disruption that will result from allowing states to impose their own break rules on flight crews. The court's only response was that adding flight attendants to longer flights would let crew members take turns with their state-required breaks. But that is no solution because it would create forbidden impacts of its own. For starters, it would confiscate seats otherwise available to passengers—directly depriving those passengers of the very core service of air travel. It would also affect prices, and make some routes—especially those served by small planes with few seats to begin with—unsustainable altogether.

In the Ninth Circuit's view, none of these significant impacts matters because the ADA preempts generally applicable "background" rules only if they "*bind*[] the carrier to a particular price, route, or service." App. 20a (citation omitted). That impossible standard eviscerates the ADA's express preemption clause, contradicts this Court's decisions, and cements a split with four other circuits. It is also illogical on its own terms: By definition, a generally applicable background rule—one that doesn't even refer to air carriers—does not bind the carrier to the particulars of a price, route, or service. On top of the chaos that the Ninth Circuit's rule will cause for the traveling public, it threatens to force airlines to comply with a dizzying patchwork of conflicting break laws in any state they happen to serve, contravening a core purpose of the ADA. And the problems only multiply if, as plaintiffs have already asserted, the Ninth Circuit's logic extends to pilots, ground crew, and other employees necessary for airlines to function. This Court should intervene to restore the ADA's "deliberately expansive" preemptive effect and to prevent nationwide tumult in the airline industry. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citation omitted).

## I. FEDERAL REGULATORY BACKGROUND

### A. The ADA Preempts State Laws That Interfere With Federal Deregulation Of Airlines

Congress enacted the ADA in 1978 to further "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces." 49 U.S.C. App. § 1302(a)(9), (4) (1988). The ADA includes a preemption provision

intended to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. That provision expressly preempts State laws that are "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

As this Court has recognized repeatedly, this language is "deliberately expansive." *Morales*, 504 U.S. at 384 (citation omitted). It broadly preempts state laws that affect airline prices, routes, and services—even if the state law is "not specifically designed to affect" airlines, and even if its "effect is only indirect," as long as it is not "too tenuous, remote, or peripheral." *Id.* at 384-86, 390 (citations omitted). Thus, the Court analyzes preemption by considering whether state law has "a 'significant impact'" on carrier rates, routes, or services. *Rowe v. N. H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (quoting *Morales*, 504 U.S. at 390) (same analysis under similarly worded Federal Aviation Administration Authorization Act (FAAAA)).

*Morales*, for example, held that the ADA preempted the application of a state's general deceptive-advertising law to an airline because of the "significant impact" it would have on fares. 504 U.S. at 390; *see id.* at 386-88. The Court rejected the state's arguments that "the ADA imposes no constraints on laws of general applicability," and that "only state laws specifically addressed to the airline industry are preempted." *Id.* at 386. That crabbed reading "ignores the sweep of the 'relating to' language" and would "creat[e] an utterly irrational loophole." *Id.* *Morales* also rejected the state's argument that its laws were not sufficiently "related to" an airline's prices. Although the state was "not compelling or restricting" particular prices, its laws "would have a

significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge." *Id.* at 389. It was "quite obvious[]" that applying such laws to airlines "relates to" airline rates. *Id.* at 387-89.

Similarly, *American Airlines, Inc. v. Wolens* held that the ADA preempted the application of a state's general consumer-fraud statute to an airline's frequent-flier program. 513 U.S. 219 (1995). The lower court had deemed frequent flier programs too "peripheral to the operation of the airline" to implicate preemption; it thought the ADA's preemption provision reached only matters "essential" to airline operations. *Id.* at 226 (citation omitted). *Wolens* rejected that formalistic restriction, emphasizing that the relevant question is how the claims at issue affect airline prices, routes, or services. *See id.* at 226-27. The Court concluded that applying the consumer-fraud statute would have an impermissible effect: It would impact the airline's "'rates,' *i.e.*, charges in the form of mileage credits for free tickets and upgrades," and "'services,' *i.e.*, access to flights and class-of-service upgrades." *Id.* at 226.

Finally, *Northwest, Inc. v. Ginsberg* held that the ADA preempted a general breach-of-implied-covenant claim against an airline arising from its frequent-flier program because of the impact it would have on rates and services. 572 U.S. 273, 284 (2014). To begin with, the Court "ha[d] little difficulty rejecting" the argument that "the ADA's pre-emption provision applies only to [state] legislation … but not to a [background] common-law rule." *Id.* at 281. "What is important" is a state law's "effect," "not its form." *Id.* at 283. "[T]he ADA's deregulatory aim can be undermined just as surely by a state common-law rule as it can by a state

statute or regulation." *Id.* And when it came to the dispositive question for preemption—whether the plaintiff's breach-of-implied covenant claim "relates to" prices, routes, or services—the Court found a "clear[]" connection. *Id.* at 284. That claim sought the plaintiff's reinstatement into the airline's frequent flier program, which, in turn, could ultimately impact "the price of a particular ticket" and "access to flights and to higher service categories" (since frequent flier miles "can be redeemed for tickets and upgrades"). *Id.*

To be sure, "the breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013). Some state laws, such as prohibitions on "gambling and prostitution," may affect airlines in "in too tenuous, remote, or peripheral a manner to have pre-emptive effect." *Morales*, 504 U.S. at 390 (citation omitted). But the question is always the same: Whether a state law has a significant impact on airline prices, routes, or services.

### B. Federal Law Regulates Flight Attendants' Duty And Break Periods

The ADA's preemption provision reflects that the federal government, not states, is primarily responsible for regulating airlines. "The United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1). Because air transportation is an inherently national enterprise, the Federal Aviation Administration (FAA) "develop[s] plans and policy for the use of the navigable airspace," and "ensur[es] the safety of aircraft and the efficient use of airspace." *Id.* § 40103(b). To that end, the FAA "promote[s] safe flight of civil aircraft in air commerce by prescribing" "regulations in the

interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers." *Id.* § 44701(a), (a)(4). And under that authority, the FAA has promulgated extensive rules about duty and break periods for flight attendants. *See* 14 C.F.R. § 121.467.

FAA regulations provide that airlines "may assign a duty period to a flight attendant" of up to "14 hours," and that every duty period must be followed by a mandatory "rest period of at least 9 consecutive hours." *Id.* § 121.467(b)(1), (2). A "duty period" is "the period of elapsed time between reporting for an assignment involving flight time and release from that assignment." *Id.* § 121.467(a).

Flight attendants have ample opportunity to sit and eat on flights, but under FAA rules they must remain on duty at all times to perform their mandatory safety duties. *See, e.g.*, *id.* § 121.135(b)(12) (must respond to emergencies according to procedures outlined in flight manual); *id.* §§ 121.467(a), 121.397(a) (must handle "cabin-safety-related responsibilities"); *id.* § 121.391(d) (must remain "uniformly distributed throughout the airplane" to help passengers); *id.* § 121.542(a) (must perform "duties required for the safe operation of the aircraft"); *id.* § 121.575 (must be constantly aware of intoxicated passengers). Indeed, the FAA considered and rejected a proposal to "establish provisions for on-board rest" for flight attendants because it found that the rest requirements "adopted in [the] final rule are adequate to ensure that flight attendants are provided the opportunity to be sufficiently rested to perform their routine and emergency safety duties without imposing a significant burden on operators." Flight Attendant Duty Period Limitations

and Rest Requirements, 59 Fed. Reg. 42,974, 42,979-80 (Aug. 19, 1994).

Finally, consistent with the scope of flight attendant responsibilities, FAA regulations specify the minimum number of flight attendants airlines must staff on passenger airplanes, based on a plane's capacity. 14 C.F.R. § 121.391(a).

## II. PROCEEDINGS BELOW

### A. Plaintiffs Sued Virgin For Not Providing Meal And Rest Breaks Under California Law

The plaintiffs here are a class of flight attendants who spent a small fraction of their time working in California, but the vast majority of their time working elsewhere—either in federal airspace, or at airports in other states. App. 41a; Appellants' Excerpts of Record at 247, *Bernstein v. Virgin America, Inc.*, No. 19-15382 (9th Cir.), ECF No. 25-1. Among other claims, they asserted that Virgin violated California law by assigning them to work continuous duty periods authorized by federal law, while failing to provide them with duty-free meal and rest breaks as required by the California Labor Code.

Unlike the FAA regulations that govern duty and break periods for flight attendants, California law generally requires employees to receive a meal or rest break every three-and-a-half to five hours. *See* IWC Wage Order No. 9-2001, § 11-12. During these mandatory breaks, employers "shall not require an employee to work." Cal. Lab. Code § 226.7(b).

This means that employers must not only "relieve employees of all duties," but also "relinquish control over how employees spend their time"—"including the

obligation that an employee … remain on call, vigilant, [or] at the ready," with no exception for safety duties. *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d 823, 832-34 (Cal. 2016). During meal breaks, employees must be "free to leave the premises." *Brinker Rest. Corp. v. Superior Ct.*, 273 P.3d 513, 534 (Cal. 2012). And although breaks may be "interrupted" or "reschedule[d]" occasionally, this must be "the exception rather than the rule." *Augustus*, 385 P.3d at 833-34 & n.14. On-duty meal breaks (that is, breaks occurring on the jobsite) are permissible "only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement" the employer and employee agree to an "on-the-job paid meal period." *Brinker*, 273 P.3d at 533. An employee may revoke his agreement to on-the-job breaks at any time. *See id.*

California law also requires an employer who fails to provide the prescribed meal or rest breaks to "pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided." Cal. Lab. Code § 226.7(c); *see also* IWC Wage Order No. 9-2001, §§ 11(D), 12(B). Employees also may bring a private claim under California Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.*, which allows an employee to seek civil penalties against his employer on behalf of himself and other current or former employees, a portion of which must be awarded to the state, *id.* § 2699.

**B. The District Court's Decision**

**1.** Virgin moved for summary judgment. As relevant here, Virgin argued that the ADA preempts California's break rules because they have a

"significant impact" on prices, routes, and services. Relieving flight attendants of all duties every three-and-a-half to five hours, as California law requires, would disrupt carefully choreographed flight schedules because airplanes cannot operate without a full contingent of flight attendants on duty. Nor can airlines engage in critical operations that affect core services, including boarding, takeoff, landing, and deplaning. Forcing airlines to employ more flight attendants than the federally required minimum—and to let them take breaks in seats otherwise available to passengers—would not solve the ADA problem because that, too, would have an impermissible significant impact on prices, routes, and services.

Virgin also argued that requiring mandatory breaks under state law conflicts with FAA regulations. By preventing flight attendants from remaining on duty to handle their federally assigned safety responsibilities, California's break laws interfere with the functioning of the FAA's regulatory scheme.

**2.** The district court rejected both arguments. First, the district court held that Ninth Circuit precedent foreclosed Virgin's argument that the ADA preempts California's meal-and-rest-break laws. App. 65a-67a (citing *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014)). In *Dilts*, the Ninth Circuit held that the FAAAA does not preempt California's meal-and-rest-break laws for the intrastate trucking industry because those laws do not "*bind*[] the carrier to a particular price, route or service": "They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly." 769 F.3d at 646-47. Without addressing Virgin's arguments about the

more acute impact that rest break laws would have on interstate airlines as compared to intrastate trucking companies, the district court concluded that airlines, like the trucking companies in *Dilts*, "simply must hire a sufficient number of [flight attendants] and stagger their breaks for any long period in which continuous service is necessary." App. 66a (quoting *Dilts*, 769 F.3d at 648).

For similar reasons, the district court also found no conflict between California's break rules and FAA rules that require flight attendants to remain on duty during flights to handle federal safety duties. It said that Virgin could simply "staff longer flights with additional flight attendants in order to allow for duty-free breaks." App. 64a.

**3.** Virgin sought reconsideration, emphasizing the United States' argument in *Dilts* that, while California's meal-and-rest-break laws were not preempted as applied to truckers, applying those laws to airlines would present "significantly different considerations." Brief for the United States as Amicus Curiae in Support of Appellants and Reversal at 25, *Dilts*, 769 F.3d 637 (9th Cir.), 2014 WL 809150; *see* Defendant's Motion for Leave to File a Motion of Reconsideration at 11-12, 17-18, *Bernstein v. Virgin America, Inc.*, No. 15-cv-02277-JST (N.D. Cal.), ECF No. 127. The district court denied Virgin's motion. App. 79a.

### C. The Ninth Circuit's Decision

**1.** On appeal, Virgin again argued that the ADA preempts state-mandated, duty-free breaks for flight attendants because such breaks would have a forbidden significant impact on airline's prices, routes, and services.

The United States filed an uninvited amicus brief supporting Virgin and arguing that "[t]here can be no serious question that applying California's meal and rest break laws to flight attendants will have a significant impact on the market forces influencing carrier services and prices." Brief for the United States as Amicus Curiae in Support of Appellants at 18, *Bernstein*, No. 19-15382 (9th Cir.), 2019 WL 4307414. Because "federal regulations contemplate that attendants will be on-duty and on-call to perform" critical safety duties throughout a flight, "the only time that an off-duty break could occur would be between flights." *Id.* at 19-20. That, in turn, "would significantly interfere with th[e] complex choreography" of air traffic, and could "easily snowball into delays at other airports throughout the country." *Id.* at 21. Adding more flight attendants as an alternative "would create its own difficulties," including stranding extra flight attendants away from their home base, and taking away "seats that might otherwise have been occupied by paying passengers." *Id.* at 22-23.

**2.** The Ninth Circuit affirmed. App. 1a-28a. It rejected Virgin's argument that the ADA preempts California's break laws, because it reasoned that those generally applicable "background" rules do not "*bind*[] the carrier to a particular price, route or service." App. 20a (quoting *Dilts*, 769 F.3d at 646). The court explained that *Dilts*'s holding that the FAAAA does not preempt applying California's break laws to the trucking industry "applies with equal force here." App. 21a. The court did not address Virgin's or the United States' arguments about the different impact that California's meal-and-rest-break laws would have on airlines as compared to the trucking industry. Nor did it consider whether applying those laws would

have a "significant impact" on air carrier rates, routes, or services. It noted only that "an increase in cost associated with compliance [is] not sufficient to show a relation to prices, routes, or services." App. 20a-21a.

Finally, like the district court, the panel thought that Virgin could comply with California's break rules by staffing flights with additional flight attendants—i.e., more than the federally required number—"in order to allow for duty-free breaks." App. 18a (citation omitted). It refused to consider, however, the effect that this would have on airlines' prices, routes, and services.

**3.** Virgin petitioned for panel rehearing and rehearing en banc, arguing that the Ninth Circuit's demanding "binds to" test contravenes this Court's precedents and creates a circuit split. Although the panel amended its opinion to address other arguments that Virgin made in its rehearing petition about conflict preemption, it left its discussion of ADA preemption untouched. The court of appeals denied rehearing en banc. App. 2a.

## REASONS FOR GRANTING THE PETITION

This case checks every box for certiorari. The Ninth Circuit's decision eviscerates a crucial federal preemption statute, with nationwide consequences for air carriers and passengers alike, by shielding generally applicable laws from the ADA's preemptive reach. It also conflicts with this Court's decisions interpreting the ADA and cements a split with four other circuits. This Court should intervene.

**I.** The Ninth Circuit's categorical "binds to" test contradicts this Court's decisions. *Morales*, *Wolens*, and *Ginsberg* explicitly reject the notion that the ADA preempts only state laws that force airlines to adopt

particular prices, routes, or services. And they shun a specialized test for generally applicable laws.

The Ninth Circuit's demanding rule also conflicts with the decisions of the First, Fifth, Seventh, and Eleventh Circuits. Those courts analyze ADA preemption by considering whether a generally applicable state law has a forbidden "significant impact" on prices, routes, or services. The Ninth Circuit, by contrast, refuses to even ask that question unless a law can satisfy its demanding "binds to" prerequisite.

**II.** The Ninth Circuit's holding that the ADA does not preempt the application of California's rest break laws to flight attendants is wrong. It is based on a flawed standard—one that this Court and other courts of appeals have rightly rejected as conflicting with the ADA's text and purpose. Under the correct test—whether the law has a "significant impact"—preemption is obvious: Affording flight attendants state-mandated, duty-free breaks would have a tremendous impact on airline prices, routes, and services. Airplanes cannot operate without a full contingent of flight attendants on duty, and requiring them to take duty-free breaks would interfere with critical operations like takeoff and landing, leaving planes stranded on runways at unpredictable times and causing cascading delays at airports nationwide.

While the Ninth Circuit viewed these disruptions as irrelevant to preemption, it also suggested that airlines could avoid them by adding more flight attendants per flight. But that "solution" creates forbidden impacts of its own by confiscating seats otherwise available to paying customers, substantially affecting prices, and threatening the very viability of some routes. It also generates confusion

and uncertainty for airlines operating in federal airspace by subjecting them to a patchwork of state break rules.

The petition should be granted.

## I. THE NINTH CIRCUIT'S ADA PREEMPTION TEST CONTRAVENES THIS COURT'S PRECEDENT AND CREATES A CIRCUIT SPLIT

The decision below reflects the Ninth Circuit's longstanding, categorical rule that the ADA does not preempt "generally applicable" state laws unless they "bind[]" a carrier to a "particular rate, route, or service." App. 20a; *see Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 664 (9th Cir. 2021), *petition for cert. docketed*, No. 21-194 (U.S. Aug. 11, 2021) ("generally applicable labor law[s]" are not preempted unless they "bind, compel, or otherwise freeze into place a particular price, route, or service of a … carrier"); *see also, e.g.*, *Ward v. United Airlines*, 986 F.3d 1234, 1243 (9th Cir. 2021); *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 398 (9th Cir. 2011); *Dilts*, 769 F.3d at 646; *Air Transp. Ass'n of Am. v. City of San Francisco*, 266 F.3d 1064, 1071-72 (9th Cir. 2001). Based on that stringent rule, the Ninth Circuit refuses even to consider a state law's impact on prices, rates, or services. *See, e.g.*, App. 19a-21a; *Ward*, 986 F.3d at 1243.

The Ninth Circuit's rule disregards the decisions of this Court, which hold that the ADA preempts generally applicable laws if they have a "significant impact" on a carrier's prices, routes, or services. And as the Ninth Circuit itself has recognized, its demanding standard also "is contrary to" the law of other circuits, which interpret the same language more broadly to preempt laws that significantly impact prices, routes, and services, even if the impact is only

"indirect." *Cal. Trucking*, 996 F.3d at 663-64; *see id.* at 670-71 (Bennett, J., dissenting).

### A. The Ninth Circuit's Demanding "Binds To" Test Conflicts With This Court's Decisions

The Ninth Circuit's rule that the ADA does not preempt generally applicable laws unless they "bind" a carrier to specific prices, routes, or services, cannot be squared with this Court's decisions interpreting the ADA's express preemption provision.

*First*, this Court has rejected the notion that the ADA "only pre-empts the States from actually prescribing rates, routes, or services." *Morales*, 504 U.S. at 385. Indeed, in *Ginsberg*, this Court reversed the Ninth Circuit's holding that "the prerequisite for [ADA] preemption" is whether a state law "force[s] the Airlines to adopt or change their prices, routes or services." 572 U.S. at 279 (citation omitted). None of the state laws that the Court found preempted in *Morales*, *Wolens*, or *Ginsberg* "force[d] [airlines] to adopt or change their prices, routes, or services." *Ginsberg*, 572 U.S. at 279 (citation omitted); *see Morales*, 504 U.S. at 385 (rejecting argument that ADA "only preempts the States from actually prescribing rates, routes, or services"). The Court still found them preempted because of their "significant impact" on airline prices, routes, or services. *Morales*, 504 U.S. at 390; *see Ginsberg*, 572 U.S. at 284; *Wolens*, 513 U.S. at 226-27.

*Second*, this Court's preemption analysis in *Morales*, *Wolens*, and *Ginsberg* confirms that there is no specialized or more demanding preemption test for "generally applicable" laws. The state rules at issue in those cases were all generally applicable; none

specifically targeted airlines. *See Ginsberg*, 572 U.S. at 276 (general breach-of-implied-covenant rule); *Wolens*, 513 U.S. at 227 (general consumer-fraud statute); *Morales*, 504 U.S. at 378 (general deceptive-advertising laws). Subjecting *all* laws to the same standard reflects the text of the ADA, which specifies a single test: whether the law is "related to" an air carrier's prices, routes, or services. 49 U.S.C. § 41713(b)(1).

The Ninth Circuit's heightened standard for generally applicable laws is particularly at odds with *Ginsberg*. If background common-law rules are not subject to heightened standards, then there is no reason generally applicable statutes should be either. "[T]he ADA's deregulatory aim can be undermined just as surely" by a generally applicable statute "as it can by [a common-law rule,] state statute or regulation." *Ginsberg*, 572 U.S. at 283. "What is important … is the effect of a state law, regulation, or provision, not its form." *Id.*

### B. Four Circuits Apply The "Significant Impact" Test For ADA Preemption

The First, Fifth, Seventh, and Eleventh Circuits analyze ADA preemption by considering whether a generally applicable state law has a forbidden "significant impact" on prices, routes, or services.

**1.** In several decisions, the First Circuit has found preemption of generally applicable laws without considering whether those laws *bind* a carrier to particular prices, routes, or services. In *DiFiore v. American Airlines, Inc.*, for example, the court concluded that the ADA preempted a generally applicable Massachusetts law governing tips for all "service employees," without considering whether the law *bound*

the airlines to any specific prices, routes, or services. 646 F.3d 81, 84, 86-88 (1st Cir. 2011). That case involved skycaps' claim that an airline's $2 curbside bag-check fee constituted a tip under Massachusetts's tipping statute, and thus belonged to the skycaps. Under the Ninth Circuit's "binds to" test, the tipping statute would not have been preempted because it did not prescribe any particular price or service. Indeed, the skycaps proposed several ways for the airline to comply "without incurring great expense or substantially altering the gist of curbside check-in service." *Id.* at 88. But the statute was preempted anyway because of its "significant impact" on the airline's "service" of "arranging for transportation of bags," and on the airline's "price," which "includes charges for such ancillary services as well as the flight itself." *Id.* at 87.

Similarly, in *Bower v. Egyptair Airlines Co.*, the First Circuit held that the ADA preempted generally applicable common-law tort claims because they would "significantly impact" services by requiring "heightened and qualitatively different procedures for the booking and boarding of certain passengers on certain flights." 731 F.3d 85, 92, 95-96 (1st Cir. 2013). And in *Massachusetts Delivery Association v. Healey*, the court held that the FAAAA preempted the application of Massachusetts' generally applicable employee-classification law to same-day delivery because of the "significant impact" it would have on the companies' services by eliminating their choice between providing services directly or through an independent contractor. 821 F.3d 187, 191-92 (1st Cir. 2016); *see also Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 438-39 (1st Cir. 2016) (same).

Underscoring the difference between the First Circuit's standard and the Ninth Circuit's, a district court recently ordered a trial to determine the "significant impact" of applying Massachusetts's sick-leave law to airlines for purposes of ADA preemption. *Air Transp. Ass'n of Am., Inc. v. Healey*, No. 18-CV-10651-ADB, 2021 WL 2256289, at *12 (D. Mass. June 3, 2021). Under the Ninth Circuit's test, a trial would be unnecessary because this generally applicable law does not prescribe any particular rates, routes, or services.

**2.** The Fifth Circuit applies the same standard as the First Circuit. In *Witty v. Delta Air Lines, Inc.*, it held that the ADA preempted a passenger's common-law negligence claim arising from an airline's failure to provide adequate leg room to prevent deep vein thrombosis. 366 F.3d 380, 383 (5th Cir. 2004). Because "requiring more leg room would necessarily reduce the number of seats on the aircraft," the court held that state regulation of leg room would have a "forbidden significant effect" on prices. *Id.* (citation omitted). That ended the preemption inquiry; the Fifth Circuit did not ask whether the passenger's claim would have *bound* the airline to specific prices. *See id.* Other cases agree. *See, e.g.*, *Onoh v. Nw. Airlines, Inc.*, 613 F.3d 596, 599 (5th Cir. 2010) (ADA preempted emotional-distress and breach-of-contract claims arising from airline's denial of boarding because of their impermissible impact on airline's services); *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 288 (5th Cir. 2002) (ADA preempted travel agency's tortious-interference claims because of their impermissible impact on airline's prices and services).

**3.** The Seventh Circuit likewise applies the "significant impact" standard. For example, in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, an airline cancelled tickets that customers bought through a travel agency, and required them to purchase tickets directly from the airline. 73 F.3d 1423, 1428 (7th Cir. 1996). The Seventh Circuit held that the ADA preempted intentional tort claims based on the airline's actions. *Id.* at 1434. The court did not ask whether those generally applicable common-law claims *bound* the airline to any particular price, route, or service. It was sufficient for ADA preemption that the claims were "based on the airline's refusal to transport [certain] passengers" and accordingly had "a significant economic effect on the airline's services." *Id.*; *see also United Airlines, Inc.*, *v. Mesa Airlines, Inc.*, 219 F.3d 605, 611 (7th Cir. 2000) (ADA preempted state-law fraudulent-inducement claims arising from major airline's code-sharing agreement with regional airline because of their "significant effect" on "routes and divisions of revenues").

**4.** The Eleventh Circuit similarly recognizes that the ADA preempts state-law claims that would significantly impact airlines' baggage-handling procedures, even if they do not *bind* airlines to specific prices, routes, or services. *See Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339, 1343-44 (11th Cir. 2005) (ADA preempted breach-of-contract claim based on airline's baggage-handling services, relying on *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1255 (11th Cir. 2003) (holding that a law with "a forbidden significant effect" on a "carrier's prices, routes or services" is preempted)).

**5.** Finally, state high courts, too, apply the same standard. The Rhode Island Supreme Court has held

that the ADA preempts generally applicable state laws regulating pay on Sundays and holidays because of the "significant impact" such laws have on airlines' services. *Brindle v. R. I. Dep't of Lab. & Training*, 211 A.3d 930, 937-38 (R.I. 2019), *cert. denied*, 140 S. Ct. 908 (2020). The court explained that "increased labor costs" on Sundays and holidays "could lead to reduction in service from a flight frequency opportunity." *Id.* Other states likewise consider a law's forbidden "significant impact" dispositive of the preemption analysis. *See Chambers v. RDI Logistics, Inc.*, 65 N.E.3d 1, 9 (Mass. 2016) (FAAAA preempted state worker-classification law because of its "'significant impact' on motor carriers"); *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 756 (Tex. 2003) (ADA preempted misrepresentation and fraud claims arising from denial of first class seating because of their significant impact on airlines' services).

## II. THE NINTH CIRCUIT'S DECISION IS WRONG

The Ninth Circuit's holding that the ADA does not preempt applying California's rest break laws to airlines is wrong.

### A. The Ninth Circuit Applied The Wrong Legal Standard

The Ninth Circuit's categorical rule that the ADA does not preempt a generally applicable state law unless it "binds" a carrier to a particular price, route, or service conflicts with this Court's cases. *See supra* at 16-17. Whether described as "bind[ing], compel[ing], or otherwise freez[ing] into place," *Cal. Trucking*, 996 F.3d at 664, this test is indistinguishable from the "prescrib[ing]" and "forc[ing]" tests that *Morales* and *Ginsberg* rejected, *Ginsberg*, 572 U.S. at 279; *Morales*, 504 U.S. at 385. Whatever the synonym, none is a

"prerequisite for … preemption." *Ginsberg*, 572 U.S. at 279 (citation omitted).

The plain language of the ADA's preemption provision forecloses such a crabbed reading. Interpreting the ADA to preempt only state laws that "actually prescrib[e] rates, routes, or services" would "read[] the words 'relating to' out of the statute." *Morales*, 504 U.S. at 385. "Had the statute been designed to preempt state law in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes, and services.'" *Id.* But that is not what Congress wrote, and in fact, it rejected a bill that would have substituted "determining" for "relating to." *Id.* at 386 n.2. In addition, if the ADA's preemption provision had so "limited" effect, "no purpose would be served by" the later subsection "preserv[ing] to the States certain proprietary rights over airports." *Id.* at 386; *see* 49 U.S.C. § 14713(b)(3).

The Ninth Circuit's restrictive view of preemption also thwarts the ADA's underlying policy of deregulation. It is hard to imagine how any generally applicable law would "bind, compel, or otherwise freeze into place" specific prices, routes, or services. *Cal. Trucking*, 996 F.3d at 664. Yet a generally applicable statute can undermine the ADA's deregulatory aim "just as surely" as state common-law rules, statutes, or regulations. *Ginsberg*, 572 U.S. at 283. And "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." *Morales*, 504 U.S. at 386. Indeed, essentially exempting generally applicable laws would resurrect the "patchwork of state service-determining laws, rules, and regulations" that the ADA was designed to eliminate. *Rowe*, 552 U.S. at 373.

The proper standard for ADA preemption, as this Court and several circuits have recognized, is whether state law has "a 'significant impact'" on carrier rates, routes, or services. *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390).

### B. California's Break Laws Would Have A Significant Impact On Virgin's Rates, Routes, And Services

Under the "significant impact" doctrine recognized by this Court and other circuits, ADA preemption is inescapable here. As the United States agreed as amicus below, completely relieving flight attendants of their duties as required by California's break laws would have a severe impact on airlines' prices, routes, and services. And while the Ninth Circuit thought that adding flight attendants would help eliminate disruptions caused by breaks, its solution would have an impermissible impact of its own.

#### 1. Relieving flight attendants of their duties would disrupt airline operations

Relieving flight attendants of all duties every three-and-a-half to five hours, as California law requires, would have a massive impact on an airline's services, which at a minimum, include "the provision of air transportation." *Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) (noting circuit split on whether "services" is confined to transportation or also includes amenities like beverage service, baggage handling, and passenger assistance). FAA regulations require flight attendants to be on duty throughout a flight. *See supra* at 7. Forcing flight attendants to take breaks every few hours would disrupt and delay air traffic: Whenever

flight attendants take state-mandated breaks, airlines cannot engage in critical operations that affect core services—including boarding, takeoff, landing, and deplaning. As the United States explained in its amicus brief below, moreover, "[r]elieving [flight] attendants of all duty while inflight or even taxiing would clearly interfere with duties prescribed by federal regulations," including routine and emergency safety responsibilities. Brief for the United States as Amicus Curiae, *Bernstein*, *supra*, at 20.

Flight attendants are essential to ensuring that all of these operations function smoothly, often within narrow windows of availability on runways and at gates. But state-mandated break periods would fall at unpredictable times due to weather, maintenance, and other contingencies. So, for example, if a flight were grounded because of a passing thunderstorm, and then were cleared for takeoff just as state break rules kicked in at the three-and-a-half-hour mark of a shift, the passengers could be left sitting on the tarmac waiting for the flight attendants' breaks to end. And because flights operate on tight schedules and crowded runways, such delays would have ripple effects: One plane delayed by a mandatory break could delay the next plane in the queue, which could delay another from landing, which would cause missed passenger connections, and so on. Appellants' Excerpts of Record at 671-72 ¶¶ 4-5, *Bernstein*, No. 19-15382 (9th Cir.), ECF No. 25-3. Allowing state law to interfere with these tightly scheduled operations would have precisely the type of "significant impact" on airline services that the ADA's preemption clause prevents. *Rowe*, 552 U.S. at 375 (emphasis omitted) (citation omitted); *see* Brief for the United States as Amicus Curiae, *Bernstein*, *supra*, at 22 (requiring

airlines "to shift flight schedules to accommodate …state-mandated breaks" would have "a significant impact throughout the country and internationally").

### 2. Adding more flight attendants would create new adverse impacts

The Ninth Circuit suggested that airlines could add more flight attendants to each plane, allowing them to cycle on and off duty to facilitate mandatory breaks without disruption. App. 18a; *see* App. 66a. But that is no solution because it, too, would have an impermissible effect on prices, routes, and services.

*First*, adding flight attendants would significantly affect services by taking away available seats on every flight, depriving some passengers of the very core service of air travel. Only "*some* [Virgin] aircraft … ha[ve] an extra jump seat," Appellees' Supplemental Excerpts of Record at 1241, *Bernstein*, No. 19-15382 (9th Cir.), ECF No. 68-1 (emphasis added), and even then, any extra seat is often occupied by commuting employees, *see id.* at 1133. The ADA does not let states determine how many seats are available for passengers by forcing airlines to add flight attendants any more than states can directly regulate the seating configuration of planes. *Cf. Witty*, 366 F.3d at 383.

Moreover, California's break rules would require *multiple* extra attendants per flight. FAA rules require a "rest period" of "at least 9 consecutive hours" after any "duty period of 14 hours *or less*." 14 C.F.R. § 121.467(b)(2) (emphasis added). And a duty period ends whenever a flight attendant is "release[d]" from duty. *Id.* § 121.467(a). This means that a flight attendant who is released from duty—as California law requires for every meal and rest break—cannot "commence[]" working again for at least nine hours. *Id.* at

§ 121.467(b)(2). If state regulation of even a *single* customer's membership in a frequent flier program impermissibly impacts services by restricting "access to flights," then surely restricting access to *multiple* otherwise available seats does, too. *Ginsberg*, 572 U.S. at 284; *see Wolens*, 513 U.S. at 226 (finding ADA preemption based on impact on passengers' "access to flights").

*Second*, "reducing the number of seats on the aircraft" available for customers would also have a "significant" impact on "prices." *Witty*, 366 F.3d at 383. Indeed, requiring airlines to shift seats from paying customers to flight attendants would effectively change the price of a given seat to $0 (and correspondingly drive up the price of tickets for remaining seats). That is precisely the sort of state regulation the ADA prohibits. *See Ginsberg*, 572 U.S. at 284 (ADA preempts state laws that indirectly "eliminate[] or reduce[]" "the price of a particular ticket"); *Wolens*, 513 U.S. at 226 (ADA preempts state laws that indirectly impact airline "charges in the form of mileage credits for free tickets and upgrades").

*Third*, requiring more flight attendants would impact routes, too. Adding even a single flight attendant to a route would increase flight-attendant-related costs by "approximately 33%." Appellants' Excerpts of Record at 463-64 ¶ 81, *Bernstein,* No. 19-15382 (9th Cir.), ECF No. 25-3. These costs would make some routes unsustainable. *Id. at* 463-64 ¶¶ 81-82. As the Regional Airline Association has explained, the Ninth Circuit's decision will "likely … cause cessation of service" to some "small communities"—which are served by small planes with limited seating capacity to begin with—by making it unprofitable for airlines to fly there. Brief for Regional Airline Association as

Amicus Curiae in Support of Defendants-Appellants and Reversal at 26, *Bernstein*, No. 19-15382 (9th Cir.), 2019 WL 4060560. That impact is significant, and the ADA prevents it. *Cf. United Airlines*, 219 F.3d at 611 (finding ADA preemption based on "significant effect" on routes); *Brindle*, 211 A.3d at 937-38 (finding forbidden impact based on "reduction in service from a flight frequency opportunity").

*Finally*, the radical nature of the Ninth Circuit's "solution" underscores the significant impact that duty-free, state-mandated rest breaks would have on airline prices, routes, and services. If states' efforts to regulate a carrier's choice between providing services directly or through an independent contractor would have a forbidden "significant impact," *Mass. Delivery Ass'n*, 821 F.3d at 191-92, then surely the same is true of states dictating *how many* employees to staff on a flight. Moreover, if California can tell airlines how many flight attendants to put on each plane, then so can every other state, subjecting airplanes operating in federal airspace to a confusing "patchwork" of conflicting state regulations and undermining the ADA's core goal. *Rowe*, 552 U.S. at 373; *see Morales*, 504 U.S. at 378-79.

## III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

The question presented has nationwide importance.

**A.** Giving state-mandated, duty-free breaks to flight attendants would cast air traffic control into disarray. *See supra* at 23-25. It also would create enormous operational problems for airlines. If the ADA does not preempt California's break rules against airlines, then other states could enforce their

rules, too. While California requires a 30-minute meal break for five hours of work, *see* Cal. Labor Code § 512(a), New York (to take one example) requires a 30-minute meal break for six hours of work, to be taken at a *particular time of day* (between 11:00 a.m. and 2:00 p.m.), unless an employee starts work between 1:00 p.m. and 6:00 a.m., in which case the meal break must be 45 minutes, N.Y. Lab. Law § 162(2), (4) (McKinney). Subjecting airlines to a confusing "patchwork" of state laws undermines the very purpose of the ADA. *Rowe*, 552 U.S. at 373; *see Morales*, 504 U.S. at 378-79.

The breadth of the Ninth Circuit's reasoning exacerbates the uncertainty and cost of requiring airlines to comply with multiple states' break rules. The Ninth Circuit's logic is not limited to flight attendants; indeed, plaintiffs have already brought cases seeking breaks for other flight and ground crew, including pilots. *See Goldthorpe v. Cathay Pac. Airways Ltd.*, 279 F. Supp. 3d 1001, 1003 (N.D. Cal. 2018) (pilots); *Angeles v. US Airways, Inc.*, No. C 12-05860, 2013 WL 622032 (N.D. Cal. Feb. 19, 2013) (ground crews). And plaintiffs will no doubt try to extend the Ninth Circuit's reasoning to flight attendants who are merely passing through California, no matter where they live or are based. Airlines therefore could be forced to provide breaks for *all* flight and ground crew under the laws of *every* state that the airline happens to serve.

**B.** The possibility of adding flight attendants does not mitigate this logistical disaster. It would, however, have a forbidden significant impact on airline prices, routes, and services, to the detriment of the traveling public. *See supra* at 25-27.

Those effects will multiply if airlines are also required to provide state-mandated breaks to pilots. Allowing states to dictate the number of pilots—above the FAA's minimum requirements, *see* 14 C.F.R. § 121.385(c)—would confiscate *even more* seats that are otherwise available to customers. Adding just one pilot to every flight also would multiply costs, inevitably increasing ticket prices and jeopardizing the sustainability of certain routes. These results do not benefit anyone.

On top of that, the United States explained below that adding flight attendants would create operational problems of its own. Because federal law mandates a nine-hour break whenever a flight attendant is released from duty, *see* 14 C.F.R. § 121.467(b)(2); *supra* at 25-26, complying with California's duty-free rest period would require releasing flight attendants for nine hours after their first three-and-a-half hours of work. That not only means that hiring one additional flight attendant would be insufficient. It also would disrupt the "pairing" systems in which flight attendants typically work—coordinated multi-leg flights that enable attendants to fly to and from one city, before eventually returning to their home base. If the original flight attendants have to be replaced in the middle of a pairing, a new set of flight attendants will not necessarily be available to replace them and complete the pairing. Moreover, a flight attendant who is being relieved for a break may end up stranded away from his home base for an extended period. In other words, airlines would often need "to hire two flight attendants to do the work of one, stranding both … outside of their home base for significant periods." Brief for the United States as Amicus Curiae, *Bernstein*, *supra*, at 23.

**C.** Finally, the Ninth Circuit's reasoning extends beyond break rules, effectively insulating all laws of general applicability from the ADA's preemptive reach. That creates "an utterly irrational loophole" that will "undo" the ADA's deregulatory purpose. *Morales*, 504 U.S. at 378, 386.

## IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE COURT'S CONSIDERATION

This case is a perfect vehicle for considering the appropriate test for ADA preemption. The question presented is dispositive of the plaintiffs' meal-and-rest-break claims: Under the "significant impact" test, the ADA preempts those claims, *see supra* at 23-27; but under the Ninth Circuit's "binds to" test, the claims evade preemption and the plaintiffs are entitled to summary judgment, *see* App. 19a-21a, 27a-28a. The record below is well-developed with evidence of the immense impact that applying California's break laws will have on Virgin's prices, routes, and services. And the Court has the benefit of the considered views of the United States, which participated as an amicus below.

Letting the Ninth Circuit's decision stand here also would have more drastic consequences than in *Dilts*. As the United States explained in *Dilts*, applying state break laws to airlines rather than *intrastate* motor carriers "entails significantly different considerations": "[U]nlike motor carriers, an airline cannot readily interrupt tightly scheduled flight operations to accommodate state-mandated rest breaks for its staff." Brief for the United States as Amicus Curiae, *Dilts*, *supra*, at 25. The United States again stressed that distinction in this case, agreeing with Virgin that changing flight schedules "to accommodate breaks

would have a significant impact throughout the country and internationally," and that adding flight attendants is no solution. Brief for the Unites States as Amicus Curiae in *Bernstein*, *supra*, at 22; *see also supra* at 23-27.

In addition, the need for this Court's intervention is more acute than it was in 2015 when this Court denied certiorari in *Dilts*. At that time, perhaps it was reasonable to hope that the Ninth Circuit would not apply its "binds to" language as a categorical rule: Such a rule conflicts with *Ginsberg*, decided only a few months before *Dilts*, and *Dilts* itself analyzed the impact that meals and rest breaks would have on motor carrier's prices, routes, and services. *See Dilts*, 769 F.3d at 648-49. In the years since *Dilts*, however, the Ninth Circuit has clarified—repeatedly and emphatically—that its rule is both categorical and sweeping. *See supra* at 15. Unless a generally applicable law binds a carrier to specific prices, routes, or services, the Ninth Circuit will not even consider the law's impact. *See* App. 19a-21a.

The Court should intervene now, before the Ninth Circuit's decision wreaks nationwide havoc in the airline industry.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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August 19, 2021