No. 21-260

In the
Supreme Court of the United States

VIRGIN AMERICA, INC, *et al.*,

Petitioners,

v.

JULIA BERNSTEIN, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Airline Deregulation Act expressly preempt the application of California's generally applicable labor laws governing employee meal and rest breaks to California-based flight attendants employed by a California-based airline, while they are operating flights that take off, fly, and land entirely within California?

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INTRODUCTION

Petitioners ask the Court to grant review to consider a question this case does not present. Virgin America, Inc. ("Virgin")'s statement of the Question Presented assails the Ninth Circuit panel below for adopting a "categorical rule" that the Airline Deregulation Act ("ADA") "does not preempt generally applicable background rules unless they *bind* the carrier to a particular price, route, or service." Pet. at i (brackets and quotation marks omitted). The Ninth Circuit has adopted no such rule, and the rule it *actually applied* below bears little resemblance to it. The reasons for granting the petition advanced by Virgin—from the purported conflict with this Court's precedent and the precedent from other circuits, to the various forms of chaos the rule will supposedly engulf the airline industry in—are thus all critically premised on the application of a "categorical rule" that does not exist. Once the genuine nature of the preemption standard applied below is seen, Virgin's arguments all come apart at the seams. The Court should deny the petition.

The ADA preemption standard *actually* adopted by the Ninth Circuit, and applied by the panel below, is this: the Ninth Circuit considers several flexible factors in determining whether a state law is impermissibly "related to" an airline's "price, route, or service" under the ADA, 49 U.S.C. § 41713(b)(1), including (1) whether the law regulates airlines in their relationship with their customers rather than their relationship with their workers, *see California Trucking Ass'n*

v. Bonta, 996 F.3d 644, 657 (9th Cir. 2021) (citing *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 375 (2008)); and (2) whether the law regulates "how the airline behaves as an employer," rather than "operat[ing] at the point where carriers provide services to customers," *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015). Where these two factors are both present, the Ninth Circuit generally will find preemption only if the challenged labor law "*binds* the carrier to a particular price, route or service," *id.* at 646—though even in this narrow context, the court has indicated that it would hold preempted a law that fails this "binds to" test if it "so significantly impact[s] the employment relationship" that it *indirectly* "binds … carriers to specific prices, routes, or services at the consumer level," *Bonta*, 996 F.3d at 661-62.

The panel below correctly held that under this test, the generally applicable California labor protections at issue—periodic meal-and-rest-break requirements—may validly be applied to California-based flight attendants working for a California-based airline, while (but only while) they are staffing flights that take off, fly, and land entirely within California's borders. California's break requirements are generally applicable protections that affect Virgin as an employer, not as a provider of air travel services. And far from "so significantly impact[ing]" Virgin that they directly or indirectly "bind, compel, or otherwise freeze into place a particular price, route, or service," *id.* at 661, 664, it is undisputed that Virgin can comply with

those requirements by simply staffing any wholly-intrastate flights with an additional flight attendant—at the marginal cost of "$100 per flight according to Virgin's estimate," Pet.App. at 59a.

The Ninth Circuit's preemption standard, as applied here, appropriately implements the longstanding rule that when a federal statute legislates "in a field which the States have traditionally occupied," the courts must "start with the assumption that the historic police powers of the States were not to be superseded." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). California's choice to grant mandatory rest breaks to California employees working within California's borders for a California business lies at the heart of the State's traditional police power. The Ninth Circuit's flexible ADA preemption standard merely recognizes, in accord with both the statutory text and the fundamental principles of our federalist constitutional structure, that the enactment of the ADA did not upend our constitutional system and effect a federal takeover of the labor law governing airlines.

The reason Virgin's petition invents and then attacks its straw man, rather than the standard actually applied by the courts below, is not hard to guess. The Ninth Circuit's *genuine* preemption standard is fully consistent with this Court's precedent and the precedent of the other circuits. None of this Court's cases even relates to the narrow context to which the Ninth Circuit's standard is limited: generally applicable labor regulations. And, contrary to Virgin's arguments, this Court has never said anything to proscribe

the use of the preemption factors the Ninth Circuit consults—factors which all fit comfortably with the text of the ADA's preemption clause. And while Virgin cites a laundry-list of circuit cases holding—unsurprisingly, and *consistent* with the Ninth Circuit's jurisprudence—that a state law can be preempted because of its significant effect on prices, routes, or services, none of the cases it cites are actually contrary to the decision below or the preemption standard it applies. For none of those cases involves the application of state meal-and-rest-break requirements; the vast majority do not even involve labor protections; and the handful that do are either *in accord with* the Ninth Circuit's approach or turn on fact-bound assessments of the impact of other labor rules not remotely implicated here.

Finally, whether or not Virgin's imaginary version of the Ninth Circuit's ADA preemption standard would "wreak[ ] nationwide havoc in the airline industry," Pet. at 31, the court's *actual* standard plainly will not. The decision below does nothing more than apply California's generally applicable meal-and-rest-break requirements to California-based flight attendants who work for a California-based employer, while they are working on flights that take place entirely within California. It has been clear that California's break requirements apply in this narrowly confined context at least since the Ninth Circuit decided *Dilts*—a decision that this Court declined to review—seven years ago. Interstate commerce did not grind to a halt then, and Virgin provides no reason to think that it will *this*

time, now that the Ninth Circuit has simply reiterated that it really meant what it said in *Dilts*.

Virgin's petition accordingly fails on its own terms, and it should be denied.

STATEMENT

I. Virgin, a California-Based Airline, Failed To Give Its California-Based Flight Attendants Operating Intra-California Flights the Meal-and-Rest Breaks Required by California Law.

Petitioners assert that the decision below will "wreak[ ] nationwide havoc in the airline industry," forcing airlines "to provide breaks for *all* flight and ground crew under the laws of *every* state that the airline happens to serve." Pet. at 28, 31. The reality is far more mundane: the courts below did nothing more than apply California's meal-and-rest-break rules to a California-based airline employing California-based flight attendants on intrastate flights that take off, fly, and land entirely within California. The uncontroverted facts are these:

Petitioner Virgin America, Inc., was a California employer that set company policy in California and employed a California workforce.[1] Virgin's headquarters were located in Burlingame, California, and that

[1] Virgin was acquired by Alaska Air Group, Inc., in 2017 and was thereafter merged with Petitioner Alaska Airlines, Inc. The claims in this case all relate to conduct that preceded Virgin's acquisition and merger.

is where it trained all of its flight attendants—a location that it chose in return for millions of dollars in subsidies from the State, based on its "commit[ment] to hiring and training local workers." Pet.App. at 30a; 9th Cir. Doc. 55-3, SER674 (Dec. 27, 2019). Virgin touted its status as "the only airline that calls California its home," *id.* at SER684, and its flight routes fully supported the boast: "From 2011 through 2016, the daily percentage of Virgin's flights that arrived in or departed from California airports was never less than 88%, and during some years reached 99%." Pet.App. at 3a (quotation marks omitted).

The class of flight attendants represented by Respondents have equally "deep ties" to California. *Id.* at 41a. The class is comprised entirely of flight attendants who "Virgin itself classified … as being California-based" and who spent more time working in California than any other State. *Id.* at 23a. Indeed, between 92% and 97% of all flights that Respondents serviced during the relevant period arrived in, departed from, or flew wholly within California. 9th Cir. Doc. 55-5, SER1006, SER1031 (Dec. 27, 2019). And importantly, although the flight attendants performed some work outside California, the meal-and-rest-break claims at issue here *are limited to wholly intrastate flights*—that is, flights that *took off, flew, and landed entirely within California*. Pet.App. at 47a-48a.

II. Federal Law Leaves the Labor Law Governing Airlines to the States.

Federal law does not comprehensively regulate the labor relations of the airline industry. Rather, "the establishment of labor standards falls within the traditional police power of the State"—a settled principle that applies with equal force to airlines. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 259 n.6 (1994). Although "Congress has enacted regulations touching on numerous aspects of the airline industry," it *has not* "preempt[ed] the entire field of aviation." *Hirst v. Skywest, Inc.*, 2016 WL 2986978, at *12 (N.D. Ill. May 24, 2016), *aff'd in part*, 910 F.3d 961, *cert. denied*, 139 S. Ct. 2745, 2759 (2019). Indeed, the Fair Labor Standards Act, which governs airlines like Virgin, expressly *preserves* state wage and hour law from preemption. *See* 29 U.S.C. § 218(a). And when Congress has regulated airlines, it has imposed specific standards that set a federal *floor*—not a federal *ceiling*.

The limited nature of federal regulation in this context accords with the basic ground rules of our constitutional structure. "The Framers split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995), carefully separating the federal and state spheres so as to "secure[ ] the freedom of the individual," *Bond v. United States*, 564 U.S. 211, 221 (2011). "The federal structure allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic

processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* (quotation marks omitted). The labor policies governing the in-state conduct of an in-state employer have long been understood to lie at the heart of the States' traditional authority. And where a party contends that Congress has radically "upset the usual constitutional balance of federal and state powers" by seizing authority over such a core state concern, this Court has long cautioned that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted).

Virgin nonetheless claims that "the federal government, not states, is primarily responsible for regulating airlines," based on three statutory provisions. Pet. at 6. None of them, alone or in combination, come close to establishing any sort of federal takeover of the labor law governing airlines.

A. First, Virgin asserts that "[t]he United States Government has exclusive sovereignty of airspace of the United States," based on a provision that originated in the Air Commerce Act of 1926, 49 U.S.C. § 40103(a)(1). But as this Court has expressly held, because this provision is "bottomed on the commerce power of Congress, not on national ownership of the navigable air space," it "[does] not expressly exclude the sovereign powers of the states." *Braniff Airways v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 595, 597 (1954). Instead, state law

validly applies to conduct in the airspace over its territory so long as it is "consistent with" federal law, *id.* at 597, under ordinary "principles of conflict preemption," *Skysign Int'l, Inc. v. City & Cnty. of Honolulu*, 276 F.3d 1109, 1117 (9th Cir. 2002).

Indeed, Virgin effectively concedes that "[s]ome state laws, such as prohibitions on gambling and prostitution," may be validly applied to airlines. Pet. at 6 (quotation marks omitted). This concession is flatly inconsistent with the notion that the federal government genuinely has "exclusive sovereignty" over airspace and airlines, *id.*, so that is the end of this makeweight argument.

B. Nor does the ADA preempt the application of state labor law to airlines. That statute's preemption clause provides:

> Except as provided in this subsection, 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 ….

49 U.S.C. § 41713(b)(1). While this language is "deliberately expansive," *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992), it "does not mean the sky is the limit," *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013). And as discussed in greater detail below, *infra* Part I, the text and purpose of this preemption clause, and this Court's precedent

interpreting it, all show that it does not sweepingly invalidate generally applicable state labor law with respect to airlines. Indeed, given the absence of any *federal* labor code governing airlines, such a result would mean that airlines, unlike other major private industries, have the ability to operate *free from any comprehensive labor restrictions whatsoever*.

C. Finally, Virgin cites a regulation adopted by the Federal Aviation Administration ("FAA"), which generally provides that no airline "may assign a flight attendant to a scheduled duty period of more than 14 hours." 14 C.F.R. § 121.467(b)(1). Virgin has abandoned, before this Court, its unsuccessful claim that this regulation itself preempts California's labor law. *See* Pet.App. at 13a-19a. That was a wise choice, for contrary to Virgin's sweeping description, this regulation merely sets discrete federal *minimum* break standards—and it says *nothing* to preclude States from setting more protective limits. It is hornbook law that where the federal government establishes a *floor* beneath which state limits may not fall—"not a ceiling above which they may not rise"—a State is free to impose more stringent requirements. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). Indeed, when the FAA promulgated the regulation at issue, it expressly found that it would "not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." 59 Fed. Reg. 42,974, 42,991 (Aug. 19, 1994).

Virgin nonetheless asserts that applying California's meal-and-rest-break rules to flight attendants would be contrary to the FAA's supposed requirement that they must remain "on duty at all times." Pet. at 7. No such duty exists. None of the regulatory provisions cited by Virgin imposes such a duty, and it has concocted it out of little more than thin air. Instead, all of the provisions in Virgin's string-cite merely (1) assign flight attendants certain responsibilities during boarding, takeoff, landing, and deplaning, *see* 14 C.F.R. §§ 121.391(d), 121.542(a); 121.575(c); (2) generically indicate that their duties "include … cabin-safety-related responsibilities," *id.* § 121.467(a); or (3) give them certain duties in the event of "an emergency or a situation requiring emergency evacuation," *id.* § 121.397, *see also id.* § 121.135(b)(12). None of these rules requires flight attendants to *continuously exercise* their duties nonstop, without taking a break for 14 hours straight.

D. In sum, federal law generally leaves the States free to exercise "their traditional role in regulating employment relationships" in the context of the airline industry. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). Pursuant to that role, California requires California employers to give their workers a 30-minute meal break for every five hours worked, and an additional rest break "based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." IWC Wage Order 9-2001 § 12(A); *see also id.* § 11; CAL. LABOR CODE § 512(a). These break

requirements are designed to further critical "health and safety considerations," since "[e]mployees denied their rest and meal periods face greater risk of work-related accidents and increased stress." *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 296 (Cal. 2007).

There is no dispute that Virgin did not comply with these requirements, even for California-based flight attendants on flights that operated wholly within California's borders. Pet.App. at 22a, 33a.

III. Proceedings Below.

Respondents brought suit, challenging these (and other) violations of California labor law. The district court certified a class and, ultimately, granted Respondents summary judgment on their meal-and-rest-break claims. The court rejected Virgin's defense that California's break requirements were preempted by the ADA. Pet.App. at 65a-67a.

Virgin appealed, and the Ninth Circuit affirmed the district court's rejection of Virgin's preemption claims. The panel unanimously concluded that California's meal-and-rest-break requirements are "not preempted under the ADA," since a generally applicable state labor law requirement that bears no "reference to rates, routes, or services" falls afoul of the ADA only if it "directly or indirectly, *binds* the carrier to a particular price, route, or service"—which California's break mandate plainly does not do. *Id.* at 20a-21.

Virgin petitioned for rehearing of its ADA preemption claim, but its petition was denied, with no judge on the *en banc* court requesting a vote. *Id.* at 2a.

REASONS FOR DENYING THE PETITION

Virgin's petition is based on the following description of the rule applied below: "the Ninth Circuit … holds that the ADA does not preempt generally applicable 'background' rules unless they '*bind* the carrier to a particular price, route, or service' "—a rule that, according to Virgin, "is both categorical and sweeping." Pet. at i, 31.

This description of the Ninth Circuit's jurisprudence is not accurate.

What the Ninth Circuit precedent applied by the panel below *actually* says is this: Where a State's law is generally applicable, rather than targeted at the airline industry, and impacts an airline's "relationship with [its] workforce," rather than its "relationship with its customers," then it generally is preempted by the ADA only if it either directly or indirectly "*binds* the carrier to a particular price, route or service or otherwise freezes them into place or determines them to a significant degree." *Bonta*, 996 F.3d at 657-58 (quotation marks omitted).

That nuanced, contingent standard is neither "categorical" nor "sweeping." Pet. at 31. Nor is it contrary to this Court's precedent or the precedent of any other circuit.

I. The Ninth Circuit's Interpretation of the ADA Is Correct and Consistent with this Court's Precedent.

A. The Ninth Circuit Does Not Apply the Test Virgin Describes.

The ADA provides that "a State … may not enact or enforce a law … related to a price, route, or service of an air carrier." 49 U.S.C. § 41713. While this standard is "deliberately expansive," *Morales,* 504 U.S. at 384, this Court has cautioned (in the context of the materially identical preemption clause in the Federal Aviation Administration Authorization Act of 1994 ("FAAAA")) that the text's apparent breadth "does not mean the sky is the limit," *Dan's City*, 569 U.S. at 260, and that the preemption clause does not extend to state laws that affect prices, routes, or services in "only a tenuous, remote, or peripheral manner," *Rowe,* 552 U.S. at 371 (quotation marks omitted). The Ninth Circuit's cases interpreting the ADA's (and FAAAA's) preemption clauses have established several principles governing how the "related to" text applies in specific instances.

First, if a state law falls into the category of "generally applicable background regulations that are several steps removed from prices, routes, or services," Ninth Circuit precedent indicates that this weighs against preemption. *Dilts*, 769 F.3d at 646; *see also California Trucking Ass'n v. Su*, 903 F.3d 953, 966 (9th Cir. 2018). Second, the Ninth Circuit has held that "[l]aws are more likely to be preempted when

they operate at the point where carriers provide services to customers," *Dilts*, 769 F.3d at 646—and correspondingly less likely to be preempted where they regulate "the contractual relationship … between a carrier and its *workforce*," *Su*, 903 F.3d at 962; *see also Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1023-24 (9th Cir. 2020). Where these two considerations converge—that is, where a law (1) affects airlines "solely in their capacity as members of the general public," *Bonta*, 996 F.3d at 657, and (2) regulates the "relationship … between a carrier and its *workforce*" rather than its customers, *Su*, 903 F.3d at 962—Ninth Circuit precedent instructs that the law is generally preempted only if it "directly or indirectly, *binds* the carrier to a particular price, route or service," *Dilts*, 769 F.3d at 646.

Even in the specific context of generally applicable labor laws, however, this "binds to" test is not absolute. The Ninth Circuit's decisions have "acknowledged that the scope of [ADA] preemption" may be "broader" in some cases, *Miller*, 976 F.3d at 1025, potentially encompassing "a generally applicable law" that "so significantly impact[s] the employment relationship between … carriers and their employees that it *effectively* binds … carriers to specific prices, routes, or services at the consumer level," *Bonta*, 996 F.3d at 660-61 (emphasis added). The Ninth Circuit has made clear, however, that the mere fact that such a law will "raise the overall cost of doing business" does not suffice—for "[n]early every form of state regulation carries some cost." *Dilts*, 769 F.3d at 646.

The court below simply applied these principles to a context where their result is clear and straightforward. As the panel noted, in *Dilts* the Ninth Circuit held "that the FAAA[A] did not preempt California's meal and rest break requirements as applied to the [intrastate] trucking industry." Pet.App. at 21a. California's break requirements, the court in *Dilts* explained, are generally applicable "background rules for almost *all* employers doing business in the state of California," and they regulate a carrier's relationship with its workforce rather than "interfering at the point that [it] provides services to its customers," 769 F.3d at 647, 649. Because the requirements "do not 'bind' motor carriers to specific prices, routes, or services," and merely give rise to "a modestly increased cost of doing business," they are not preempted under the FAAAA. *Id.* at 647, 648. Every one of these considerations is as true of the airline industry as the intrastate trucking industry, and the Panel thus concluded that "[t]he reasoning of *Dilts* … applies with equal force here." Pet.App. at 21a.

When the actual nature of the Ninth Circuit's ADA preemption standard is understood, Virgin's criticisms of the decision below collapse. Virgin says, remarkably, that the Ninth Circuit's cases establish an "impossible standard" that "refuses even to consider a state law's impact on prices, rates, or services." Pet. at 3, 15. In truth, the court's precedent expressly preserves "the possibility that a generally applicable law could so significantly impact the employment relationship between motor carriers and their employees

that it effectively binds motor carriers to specific prices, routes, or services at the consumer level." *Bonta*, 996 F.3d at 660-61.

Virgin says that the Ninth Circuit's test is "illogical on its own terms" since a "generally applicable background rule" "[b]y definition … does not bind the carrier to the particulars of a price, route, or service." Pet. at 3. That is not so, for a law that is generally applicable to many industries and activities logically may, as applied to airlines, affirmatively dictate their prices, routes, or services. (Think, for example, of a general price-control law applied to the food and beverages sold by the airline in-flight). To be sure, generally applicable laws, because of their nature, will only rarely have this effect—but this serves only to *underscore the reasonableness* of the Ninth Circuit's decision to weigh this factor against finding preemption.

Virgin says that the Ninth Circuit's "binds to" test is "sweeping." Pet. at 31. In reality, the standard is limited to the narrow context where two other considerations—the fact that the challenged law is generally applicable and limited to the employment context—already indicate that the relationship between the challenged law and an airline's prices, routes, and services is extremely attenuated.

The Ninth Circuit's preemption jurisprudence thus bears little-to-no resemblance to the "categorical rule" Virgin has conjured for the purpose of attacking in its petition. Pet. at 15.

B. The Actual ADA Preemption Standard Applied Below Is Consistent with this Court's Precedent.

As explained, the narrow rule set forth in the Ninth Circuit's cases (and applied by the Panel here) is that where a state law is both generally applicable and regulates a carrier's relationship with their employees rather than their customers, there is generally no preemption unless the law has a direct or indirect binding effect on the carrier's prices, routes, or services. That rule is not at odds with this Court's case law. It couldn't be, for none of the Court's cases involve generally applicable labor law.

1. This Court first encountered the ADA's preemption clause in *Morales*. In that case, airlines challenged the application of guidelines adopted by the National Association of Attorneys General ("NAAG"), which interpreted their member-States' deceptive-advertising and trade-practice laws as entailing "detailed standards governing the content and format of airline advertising." 504 U.S. at 379. The Court held that NAAG's interpretation of state law was obviously preempted, since "the guidelines establish binding requirements as to how tickets may be marketed if they are to be sold at given prices," and "compelling or restricting price advertising surely 'relates to' price." *Id.* at 388, 389 (brackets and quotation marks omitted). To be sure, the *Morales* Court, in dicta, described the ADA's preemption clause in broad terms—as "deliberately expansive" and "conspicuous for its breadth." *Id.* at 384. But it also emphasized that

the clause *did not* reach restrictions that affect prices, routes, or services "in too tenuous, remote, or peripheral a manner," and that its interpretation of the ADA did not, for example, "set out on a road that leads to preemption of state laws against gambling and prostitution as applied to airlines." *Id.* at 390.

Morales's somewhat ambivalent dicta aside, the root fact is that the case involved state restrictions that "impact[ed] the … carrier's relationship with its customers" rather than its "relationship with its workforce." *Bonta*, 996 F.3d at 657. Accordingly, the Ninth Circuit standard applied below *cannot* conflict with the result in *Morales*, since the lower court's standard by its own terms *would not apply* to the airline advertising restrictions at issue in that case.

2. The Ninth Circuit's standard is also consistent with this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), and for the same reason. *Wolens* arose from a class action by airline customers challenging, under Illinois's consumer fraud statute, changes American Airlines made to its frequent flyer program in 1988. The customers alleged that these changes "devalued credits" that frequent flyers had accrued by imposing new "limits on seats available" and "blackout dates." *Id.* at 224-25. *Wolens* noted that *Morales* had interpreted the ADA's preemption clause as "broadly preemptive," but it also emphasized that the case "left room for state actions 'too tenuous, remote, or peripheral to have pre-emptive effect.' " *Id.* at 224, 225 (ellipsis omitted). Because application of the state consumer fraud statute would "serve[ ] as a

means to guide and police the marketing practices of the airlines," the Court had little trouble concluding that it would impermissibly "relate to 'rates,' *i.e.,* American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.,* access to flights and class-of-service upgrades." *Id.* at 227, 228.

Like *Morales*, then, *Wolens* involved the application of a generally applicable state law to an airline's relationship with *its customers*—rather than *its workforce*—so the case does not even make contact with the Ninth Circuit preemption caselaw applied below.

3. Finally, *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014), is even further afield from the issues in this case. In *Ginsberg*, a class of customers challenged, under a variety of common-law theories, changes in Northwest Airline's frequent flier program akin to the changes at issue in *Wolens*. The Court reaffirmed *Wolens* and then briskly dispatched a series of arguments that are utterly irrelevant in this case: whether the ADA's preemption clause applies "only to legislation … but not to a common-law rule" (it applies to both); whether the minor distinction between the frequent-flyer program changes at issue in *Ginsberg* and *Wolens* made any difference (the "proffered distinction ha[d] no substance"); and whether the common-law good-faith-and-fair-dealing claim at issue was "based on a state-imposed obligation" and thus preempted under *Wolens*'s holding (it was). *Id.* at 281, 285. None of these issues has any relevance in this case, and *Ginsberg*'s resolution of them does not conflict in the

slightest with the Ninth Circuit precedent applied below.

4. Virgin's attempts to show that the Ninth Circuit's ADA preemption standard nonetheless "cannot be squared with this Court's decisions," Pet. at 16, are completely unpersuasive.

Virgin argues that the Ninth Circuit's jurisprudence is contrary to this Court's precedent because one factor it looks to is whether the challenged state restrictions are generally applicable "normal background rules for almost *all* employers doing business in the state." *Dilts*, 769 F.3d at 647. But while *Morales* does certainly reject the suggestion "that *only* state laws specifically addressed to the airline industry are pre-empted," 504 U.S. at 386 (emphasis added), this Court has *never* said that a law's general applicability is *irrelevant* to the inquiry whether a law is sufficiently "related to" prices, routes, or services.

Indeed, the Court's subsequent decision in *Rowe* makes clear that whether a challenged state law is generally applicable—and thus affects carriers "solely in their capacity as members of the general public"—*is in fact* a relevant factor in the preemption inquiry. 552 U.S. at 375. *Rowe* concerned the FAAAA's similarly-worded preemption clause and applied the same standard as *Morales* and the Court's other ADA cases. *Id.* at 370. The case dealt with a Maine law "regulat[ing] the delivery of tobacco to customers within the State." *Id.* at 367. Because the law regulated "the essential details of a motor carrier's system for picking

up, sorting, and carrying goods," the Court held it was obviously related to a carrier's "service" and thus preempted. *Id.* at 373.

The Court also held that there is no "implied 'public health' or 'tobacco' exception to federal preemption." *Id.* at 374. It noted, however, "[t]his is not to say that this federal law generally pre-empts state public health regulation" that "broadly prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public"—for such a generally applicable law may "affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner' " to trigger preemption. *Id.* at 375 (quoting *Morales*, 504 U.S. at 390). But because Maine's law was "not general" and instead "aim[ed] directly at the carriage of goods," it could not benefit from this consideration. *Id.* at 375-76. *Rowe* thus endorses and conducts the very inquiry—whether a challenged law "aim[s] directly" at prices, routes, or services or merely affects carriers "solely in their capacity as members of the general public," *id.* at 375—that Virgin claims the Ninth Circuit *may not* conduct.

Nor is the Ninth Circuit preemption standard applied below contrary to *Morales*'s rejection of the argument that the ADA "only pre-empts the States from actually prescribing rates, routes, or services." Pet. at 16. As an initial matter, and as discussed at length above, the Ninth Circuit's "binds to" inquiry only applies where a state law is both generally applicable and *limited to a carrier's employment relations*—a specific context that is significantly different from the

types of laws at issue in any of this Court's precedents. And even in this narrow context, the Ninth Circuit's preemption standard *reaches beyond* laws "actually prescribing rates, routes, or services." *Id.* Rather, the Ninth Circuit *also* asks whether the challenged law "so significantly impact[s] the employment relationship" that it has the *implicit effect* of dictating "prices, routes, or services at the consumer level." *Bonta*, 996 F.3d at 660-61.

C. The Ninth Circuit's Standard Is Also Consistent with the ADA's Text and Purpose.

What has been said thus far also suffices to dispose of Virgin's argument that the Ninth Circuit preemption inquiry applied below is contrary to the ADA's text and purpose. Petitioners' argument on this score is, again, wholly premised on their misinterpretation of Ninth Circuit law as imposing a sweeping "categorical rule," Pet. at 21, and so it fails for the reasons already discussed. And the flexible inquiry *actually* applied by the court below is fully consistent with—and in fact faithfully implements—the ADA.

In interpreting the ADA's preemption clause, "the key phrase, obviously, is 'relating to.' " *Morales*, 504 U.S. at 384. But as the case law interpreting this phrase in the ADA and other analogous statutes has shown, the meaning of that key phrase is not self-evident. "Perhaps the author of *Morales* said it best: 'applying the "relate to" provision according to its terms was a project doomed to failure, since, as many a

curbstone philosopher has observed, everything is related to everything else.' " *Bonta*, 996 F.3d at 656 (quoting *California Div. of Lab. Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring)). Merely pointing to the breadth of the "related to" phrase thus "provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended—which it is not." *Dillingham Construction*, 519 U.S. at 335-36 (Scalia, J., concurring).

Of course, the ADA does not contain the words "generally applicable," "workforce," "customers," or "binds to"—or, for that matter, the phrase "significant impact." Pet. at 21, 23. Rather, these formulations merely describe the principles that this Court, and the lower courts, have looked to in seeking to discern whether a challenged law is sufficiently "related to" prices, routes, and services to trigger preemption—or, instead, merely affects those things "in only a tenuous, remote, or peripheral manner." *Rowe*, 552 U.S. at 371 (quotation marks and ellipsis omitted). And the factors incorporated in the Ninth Circuit standard applied by the panel here are all sensible measures—consistent with the ADA's text and common sense—for gauging whether a law bears a sufficient relationship to the forbidden matters to require preemption.

Asking whether the challenged law directly aims at airlines or instead affects them indirectly as members of the general public is plainly relevant to the determination of whether the law is sufficiently "related to" rates, routes, and services. *See, e.g.* "Relate to,"

Merriam-Webster.com ("to be about (someone or something)"), https://bit.ly/3Bg2wbr. True, a law's general applicability cannot be *dispositive* of that determination. *See Morales*, 504 U.S. at 386. But Virgin's assertion that it is *irrelevant* to the determination is itself inconsistent with "[t]he plain language of the ADA's preemption provision." Pet. at 22.

Similarly, the Ninth Circuit's reluctance to find preemption of laws that regulate an airline's employment relationship also makes complete sense. It is consistent with the ADA preemption clause's focus on *customer*-facing issues—the prices, routes, and services that airlines make available to the flying public. It respects this Court's admonition that even within the context of interstate air travel, "the establishment of labor standards falls within the traditional police power of the State." *Hawaiian Airlines*, 512 U.S. at 259 n.6. And it respects the fact that the ADA cannot be given "a degree of pre-emption that no sensible person could have intended." *Dillingham Construction*, 519 U.S. at 335-36 (Scalia, J., concurring). Indeed, Virgin's theory of preemption would threaten to invalidate all manner of police-power regulations that might affect an airline's bottom-line, from the building codes and zoning rules governing airports to the labor, workplace safety, and anti-discrimination rules that govern the factories that manufacture airplanes.

Considerations like these have led at least six courts of appeals—to Respondents' knowledge, every circuit to have addressed the issue—to apply standards that disfavor ADA preemption of generally

applicable labor laws. *See, e.g.*, *Bonta*, 996 F.3d at 657; *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 136 (3d Cir. 2018); *Watson v. Air Methods Corp.*, 870 F.3d 812, 818 (8th Cir. 2017); *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1054 (7th Cir. 2016); *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 87-88 (1st Cir. 2011); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1259 (11th Cir. 2003).

Inquiring whether a law's impact on the employment relationship is so significant that it either explicitly or implicitly binds airlines to offer its customers specific prices, routes, or services also fits comfortably with the plain meaning of ADA's "related to" language. *See, e.g.*, "Related," CAMBRIDGE DICTIONARY ('influenced by, or caused by something"), https://bit.ly/3kyEmlY. Indeed, when this Court has found preemption it has *repeatedly* emphasized the binding nature of the preempted laws. *See Morales*, 504 U.S. at 388 ("the guidelines establish binding requirements as to how tickets may be marketed if they are to be sold at given prices"); *Wolens*, 513 U.S. at 228 ("the Consumer Fraud Act serves as a means to guide and police the marketing practices of the airlines"); *Rowe*, 552 U.S. at 372 ("the law will require carriers to offer a system of services that the market does not now provide … [and] would freeze into place services that carriers might prefer to discontinue in the future").

Accordingly, each part of the Ninth Circuit's standard faithfully implements "[t]he plain language of the ADA's preemption provision." Pet. at 22.

Moving swiftly past the statute's text, Virgin argues that the Ninth Circuit's standard "thwarts the ADA's underlying policy of deregulation." Pet. 22. But as this Court has repeatedly observed, "no legislation pursues its purposes at all costs." *Home Depot USA, Inc. v. Jackson*, 587 U.S. ---, 139 S. Ct. 1743, 1755 (2019) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (*per curiam*)). Here, the ADA pursues its "deregulatory aim" not by mandating deregulation *in vacuo*, but by tasking the courts with discerning which state laws are sufficiently "related to a price, route, or service of an air carrier" to warrant the extraordinarily intrusive remedy of judicial invalidation. 49 U.S.C. § 41713(b)(1). That is the very question that the Ninth Circuit's standard seeks to answer.

II. Petitioners' Purported Circuit Split Is Illusory.

Virgin's attempt to contrive a circuit split fails for the same reasons. It is evident just from reading its petition that *none* of the cases it cites from other circuits involves a meal-and-rest-break law like the one here—so the best Virgin can hope for is an ephemeral conflict in the general *approach* or *standards* applied by other circuits. It fails to show even that much.

A. Virgin first cites the First Circuit's decision preempting a Massachusetts law barring employers from diverting tips received by their employees as applied to baggage handlers. *DiFiore*, 646 F.3d 81. But *DiFiore* drew *precisely the same line* as the Ninth Circuit does—it found preemption because "the tips law

as applied here directly regulates how an airline service is performed and how its price is displayed to customers—not merely how the airline behaves as an employer or proprietor." *Id.* at 88. Virgin is thus simply wrong when it says that "[u]nder 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." Pet. at 18. As *DiFiore*'s own reasoning demonstrates, the Ninth Circuit's "binds to" test *would not have applied in the first place*, since the First Circuit interpreted Massachusetts's law as directly regulating the airline's relationship with its customers.

The next First Circuit case cited by Virgin is distinguishable on the same grounds. The decision in *Bower v. Egyptair Airlines Co.*, found preemption because the common-law claims at issue would have directly regulated customer-facing services by "imposing a fundamentally new set of obligations on airlines" including "heightened and qualitatively different procedures for the booking and boarding of certain passengers on certain flights." 731 F.3d 85, 96 (1st Cir. 2013). It did not involve regulation of an airline's employee relations.

Finally, Virgin cites two First Circuit decisions holding that the FAAAA preempts the application of a Massachusetts law governing the classification of workers as either employees or independent contractors. *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016); *see also Massachusetts Delivery Ass'n v. Healey*, 821 F.3d 187 (1st Cir. 2016)

(reaffirming and following *Schwann*). Yes, the Ninth Circuit's decision in *Bonta* upheld California's similar law. But that is because the First Circuit concluded that forcing a carrier to classify its workers as employees rather than independent contractors *does* "ultimately determine what services that company provides" and impose "a significant impact on [its] actual routes," *Schwann*, 813 F.3d at 438-39, while a majority of a split panel of the Ninth Circuit disagreed with those propositions, *Bonta*, 996 F.3d at 659-61, 663. The dissenting judge, by contrast, agreed with the First Circuit that laws of this type "*mandate[ ]* the very means by which [the plaintiff's] members must provide transportation services to their customers." *Id.* at 667 (Bennett, J., dissenting) (emphasis added). The basis for the Ninth Circuit's divergence from the First was thus not the Ninth Circuit's general approach to FAAAA preemption but rather the determination whether the law in question did in fact bind businesses in the provision of services to consumers. That fact-bound dispute—over the proper application of the ADA preemption standard to a type of law not implicated here—plainly does not justify this Court's review in this case, where Petitioners' *own estimates* put the cost of compliance with the challenged California rules at a minimal $100 per flight. Pet.App. at 59a.

B. The Fifth Circuit cases cited by Virgin likewise do not give rise to any circuit conflict. Virgin's own descriptions of these cases show that they are readily distinguishable. *Witty v. Delta Air Lines, Inc.*

involved a passenger's negligence claim based on Delta's alleged failure to provide adequate leg room. 366 F.3d 380, 382 (5th Cir. 2004). The Fifth Circuit's conclusion that requiring more leg room "would impose a standard 'relating to a price' " under the ADA, *id.* at 383, has nothing to do with the employment context, so the "binds to" test articulated by the Ninth Circuit in the *Dilts* line of cases would not apply on its own terms. For the same reason, both *Onoh v. Northwest Airlines, Inc.*—involving whether a customer "suffered an IIED when a Northwest agent prohibited her from boarding a flight," 613 F.3d 596, 600 (5th Cir. 2010)—and *Lyn-Lea Travel Corp. v. American Airlines, Inc.*—concerning common-law claims by a disgruntled travel agent that, if successful, "would regulate American's pricing policies, commission structure and reservation practices," 283 F.3d 282, 287 (5th Cir. 2002)—relate to the prices and services that airlines offer their customers, not their relations with their employees.

C. The Seventh Circuit cases Virgin cites all fit the same mold. The common-law claims preempted in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia* were not generally applicable regulations governing how airlines treat their employees; rather, those claims "expressly refer[ed] to" and were "clearly 'relate[d] to' the airline's provision of services" to customers, "includ[ing] ticketing as well as the transportation itself." 73 F.3d 1423, 1434 (7th Cir. 1996). *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), is to the same effect. The common-

law claims advanced by regional carrier Mesa Airlines against its major-carrier associate in that case had nothing to do with employee relations, but rather "concern[ed] which carriers fly to which destinations from which airports, and which carriers provide service (and at what rates) on through or joint routes." *Id.* at 608.

D. Virgin's attempt to show a conflict with the Eleventh Circuit's decisions also fails. *Koutsouradis v. Delta Air Lines, Inc.* involved an IIED claim against Delta's baggage handling service—"the heart of services that an airline provides"—based on the plaintiff's allegation that Delta's baggage handlers "made sexually explicit statements towards her" after they discovered "a sex toy[ ] in her checked luggage." 427 F.3d 1339, 1341-42, 1344 n.2 (11th Cir. 2005). The case had nothing to do with Delta's employment practices. And *Branche*, 342 F.3d 1248—which Virgin cites for the anodyne proposition that "a law with a 'forbidden significant effect' on a 'carrier's prices, routes or services' is preempted," Pet. at 20—in fact concluded that the whistleblower protection statute at issue in that case *was not preempted*, based in part on the principle that "employment standards fall squarely within the traditional police powers of the states, and as such should not be disturbed lightly," *Branche*, 342 F.3d at 1259. To the extent *Branche* has any relevance at all in this case, it is thus simpatico with the Ninth Circuit's approach.

E. Finally, Virgin turns to the state courts. Two of the decisions it cites may be quickly dispensed with

based on reasons already canvassed. The Texas Supreme Court's decision in *Delta Air Lines, Inc. v. Black* concerned "state breach of contract and misrepresentation claims challenging an airline's ticketing and boarding procedures"—matters that "are fundamental to airline services" at the customer level and are far removed from the labor-law context of the decision below. 116 S.W.3d 745, 747, 752 (Tex. 2003). And the Massachusetts Supreme Judicial Court's opinion in *Chambers v. RDI Logistics, Inc.* merely deals with the same independent-contractor statute at issue in the First Circuit's *Schwann* decision discussed above, *see supra*, pp. 28-29—and concludes that it is preempted for essentially the same (fact-bound) reasons. 65 N.E.3d 1, 9-10 (Mass. 2016).

That leaves the Rhode Island Supreme Court's decision in *Brindle v. Rhode Island Department of Labor and Training*, 211 A.3d 930 (R.I. 2019), *cert. denied*, 140 S. Ct. 908 (2020). *Brindle* did not deal with break requirements, but it did hold that the ADA preempts the application of a generally applicable labor rule—a time-and-a-half pay requirement for Sundays and holidays—so it at least falls within the same general ballpark as the decision below. The decision in *Brindle*, however, turned largely on the factual question whether the airline there had submitted "sufficient evidence in the record" to "satisfy its burden of proof of demonstrating that compliance with [the time-and-a-half requirement] would have a significant impact on its prices, routes, and services." *Id.* at 936-37, 938 (quotation marks omitted). And while

the preemption standard applied in *Brindle* was somewhat less demanding than the approach that the Ninth Circuit—and every other court of appeals to address the issue—has adopted in the context of generally applicable labor protections, the Rhode Island Supreme Court did not even acknowledge this line of federal cases, let alone grapple with the reasoning that has led all of these courts to apply a more-State-protective standard in this context.

At the end of the day, a single, fact-bound decision by the Rhode Island Supreme Court applying an approach to ADA preemption that blindly departs from the consensus of every federal court of appeals to face the issue hardly justifies this Court's intervention—as this Court itself implicitly recognized in declining to grant certiorari in *Brindle* last year.

III. The Case Does Not Present Any Question Sufficiently Important To Merit this Court's Review.

Virgin argues, finally, that this Court's review is warranted even in the absence of any circuit split or conflict with this Court's precedent because the decision below will purportedly lead to "nationwide tumult in the airline industry." Pet. at 3. Not so.

A. This doomsday argument is a red herring, because Virgin can *easily avoid* all of the supposed catastrophic effects of the decision below through the simple expedient of adding an additional flight attendant to some of its longer intrastate flights so that they can rotate breaks—a solution that, as the district court

found, would cost only "$100 per flight according to Virgin's estimate," an amount "relatively small compared to the overall cost of a flight." Pet.App. at 59a. The availability of this option renders all of Virgin's dire warnings about the "massive impact" of following California's break rules, Pet. 23, completely hollow.

Virgin responds that this $100-per-flight alternative "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." Pet. at 14. That is false: while Virgin now claims that "[o]nly *some* Virgin aircraft have an extra jump seat," *id.* at 25 (alterations omitted), the very testimony it cites in fact establishes that *all* of its planes have at least one extra jump seat, *see* 9th Cir. Doc. 68-1, SER1242 (Jan. 21, 2020) (Q. "[A]re there some Virgin America planes that have no extra jump seats …?" A. "No."). And even if Virgin had its facts right, that a state regulation creates "a modestly increased cost of doing business" is obviously not enough to trigger ADA preemption. *Dilts*, 769 F.3d at 648; *see also Brindle*, 211 A.3d at 936 (noting that "were preemption to apply to a state law solely" because it "may impose costs on airlines and therefore adversely affect fares," the ADA would "effectively exempt airlines from … most … state regulation of any consequence." (quotation marks omitted)).

Virgin's argument thus seeks to transform the ADA into a font of sweeping immunity, exempting airlines from every state and local regulation imaginable—from property taxes and zoning laws to, yes,

"laws against gambling and prostitution," *Morales*, 504 U.S. at 390, and "prohibition[s] on smoking in certain public places," *Rowe*, 552 U.S. at 375. Virgin may have to "reallocate resources in order to maintain a particular service level" under California's break rules, *Dilts*, 769 F.3d at 648, but this downstream effect of California's generally applicable labor rules simply cannot suffice to show preemption under the ADA.

Virgin's other arguments against the viability of the alternative of simply staffing some intra-California flights with an additional flight attendant all depend on wildly implausibly interpretations of the FAA's regulations. It briefly suggests (and argued below) that adding additional flight attendants would conflict with the "minimum number" required by the FAA. Pet. at 8. But the FAA's requirement that airlines staff "*at least* [a prescribed number of] flight attendants," 14 C.F.R. § 121.391 (emphasis added), obviously does nothing to prevent Virgin from staffing its flights with *more* than the minimum.

Virgin also contends that FAA's regulations somehow require each California-mandated meal and rest break to last *for nine hours*, such that it would have to add "*multiple* extra attendants per flight." Pet. at 25. This argument is simply beyond the pale. The FAA rules require the *federal* rest period after 14 hours on the clock to last nine hours, but they say nothing about the length of *state*-mandated breaks. 14 C.F.R. § 121.467(b)(2).

Finally, Virgin claims that adding an additional flight attendant is no solution because "FAA regulations require flight attendants to be on duty throughout a flight"—such that allowing *any* flight attendant to take a single break during their shift is a violation of federal law. Pet. at 23. That argument is completely unpersuasive. As shown above, *nothing* in the FAA's rules require flight attendants to be constantly "on duty" for up to 14 hours straight. Rather, the regulatory provisions cited by Virgin simply impose certain periodic duties—during, for example, takeoff and landing, or in the event of an emergency. *See supra*, p. 11. None of these requirements conflicts with California's break requirements, since state law expressly gives employers "flexibility in scheduling breaks," *Dilts*, 769 F.3d at 642, and the ability to "summon an employee back to work" in "irregular or unexpected circumstances such as emergencies," *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d 823, 834 n.14 (Cal. 2016); *see also Brinker Rest. Corp. v. Superior Ct.*, 273 P.3d 513, 530 (Cal. 2012) (California law's "only constraint on timing is that rest breaks must fall in the middle of work periods 'insofar as practicable.' Employers … may deviate from that preferred course where practical considerations render it infeasible.").

B. Finally, Virgin speculates that the decision below will lead to a cascade of increasingly catastrophic results—from the application of California's labor law to "other flight and ground crew," and forcing airlines to "provide breaks … under the laws of every state that the airline happens to serve," to,

ultimately, "effectively insulating all laws of general applicability from the ADA's preemptive reach." Pet. at 28, 30. But whatever the considerations surrounding these woe-is-me issues, this case is not the appropriate vehicle for considering them.

The decision below does not involve other flight and ground crew. It does not require the application of state break laws "to flight attendants who are merely passing through" the State. *Id.* at 28. It does not apply to "laws of general applicability" outside of the employment-law context. *Id.* at 30. Again, the decision below does nothing more than apply California's meal-and-rest-break requirements to flight attendants who are based in California, who work for an airline based in California, while they are operating flights that take off, fly, and land entirely within California. And it does so through the straightforward application of an approach to ADA preemption that is consistent with the caselaw of the other circuits and that has been clear since at least seven years ago, when the Ninth Circuit decided *Dilts* (a decision that this Court declined to review).

Virgin's Question Presented asks this Court to consider whether the ADA is consistent with a "categorical rule" that the Act preempts all "generally applicable state laws … only if they *bind* an airline to a particular price, route, or service." As explained above, the Ninth Circuit simply does not apply such a rule. Far from "a perfect vehicle for considering" Virgin's statement of the Question Presented, this case

does not even raise that question. The Court should deny the writ.

CONCLUSION

The petition for certiorari should be denied.

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