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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Ninth Circuit Has Long Contravened This Court's Precedent Under The ADA And FAAAA..5

A. This Court Has Interpreted The Statutes To Impose A "Significant Impact" Test 5

B. For Decades, The Ninth Circuit Has Applied The "Binds To" Test Instead 7

II. The Ninth Circuit's Decision In This Case Takes Its Flawed Preemption Jurisprudence To A New Extreme 10

III. This Court's Intervention Is Needed Now 12

A. Applying California's Meal-And-Rest-Break Rules To Flight Crews Would Severely Disrupt The Airline Industry..12

B. The Ninth Circuit's Outlier Preemption Regime Also Harms National Commerce More Broadly...........15

TABLE OF CONTENTS—Continued

Page

CONCLUSION..19

TABLE OF AUTHORITIES

Page(s)

CASES

Air Transport Association v. City & County of San Francisco,
266 F.3d 1064 (9th Cir. 2001)............................7, 8

American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995)...3, 18

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660 F.3d 384 (9th Cir. 2011).................................8

Augustus v. ABM Security Services, Inc.,
385 P.3d 823 (Cal. 2016).....................................10

Brinker Restaurant Corp. v. Superior Court,
273 P.3d 513 (Cal. 2012).....................................10

California Trucking Association v. Bonta,
996 F.3d 644 (9th Cir. 2021), *petition for cert. filed*, No. 21-194 (U.S. Aug. 9, 2021)...8, 16

California Trucking Association v. Su,
903 F.3d 953 (9th Cir. 2018).................................8

Dilts v. Penske Logistics, LLC,
769 F.3d 637 (9th Cir. 2014).......................7, 8, 15

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532 U.S. 141 (2001)....................................8, 9

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572 U.S. 273 (2014)..............................3, 5, 9, 18

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57 Cal. App. 5th 619 (2020)...............................16

Rowe v. New Hampshire Motor Transport Association,
552 U.S. 364 (2008)...........................3, 6, 7, 9, 18

Ward v. United Airlines, Inc.,
986 F.3d 1234 (9th Cir. 2021)...............................8

FEDERAL STATUTES

49 U.S.C. App. § 1302(a)(4) (1988) 5

49 U.S.C. § 14501...2

49 U.S.C. § 14501(c)(1)..2, 6

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Pub. L. No. 95-504, 92 Stat. 1705 (1978) 5

TABLE OF AUTHORITIES—Continued

Page(s)

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Cal. Lab. Code § 226.7 10

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country—including throughout California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise recurring issues of concern to the nation's business community.

The Chamber has a strong interest in this case because it raises important and recurring questions concerning the extent to which States may interfere with the prices, routes, and services of air carriers in the face of Congress's decision to expressly preempt such interference. Many of the Chamber's members are either airlines themselves, or transact business on a nationwide scale and rely on the services of air carriers in their day-to-day operations. Indeed, the air carrier industry affects nearly every business in the United States, whether directly or indirectly, as well as countless American consumers.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than *amicus curiae*, its members, or its counsel—made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were timely notified more than 10 days prior to filing, and all parties have consented to the filing of this brief.

If allowed to stand, the Ninth Circuit's decision will significantly hamper the airline industry and prevent air carriers from competing freely and efficiently. It will also increase costs for businesses and consumers alike, as air carriers are forced to cope with the expense of regulatory burdens that Congress prohibited in passing the Airline Deregulation Act. Granting the petition and reversing would ensure that—consistent with congressional design—businesses and consumers continue to enjoy a full range of services at prices determined largely by the free market, rather than a haphazard patchwork of state regulation.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, the Ninth Circuit has refused to follow this Court's preemption precedent under the Airline Deregulation Act (ADA), 49 U.S.C. § 41713(b)(1), and the Federal Aviation Administration Authorization Act of 1994 (FAAAA), *id.* § 14501. Those statutes expressly preempt all state laws "related to a price, route, or service" of an air or motor carrier. *Id.* § 41713(b)(1); *id.* § 14501(c)(1). Consistent with their text and history, this Court has repeatedly held that those provisions preempt at least any state law that has a "significant impact" on an air carrier's price, route, or service. Despite that clear precedent, the Ninth Circuit has doggedly applied its own markedly narrower preemption test. The Ninth Circuit's outlier approach creates a direct conflict in the courts of appeals and flies in the face of this Court's case law. That approach also has (and will continue to have) severely disruptive effects on the interstate transportation

industry. The Court should grant the petition and reverse.

Petitioners have already persuasively explained the circuit split among the lower courts on the question presented, Pet. 15-21, and why the decision below is wrong, *id.* at 21-27. The Chamber submits this brief to elaborate upon how the decision is just the latest example of the Ninth Circuit's blatant disregard for this Court's preemption precedent—and to reinforce the threat that the decision poses to the airline industry and national commerce more broadly.

I. This Court's intervention is necessary to put an end to an entrenched body of Ninth Circuit preemption jurisprudence that sharply conflicts with the decisions of other courts of appeals—and deprives the airline and transportation industries of the protections that Congress afforded in the ADA and FAAAA. Over the last 30 years, this Court has addressed the preemptive effect of the ADA and FAAAA in four key cases: *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008); and *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014). Consistent with Congress's expressed intent, these decisions interpret the ADA and FAAAA to insulate the airline and transportation industries from state laws that impose duties on such carriers, including by preempting "at least" state laws that have a "significant impact" on carrier prices, routes, or services. *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 390). Although most lower courts have followed this Court's guidance, the Ninth Circuit has charted its own path that veers further and further from this Court's jurisprudence. The

decision below—holding that California's meal-and-rest-break laws apply to flight crews because such laws do not directly "bind" airlines to particular prices, routes, or services—takes the Ninth Circuit's derelict preemption jurisprudence to a new extreme.

II. As petitioners have explained, the Ninth Circuit's decision below is wrong and should be overturned. Enforcing California's meal-and-rest-break rules against airlines would allow California to dictate how air carriers assign and manage their flight crews, which, in turn, will affect airline travel more generally. California's regime, for instance, requires breaks every three-and-a-half to five hours, during which time the employee must be completely off-duty. Enforcing those rules would require more crew members aboard each flight, would create longer delays between flights, and would undoubtedly cause significant impacts on carriers' prices, routes, and services. That is the very type of law Congress sought to preempt when it enacted the ADA and FAAAA. Indeed, it is hard to imagine state laws that more squarely implicate the concerns that Congress sought to address.

III. This Court's intervention is needed because the decision below threatens to severely disrupt the airline industry and interstate commerce more broadly. By allowing California to regulate the working conditions of flight crews—a decision that will inevitably open the door to other States doing the same—the decision below creates precisely the kind of interference with market-driven uniformity and efficiency that Congress sought to prevent through the ADA. Enforcing California's meal-and-rest-break laws would also destabilize the airline industry by reducing the services and routes air carriers are able

to offer. And the negative consequences of the Ninth Circuit's approach to preemption extend even further, given the identically worded preemption provision governing the motor carrier industry in the FAAAA.

This case provides an ideal—and urgently necessary—opportunity to rein in the Ninth Circuit's persistent misapplication of this Court's preemption precedent and to vindicate Congress's deregulatory design. The petition should be granted.

ARGUMENT

I. THE NINTH CIRCUIT HAS LONG CONTRAVENED THIS COURT'S PRECEDENT UNDER THE ADA AND FAAAA

A. This Court Has Interpreted The Statutes To Impose A "Significant Impact" Test

In 1978, Congress enacted the Airline Deregulation Act after "determining that 'maximum reliance on competitive market forces'" would lead to lower airline fares and better airline service. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (quoting 49 U.S.C. App. § 1302(a)(4) (1988)); *see* Pub. L. No. 95-504, 92 Stat. 1705 (1978); *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 280-83 (2014) (likewise emphasizing that Congress enacted the ADA to "promote 'efficiency, innovation, and low prices' in the airline industry through 'maximum reliance on competitive market forces and on actual and potential competition'" (citation omitted)). To "ensure that the States would not undo federal deregulation with regulation of their own," Congress sharply circumscribed state authority to regulate the airline industry by including a broadly worded preemption provision in the ADA: States are prohibited from

"enforcing any law relating to rates, routes, or services of any air carrier." *Morales*, 504 U.S. at 378-79 (citation omitted); *see* 49 U.S.C. § 41713(b)(1).

In 1980, Congress extended its deregulation efforts from the airline industry to trucking. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. Then, in 1994, Congress borrowed the ADA's preemption language to preempt state trucking regulation and thereby ensure that the States would not frustrate its deregulatory objectives. *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) (citing the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605-06); *see* 49 U.S.C. § 14501(c)(1) (preempting States from enacting or enforcing any law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property"); *see also* 49 U.S.C. § 41713(b)(4)(A) (similar provision for combined motor-air carriers).

Consistent with the statutes' shared text and history, this Court has instructed that courts should interpret the preemption language in the ADA and FAAAA in *pari materia*. *See Rowe*, 552 U.S. at 370-71. This Court has also long emphasized the statutes' comprehensive preemptive force. It has held that Congress's use of the phrase "relating to"—consistent with its plain meaning—expresses a "broad pre-emptive purpose." *Morales*, 504 U.S. at 383. It has made clear that laws bearing a "connection with" rates, routes, or services qualify. *Id.* at 384. It has clarified that preemption may occur even if a state law is one of general applicability and if its effect on rates, routes, or services "'is only indirect.'" *Id.* at 386 (citation omitted). And it has emphasized that the state law need not "'*regulate* rates, routes, or

services'" to be preempted. *Id.* at 383-86 (citation omitted).

To underscore the reach of these statutes, the Court has explained that only those laws that affect rates, routes, or services in a "'tenuous, remote, or peripheral . . . manner'"—like a law proscribing "gambling" or "prostitution"—can survive preemption. *Id.* at 390 (citation omitted); *see also Rowe*, 552 U.S. at 370-71, 376 (interpreting FAAAA's preemption clause to have same broad scope).

Putting all of that together, this Court has repeatedly held that the ADA and FAAAA preempt any state law that has "a 'significant impact'" on carrier rates, routes, or services. *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 390).

B. For Decades, The Ninth Circuit Has Applied The "Binds To" Test Instead

Despite the plain text of the ADA's and FAAAA's preemption provisions—as well as this Court's straightforward case law interpreting them—the Ninth Circuit has for decades followed its own line of ADA and FAAAA preemption precedent. Instead of implementing this Court's "significant impact" test, the Ninth Circuit has held that a state law is preempted by the ADA only if it "*binds* the [air] carrier to a particular price, route, or service." Pet. App. 20a (emphasis added) (quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014)).

The Ninth Circuit first articulated the "binds to" test in *Air Transport Association v. City & County of San Francisco*, 266 F.3d 1064, 1072 (9th Cir. 2001). There, it interpreted a decision of this Court construing a different statute, the Employee Retirement Income Security Act of 1974 (ERISA), as

"suggest[ing]" the proper preemption analysis under the ADA. *See id.* at 1071-72 (citing *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001)). Quoting this Court's observation in *Egelhoff* that the state law at issue "*b[ound]* ERISA plan administrators to a particular choice of rules for determining beneficiary status," *id.* at 1071 (citation omitted), the Ninth Circuit read that phrase to mean the state law "*must* compel or bind" the plan administrator for ERISA preemption to attach, *id.* (emphasis added). Turning back to the ADA, the court concluded that "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.

In the decades following *Air Transport Association*, the Ninth Circuit has repeatedly applied the "binds to" test in its ADA and FAAAA preemption decisions. *See Dilts*, 769 F.3d at 646; *California Trucking Ass'n v. Su*, 903 F.3d 953, 964 (9th Cir. 2018) ("'[T]he question is whether the Ordinance compels or binds [airlines] to a particular price, route or service.'" (quoting *Air Transp. Ass'n*, 266 F.3d at 1074)); *American Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011) (describing the "binds" test as "the proper inquiry"). This past year was a high-water mark, with the Ninth Circuit issuing *three* ADA and FAAAA decisions enforcing that standard to deem California labor laws not preempted. *See* Pet. App. 20a; *California Trucking Ass'n v. Bonta*, 996 F.3d 644, 664 (9th Cir. 2021), ("[G]enerally applicable labor law[s]" are not preempted unless they "bind, compel, or otherwise freeze into place a particular price, route, or service of a . . . carrier . . . ."), *petition for cert. filed*, No. 21-194 (U.S. Aug. 9, 2021); *Ward v. United Airlines, Inc.*, 986

F.3d 1234, 1243 (9th Cir. 2021) (The "ADA and FAAAA . . . preempt state regulations that bind carriers to specific prices, routes, or services . . . .").

But the "binds to" test is doctrinally unsound at its core. To start with, the Ninth Circuit flatly misread *Egelhoff*; this Court was merely describing a *sufficient* condition for ERISA preemption, not a necessary condition. *See* 532 U.S. at 147. *Air Transport Association* also ignored this Court's far more on-point statement in *Morales* that state laws with a "significant impact" upon airline prices are preempted under the ADA. 504 U.S. at 390. The Ninth Circuit also apparently overlooked the *Morales* Court's forceful rejection of the argument that the ADA "only pre-empts the States from actually prescribing rates, routes, or service." *Id.* at 385-86. And even when this Court reinforced the "significant impact" test in subsequent ADA and FAAAA decisions, *see Rowe*, 552 U.S. at 370-71, the Ninth Circuit has refused to revisit its contrary standard.

The Ninth Circuit's flawed preemption analysis has not gone unnoticed by this Court. In *Ginsberg*, the Court reversed the Ninth Circuit's holding that a state-law claim was not preempted because it did not "*force* the Airlines to adopt or change their prices, routes or services" and did not have a "direct effect" on either "prices" or "services." 572 U.S. at 279 (emphasis added) (citations omitted); *see id.* at 284 (finding that the state-law claim "clearly" had the kind of "connection" to airline prices and services to warrant preemption). Unfortunately, the Ninth Circuit did not get the message. Its continued misapplication of ADA preemption—even after this Court's clear signal in *Ginsberg* that the court was off course—requires this Court to intervene once again.

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE TAKES ITS FLAWED PREEMPTION JURISPRUDENCE TO A NEW EXTREME

In the decision below, the Ninth Circuit doubled-down on its outlier test for when the ADA's and FAAAA's express preemption provisions are triggered. In allowing respondents to enforce California's meal-and-rest-break rules against air carriers' flight crews, the decision below disregards not only this Court's precedent, but also the vital congressional objective of the ADA's preemption provision.

California's Labor Code requires employers to provide a 30-minute meal period after five hours of work. *See* Cal. Lab. Code §§ 226.7, 512(a). The State further requires an "authorized rest period time" that is "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." Indus. Welfare Comm'n, Order No. 9-2001 Regulating Wages, Hours & Working Conditions in the Transp. Indus. § 12(A) (updated Jan. 1, 2003), https://www.dir.ca.gov/iwc/Wageorders2003/IWCArticle9.pdf; Cal. Lab. Code § 226.7(b). During such breaks, employers must "relieve employees of all duties and relinquish control over how employees spend their time." *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d 823, 832 (Cal. 2016). Employees must also be "free to leave the premises" during their breaks. *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 533-34 (Cal. 2012). What might be feasible in a warehouse hardly translates to a confined space traveling over 500 miles per hour at 30,000 feet.

Under this Court's test, it is clear that the ADA preempts these labor regulations. As the United States explained in its amicus brief to the Ninth Circuit, "[t]here can be no serious question that applying California's meal and rest break laws to flight attendants will have a significant impact on the market forces influencing carrier services and prices." Brief for the United States as Amicus Curiae in Support of Appellants 18, *Bernstein v. Virgin Am., Inc.*, No. 19-15382 (9th Cir. Sept. 3, 2019), 2019 WL 4307414 ("United States Amicus Br.").

Carriers cannot operate flights without a full crew on duty, and requiring them to take duty-free breaks would interfere with critical—and tightly scheduled—operations like boarding, takeoff, landing, and deplaning, not to mention unplanned contingencies like weather or actual emergencies. Pet. 23-24. To be sure, airlines could attempt to rearrange flight schedules to accommodate breaks between flights, but that just underscores the problem. That would have an unavoidable impact on services, routes, and prices—both "throughout the country and internationally." United States Amicus Br. 22; *see* Pet. 24-25. The same goes for the Ninth Circuit's proffered solution of adding more paid flight attendants to the flights themselves, *see* Pet. App. 18a; that would have the direct effect of taking away seats from passengers, reducing services, increasing prices, and negatively impacting routes. Pet. 25-27.

Under the Ninth Circuit's "binds to" test, however, none of that matters. The only question is whether the California regime compels "a *particular* price, route, or service." Pet. 20a (emphasis added) (citation omitted). Because the answer to that question is (and invariably will be) no, the Ninth Circuit held that

California's meal-and-rest-break laws could be applied to the airline industry. Pet. 19a-21a.

III. THIS COURT'S INTERVENTION IS NEEDED NOW

A. Applying California's Meal-And-Rest-Break Rules To Flight Crews Would Severely Disrupt The Airline Industry

If the decision below stands, it will have dire effects on airlines. As the United States recognized in its brief below, enforcing California's labor law to govern flight crews will frustrate the congressional policy underlying ADA preemption by allowing state regulation, rather than federal regulation and market forces, to dictate the manner by which air carrier services will be performed. United States Amicus Br. 18. The result will be precisely the inefficiency, confusion, and patchwork of state regulation that Congress sought to avoid.

As the United States has explained, commercial aircraft operate under tight schedules and require careful coordination regarding the availability of runways, gates, and flight crews. *Id.* at 20-21 (citing U.S. GAO, *National Airspace System: Initiatives to Reduce Flight Delays and Enhance Capacity are Ongoing but Challenges Remain*, GAO-05-755T at 4-5 (May 26, 2005), https://www.gao.gov/products/GAO-05-755T (GAO Report)). The Federal Aviation Administration also conducts extensive coordination with air carriers to manage airspace, including planning related to thunderstorms, en-route congestion, and terminal congestion. *Id.* at 21 (citing GAO Report 7-9). Those tasks are particularly difficult for airports serving major metropolitan areas, *see id.*, like Los Angeles International Airport,

McCarran International Airport, San Francisco International Airport, Phoenix Sky Harbor International Airport, and Seattle-Tacoma International Airport—five of the ten busiest airports in the United States, *see* Doug Carlin, *15 Largest Airports in the US [Update 2021]*, USA by Numbers (Mar. 13, 2021), https://usabynumbers.com/largest-airports-in-the-us/, and only a few of the large airports located in the Ninth Circuit.

Requiring air carriers to comply with California's meal-and-rest-break laws would substantially disrupt that already complex coordination. The proposed options for complying with California's laws—adding mid-flight breaks for flight attendants, hiring more flight attendants, and scheduling longer ground time between flights—would significantly affect airline prices by adding labor expenses and reducing the efficiency and number of flights. *See* United States Amicus Br. 21-23. This is all the more true if—as seems likely—the decision below is extended to pilots as well as flight attendants. *See* Pet. 28.

The Ninth Circuit's proposed solution is also unworkable. As petitioners point out, adding a single flight attendant to a route would increase flight-attendant-related costs by 33%. *Id.* at 26. Nor is it simply a matter of adding extra employees to the plane. "Flight attendants . . . often work in flight 'pairings'; coordinated flights that allow the attendant to fly to and from one city, always returning to the attendant's home base." United States Amicus Br. 22. As the United States observed, "[i]f providing attendants with a state-mandated break caused them to be replaced by a relief attendant on the next regularly scheduled flight, the first attendant could

be abandoned in an airport that is not their home base for a significant period." *Id.* In other words, not only would the Ninth Circuit's solution "require airlines to hire two flight attendants to do the work of one," it would require them to "strand[] both in airports outside of their home base." *Id.* at 23.

The compliance options are even less realistic for regional airlines, which already have extremely tight profit margins. *See* Pet. 26-27. These airlines specialize in the use of smaller planes that are carefully calibrated to the size of the market and demand. These flights already have lower revenue potential compared to large aircraft flights, and any of the proposed compliance options—like requiring the airlines to staff back-up flight attendants or pilots on flights and then take away scarce seats on planes from customers—would render many such flights economically unviable. *See id.*

And make no mistake: the decision below will have widespread ramifications in the aviation industry beyond airlines' attempts to accommodate the California rules at issue here. After the Ninth Circuit's decision, airlines cannot turn to a single body of labor law to govern their flight crews. The Ninth Circuit's stingy approach to preemption permits enforcement of not only California law, but also the different (and sometimes incompatible) labor requirements of other States as well. Pet. 27. Layering those additional logistical complications on top of the already complex requirements of aviation coordination would be disastrous. It is no surprise that the United States warned the court below that imposing labor regimes like California's on airlines would "plainly conflict" not just with efforts "to maximize efficient use of the navigable airspace," but

with "the purposes and objectives of federal safety regulations." United States Amicus Br. 4.

B. The Ninth Circuit's Outlier Preemption Regime Also Harms National Commerce More Broadly

The Ninth Circuit's flawed preemption test also has—and will continue to have—grave consequences well beyond the airline industry. Its misguided approach has already negatively affected the trucking industry in particular, which Congress protected from state laws disrupting rates, routes, and services by enacting an identical preemption provision in the FAAAA. The Ninth Circuit has applied the "binds to" test to hold that California's meal-and-rest-break laws are not preempted by the FAAAA and must be enforced against motor carriers in the State—notwithstanding the state regime's significant impact upon trucking routes and services. *Dilts*, 769 F.3d at 646-47. Ultimately, the disastrous practical effects of that decision were averted only by federal intervention; in the aftermath of *Dilts*, the Federal Motor Carrier Safety Administration (FMCSA) exercised its statutory authority to administratively exempt truckers from California's meal-and-rest-break laws. 83 Fed. Reg. 67,470 (Dec. 28, 2018).[2]

Undeterred, the Ninth Circuit has since applied the same test to hold that the FAAAA does not preempt a California worker-classification law that

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[2] The FMCSA deemed California's meal-and-rest-break regime a regulation of "commercial motor vehicle safety" that was "incompatible" with federal regulation and would "cause an unreasonable burden on interstate commerce" while providing "no safety benefit." 83 Fed. Reg. at 67,473-80.

effectively precludes motor carriers from using independent owner-operators to provide trucking services. *See California Trucking Ass'n*, 996 F.3d at 664. That decision also split with other courts, and the petition of the California Trucking Association et al. seeking review has been supported by dozens of stakeholders in the trucking industry (including the Chamber). *See* Docket in No. 21-194. The Court should consider granting that petition alongside this one, both of which address the Ninth Circuit's flawed analysis of the same preemption language.[3]

Without this Court's intervention, the Ninth Circuit's rulings pose a significant threat to national commerce more broadly. Because travel and supply chains are configured for competitive and efficient air and motor carrier service, prices will rise as carriers' capacity is reduced and routes become more circuitous. The ripple effect from this disruption will harm travelers, consumers, and the national economy, which are already grappling with travel disruptions and significant supply-chain delays caused by the ongoing COVID-19 pandemic.

This fallout could not come at a worse time for the shipping industry. Currently a global semiconductor shortage "is short-circuiting heavy-duty truck production" and as of July 2021, "the backlog of trucks ordered but not built has nearly tripled from the same month a year ago, to 262,100." Jennifer Smith,

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[3] The petition in *Cal Cartage Transportation Express, LLC v. California*, No. 20-1453, seeking review of the California Court of Appeal's decision in *People v. Superior Court*, 57 Cal. App. 5th 619 (2020), presents the same FAAAA-preemption question as *California Trucking Association v. Bonta*—further illustrating the need for this Court's review.

Chip Shortage Curtails Heavy-Duty Truck Production, Wall St. J. (Sept. 3, 2021), https://on.wsj.com/3yMccJa. And even where trucks are available, there is simply too much cargo to move and not enough infrastructure to move it, as businesses are facing a full-fledged "supply-chain crisis," including "port delays . . . near a record high," with dozens of ships carrying "tens of thousands of shipping containers" "waiting off the shore for weeks, pushing back delivery dates and driving up the cost of transportation." Grace Kay, *The US Shipping Crisis Is Not Going Away As 33 Cargo Ships Float Off The Coast Of LA Waiting To Dock*, Business Insider (July 26, 2021), https://bit.ly/3j5JyhF.

All of this results in dramatically higher prices for businesses and consumers. Consistent with the broader trend of inflation across the country, U.S. freight costs are rising disproportionate to demand: "U.S. freight demand rose 3.4% from February to March [2021] while . . . freight expenditures rose nearly twice as fast, at 6.5%." Jennifer Smith, *Truckers Expect U.S. Transport Capacity Crunch to Persist*, Wall St. J. (May 2, 2021), https://on.wsj.com/3mmWt0K. That trend is set to continue, as "U.S. ports expect congestion" of the nation's shipping routes "to continue deep into next year," with "logjams stretch[ing] into warehouses and distribution networks across the country." Paul Berger, *U.S. Ports See Shipping Logjams Likely Extending Far Into 2022*, Wall St. J. (Sept. 5, 2021), https://on.wsj.com/3DVCXOV. As the Council of Economic Advisers has explained, "[t]he situation has been especially difficult for businesses with complex supply chains, as their production is vulnerable to disruption due to shortages of inputs from other

businesses." Susan Helper & Evan Soltas, *Why the Pandemic Has Disrupted Supply Chains*, The White House (June 17, 2021), https://www.whitehouse.gov/cea/blog/2021/06/17/why-the-pandemic-has-disrupted-supply-chains.

In short, the Ninth Circuit's repeated refusal to give effect to the broad reach of ADA and FAAAA preemption has created unacceptable uncertainty, confusion, and obstruction in industries for which nationwide uniformity is crucial. And the Ninth Circuit's latest decision applying its flawed precedent to the airline industry epitomizes why its rule cannot stand. The Court should grant this petition and put an end to the Ninth Circuit's legally unsound and commercially disruptive preemption standard.

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This Court's ADA and FAAAA jurisprudence has been clear. *Morales* affirmed the breadth of the ADA's preemption language, stating that the clause "express[ed] a broad pre-emptive purpose," had a "sweeping nature," and was "'broadly worded.'" 504 U.S. at 383-84 (citation omitted). *Wolens* reiterated a broad construction of the ADA preemption clause, applying it to claims relating to "unessential," as well as "essential," services. 513 U.S. at 226. *Rowe* affirmed that a claim may have an effect that is "only indirect" on prices, routes, or services, and still be preempted. 552 U.S. at 370 (citation omitted). And *Ginsberg* expressly rejected the Ninth Circuit's crabbed reading of ADA preemption. 572 U.S. at 279. Other courts of appeals have faithfully applied those decisions, *see* Pet. 17-21, yet the Ninth Circuit has charted a completely different course. This has

produced a clear split of authority that itself threatens national uniformity in this critical area.

In this case, the Ninth Circuit has upped the ante. Only this Court can address the circuit's flawed approach, and it should do so before the court's decisions further undermine Congress's design—and disrupt the nation's vital air transportation system.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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