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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit's rigid "binds to" test for Airline Deregulation Act (ADA) preemption eviscerates a crucial preemption provision, flouts this Court's cases, and conflicts with four other circuits' decisions. As the amici—including 19 States—confirm, the nationwide impact of subjecting airlines to a patchwork of state meal-and-rest-break rules cannot be overstated. The Court should intervene.

Respondents say there is no cert-worthy conflict because the Ninth Circuit's "binds to" test applies only to generally applicable *labor* laws. But this Court's decisions reject a heightened test for *all* generally applicable laws, regardless of their subject matter. And Respondents' attempt to distinguish other circuits' cases as involving regulations of "customer-facing services" falls flat. Opp. 28. It is hard to imagine more direct impacts on airlines' customer-facing services than delaying flights to give flight attendants duty-free breaks or confiscating seats from customers to accommodate the additional flight attendants required to comply with California law. Displaced passengers are not merely a "downstream effect" of state regulation. Opp. 35. They are customers deprived of the core service of air travel. The Ninth Circuit's own language repudiates Respondents' characterization of the decision below, and Respondents do not even attempt to identify any vehicle problems.

The petition should be granted.

ARGUMENT

I. THE NINTH CIRCUIT'S ADA PREEMPTION TEST CONFLICTS WITH THIS COURT'S DECISIONS AND THOSE OF OTHER CIRCUITS

In conflict with this Court and other courts of appeals, the Ninth Circuit holds that the ADA does not preempt "generally applicable" state laws unless they "*bind*[]" a carrier to a "particular price, route, or service." App. 20a (citation omitted); *see* Pet. 15-21. Under that rigid categorical rule, the Ninth Circuit refuses even to consider a state law's impact on prices, rates, or services. *See* App. 19a-21a.

Respondents ultimately concede that the Ninth Circuit applies this "binds to" test. Opp. 15-18. But that's okay, they say, because the "binds to" standard is a special test developed specifically for state labor laws. Opp. 13. And that special test doesn't conflict with this Court's decisions or the decisions of other circuits, they insist, because those decisions, unlike the Ninth Circuit's cases, involved regulations affecting airlines' interactions with customers.

Those responses don't wash. Neither this Court nor other circuits carve out some special "labor-law" preemption test. To the contrary, this Court has considered generally applicable laws on three occasions, each time reaffirming that the question is whether the law, whatever its subject matter, has a "significant impact" on prices, routes, or services. *See Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 279, 289 (2014); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 226-27 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 385-86, 388-90 (1992). And the answer here is "yes" because California's meal-and-rest-break rules force airlines either to impose cascading flight delays

on customers or to confiscate customers' seats for additional flight attendants.

A. The Ninth Circuit's "binds to" test cannot be squared with this Court's decisions. The notion that the ADA "only pre-empts the States from actually prescribing rates, routes, or services" "simply reads the words 'relating to' out of the statute." *Morales*, 504 U.S. at 385. Indeed, this Court has reversed the Ninth Circuit before for concluding that "the prerequisite for … preemption" is whether a state law "force[s] the Airlines to adopt or change their prices, routes or services." *Ginsberg*, 572 U.S. at 279 (citation omitted). The correct question is whether the state law has a "significant impact" on prices, routes, or services. *E.g.*, *Morales*, 504 U.S. at 390.

Respondents' counterarguments fail.

1. Respondents first claim that the Ninth Circuit does not actually apply a "binds to" test because it assesses "two [other] considerations"—whether the "law (1) affects airlines 'solely in their capacity as members of the general public' and (2) regulates the relationship … between a carrier and its *workforce* rather than its customers." Opp. 15 (quoting *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 657 (9th Cir. 2021), *petition for cert. docketed*, No. 21-194 (Aug. 11, 2021); citation and quotation marks omitted). As Respondents concede, however, such a law is "preempted only if it 'directly or indirectly, *binds* the carrier to a particular price, route or service.'" *Id.* (quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014)). In the end, the Ninth Circuit doesn't care how significant a law's impact on prices, routes, or services may be unless the law "*binds* the carrier to a

particular price, route, or service." App. 20a (citation omitted).

2. Respondents next contend that the Ninth Circuit's "binds to" test does not conflict with this Court's precedent because it applies only to generally applicable *labor* laws. Opp. 18-23. But this Court applies just *one* test, consistent with the ADA's text, to generally applicable laws of all genres: whether the law is "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1); *see Ginsberg*, 572 U.S. at 276 (general breach-of-implied-covenant rule); *Wolens*, 513 U.S. at 227 (general consumer-fraud statute); *Morales*, 504 U.S. at 378 (general deceptive-advertising laws). There is no basis for carving out an exception for generally applicable *labor* laws, and doing so would create "an utterly irrational loophole" that would "undo" the ADA's deregulatory purpose. *Morales*, 504 U.S. at 378, 386.

Respondents also characterize this Court's decisions as focusing on "the binding nature of the preempted laws." Opp. 26. But saying that a law is "binding" in some respect—because it is, after all, a law—doesn't mean that a law binds a carrier to any particular price, route, or service, as the Ninth Circuit requires. Indeed, none of the state laws that the Court found preempted in *Morales*, *Wolens*, or *Ginsberg* "force[d] [airlines] to adopt or change their prices, routes or services." *Ginsberg*, 572 U.S. at 279 (citation omitted).

3. Respondents say *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008), "endorses and conducts" the same inquiry as the Ninth Circuit by making a law's general applicability "a relevant factor." Opp. 21-22. Not so. Although

Rowe involved a law "aim[ed] directly at the carriage of goods," 552 U.S. at 375-76, it created no presumption against preemption for generally applicable laws. To the contrary, *Rowe reaffirmed* that "pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect,'" including "where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Id.* at 370-71 (quoting *Morales*, 504 U.S. at 386, 390). As the Court's decisions involving generally applicable laws make clear, "significant impact" is the sole test. *Supra* pp. 3-4.

4. Respondents' remaining arguments fare no better. Respondents admit that "the ADA does not contain the words 'generally applicable,' 'workforce,' 'customers,' or 'binds to'"—terms at the core of their reading of the Ninth Circuit's standard. Opp. 24. And *Rowe* rejected the argument that a law within the state's "police power," Opp. 25 (citation omitted), falls into "an exception [from preemption] on that basis," *Rowe*, 552 U.S. at 374. Finally, the decisions Respondents say "disfavor ADA preemption of generally applicable labor laws," Opp. 25-26, do no such thing (except for *California Trucking*, 996 F.3d at 657 (9th Cir.)). *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 84, 86-88 (1st Cir. 2011), *found* preemption, and the other cases involved wage laws and whistleblower claims that each court concluded did not significantly impact prices, routes, or services.

B. The Ninth Circuit's standard also conflicts with the First, Fifth, Seventh, and Eleventh Circuits' test, which, like this Court, asks whether a generally applicable state law has a "significant impact" on prices, routes, or services. Respondents claim that those circuits' cases are not labor-law cases and that,

unlike this case, they involved laws affecting airlines' interactions with customers. Opp. 27-33. But several *are* labor-law cases. And, more importantly, California's meal-and-rest-break rules have just as great an impact on customer-facing services as the regulations in any other circuit's cases because (among other things) they require airlines to delay passenger service or confiscate passenger seats.

1. a. The First Circuit's decisions exemplify the problems with Respondents' purported distinctions. *First*, the First Circuit has repeatedly found preemption *of generally applicable labor laws*. *DiFiore* held that the ADA preempted Massachusetts' generally applicable law governing tips for all "service employees" because it had a "significant impact" on the airline's "service" of "arranging for transportation of bags," and on the airline's "price" as well. 646 F.3d at 84, 86-88 (citation omitted). Likewise, *Massachusetts Delivery Association v. Healey*, 821 F.3d 187, 191-92 (1st Cir. 2016), and *Schwann v. FedEx Ground Package System, Inc.*, 813 F.3d 429, 438-39 (1st Cir. 2016), both found preemption of a provision of Massachusetts' generally applicable employee-classification law to same-day delivery carriers because of its "significant impact" on the companies' services.

Second, Respondents' attempt to distinguish the laws in these cases as regulating at the level of customer service fails because California's meal-and-rest-break laws do the same thing. Delaying flights or confiscating seats is a customer-facing fiasco.

Third, the First Circuit's cases all ask the "significant impact" question, not any "binds to" question. *See DiFiore*, 646 F.3d at 87; *Mass. Delivery Ass'n*, 821 F.3d at 191-92; *Schwann*, 813 F.3d at 438-39; *Bower*

v. EgyptAir Airlines Co., 731 F.3d 85, 96-97 (1st Cir. 2013). And *Bower* confirms that state laws are particularly problematic where they have an "effect on airlines' day-to-day operations" or "impose[] on the airline service obligations beyond what the market require[s]." 731 F.3d at 95-96. Booting customers to add flight attendants (and pilots) does just that.

b. A recent district court decision—which Respondents don't address—confirms the circuit conflict. In *Air Transport Association of America, Inc. v. Healey*, No. 18-cv-10651, 2021 WL 2256289, at *11 (D. Mass. June 3, 2021), the court held that whether Massachusetts' paid sick-leave law is preempted turns on whether it has "a significant impact on airline prices, routes, or services." That rule applies "even though [the law] is a generally-applicable labor law," and regardless of "whether the impact is direct or indirect." *Id.* Because the significant-impact inquiry turns on factual questions, the court set the matter for trial. *Id.* at *12.

The Ninth Circuit does the opposite. In *Air Transport Association of America, Inc. v. Washington Department of Labor & Industries*, No. 19-35937, 2021 WL 3214549 (9th Cir. July 29, 2021), the court affirmed summary judgment against ADA preemption, without considering impact, because Washington's paid-sick-leave law does not "*bind*[] the [airlines] to a particular price, route, or service." *Id.* at *2 (quoting App. 20a). As a New York district court recently put it in disagreeing with that Ninth Circuit decision and finding New York City's paid-sick-leave law preempted, "[n]o other circuit … has adopted such a narrow standard." *Delta Air Lines, Inc. v. N.Y.C. Dep't of Consumer Affs.*, No. 17-cv-1343, slip op. at 13 (E.D.N.Y. Sept. 30, 2021).

2. Petitioners' attempts to distinguish the remaining circuit and state-high-court decisions fail for the same reasons.

First, those cases also involved labor laws. *Brindle v. Rhode Island Department of Labor & Training*, 211 A.3d 930, 937-38 (R.I. 2019), *cert. denied*, 140 S. Ct. 908 (2020), held that the ADA preempts generally applicable state laws regulating Sunday and holiday pay because of their "significant impact" on airlines' services. And *Chambers v. RDI Logistics, Inc.*, 65 N.E.3d 1, 9 (Mass. 2016), followed *Schwann* (1st Cir.) in holding a provision of Massachusetts' worker-classification law preempted.

Second, all those circuit and state-court decisions applied the "significant impact" test. *See* Pet. 19-21 (discussing cases). Respondents try to wave away *Brindle* as "turn[ing] largely on the factual question" of significant impact. Opp. 32. But factual questions are precisely why decisions like *Brindle* and the Ninth Circuit's cases are irreconcilable: the Ninth Circuit doesn't care about the facts if the law doesn't *bind* an airline to a particular price, route, or service—something the laws in *Brindle* didn't do.

Finally, the findings of impact in those cases show that taking seats away from paying passengers is just as significant. For example, *Witty v. Delta Airlines, Inc.*, 366 F.3d 380 (5th Cir. 2004), found that a passenger's common-law negligence claim seeking more legroom had a "'forbidden significant effect'" on prices because "requiring more leg room would necessarily reduce the number of seats on the aircraft." *Id.* at 383 (quoting *Morales*, 504 U.S. at 388). Here, in contrast, the Ninth Circuit suggested "reduc[ing] the number of

seats on the aircraft" by adding flight attendants would *avoid* a preemption problem.

II. THE NINTH CIRCUIT'S DECISION IS WRONG

The Ninth Circuit's holding that the ADA does not preempt applying California's meal-and-rest-break laws to airlines is wrong. The correct test is not whether state law "*binds* the carrier to a particular price, route, or service," App. 20a (citation omitted), but whether state law has "a 'significant impact'" on carrier rates, routes, or services. *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390). As the United States told 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 at 18, *Bernstein v. Virgin America, Inc.*, No. 19-15382 (9th Cir.), 2019 WL 4307414 ("U.S. CA9 Br.").

Respondents do not dispute that relieving flight attendants of all duties every few hours, as California law requires, would disrupt and delay airline services. Flight attendants cannot go off duty at any time when a plane is operating, so they must take breaks between flights. Pet. 23-25; U.S. CA9 Br. 19-20. Instead, Respondents contend that airlines can inexpensively add flight attendants. But that doesn't work either.

First, as the United States explained below, Federal Aviation Administration regulations require flight attendants to remain "on-duty and on-call to perform" both emergency and "routine safety duties." U.S. CA9 Br. 19-20; *see* Pet. 7-8. Beyond that, sitting in uniform in a jump seat invites passengers to

disrupt a break period. Brief of 19 States as Amici Curiae at 18 & n.2 ("19 States Br."). The practical reality is that flight attendants on a flying airplane cannot take breaks under California law because they cannot "leave the premises," *Brinker Rest. Corp. v. Superior Ct.*, 273 P.3d 513, 534 (Cal. 2012), and federal regulations require predictable rather than "exception[al]" interruptions, *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d 823, 833-34 & n.14 (Cal. 2016). Thus, even with additional flight attendants, off-duty break periods must still occur between flights, wreaking havoc on tight schedules and crew pairings. U.S. CA9 Br. 22-23; Brief for Regional Airline Association as Amicus Curiae at 14 ("RAA Br.").

Second, adding flight attendants—and inevitably pilots—will displace paying passengers. Extra jump seats are often already occupied by commuting employees. And regional carriers, which "operate aircraft with 9-76 seats," have "no room in the passenger cabin for the additional jump seats needed for the extra crew" and will need to eject paying customers. RAA Br. 14. SkyWest Airlines *alone* ran 25,176 sold-out flights in 2019. *Id.* at 11. Denying thousands of passengers access to seats unquestionably has a significant impact. Pet. 26.

Third, California's meal-and-break rules would require *multiple* extra attendants per flight, because once a flight attendant is released from duty, she must receive a "rest period" of "at least 9 consecutive hours." 14 C.F.R. § 121.467(a), (b)(2). As the United States has explained, flight attendants may be stranded upon taking their breaks because they would need to be relieved by an entirely new crew. *See* U.S. CA9 Br. 7, 22-23.

Finally, adding flight attendants would also have a significant impact on prices and routes. Pet. 26-27. Fewer seats for paying customers means higher prices. And the increased costs likely will make some routes unsustainable, especially for regional airlines. RAA Br. 6-7, 11.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

As amici confirm, the question presented is vitally important nationwide. State-mandated duty-free breaks would cast air-traffic control into disarray—especially when applied to pilots and other crew. Pet. 27-28. And adding flight attendants (and pilots) is no solution. It would disrupt flight pairings and multiply costs, inevitably increasing ticket prices and jeopardizing the sustainability of certain routes.

Respondents nevertheless claim the question presented is unimportant because California's meal-and-rest-break rules apply only to intra-California flights. Opp. 34-36. But that view enables the very "patchwork of state service-determining laws" that federal law was meant to prevent. *Rowe*, 552 U.S. at 373. Moreover, even leaving aside Virgin's far more numerous interstate flights, *see* Appellees' Supplemental Excerpts of Record at 1007, 1031, *Bernstein*, No. 19-15382 (9th Cir.), ECF No. 55-5, such a narrow focus ignores reality in the air-transportation context. Assuming it is possible—despite the "severe shortage of qualified pilots," RAA Br. 15-17 & n.7—adding crew costs money and deprives paying passengers of seats (snatching away still more revenue). As the regional airlines, which handle more than 40% of passenger departures, explain, many routes rely on small planes and federal subsidies tied to razor-thin profit margins.

RAA Br. 1, 5-11; *see* Brief for Amici Curiae Airlines for America & Int'l Air Transport Ass'n at 14. Those routes, which can serve "up to eight cities on an average day," play a crucial role in feeding passengers into the nationwide air-transportation system. 19 States Br. 11-14. What happens in California doesn't stay in California. *See id.* at 19-20; RAA Br. 12-13.

* * *

As the United States has explained, the Ninth Circuit's test obstructs Congress' deregulatory objectives with particularly severe consequences for air transportation, "rais[ing] concerns" about "significant delays and disruptions" "not present in applying the California law to truckers." U.S. CA9 Br. 24. Those heightened aviation-specific concerns warrant this Court's plenary review, regardless of whether they also warrant review in the trucking context. *See Cal. Trucking Ass'n, Inc. v. Bonta*, No. 21-194; *cf.* Opp. 18-25, *Cal Cartage Transp. Express, LLC v. California*, No. 20-1453, *cert. denied* (Oct. 4, 2021) (Court lacks jurisdiction over interlocutory state-court decision).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 6, 2021