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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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INTRODUCTION

The United States' brief makes clear that the Court should grant review in this important case. The Ninth Circuit held that airlines could comply with California's meal-and-rest-break laws and Federal Aviation Administration (FAA) regulations by *adding a flight attendant to every flight*. It's hard to imagine state-law requirements with a more significant impact on airline prices, routes, and services. The only other way for airlines to comply with California's meal-and-rest-break laws is to keep planes grounded while flight attendants take their breaks. Thus, as the United States told the Ninth Circuit, "[t]here can be no serious question" that those laws "will have a significant impact" on airline prices, routes, and services, and therefore that the Airline Deregulation Act (ADA) preempts them. U.S. CA9 Br. 18 (No. 19-15382). As the Solicitor General tells this Court, however, the Ninth Circuit ignored that significant impact entirely—flouting this Court's ADA precedents.

The government also does not dispute the exceptional importance of this case. To the contrary, the government announces that it is "prepared to facilitate discussions outside of this litigation with the airlines, unions, and States to address and minimize" the "disruption to the traveling public" that the Ninth Circuit's opinion will cause. U.S. Br. 15 n.*. How the government plans to compel dozens of state legislatures to change their patchwork of laws, and still more plaintiffs' lawyers to abandon their class-action lawsuits, is a mystery. Nineteen states have already told the Court that they want cert, not a federal summit. Unless this Court intervenes, the disruption the government predicts will come imminently, as nineteen states have also warned this Court. Indeed, a recent

study projects that applying California's meal-and-rest-break rules could cause nearly $40 *billion* in economic damage—at a time when nationwide staffing issues and worsening pilot shortages are already grounding thousands of flights. *Infra* p. 7.

So why does the government resist cert by advancing an implausible vehicle argument? The answer, presumably, is that the new administration's political constituencies wouldn't stand for straightforward legal analysis. *Cf.* Association of Flight Attendants-CWA CA9 Amicus Br.

The government doesn't dispute that the Ninth Circuit required airlines to add flight attendants to comply with California law. And the government doesn't dispute that the United States, the parties, and the California Attorney General all understood the California Supreme Court's unequivocal precedent the same way: state law requires *duty-free* breaks. But maybe, the government now tells this Court, if the Ninth Circuit just thought harder, it might hold that California's "off duty" break requirement really means "on duty," with flight attendants continuing to carry out their FAA-imposed responsibilities. That notion of a working break isn't just a "contestable" view of California law, as the SG admits. U.S. Br. 16. It is oxymoronic and unprecedented—and certainly not a reason to deny or GVR.

What would GVR accomplish anyway? Presumably the Ninth Circuit, having no basis to rethink its holding, would simply reaffirm its prior judgment. Or maybe it would certify a question to the California Supreme Court. Then, maybe by 2024, the California Supreme Court would decide either (1) that California law means what the state high court already said it

means—a pointless exercise—or (2) that on-duty "breaks" are okay—essentially self-preempting, and undermining state sovereignty, to avoid federal preemption. The parties, the traveling public, and the states—including California—deserve better than years more of legal limbo. The stakes are too high. 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.

The government agrees that the Ninth Circuit deviated from this Court's precedent by failing to examine whether California's meal-and-rest-break laws will have a significant impact on the airline industry. *See* U.S. Br. 10-11. By applying the wrong test for ADA preemption, the Ninth Circuit split from this Court's decisions and those of other federal and state courts.

A. The test for ADA preemption is clear: courts must ask whether generally applicable state laws have a *significant impact* on airline prices, routes, or services. *See* U.S. Br. 4, 8-10. That test "reflects a broad and deliberately expansive preemptive purpose." U.S. Br. 8. Thus, the government explains, the ADA preempts "not only state laws that make 'reference' to the prices, routes, or services of airlines and motor carriers, but also laws of general applicability that have a 'significant impact' on prices, routes, or services." U.S. Br. 4, 8 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388, 390 (1992)).

The Ninth Circuit didn't apply the "significant impact" test. It held instead that the ADA preempts "generally applicable" state laws only if they "*bind[]*

the carrier to a particular price, route, or service." App. 20a (citation omitted); *see* Pet. 15-21; Reply 2-9. That "binds to" test lets the Ninth Circuit ignore a state law's impact on airline prices, routes, or services. And that's exactly what the Ninth Circuit did here. *See* App. 19a-21a. As the government says, the Ninth Circuit's "reasoning was misguided" because the court "did not … engage in the requisite industry-specific analysis of any potential impact." U.S. Br. 10-11.

That departure puts the Ninth Circuit in conflict with not only this Court's decisions, but also those of at least four other circuits plus state high courts, each of which faithfully applies this Court's "significant impact" test. *See* Pet. 17-21; Reply 5-9.

B. Despite agreeing that the Ninth Circuit failed to apply the "significant impact" test, U.S. Br. 9-10, the government claims "no conflict," U.S. Br. 17-22. That contention is meritless.

First, the government's premise is that the Ninth Circuit didn't actually apply the "binds to" test. *See* U.S. Br. 17-19. But the Court "take[s] the Court of Appeals at its word." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 815 (2011). And the Ninth Circuit said that "the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route, or service." App. 20a (citation omitted). That clear language proves that the Ninth Circuit applied the "binds to" test to generally applicable state laws rather than the "significant impact" test. So does the Ninth Circuit's failure—which the government underscores—to assess "*any* potential impact." U.S. Br. 11 (emphasis added).

Second, even if this Court could disregard what the Ninth Circuit said below, the decision is not some

outlier in the Ninth Circuit. It's binding precedent. *See* Reply 7. That's why the Ninth Circuit followed it in *Air Transport Ass'n of America, Inc. v. Washington Department of Labor & Industries*, 859 F. App'x 181, 184 (9th Cir. 2021), *cert. pending*, No. 21-627 (U.S.): "The proper inquiry is whether the [state law] itself '*binds* the [airlines] to a particular price, route, or service.'" *Id.* (quoting App. 20a). *Air Transport* then applied the "binds to" test, holding that "because the [state law] does not regulate the airline-customer relationship or otherwise bind the airlines to a particular price, route, or service, it is not preempted by the ADA." *Id.* Thus, like the decision below, *Air Transport* "did not … engage in the requisite industry-specific analysis of any potential impact." U.S. Br. 10-11. Indeed, neither the decision below nor *Air Transport* even mentioned the word "impact," let alone "significant impact." In another circuit, the inquiry would have been different, as Massachusetts and New York cases involving similar state laws show. Reply 7. There simply is no way to reconcile the decision below or *Air Transport* with the many decisions of this Court, other circuits, and state high courts. *See* Suppl. Br. for Petitioner, *Air Transp. Ass'n*, No. 21-627 (filed June 7, 2022).

Nor does it matter that the government found language in some Ninth Circuit decisions that sounds consistent with the "significant impact" test. The Ninth Circuit applies the "binds to" test in important cases like this one, and it will continue to do so until this Court intervenes. The Ninth Circuit has had nearly a decade to self-correct since *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), but the problem persists. This Court should wait no longer to intervene.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

The government does not dispute the exceptional importance of this case. In fact, by proposing a summit to try to "minimize" the "potential disruption to the traveling public," the government *underscores* the case's importance. U.S. Br. 15 n.*.

As the petition explained, break laws like California's will significantly impact not just airline services, routes, and prices, but also our Nation's economy. Airlines will be forced to cancel routes and shutter California bases, and customers will be forced to pay more for less service. That's the opposite of what Congress intended in deregulating the airline industry. *See* Pet. 27-30; Reply 11-12.

The disruption couldn't come at a worse time. As airline CEOs have recently testified before Congress, nationwide employee shortages are grounding flights. *See, e.g.*, *Airline Oversight Hearing* at 1:31:39-45 (testimony of Scott Kirby, CEO, United Airlines), https://tinyurl.com/2fztjm9f (Dec. 15, 2021). Around the holidays, labor shortages forced airlines to cancel more than 3,000 flights. *Covid News: Thousands of Flights Cancelled as Omicron Spreads*, New York Times (Dec. 24, 2021), https://tinyurl.com/yeadb39k. And the shortages persist, forcing airlines to "pull[] back even further on their flights" despite soaring demand. *Is this the summer of travel chaos? 7 questions, answered.*, Wash. Post (May 31, 2022), https://tinyurl.com/yszj7run. Yet the Ninth Circuit thinks the Airline *Deregulation* Act allows California to require *extra* flight attendants and pilots. App. 18a.

Data also proves this case's exceptional importance. A recent "comprehensive study" concluded

that California's meal-and-rest-break laws will "impose high financial costs on the airline industry"; "cause route cancellations in many states, not just California"; "cause the loss of airline and non-airline jobs"; and "negatively impact the U.S. national economy." InterVISTAS, *InterVISTAS Study Finds California's Meal and Rest Break Law Would Substantially Harm the Economy and U.S. Airline Operations* (Mar. 15, 2022), https://www.intervistas.com/intervistas-study-california-meal-and-rest-break-law/. The total economic damage could cost nearly $40 *billion*. Too much is at stake to let the Ninth Circuit's erroneous decision stand.

III. THE GOVERNMENT'S VEHICLE ARGUMENT IS MERITLESS.

Despite the Ninth Circuit's "misguided reasoning" and the case's exceptional importance, the government tells the Court to either deny review or GVR. The government puts California law through the Transmogrifier, offering a "contestable" view that might allow flight attendants to remain *on duty* while *on break*. U.S. Br. 16. But even the government doesn't *advocate* that view—in fact, it spends a full page explaining why California law holds just the opposite. U.S. Br. 13-14. Indeed, the Ninth Circuit understood that California law requires off-duty breaks, so it held that airlines must add flight attendants to comply with both state and federal law. App. 18a. There is no reason—other than, apparently, the preferences of the administration's favored constituencies—to deny review or GVR.

A. The government acknowledges that it told the Ninth Circuit that California's "break requirements would have an improper significant impact on prices,

routes, or services." U.S. Br. 13. Indeed, the government's position was unequivocal: "There 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." U.S. CA9 Br. 18.

B. That position, the government continues, "was premised on the assumption" that airlines would have to provide breaks "on the ground, not during a flight." U.S. Br. 13. That assumption, of course, was based on the California Supreme Court's authoritative construction of state law: off-duty breaks must be "uninterrupted," the employees must be "free to leave the premises," and the "employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." U.S. Br. 13-14 (quoting *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d 823, 826 (Cal. 2016); *Brinker Rest. Corp. v. Superior Ct.*, 273 P.3d 513, 536 (Cal. 2012)). Indeed, *Augustus* held that because "state law prohibits on-duty and on-call rest periods," an employer couldn't require security guards on break to carry radios and pagers, respond to emergencies, or otherwise remain vigilant. 385 P.3d at 825-26.

But now, under the new administration, the government conjures a "view of California law" that even it concedes is "contestable": maybe "flight attendants could remain subject to their FAA-imposed duties"—like preparing the cabin for routine landing—"during an in-flight meal or rest break without running afoul of state law." U.S. Br. 16.

That "view" is an illusion. The lower courts here understood that California Supreme Court precedent requires duty-free, uninterrupted breaks permitting

employees to leave the premises. *See, e.g.*, *Bernstein*, No. 15-cv-02277, 2016 WL 6576621, at *13 (N.D. Cal. Nov. 7, 2016) (citing *Brinker*, 273 P.3d at 533). "[A]gree[ing] with the district court" about the requirements of state law, the Ninth Circuit thus held "that airlines could comply with both the FAA safety rules and California's meal and break requirement by 'staff[ing] longer flights with additional flight attendants.'" App. 18a. And the parties, United States, and California Attorney General all understood in their Ninth Circuit briefs that California law requires duty-free, uninterrupted breaks allowing employees to leave the premises. *See* U.S. CA9 Br. 8-10; California CA9 Amicus Br. 22-24, 2020 WL 709441; U.S. Br. 14 (noting that "respondents' expert proposed a damages calculation" based on only on-the-ground breaks).

What's more, the government's own brief before this Court—like the petition (at 8-9) and reply (at 9-10)—explains that the California Supreme Court has held that breaks must be uninterrupted and off duty, and employees must be free to leave the premises. U.S. Br. 13-14.

So where is the uncertainty? All the government says is that "the Ninth Circuit elsewhere has taken a permissive view of what California requires," so perhaps California law *might* permit breaks during which flights attendants remain on duty. *See* U.S. Br. 13-16. But the government's single supposed authority, *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952 (9th Cir. 2018), proves nothing. The court held that Taco Bell did not violate California's break laws just because it required employees who took advantage of discounted meals during their breaks to eat on site. That's because employees remained "free to leave the

premises," including with full-price meals. *Id.* at 956-57.

Taco Bell has nothing to do with this case. Flight attendants cannot leave the premises in flight because they "cannot take a brief walk" at 30,000 feet. *Augustus*, 385 P.3d at 833. And they can't ignore their FAA duties on break either. U.S. Br. 11-12. There is thus no way for airlines to comply with California law.

The government's hocus pocus doesn't create any state-law issue that "would complicate this Court's review." U.S. Br. 16. This Court's "ordinary approach" is to defer to the court of appeals' interpretation of state law, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 n.3 (2019), and proceed to the merits of the federal question, *see, e.g.*, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150-51 (2017). The government has given no reason for a different approach here.

C. Perhaps to make its position more palatable, the government says the Court could GVR—after all, insisting on denial of a "misguided" decision poised to create nationwide disruption is quite a reach, even for the Solicitor General. So the government floats GVR'ing "for further consideration of California law and the applicable FAA requirements." U.S. Br. 23.

To be sure, the Court should GVR before it denies. But the government offers no reason to GVR rather than grant. Indeed, it's not clear what GVR would accomplish. Why would the Ninth Circuit take a different view of a settled question that it already decided?

And if the Ninth Circuit instead certified the question to the California Supreme Court, the state high court, if it accepted certification, would have two

troubling options: (1) adhere to its precedent interpreting California law, leading inevitably to ADA preemption; or (2) contort California law to avoid ADA preemption, instead choosing to self-preempt. That choice—judicially amend state law or else face preemption—is no choice at all.

This Court should not accept the government's invitation to conscript the state court into deciding how to cope with a cleanly presented federal preemption question. All that will accomplish is years of legal uncertainty, with nationwide consequences, and likely another trip to this Court.

D. Finally, the government suggests that the Ninth Circuit might reconsider the FAA requirements on remand. U.S. Br. 23. But any confusion about the FAA regulations—which the Solicitor General can illuminate before this Court—provides another reason to *grant* review. In short, the government thinks that if California law requires off-duty breaks (and it does, as discussed), then adding flight attendants won't work because the FAA regulations require advance notice of who will remain on duty all flight long. U.S. Br. 12. So, the government continues, all breaks must occur on the ground. U.S. Br. 12-15. Of course, as the government itself argues, requiring planes to wait around at the jet bridge or on the tarmac for meal and rest breaks would wreak havoc on the airline industry. U.S. Br. 6-7; U.S. CA9 Br. 20-22. Whether breaks must take place on the ground or airlines must add flight attendants, the question presented is the same. And the answer is "ADA preemption."

* * *

The government agrees that the Ninth Circuit's decision is "misguided" and it is preparing to

"facilitate" an effort to address the impending "disruption." U.S. Br. 10, 15 n.*. Still, the government resists a grant. But the purported reason—a supposed California law issue—doesn't make sense. Although the Court asked for the government's legal judgment, it seems that what the Court got was another helping of the government's political preferences. *See e.g.*, U.S. Amicus Br., *Monsanto Co. v. Hardeman*, No. 21-241 (U.S.), *cert. pending*; *Terry v. United States*, 141 S. Ct. 1858, 1862 (2021). The Court shouldn't wait to resolve this critical question.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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June 7, 2022