No. 21-260

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

BRIEF FOR *AMICI CURIAE* AIRLINES FOR AMERICA AND INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONERS

PATRICIA N. VERCELLI
RIVA PARKER
AIRLINES FOR AMERICA
1275 Pennsylvania Ave., NW
Suite 1300
Washington, D.C. 20004
(202) 626-4001

*Counsel for A*micus Curiae
Airlines for America

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

JASON ZARROW
O'MELVENY & MYERS LLP
400 S. Hope St.
Los Angeles, Cal. 90071
(213) 430-6000

Counsel for Amici Curiae

(Additional Counsel Listed on Inside Cover)

LESLIE MACINTOSH
INTERNATIONAL AIR
TRANSPORT ASSOCIATION
Route de l'Aéroport 33, P.O
Box 416
1215 Geneva Airport 15
Switzerland
+41 (0) 22 770 26 99

*Counsel for A*micus Curiae
International Air Transport
Association

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INTEREST OF THE *AMICI CURIAE*[1]

Airlines for America ("A4A") is the nation's oldest and largest airline trade association. In 2019, A4A's passenger carrier members and their marketing partners accounted for more than 90% of U.S. airline passenger and cargo traffic. The International Air Transport Association ("IATA") is a nongovernmental international trade association founded by air carriers engaged in international air services. Commercial aviation drives 5% of U.S. GDP and helps support more than 10 million U.S. jobs. Amici routinely file briefs in courts around the Nation, and participated as amici in the court below.

Ensuring the uniformity of the laws and regulations governing interstate aviation through proper application of preemption principles is vitally important to Amici's members. Its members operate under complex federal regulatory regimes, which, properly construed, will often preempt the application of state and local law. The Ninth Circuit's decision threatens to upset this regulatory stability by construing critical preemption protections out of existence, thereby subjecting Amici's members to exactly the sort of patchwork of regulation that federal preemption is intended to prevent.

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

If California enacted a law requiring every flight to and from its airports to have one extra flight attendant, the law would obviously be invalid. And if California required airlines to schedule longer ground times between flights, preemption would, if anything, be even more obvious. Both laws would significantly affect airline prices, routes, and services, and thus would be preempted by the express preemption clause of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1).

California's meal-and-rest-break laws—which require such breaks at rigid intervals, and even require employers to allow employees to leave the premises (an impossibility on a plane)—are invalid as applied to flight attendants for exactly these reasons, as the federal government explained below. The only way airlines can comply with these laws is to add more flight attendants on "longer" flights and to schedule longer ground times between "shorter" flights. That is precisely the sort of state regulation of airline routes and services that the ADA was meant to eradicate.

Remarkably, the court of appeals did not dispute that this would be the effect of the rule it adopted. According to the court below, "airlines [can] comply with both the FAA safety rules and California's meal and break requirement by staffing longer flights with additional flight attendants in order to allow for duty-free breaks." Petition Appendix ("Pet. App.") 18a (quotations and alterations omitted). Yet the court did not find California's meal-and-rest-break laws

preempted because of a key doctrinal error that has long infected the Ninth Circuit's test for ADA preemption: under its test, state laws of general applicability are not preempted unless they *bind* airlines to *particular* prices, routes, or services. And because generally-applicable background laws by definition do not bind carriers in that way, such laws are never preempted in the Ninth Circuit, including California's meal-and-rest-break laws, no matter how significantly they impact airline prices, routes, or services.

That result conflicts with this Court's cases, which have rejected special rules or carve-outs for laws of general applicability as "utterly irrational" and inconsistent with the ADA's text. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992). The Ninth Circuit's interpretation of the ADA's preemption provision is also inconsistent with that of multiple other circuits. Amici thus agree with petitioners that this Court's review is necessary to correct an erroneous interpretation of federal law on which the courts of appeals are divided.

Amici write separately to emphasize the immense practical consequences of the Ninth Circuit's decision for aviation. California's meal-and-rest-break rules are strict. They require employers to provide breaks that "relieve employees of all duties and relinquish control over how employees spend their time." *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 269 (2016). And they require that employees be "free to leave the premises," *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1036 (2012), which is impossible when a plane is in the air. Yet the court below held that airlines are re-

quired to comply with California's requirements with respect to flight attendants. After initially omitting any mention of how, exactly, airlines are supposed to do that, the Ninth Circuit partially addressed this critical issue in its amended opinion denying rehearing en banc: airlines, the Ninth Circuit held, should staff "longer flights with additional flight attendants in order to allow for duty-free breaks." Pet. App. 18a (quotations omitted).

A state-law rule requiring airlines to add more flight attendants is self-evidently not a solution to ADA preemption—it is a reason to find preemption. It is not at all clear as a threshold matter that an airline can comply with federal regulations and California law by giving flight attendants on-duty breaks. But assuming that is possible, adding extra flight attendants requires taking seats away from the traveling public because many flights will not have extra flight-attendant seats. Adding extra flight attendants also increases labor costs, which will be passed on to passengers in the form of higher prices and reduced services. And at regional airlines, which already operate on razor-thin margins, decreased seats and increased costs mean route cancelations, harming the small communities they serve. The inevitable effect of the Ninth Circuit's proposed solution, in other words, will be to decrease airline services, increase prices, and imperil routes. Confronted with a similar claim that would have required airlines to decrease the number of available passenger seats, the Fifth Circuit had no difficulty finding a "forbidden significant effect" on price. *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 383 (5th Cir. 2004) (quoting *Morales*, 504 U.S. at 388).

Even on its own terms, moreover, the Ninth Circuit's suggestion that airlines can just add more flight attendants only applies to "longer" flights. But many flights are relatively short. Mid-flight breaks cannot be scheduled on those flights (assuming flight attendants can even take such breaks). For these flights, the only ways to comply with California law would be either to: (i) make flights longer; or (ii) schedule longer ground-times between flights. A law that requires airlines to change flight lengths or reschedule flights clearly "relate[s] to an [airline] price, route, or service," 49 U.S.C. § 41713(b)(1), and thus is preempted by the ADA. "[S]tate-mandated breaks between flights would [also] significantly disrupt the tight choreography of flight takeoffs and landings," causing cascading delays nationwide, as the federal government explained to the court below. Br. for the United States as *Amicus Curiae* ("U.S. *Amicus* Br."), *Bernstein*, No. 19-15382 (9th Cir.) 2019 WL 4307414, at *3 .

It is no surprise that Congress enacted a broad preemption provision for aviation. Air transportation is integral to the Nation's commerce, which is precisely why Congress sought to establish national uniformity in this area. Preemption of patchwork state regulation has helped create a cost-effective and efficient transportation network throughout the United States—since deregulation, for example, ticket prices have fallen dramatically. The panel's decision undermines those achievements, directly contrary to Congress's manifest purpose.

The petition should be granted and the decision below reversed.

ARGUMENT

I. THE PANEL'S DECISION WILL HARM AVIATION IN THE PRECISE MANNER THAT FEDERAL PREEMPTION WAS MEANT TO PREVENT

In 1978, Congress deregulated the airline industry. After years of experience with federal and state regulation, Congress determined "that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety and quality of air transportation services.'" *Morales*, 504 U.S. at 378 (quoting 49 U.S.C. App. §§ 1302(a)(4), (9) (alterations omitted)). "To ensure that the States would not undo federal deregulation with regulation of their own," Congress included in the ADA a "broadly worded" and "deliberately expansive" preemption provision. *Id.* at 378, 384 (quotations omitted). That provision preempts any state "law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).[2]

While Congress deregulated the economic aspects of air travel, it has tasked the FAA—and not the states—with regulating aviation safety, including "the maximum hours or periods of service of airmen and other employees of air carriers." *Id.* § 44701(a)(4). The FAA has in turn promulgated comprehensive rules governing flight attendants' onboard responsibilities. Relevant here, carriers must

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[2] The Federal Aviation Administration Authorization Act's ("FAAAA") express preemption provision is similarly worded, *see* 49 U.S.C. § 14501(c)(1), and the same analysis generally applies under both. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008).

have at least one flight attendant for every fifty passengers, 14 C.F.R. § 121.391(a), and flight attendants have assigned places and responsibilities during taxi, takeoff, landing, and deplaning, *id.* §§ 121.391(d), 121.394(c). As the federal government explained below, "[r]elieving attendants of all duty while inflight or even taxiing would clearly interfere with the duties prescribed by federal regulations." U.S. *Amicus* Br. at *20 (footnote omitted). FAA regulations further "require that flight attendants be available to perform routine safety duties for the duration of the flight and be on call to assist with mandatory safety responsibilities in emergencies." U.S. *Amicus* Br. at *4.

FAA has also promulgated regulations specifying the length of duty and rest periods "to avoid safety issues related to fatigue." *Id.* at *1. Flight attendants may be scheduled on duty for up to 14 hours, which must then be followed by a mandatory "rest period of at least 9 consecutive hours." 14 C.F.R. § 121.467(b)(1)-(2). During the duty period, "FAA regulations contemplate that flight attendants will be able to take short, *on-duty* breaks: attendants may certainly eat on airplanes, and they spend significant amounts of time sitting down." U.S. *Amicus* Br. at *4. But federal regulations do not allow flight attendants to take an off-duty break, nor do they allow flight attendants to return immediately to work after a break: once a flight attendant's duty period ends, a nine-hour rest period is triggered under federal law.

California law requires 30-minute meal breaks and 10-minute rest breaks at certain intervals. *See* IWC Wage Order No. 9-2001, §§ 11-12; Cal. Labor

Code §§ 226.7 & 512. According to the court below, airlines can comply with these requirements and with FAA regulations by "staffing longer flights with additional flight attendants in order to allow for duty-free breaks." Pet. App. 18a (quotations and alteration omitted). That solution will necessarily and adversely affect airline prices, routes, and services on both mainline (i.e., national/international) and regional carriers and on both longer and shorter flights.

A. Adding Flight Crew Will Significantly Affect The Prices And Services Of Mainline Carriers

Adding at least one flight attendant to mainline flights would deprive passengers of seats and would be inordinately costly, driving up ticket prices and decreasing services. Though Amici strongly disagree that California's meal-and-rest-break laws can be applied to pilots, the logic of the decision below seems to suggest that conclusion, further exacerbating the effects of the decision and underscoring the importance of this Court's review.

1. a. By requiring carriers to staff extra flight attendants, the Ninth Circuit's rule will deprive the traveling public of otherwise-available seats, reducing the core service offered by airlines, and depriving airlines of the ability to generate revenues. In other words, "even assuming an on-call rotation system would comply with California law, the additional cost of that system would include not only the salaries of the additional attendants on board but the loss of revenue resulting from their use of seats that

might otherwise have been occupied by paying passengers." U.S. *Amicus* Br. at *23.

The Ninth Circuit dismissed this concern on the ground that "Virgin [America] operate[d] flights with empty jump seats." Pet. App. 18a.[3] Jump seats are the foldable seats that one often sees in the front or back of the cabin by the doors. Critically, while airlines operate *some* flights with empty jump seats, that is not always the case. And if there is no empty jump seat available, then an airline will necessarily have to reduce the number of seats available for paying passengers.

There are numerous circumstances in which jump seats may be unavailable for extra flight attendants. Jump seats are often occupied by flight crew commuting to or from other cities. Given the flexibility inherent in airline operations, many flight attendants live in one city but work out of another. For example, a flight attendant might live in San Diego but work out of San Francisco. To get to and from San Francisco before and after work, the flight attendant will often commute in the jump seat. The same also happens when a flight attendant calls out sick. The airline might fly a flight attendant from one city to another to replace the sick flight attendant, and the replacement flight attendant will fly in the jump seat. Jump seats can also be occupied by flight attendant trainees, supervisors, or FAA inspectors. Compliance with California law on one of these flights will require reducing the number

[3] Virgin America merged into Alaska Airlines and there are no longer flights operated under that name.

of seats available to paying passengers, thus reducing airlines' core service: air transport.

b. California's rule will also increase labor costs significantly. A 90-seat plane with two flight attendants, *see* 14 C.F.R. § 121.391(a)(3), will now require three, increasing flight attendant labor costs by 50%. A smaller plane, which previously needed only one flight attendant, *see id.* §§121.391(a)(1)-(2), will now require two, increasing costs by 100% because airlines will have "to hire two flight attendants to do the work of one." U.S. *Amicus* Br. at *23. To put this in perspective, staffing an additional flight attendant on all flights would increase annual labor costs at mainline airlines by *hundreds of millions of dollars* per airline. It would be absurd to suggest that such a state-law rule would not have a significant effect on the prices they charge and the services they offer. And in all fairness to the Ninth Circuit, it never suggested otherwise. Instead, it ignored these costs, and their effect on airline prices and services, because the Ninth Circuit's "binds to" test does not allow it. *See infra* Part II.A. Because California law did not *bind* airlines to *particular* prices, routes, or serves, a massive increase in costs was irrelevant as a matter of law.

c. Providing mid-flight breaks will also be a scheduling nightmare. Airlines will have to build flight attendant schedules so that mid-flight breaks occur when California law dictates they must. Obviously, that is impossible. What happens if a flight is delayed 30 minutes, such that a flight attendant's break is now scheduled during landing? What if there is serious turbulence and the captain requires

the flight attendants to remain in their seats? Or an altercation? Or an emergency?

Building California-compliant schedules also presupposes that airlines know in advance which flight attendants are flying which flights. But logistical necessity requires that schedules be built first, then crew assigned later. And flight attendant unions have negotiated tremendous flexibility for individual flight attendants to add, drop, or trade trips with other flight attendants, which means that airlines do not know in advance which flights will actually need backup crew and when they need breaks. So the only possible compliance options would be to add even more flight attendants or schedule longer ground times for all flights.

d. All of this would be made worse if the Ninth Circuit's rule were adopted nationwide. If California can require 30-minute breaks every few hours, then so can any other state. And those states also can require breaks at different intervals—say, two 20-minute breaks for every 4 hours of work. *See* Pet. 27-28. It is not clear how airlines could ever comply with the patchwork of state and local regulations that the Ninth Circuit's decision invites. It is clear, however, that these sorts of regulatory patchworks are *precisely* the type of state regulation that Congress meant to preempt. *See, e.g.*, *Rowe*, 552 U.S. at 373 ("To allow Maine to insist that the carriers provide a special checking system would allow other States to do the same …. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions … to the competitive marketplace.").

2. There is no pilot-only carve-out from California's meal-and-rest-break laws, nor any relevant pilot-only federal preemption provision. And some pilots have already taken the position that they are entitled to state-law breaks as well. *See Goldthorpe v. Cathay Pac. Airways Ltd.*, 279 F. Supp. 3d 1001 (N.D. Cal. 2018). Amici strongly disagree that federal law allows the states to require pilots to take mid-flight breaks, but the Ninth Circuit's reasoning seems to require this conclusion.

Pilots represent airlines' single largest labor cost, and there is currently a well-publicized pilot shortage, meaning extra pilots (as would be necessary under California law) are hard to come by and very expensive. Adding pilots, even more than adding flight attendants, would increase airline prices and decreases services.

Adding pilots to comply with California law will also require reducing the number of available passenger seats because some flights do not have available cockpit jump seats for extra pilots. In fact, compliance with California law as to pilots would likely require displacing *two* (or more) paying passengers because pilots and co-pilots can only be relieved mid-flight by pilots with certain qualifications, *see* 14 C.F.R. § 121.543(b)(3)(i)-(ii), and many pilots are not dual qualified. FAA regulations also give the Captain authority to determine who may access the cockpit, which California law cannot supersede. *See* 14 C.F.R. § 121.547.[4] And airline CBAs often would

[4] *See also* Airline Pilots Association, International Jumpseat Guide (July 2018), https://www.alpa.org/~/media/ALPA/Files/eLibraries/Safety/jumpseat/jumpseat-guide.pdf.

require carriers to provide relief pilots with a seat in the cabin (not in the cockpit jump seat) anyway.

B. The Decision Below Imperils Regional Routes

There is no question that the decision below will devastate regional airlines and the small and rural communities they serve. *See generally* Br. for Regional Airline Ass'n as *Amicus Curiae* In Support of Petitioners.

Regional airlines are a critical part of our national aviation infrastructure. They operate nearly half of all domestic flights, and are the sole source of air service to more than half of U.S. airports. Whereas mainline airlines typically operate between their hub airports and other large cities, regional airlines fly smaller aircraft that primarily provide "feeder" service funneling passengers to mainline hubs from smaller communities. Mainline carriers thus depend on regional airlines to bring passengers from smaller communities into their networks. If regional flights are delayed, for example, then passengers inevitably will miss their connecting flights on mainline carriers because carriers' regional and national networks are inextricably intertwined. *See id*. at 12-13.

Regional airlines specialize in the use of smaller planes that are appropriately sized for the markets they serve. Some of these smaller aircraft only have enough cabin jump seats for the FAA-required number of flight attendants, and thus cannot add more flight attendants without potentially displacing paying passengers. Consider, for example, a 20-seat aircraft staffed by one flight attendant. Under Califor-

nia's rule, a regional carrier will lose 5% of the flight's revenue potential by eliminating a revenue-generating seat *and* see their flight attendant labor costs increase by 100%. And if carriers are also required to give California-compliant breaks to pilots, these costs and losses increase on both sides of the equation. With fewer seats over which to amortize cost increases and revenue losses, additional crew can push these fragile routes from positive to negative margins, imperiling service to small communities.

Compliance will also result in small communities becoming ineligible for the Essential Air Service ("EAS") program subsidies, further resulting in withdrawal of service to smaller communities.[5] The EAS program was intended to ensure that small communities would not lose air service after deregulation due to the marginal profitability of their routes. Indeed, the entire premise of the EAS program is that smaller communities are highly vulnerable to market forces, and many today cannot be served without federal subsidization. But communities are generally ineligible for EAS subsidies if their per-passenger subsidies exceed certain limits. And the additional costs required by compliance with California's meal-and-rest-break law (as well as any other state or local laws in the Circuit) will push certain routes above these limits.

The threat of terminated service to small communities is all too real. Dozens of airports, including six in California, have lost service in the past decade.

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[5] *See* https://www.transportation.gov/policy/aviation-policy/small-community-rural-air-service/essential-air-service.

And roughly two thirds of California's airports are serviced exclusively or primarily by regional airlines. Those communities are uniquely harmed by the decision below. Route cancellations affect mainline carriers as well, because mainline carriers depend on regional routes to bring passengers into their hubs for connecting flights.

C. Airlines Will Have To Reschedule Flights To Allow Breaks During Or After "Shorter" Flights

By its terms, the Ninth Circuit's solution applies only to "longer flights." Pet. App. 18a (quotations omitted). Presumably, the Ninth Circuit meant flights that are long enough for a flight attendant to take an uninterrupted, 30-minute break between takeoff and landing. But what about "shorter" flights? The Ninth Circuit did not say, but there are only two possible options, and both would plainly violate the ADA. Airlines could make flights longer. Or they could schedule longer ground times between flights.

1. Little need be said about the notion that a state could require airlines to make short flights longer. A law with that effect would clearly relate to carrier routes and services.

2. The other option—longer ground times—is no better. "[T]he provision of regular, frequent, and safe air services requires significant coordination and scheduling of aircraft takeoff, landing and taxi time—particularly in congested airports serving major metropolitan areas." U.S. *Amicus* Br. at *21. Given this "complex choreography," flight schedules usually do not allow enough time between flights to

allow for California-compliant breaks. *Id.* "Flight attendants working in paired flights frequently must move quickly from gate to gate in order to prepare a subsequent flight for a safe departure." *Id.* And at regional airlines, crew spend much of their time between landings and takeoffs completing post- and pre-flight duties, leaving little or no time for breaks at all.

To accommodate meal-and-rest breaks, then, airlines would have to modify their flight schedules. The federal government explained this problem to the court below. Altering flight schedules to accommodate state-mandated breaks "would plainly affect the frequency and regularity of service, particularly because of the complexities of other concerns that dominate scheduling decisions, including gate availability, airport infrastructure, aircraft availability, airport takeoff and landing slots, passenger demand, weather or mechanical failures, connection times, air traffic congestion, airport noise or access restrictions, and environmental factors." U.S. *Amicus* Br. at *22. Further, "because air traffic is so intricately coordinated, changes to the scheduling of even intrastate flights to accommodate breaks would have a significant impact throughout the country and internationally." *Id.* A state-law rule whose necessary effect is cascading scheduling changes nationwide is obviously one that is "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

D. Carriers Will Have To Add Multiple Flight Attendants To Comply With FAA Rest Rules

The analysis above assumes that flight attendants would be able to resume work once their duty-free California break ends. Layering federal regulations atop state law makes the problem worse. It is not clear that airlines can lawfully provide flight attendants with 10- or 30-minute off-duty breaks because federal law requires flight attendants to remain continuously on-duty during a flight and to take at least a nine-hour rest period once released from duty. 14 C.F.R. § 121.467(b)(2). Without a regulatory change from the FAA, an airline would have to swap in a new flight attendant after every break, meaning airlines would have to staff more than one backup flight attendant on most longer flights and have replacement crew ready at the airport between shorter flights.

Using new flight attendants or flight attendant crews poses additional problems—problems that would adversely affect flight attendants in addition to airline operations. Flight attendants usually fly "trip pairings"—i.e., multi-segment flights that often span several days and begin and end at the same airport. For example, a trip pairing for a Los Angeles-based flight crew might include the following itinerary: Los Angeles-Seattle-Cleveland-Austin-Los Angeles. But if the original flight attendants must be replaced in the middle of the pairing—say, in Cleveland—the new crew will have to be flown to Cleveland to staff the rest of the itinerary, which itself may take up jump seats, *supra* at 9-10, and cause delays (airlines typically do not have crews

waiting around at non-base airports). As the government explained, California's rule will have the perverse effect of "stranding" flight attendants "outside of their home base for significant periods." U.S. *Amicus* Br. at *23.

For similar reasons, the decision below poses serious comity concerns. Because aviation is inherently national, the decision below will inevitably result in delayed or cancelled flights in states other than California. Indeed, returning to the example above, *supra* at 17, it borders on absurd to suggest that California can require a plane in Ohio (en route to Texas) to wait on the tarmac so a flight attendant can take a 30-minute break. That is why 13 states took the unusual step of arguing to the court below that federal preemption applied: "California's break rules [will] disrupt air traffic across the country even if they apply only to flight attendants that live in or are based out of California." Br. of Georgia, et al. as *Amicus Curiae* In Support of Rehearing *En Banc*, *Bernstein*, No. 19-15382 (9th Cir.), at 15. And if every state applied its meal-and-rest-break laws to flight attendants—and to pilots and ground crew—then these interstate harms would be significantly worse. *Id*.

II. THIS CASE SATISFIES ALL OF THE TRADITIONAL CRITERIA FOR CERTIORARI

The immense practical impacts of the Ninth Circuit's decision are reason enough to grant certiorari. But this case also satisfies the remaining traditional criteria. The Ninth Circuit's "binds to" test for ADA preemption "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). And it conflicts with the

preemption test in several other circuits. Sup. Ct. R. 10(a).

A. The Ninth Circuit's Longstanding "Binds To" Test Conflicts Directly With This Court's Cases

The ADA expressly preempts state laws "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). This Court has always construed this language "broadly," giving it "expansive" sweep. *Morales*, 504 U.S. at 384 (quotations omitted). As relevant here, a state law that significantly affects an airline's prices, routes, or services is preempted, even if "the effect is only indirect." *Id*. at 386 (quotations omitted).

That is not the test in the Ninth Circuit, at least for laws of general applicability. The longstanding rule for such a law, the Ninth Circuit holds, is that it is not preempted unless the law "*binds* the carrier to a particular price, route, or service." Pet. App. 20a (quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014)). And because laws of general applicability typically do not bind carriers in that way, such laws are not preempted in the Ninth Circuit, no matter how significant their actual effects on airline prices, routes, or services. *See, e.g.*, Pet. App. 20a-21a.

Not only is the Ninth Circuit's "binds to" test inconsistent with this Court's "significant effects" test, but it also incorporates three arguments that this Court has rejected.

First, whereas the Ninth Circuit has carved out from ADA preemption laws of general applicability,

this Court held in *Morales* that the notion that "the ADA imposes no constraints on laws of general applicability" is inconsistent with the "sweep" of ADA's broad language and would create "an utterly irrational loophole." *Morales*, 504 U.S. at 386. Thus, *Morales* found preempted a state's deceptive-advertising law. In *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014), the Court found preempted a breach-of-implied-covenant claim. And in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the Court found preempted a state's consumer-fraud statute. All of those are generally-applicable background laws and all were preempted because of their effects.

Second, a rule recognizing preemption only if the law has a "binding" effect on "particular" prices, routes, or services is no different than requiring direct regulation as a precondition to preemption. In fact, the Ninth Circuit expressly holds that "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not *otherwise regulate* prices, routes, or services." Pet. App. 20a (quoting *Dilts*, 769 F.3d at 644) (emphases added)). This Court has already reversed the Ninth Circuit for holding that "the prerequisite for preemption" is a state law that "force[s] the Airlines to adopt or change their prices, routes or services." *Ginsberg*, 572 U.S. at 279 (quotations and alteration omitted). *Morales* rejected that argument, too, holding that the ADA is not limited to state laws that "actually prescribe[] rates, routes, or services." 504 U.S. at 385. The same result should obtain here.

Third, the Ninth Circuit erroneously adapted its "binds to" test from ERISA precedents. The Ninth

Circuit's test traces its roots to *Air Transport Association of America v. City & County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001). That case followed the "Supreme Court ERISA cases suggest[ing] that in order for the 'effect' of a state law to cause preemption, the state law must compel or bind an ERISA plan administrator to a particular course of action." *Id.* at 1071. "By analogy," the Ninth Circuit reasoned, "a local law will have a prohibited connection with a price, route or service if the law binds the air carrier to a particular price, route or service." *Id.* at 1072.[6]

The analogy no longer holds. In *Rowe*, this Court implicitly rejected these ERISA precedents' application to the ADA and FAAAA by reaffirming *Morales* and declining to adopt petitioner's argument that "[t]he Court should use the ERISA cases as a guide." Br. for Pet'r, *Rowe v. N.H. Motor Transp. Ass'n*, 2007 WL 2428380 (U.S. No. 06-457), at *29 (Aug. 23, 2007); see *id.* at *40 ("As with the ERISA cases, because the state law neither requires nor binds the carriers to do anything, there is no preemption."). *See generally* Pet. for Certiorari, *Cal. Trucking Ass'n, Inc. v. Bonta* (U.S. No. 21-194) at 28-30 (Aug. 9, 2021) (explaining conflict with ERISA precedents).

Any one of these doctrinal errors alone would warrant this Court's review. All three make it imperative.

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[6] *Air Transport Association* also erroneously applied the presumption against preemption to an express preemption provision. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016).

B. The Ninth Circuit's "Binds To" Test Conflicts With The Preemption Test In Multiple Circuits

Virgin America's petition demonstrates that the Ninth Circuit's narrow approach to ADA and FAAAA preemption "creates a circuit split." *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 671 (9th Cir. 2021) (Bennett, J., dissenting), *petition for cert. filed*, No. 21-194 (Aug. 9, 2021); *see* Pet. 17-21. Amici write here to emphasize that the conflict with the First and Fifth Circuits is especially stark.

Two recent decisions on the validity of state paid sick-leave laws show that the difference between the Ninth and First Circuit's preemption tests is outcome determinative. In *Air Transport Association of America, Inc. v. The Washington Department of Labor & Industries*, --- F. App'x ----, 2021 WL 3214549 (9th Cir. July 29, 2021), *petition forthcoming*, the Ninth Circuit held that application of Washington's paid sick-leave law to flight crew was not preempted. According to the Ninth Circuit, "[t]he proper inquiry is whether the [paid sick-leave law] itself *binds* the airlines to a particular price, route, or service." (*Id.* at *2 (quoting the decision below, Pet. App. 20a) (alteration omitted)). By definition, a state's general paid sick-leave law does not. The court thus did not consider any of A4A's summary-judgment evidence showing the law's effects because, as a rule in the Ninth Circuit, "generally applicable labor regulations are too tenuously related to airlines' services to be preempted by the Act." *Id.*

A recent Massachusetts district court decision, by contrast, denied Massachusetts's motion for

summary judgment on an identical claim. *See Air Transp. Ass'n of Am., Inc. v. Healey*, 2021 WL 2256289 (D. Mass. June 3, 2021). Like Washington, Massachusetts argued that its paid sick-leave law was immune from ADA preemption because it did not "directly regulate[] how an airline provides services, sets prices, or chooses routes (as opposed to merely regulating how airlines behave as employers)." *Id.* at *10. But the district court rejected the Attorney General's argument precisely because the First Circuit's test for ADA and FAAAA preemption is to the contrary. *Id.*; *see also id.* at *12 (noting that the First Circuit had rejected "the attorney general's request for a categorical rule against preemption of background labor laws" like the Ninth Circuit's (quotations omitted)). In the First Circuit, the claim was set for trial. In the Ninth Circuit, it failed as a matter of law.

The Fifth Circuit, meanwhile, holds that states cannot require airlines to reduce the number of available seats. In *Witty*, the plaintiff "alleged that Delta was negligent in failing to provide adequate leg room to prevent DVT." 366 F.3d at 382. Because that application of Louisiana negligence law "would necessarily reduce the number of seats on the aircraft," the Fifth Circuit held that it was "inexorably relate[d] to prices charged by airlines" and would have "'the forbidden significant effect.'" *Id.* at 383 (quoting *Morales*, 504 U.S. at 388). The Ninth Circuit's suggestion that airlines can just add more flight attendants would likewise reduce the number of passenger seats on the aircraft, *supra* at 8-10, and thus would mean that California's meal-and-rest

break laws would be preempted if this case arose in the Fifth Circuit.

C. The Proper Test For ADA Preemption Is Exceptionally Important

The importance of this case extends well beyond the practical impacts of California's meal-and-rest break rules on aviation—and those impacts are severe and warrant certiorari on their own. *Supra* Part I. In particular, the proper test for ADA and FAAAA preemption is an issue of exceptional public importance. The sheer number of cases raising the issue is a testament to that fact, as is the involvement of the numerous amici, including the federal government in the court below. Many major airlines and trucking companies have hubs or headquarters in the Ninth Circuit and even more have flight crew bases there. All of these entities—and their employees, and their customers—are directly affected by the preemption rule the Ninth Circuit applies.

So are passengers in other states. "[D]elays in one airport—due to any cause—can easily snowball into delays at other airports throughout the country." U.S. *Amicus* Br. at *21. If carriers are required to delay flights to allow time for California breaks, the result will be delays nationwide. If state laws are to have such far-reaching extraterritorial effects on interstate commerce, then it should be this Court that says so.

The Ninth Circuit's narrow test also conflicts directly with Congress's goal in enacting the ADA—*viz.*, to deregulate the commercial aspects of aviation so that prices, routes, and services would be set by "competitive market forces." *Morales*, 504 U.S. at

378. By all accounts, the ADA has been a resounding success. But by reducing the ADA's preemption provision to a virtual nullity and only prohibiting direct regulation of airlines, the panel's decision threatens to erase these gains, and will clearly frustrate Congress's goal of creating a uniform, efficient, and affordable system of interstate transportation.

CONCLUSION

The petition should be granted and the decision below reversed.

Respectfully submitted,

PATRICIA N. VERCELLI
RIVA PARKER
AIRLINES FOR AMERICA
1275 Pennsylvania Ave., NW
Suite 1300
Washington, D.C. 20004
(202) 626-4001

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

LESLIE MACINTOSH
INTERNATIONAL AIR
TRANSPORT
ASSOCIATION
Route de l'Aéroport 33, P.O
Box 416
1215 Geneva Airport 15
Switzerland
+41 (0) 22 770 26 99

JASON ZARROW
O'MELVENY & MYERS LLP
400 S. Hope St.
Los Angeles, Cal. 90071
(213) 430-6000

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