No. _____

In the
Supreme Court of the United States

DELTA AIR LINES, INC.,

Petitioner,

v.

DEV ANAND OMAN, TODD EICHMANN, ALBERT FLORES, AND MICHAEL LEHR,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Flight attendants are quintessential employees involved in interstate commerce. They typically spend only a small fraction of their workweek in any one state, and spend most of their working time airborne, where conditions are either regulated by federal law or left deliberately unregulated by the Airline Deregulation Act. As a result, flight attendants traditionally have not been subjected to the wage-and-hour laws of any state, let alone the conflicting commands of multiple states, each with a minimal interest in workers who spend almost all of their time elsewhere. The decisions below change all that. Confronted with flight attendants hailing from New York, Nevada, and California, none of whom spent the majority of their workweek in California, but all of whom claimed the benefit of California wage-and-hour law, the Ninth Circuit certified questions for the California Supreme Court. While recognizing that state law generally would not apply to workers who primarily work outside the state, the California Supreme Court fashioned a special rule for "interstate transportation workers." Under that rule, flight attendants are subject to California wage-and-hour laws as long as they begin their multi-day, multi-state work shifts at a California airport, even if they spend only a small fraction of their workweek working in California and live elsewhere. The Ninth Circuit then found that California's new approach did not regulate extraterritorially or impermissibly burden interstate commerce. The question presented is:

Whether, consistent with the Commerce Clause and the deregulatory preferences of the Airline

Deregulation Act, California may extend its wage-and-hour laws to flight attendants who spend the vast majority of their workweek outside of California simply because they report to a California airport to begin their multi-day, multi-state work shift.

PARTIES TO THE PROCEEDING

Delta Air Lines, Inc. is petitioner here and was defendant-appellee below.

Dev Anand Oman, Todd Eichmann, Michael Lehr, and Albert Flores are respondents here and were plaintiffs-appellants below.

CORPORATE DISCLOSURE STATEMENT

Delta Air Lines, Inc. has no parent corporation and no publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Oman et al. v. Delta Air Lines, Inc.*, No. 17-15124 (9th Cir.) (opinion issued and judgment entered on Feb. 2, 2021; order denying rehearing and rehearing en banc issued April 13, 2021);
- *Oman et al. v. Delta Air Lines, Inc.*, No. S248726 (Cal.) (opinion answering certified questions of state law issued June 29, 2020); and
- *Oman et al. v. Delta Air Lines, Inc.*, No. 15-cv-131(N.D. Cal.) (order granting partial summary judgment to defendant, filed December 29, 2015; order granting partial summary judgment to defendant, filed January 6, 2017; judgment entered January 6, 2017).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Flight attendants work in interstate commerce, not within the confines of any one state. They spend the majority of their time in federal airspace, where federal regulations (and deregulatory policies) hold sway. The flight attendants' relationship with the state jurisdictions they traverse is at best episodic and transitory. As a consequence, they traditionally have not been subject to the wage-and-hour laws of any one state, let alone the conflicting laws of multiple jurisdictions. Instead, they are paid according to formulas that result in substantial compensation (well above state-law minima) and are directly responsive to the unique and sometimes unpredictable conditions associated with interstate air travel, where flights can get cancelled or delayed for myriad reasons. For example, Petitioner Delta Air Lines uses four different formulas to calculate flight attendant pay and then uses whichever formula yields the highest compensation for the complete rotation.

Respondents filed this lawsuit in an avowed effort to change those longstanding practices and subject a wide variety of flight attendants—some with virtually no connection to California—to California wage-and-hour law. Respondents hailed from New York, Nevada, and California. Despite their varied residences and bases, they had at least two things in common: they concededly spent the vast majority of their time working *outside* of California, and they nonetheless wanted California wage-and-hour law to govern their pay and wage statements. In particular, Respondents alleged that Delta failed to comply with various provisions of the California Labor Code,

including minimum wage requirements, Section 204 (governing the timing of pay), and Section 226 (governing the contents of wage statements). The district court rejected this seemingly far-fetched attempt to apply these California wage-and-hour laws to flight attendants who work only a *de minimis* amount of time in California.

On appeal, the Ninth Circuit certified questions concerning the applicability of California law to airline personnel to the California Supreme Court. The Ninth Circuit asked, *inter alia*, whether Sections 204 and 226 apply to wage payments and statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time. The California Supreme Court framed the dispute as whether "various California wage and hour laws [apply] to flight attendants who work primarily outside California's territorial jurisdiction." App.5. Remarkably, the California Supreme Court answered that question in the affirmative as long as the flight attendant does not work a majority of his time in another jurisdiction and begins his required rotation at a California airport. While the Court recognized that California wage-and-hour law generally applies only to workers spending the majority of their workweek within "California's territorial jurisdiction," it felt compelled to fashion a special rule for "interstate transportation workers" who are so actively engaged in interstate commerce that they spend only a small fraction of their workweek in any one state.

Back in the Ninth Circuit, Delta argued that the California Supreme Court's extension of California

wage-and-hour law to employees who spent the vast majority of their workweek elsewhere impermissibly regulated extraterritorially and unconstitutionally burdened interstate commerce. The Ninth Circuit disagreed and upheld California's extension of certain wage-and-hour laws into federal airspace. That ruling is both deeply flawed and profoundly disruptive. The Ninth Circuit approved California's avowed extension of wage-and-hour laws beyond California's territorial jurisdiction and into areas where federal regulation (and deregulatory preferences) govern. Indeed, the Court went further and called into question the very notion that state laws could violate the Commerce Clause by regulating extraterritorially. Worse still, the Ninth Circuit adopted that view in a case where the avowed justification for extending California law was that flight attendants are so actively involved in interstate commerce that no state has a better claim to regulation. This nature-abhors-a-vacuum justification for projecting state law extraterritorially would be mistaken in any context, but it is particularly misplaced in an industry where Congress has embraced a national policy of deregulation.

Unfortunately, the decision below does not stand alone, but is of a piece with other recent Ninth Circuit decisions that interpret both the Commerce Clause and Airline Deregulation Act narrowly, with the net effect of putting the operation of interstate airlines at the mercy of state regulation within the confines of the Ninth Circuit. *See Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021), *pet. for cert. filed* (U.S. Aug. 19, 2021); *Air Transport Ass'n of Am., Inc. v. Wash. Dep't of Labor & Indus.*, __ F.App'x __, 2021 WL

3214549 (9th Cir. July 29, 2021); *Ward v. United Airlines, Inc.*, 986 F.3d 1234 (9th Cir. 2021).

This Court's intervention is warranted to protect interstate air carriers like Delta from being subjected to California's extraterritorial regulation and the threat of a patchwork of conflicting state regulations. There can be no serious question about the importance and recurring nature of the issue. California's highest court has spoken and the Ninth Circuit has endorsed its regulatory grab as consistent with federal law. Thus, airline carriers across the nation are now subject to California wage-and-hour laws for flight attendants who spend only a small fraction of their workweek in California. And the combined effect of the decision below and other recent Ninth Circuit decisions paves the way for state regulation of matters of national concern where the congressional policy favors deregulation. The case for this Court's intervention is clear.

OPINIONS BELOW

The Ninth Circuit's opinion, 835 F.App'x 272, is reproduced at App.1-3. Its order certifying questions to the California Supreme Court, 889 F.3d 1075, is reproduced at App.47-59. The Supreme Court of California's opinion, 466 P.3d 325, is reproduced at App.5-46. The district court's decisions granting Delta's motions for partial summary judgment, 153 F.Supp.3d 1094; 230 F.Supp.3d 986, are reproduced at App.60-103.

JURISDICTION

The Ninth Circuit issued its opinion on February 2, 2021, and denied rehearing on April 13, 2021. This

Court has jurisdiction under 28 U.S.C. §1254(1). *See* Order (July 19, 2021).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the U.S. Constitution and California Labor Code are reproduced at App.104-12.

STATEMENT OF THE CASE

A. Factual and Legal Background

1. Flight attendants spend the majority of their time working in federal airspace or in brief stopovers. As a result, they spend only a small fraction of their workweek in any one state, and their relationship with each state they traverse is episodic and transitory. As a consequence, flight attendants traditionally have not been subject to the wage-and-hour laws of any state, but instead work under terms that reflect their unique industry and the federal government's regulatory (and deregulatory) approach to the airline industry.

Staffing commercial flights with pilots and flight attendants is complicated. It requires careful choreography that accounts for a web of federal regulations, gate availability, air traffic, transfers between terminals, and more. That coordination also must be flexible enough to accommodate delays, inclement weather, sick days, and other unexpected events that are an unavoidable feature of air travel.

Delta is a leading air carrier that transports passengers and cargo around the country and the globe. It is a Delaware corporation headquartered in Atlanta, Georgia. App.50. Delta employs more than

21,000 flight attendants across the United States. App.79.

In order to comply with its considerable regulatory obligations and ensure passenger and crew safety, Delta has developed a system of staffing flights that allows flight attendants to bid on rotations scheduled to depart from their base airport the following month. While each flight attendant is assigned a base airport, that simply means that a flight attendant's "rotation" will begin at that airport. The base airport is not necessarily located in the flight attendant's state of residence, and rarely means that a flight attendant will spend a significant portion of his workweek at that airport or in that state. Flight attendants report to that base for the sole purpose of departing to work elsewhere on multi-day, multi-state "rotations."

As detailed in Delta's Work Rules, a "rotation" is a sequence of flights over a day or series of days. Each rotation comprises one or more "duty periods," interspersed with layovers (when flight attendants are not "on duty" and not working). A "duty period" starts when a flight attendant reports to an airport before a flight. The flight attendant then has work responsibilities before, during, and after a flight; transit or "sit" time (waiting in another airport before the next flight); and similar obligations during each subsequent flight until the duty period ends. App.29.

Flight attendants have substantial control over which rotations they work. Each month, Delta circulates a bid packet listing available rotations. The bid packet details the number and length of duty periods within each rotation, report times and total

scheduled flight times for the flights within each rotation, and the amount of time the flight attendant can expect to be away from his base airport. App.30-31. Flight attendants submit their rotation preferences, and Delta assigns them so that each flight is staffed in compliance with federal regulations.

Delta pays its flight attendants according to a credit-based system on the same rotation-by-rotation basis. Delta uses four different formulas to calculate pay; each flight attendant is paid based on the formula yielding the highest compensation for a given rotation. App.30. The number of hours worked is part of those various calculations; however, Delta does not pay by the hour, or pay for only some hours and not others. App.30.

Delta pays flight attendants semimonthly and provides a wage statement with each payment. App.63-64. Those statements show the category of payments made but not hours worked or hourly rates, as flight attendants are not paid directly on an hourly basis. App.63. Delta also provides flight attendants a monthly "activity pay statement" showing details about each flight in a rotation, including flight time. The statement breaks down current monthly pay based on flight credits and various forms of premium pay. App.63-64; 87 n.9. The pay statement reflects the unique nature of interstate air travel, and does not follow the dictates of any one state law.

2. California wage-and-hour law is notorious for the detail in which it regulates matters left unaddressed by the federal Fair Labor Standards Act (FLSA) and other state laws. *E.g.*, *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 324 (2005) (identifying

"clear legislative intent" to regulate beyond the FLSA). It is equally notorious for its potential to generate class litigation and outsized liability via California's Private Attorneys General Act, or PAGA. Tim Freudenberger et al., *Trends in PAGA claims and what it means for California employers*, Inside Counsel (Mar. 19, 2015), https://bit.ly/3eoN9Vo.

The two provisions directly at issue here exemplify the detail at which California wage-and-hour law regulates the timing of pay and the contents of wage statements. Section 204 requires full payment of "all wages" twice monthly. Cal. Lab. Code §204(a). Section 226 requires employers to provide employees, "semimonthly or at the time of each payment," written wage statements itemizing the total hours worked, applicable hourly rates, hours worked at each rate, gross and net wages earned, deductions, and more. *Id.* §226(a). Section 226 provides that an employee must be able to "promptly and easily determine" the required information "from the wage statement alone." *Id.* §226(e)(2)(B)-(C). Violations may result in penalties of up to $4,000 for each injured employee, plus fees and costs and additional potential penalties under PAGA. *Id.* §226(e)(1).

3. The Commerce Clause of the U.S. Constitution gives Congress power to "regulate commerce … among the several States." U.S. Const. art. I, § 8, cl. 3. This Court has long held that the Clause "prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). The Clause reflects a "special concern" with laws that directly regulate interstate commerce and laws that "project[] … one state

regulatory regime into the jurisdiction of another state." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989).

There is a distinct temptation for states to project their laws extraterritorially into areas that Congress has reserved for relatively limited regulation. *Cf. Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019). Congress made just such a judgment about the airline industry in the Airline Deregulation Act of 1978 (ADA). The ADA reflects Congress' judgment that the federal government should embrace a policy of relative deregulation, and that state and local governments should not fill the resulting gap with regulatory policies of their own. 49 U.S.C. §1301; *see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) ("To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision[.]"). Congress has also recognized the distinct work environment of flight attendants, many of whom do not spend a majority of their workweek in any one jurisdiction. For example, Congress has exempted flight attendants from the overtime requirements of the FLSA, and devised special rules authorizing the flight attendant's state of residence to impose state income tax even if the flight attendant does not spend a majority of his time in any one state. *See* 49 U.S.C. §40116(f)(2).

B. The Oman Litigation

1. This lawsuit was initiated by four flight attendants with varying degrees of connection with California. The lead plaintiff, Dev Anand Oman, is a New York resident based out of New York's Kennedy

airport. A second plaintiff, Michael Lehr, lives in Nevada and is based out of San Francisco International Airport. The remaining plaintiffs, Todd Eichmann and Albert Flores, live in California and are based out of Los Angeles International Airport. App.50. None of the plaintiffs—Respondents here—spends a majority of his working time in California. On the contrary, during the relevant period, Eichmann worked *outside* California 91.4% of the time. Lehr, Flores, and Oman likewise worked the vast majority of time outside California (86%, 89.1%, and 97.1% of the time, respectively). App.65-66 n.7.

In 2015, Respondents filed a putative class action in the Northern District of California, alleging that Delta violated California's wage-and-hour laws. They alleged that Delta failed to pay at least minimum wage for all hours worked, did not pay "all wages" in accordance with the semimonthly time frame required by Section 204, and failed to provide comprehensive wage statements reporting hours worked and applicable hourly pay rates, as required by Section 226. App.6-7.

The district court granted summary judgment in Delta's favor on each of Respondents' claims. In its initial opinion, the district court granted summary judgment on Respondents' minimum-wage claims. App.77-103. The court held that even assuming California law applied, Delta complies with California minimum-wage law because its pay formulas expressly consider all hours worked and do not rely on "averaging." App.102.

In a subsequent opinion, the district court granted summary judgment for Delta on Respondents' timing-

of-pay and wage-statement claims. App.60-76. The court agreed with Delta that Section 226 does not apply to Respondents' wage statements because Respondents worked only a *de minimis* amount of time on the ground in California and thus "the 'situs' of their work is not California." App.70. The court found additional support from the facts that flight attendants "necessarily work[] in federal airspace" as well as in multiple states on a daily basis, and that Delta is based outside California. App.74. Because Respondents had conceded that Section 204 did not apply independently of Section 226, the court granted summary judgment to Delta on those claims. Having found California wage-and-hour law either inapplicable or satisfied, the district court had no occasion to address Delta's argument that application of California wage-and-hour law would violate the Commerce Clause. App.75 n.12.

Meanwhile, pilots and flight attendants filed two suits raising similar claims under California wage-and-hour law against United Airlines. *See Ward*, 986 F.3d at 1237-38. In both cases (later consolidated on appeal), separate district courts granted summary judgment for United. They held that Section 226 only applies to employees who work "principally" in California and thus could not apply to pilots or flight attendants, neither of whom work a majority of the time in any one state. *Id.* at 1238. One court further held that applying Section 226 to United's pilots would violate the Commerce Clause. *Ward v. United Airlines, Inc.*, 2016 WL 3906077, *5 (N.D. Cal. July 19, 2016).

2. Respondents and the *Ward* plaintiffs appealed. In both cases, the Ninth Circuit certified questions of state law to the California Supreme Court. In this case, the Ninth Circuit asked, *inter alia*:

> (1) Do California Labor Code §§204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California episodically and for less than a day at a time?

App.49.

The California Supreme Court answered the certified questions in two opinions released on the same day. The court first articulated the general rule that Section 226 applies "if an employee works primarily (i.e., the majority of the time) in California." App.10; *Ward v. United Airlines, Inc.*, 466 P.3d 309, 324 (Cal. 2020). The court then announced a special rule "[f]or interstate transportation workers and others who do not work more than half the time in any one state." *Ward*, 466 P.3d at 321; *see* App.10. For such workers, Section 226 still applies "if the worker performs some work" in California "and is based in California, meaning that California serves as the physical location where the worker presents himself or herself to begin work." *Ward*, 466 P.3d at 321. The court added that a pilot or flight attendant "presents himself or herself to begin work" in California if the pilot or flight attendant "has a designated home-base airport" in California. *Id.* at 321, 324. The court rejected as "not pertinent" any considerations of employer location, employee residence, receipt of pay, and payment of taxes. *Id.* at 324; *see also id.* at 311

("For pilots, flight attendants, and other interstate transportation workers who do not perform a majority of their work in any one state, this test is satisfied when California serves as their base of work operations, regardless of their place of residence.").

In this case, the California Supreme Court framed the question as whether "various California wage and hour laws [apply] to flight attendants who work primarily outside California's territorial jurisdiction." App.5. The court answered in the affirmative for "interstate transportation workers and others who do not spend a majority of their working time in any one state," if "California serves as their base of work operations." App.10. In reaching that conclusion, the court reaffirmed that California generally applies a presumption against extraterritorial application and the default rule that California wage-and-hour law applies "if an employee works primarily (i.e., the majority of the time) in California." App.10. But the court perceived an especial need to extend California law to "interstate transportation workers" precisely because they "do not spend a majority of their working time in any one state." App.10. The Court rejected as unworkable an approach that would apply California law only to the portions of the workweek spent in California, and acknowledged that its approach means that substantial "periods of work outside California *will* be covered, if they … are performed by an employee who primarily works in no state but is based here." App.14-15.

The California Supreme Court declined to definitively decide whether California's minimum wage law would apply to Respondents because Delta

would satisfy the law in any event. The court explained that under all four of Delta's compensation formulas, flight attendant compensation always exceeds the state minimum wage per hour worked and that Delta does not violate state prohibitions against wage averaging. App.31.

3. When the cases returned to the Ninth Circuit, Delta and United both argued, *inter alia*, that the California Supreme Court's newly-announced rule extending California law to "interstate transportation workers and others who do not spend a majority of their working time in any one state" violates the Commerce Clause. The Ninth Circuit disagreed. The court first rejected any notion that California discriminated against or directly regulated interstate commerce because application of California's wage-and-hour laws does not depend on the employer's location, and it therefore burdens in-state and out-of-state employers equally. App.2-3; *Ward*, 986 F.3d at 1239-40. The Ninth Circuit then rejected the objection that California's new approach involved impermissible extraterritorial regulation. In the court's view, only state statutes that "have the practical effect of dictating the price of goods sold out-of-state or tying the price of in-state products to out-of-state prices" are invalid as impermissibly "extraterritorial[]." *Ward*, 986 F.3d at 1240; *see* App.2-3. Furthermore, the court observed, California's "ties to the employment relationship are sufficiently strong to justify application of" Section 226, because the covered employees "must perform some of their work in-state and be based for work purposes in California." *Ward*, 986 F.3d at 1241; *see* App.2-3.

The Ninth Circuit then held that California's approach did not impose excessive burdens on interstate commerce. App.2-3; *Ward*, 986 F.3d at 1241 (citing *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)). Although both airlines argued that compliance with California's new rule and determining which employees would be subject to it would be complicated and burdensome, the Ninth Circuit reasoned that the costs of complying with state regulations are insufficient on their own to show a substantial burden on interstate commerce. App.2-3; *Ward*, 986 F.3d at 1241-42. And while California has a minimal interest in regulating the working conditions of workers who spend the vast majority of their workweek elsewhere, the Ninth Circuit found California's interest sufficient. App. 2-3; *Ward*, 986 F.3d at 1241.

Finally, the Ninth Circuit rejected the contention that California's approach would inevitably open up airlines to a "patchwork of inconsistent regulations imposed by other States." *Ward*, 986 F.3d at 1242; *see* App.2-3. In the court's view, Section 226 does not "regulate[] in an area that requires national uniformity." *Ward*, 986 F.3d at 1242. "Even if there are aspects of the interstate transportation industry that require national uniformity," the Ninth Circuit reasoned, "employee wage statements are not among them." *Id.*

Applying those principles to Respondents' claims, the Ninth Circuit affirmed in part, reversed in part, and remanded in part. In light of the California Supreme Court's minimum-wage holding, the Ninth Circuit affirmed summary judgment on Respondents' minimum-wage claims. App.2. The Ninth Circuit

reversed and remanded, however, with respect to Respondents' timing-of-pay and wage-statement claims. App.2-3. Having rejected Delta's argument that California's extraterritorial extension of its wage-and-hour laws to interstate transportation workers violated the Commerce Clause, the Ninth Circuit remanded for further proceedings with respect to the flight attendants who began their rotations at California airports. App.3. As to the lead plaintiff, Oman, who was based out of New York's Kennedy Airport, the Ninth Circuit affirmed the grant of summary judgment against him. App.3.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit plainly erred in holding that, consistent with the Commerce Clause, California can regulate the timing of pay and content of wage statements provided to interstate transportation workers who spend the vast majority of their workweek outside California, simply because they begin their multi-state, multi-day work rotations in California. Not only has California expressly projected its law beyond its borders to directly regulate interstate commerce, but its rule purposefully targets interstate transportation workers who principally work in a federal jurisdiction distinctively subject to federal oversight. California's regulation of interstate commerce is intentional, direct, and substantial. Worse still, the Ninth Circuit's blessing of California's effort to fill a perceived gap in the regulation of interstate commerce invites other states to follow suit, creating a patchwork of laws undermining the national uniformity and deregulatory policies that Congress

has adopted for the airline industry. California's direct and extraterritorial regulation of interstate commerce is fundamentally inconsistent with the Commerce Clause. And even if the burdens on interstate commerce were weighed against local benefits, the latter are illusory. California has only the most minimal interest in regulating workers who spend the vast majority of their workweek elsewhere, yet exempts hundreds of thousands of its own State and local workers who spend their workweeks in California from the wage-and-hour rules at issue here.

California has devised a special rule extraterritorially applying its wage-and-hour law to interstate air carriers like Delta, and the Ninth Circuit has now blessed that approach. The Ninth Circuit's decision is inconsistent with this Court's precedent and expressly calls into question the prohibition on extraterritorial legislation outside narrow contexts. As a result, air carriers are now subject to California wage-and-hour law for flight attendants who spend the vast majority of their working time outside California, and not in any one particular state but in federal airspace where federal law governs. Even worse, California's avowedly extraterritorial projection of its law invites other states to follow suit, creating a patchwork of state regulation of interstate commerce in a field that Congress, in the ADA, has already recognized as distinctively federal and where deregulation is the favored federal policy.

The decision in this case joins other recent Ninth Circuit decisions that have given short shrift to the uniquely federal nature of interstate air travel.

Congress' deregulatory preferences provide states with ample temptation to fill the regulatory vacuum. By interpreting both the ADA and the Commerce Clause narrowly, the Ninth Circuit has repeatedly approved these intrusions and left interstate airlines at the mercy of state regulation within the Ninth Circuit. This case presents an ideal vehicle to address the Ninth Circuit's errant Commerce Clause principles as a companion to the pending cases challenging the Ninth Circuit's cramped interpretation of the ADA. In all events, certiorari is clearly necessary to rein in the Ninth Circuit's misguided and far-reaching jurisprudence.

I. The Decision Below Is Profoundly Wrong.

A. Applying California Wage-and-Hour Laws to "Interstate Transportation Workers" Who Spend the Vast Majority of Their Working Time Outside California Violates the Commerce Clause.

1. This Court has long recognized "the Constitution's special concern" with "the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce." *Healy*, 491 U.S. at 335-36. Accordingly, under the Commerce Clause, a state may neither "directly regulate[] … interstate commerce" nor legislate extraterritorially by "'project[ing] its legislation' into other States." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)). California has avowedly done both those things by adopting a special rule for "interstate

transportation workers" who concededly spend only a small fraction of their workweek in California precisely because they are actively engaged in interstate commerce elsewhere. The Ninth Circuit's decision endorsing that rule as consistent with the Commerce Clause is deeply flawed.

In *Healy*, this Court set forth several guiding principles to determine whether a state law's "extraterritorial effects" render it incompatible with the Commerce Clause. 491 U.S. at 336. First, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* Second, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* The "critical inquiry" is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* Third, the "practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* That is so because "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 336-37.

California's extension of its wage-and-hour law to interstate transportation workers who spend the vast majority of their working time beyond California's borders violates all these principles. While Sections 204 and 226 do not by their terms apply extraterritorially, the rule adopted by the California Supreme Court is avowedly extraterritorial. The California Supreme Court itself framed the question as whether "various California wage and hour laws [apply] to flight attendants who work primarily outside California's territorial jurisdiction," and answered that question in the affirmative for workers who start their rotation in California but spend the vast majority of their working time elsewhere. App.5. The degree to which California purports to regulate conduct "that takes place wholly outside of the State's borders," *Healy,* 491 U.S. at 336, is staggering. For example, Respondent Eichmann spends over 90% of his workweek *outside* of California, yet California subjects 100% of his time to California wage-and-hour law, expressly rejecting a rule that would subject only work done in California to California law as unworkable.

Worse still, this direct regulation of interstate commerce is not incidental, but fully intentional. The California Supreme Court recognized both the presumption against extraterritoriality and the default rule that Sections 204 and 226 apply "if an employee works primarily (i.e., the majority of the time) in California." App.10. But the California Supreme Court then went on to purposefully extend the reach of those laws to "interstate transportation workers and others who do not spend a majority of their working time in any one state" so long as

"California serves as their base of work operations." App.10.

In purpose and effect, therefore, the California Supreme Court fashioned a special rule for "interstate transportation workers" that applies California wage-and-hour law to their work in other jurisdictions, and that does so precisely because the interstate nature of their work means that they do not spend the majority of their time in any one jurisdiction. This special rule for "interstate transportation workers" thus combines two cardinal Commerce Clause sins. It not only avowedly regulates extraterritorially but directly regulates interstate commerce. This Court has repeatedly recognized the dangers of state regulation where efficient travel across state lines is in the national interest. *E.g.*, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671 (1981) (trucking); *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429 (1978) (trucking); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959) (trucking); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (buses); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 783-84 (1945) (rail). Those dangers are even more obviously present when it comes to interstate air travel, where Congress and the federal government first regulated intensively, *see* H. Rep. No. 95-1211, at 1-4 (1978), and then adopted a federal policy of deregulation in the ADA. Perhaps for that reason, California's effort to apply its wage-and-hour laws to flight attendants spending the vast majority of their time in interstate travel is as novel as it is problematic.

The California Supreme Court recognized that it was consciously departing from its ordinary

presumption against extraterritoriality, but felt compelled to extend its law to "interstate transportation workers and others who do not spend a majority of their working time in any one state." App.10. This nature-abhors-a-vacuum justification for the extraterritorial application of state law would be questionable in any context, but it is entirely misplaced when it comes to airlines and flight attendants. Respondents do not spend the majority of their workweek in any one state, not just because they are engaged in interstate commerce, but because they spend much of their time in *federal* airspace governed by *federal* law. And the applicable federal law is expressly deregulatory. Thus, to the extent the California Supreme Court perceived a regulatory vacuum, it was one Congress created intentionally and did not intend states to fill. As its very name indicates, the ADA evinces a broad "deregulatory aim," *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 283 (2014), and includes a broadly worded preemption clause "[t]o ensure that the States would not undo federal deregulation with regulation of their own," *Morales*, 504 U.S. at 378.

This is not the first time this Court has confronted an effort to project state law into a federal realm in an effort to fill a perceived vacuum. This Court confronted and rejected such an effort in *Parker Drilling*. The plaintiffs there sought to project California's wage-and-hour laws onto the Outer Continental Shelf to regulate matters that the FLSA left unregulated. While the Ninth Circuit endorsed that extraterritorial projection of California wage-and-hour law, this Court unanimously reversed. This Court rejected that effort to fill gaps in federal law

with California wage-and-hour law even though the statute at issue there authorized borrowing state law in limited circumstances. *See* 139 S. Ct. at 1886-93. Similarly, in an earlier case involving employment on the high seas, this Court rejected the notion that a gap in coverage justified the extraterritorial extension of Texas labor law. *See Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 420-21 (1976). As the Court reasoned there, "[i]t is immaterial that Texas may have more contacts than any other State with the employment relationship in this case, since there is no reason to conclude" that under the applicable federal law "some State or Territory's law … must be applicable." *Id.* at 420. As *Oil Workers* demonstrates, sometimes a gap in coverage is entirely compatible with federal policy. That is particularly true when the federal policy favors deregulation.

California's effort to apply its wage-and-hour laws outside its territorial jurisdiction to interstate transportation workers who spend the vast majority of their time working elsewhere also creates the potential for conflicting state requirements that this Court warned against in *Healy*. To be sure, if every state adopted California's "home base" rule, then no two states would regulate the pay and wage statements of the same employee, since each employee has only one base airport. But nothing guarantees that other states would regulate based on a flight attendant's home base, as opposed to his state of residence, state where he worked the most hours, the employer's home base, or some other basis. Indeed, once states deviate from the baseline rules that they cannot regulate extraterritorially or directly regulate "interstate transportation workers" who spend the

majority of their time elsewhere, there is no coherent limit as to what states could deem a sufficient basis to apply their own laws to these interstate workers, and no end to the potential for conflicting obligations.[1]

2. Even if California's special rule for "interstate transportation workers" did not run afoul of *Healy* and the direct prohibitions against laws that regulate interstate commerce directly or extraterritorially, it would still impermissibly burden interstate commerce because the burdens on interstate commerce so "clearly exceed[] the local benefits." *Brown-Forman*, 476 U.S. at 579 (citing *Pike*, 397 U.S. at 142).

The "local benefits" to California from applying Sections 204 and 226 to workers like respondents are trivial. At most, California has adverted to a possible state interest in ensuring that employees "receive the information they need to determine whether they have been paid correctly." *Ward*, 986 F.3d at 1241. But California's interest in providing that information to a Nevada resident who spends over 85% of his workweek outside California is truly negligible.

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[1] Congress, of course, is free to pick factors that permit states to regulate such workers in a manner that avoids any potential for conflict. Congress has done just that in providing that airline employees (like Respondents) who work in more than two states, but do not spend a majority of their time in any one, are subject to the income tax laws of the state where they reside. *See* 49 U.S.C. §40116(f)(2). Thus, pursuant to Congress' judgment, Respondent Lehr pays Nevada income taxes (based on residence) and yet would get a California wage statement under the decision below. While Congress can pick from among a variety of potentially relevant factors to avoid conflicting obligations, the solution for avoiding conflicting obligations from multiple states is simpler: they cannot regulate extraterritoriality at all.

Moreover, the gaping exceptions in Section 226 make clear that California itself does not view that interest as particularly important even for workers who spend all their workweek in California. Most notably, Section 226 does not apply to the state as an employer. Nor does it apply to any "governmental entity" within the state—be it a city, county, district, or otherwise. §226(i). That is true even though those workers presumably work nearly all their hours within California's territorial jurisdiction. If wage statements including the details laid out in Section 226 are optional for hundreds of thousands of state and local workers who spend nearly all their time in-state, *see State Employee Demographics*, California State Controller, https://bit.ly/3nhk2bL (last visited Sept. 9, 2021), then it simply does not follow that California has a sufficient interest in ensuring that such statements are provided to individuals who spend the vast majority of their time working *outside* the state. *See Raymond Motor Transp.*, 434 U.S. at 445 (purported state interest "undercut by the maze of exemptions … that the State itself allows"); *accord Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).

At any rate, the "local benefits" to California are clearly exceeded by the burden on interstate commerce occasioned by applying Sections 204 and 226 to flight attendants who work a majority of time outside California, do not work a majority of time in any state, and are quintessential employees involved in interstate commerce governed by a federal law that recognizes the need for national uniformity. *See, e.g.*, *Bibb*, 359 U.S. at 527-29 (holding that burden on interstate commerce outweighed Illinois' interest in its preferred shape of mud flaps on trucks and

trailers); *Southern Pacific*, 325 U.S. at 771 (holding that because national uniformity was "practically indispensable to the operation of an efficient and economical national railway system," Arizona law limiting train length violated Commerce Clause). The burdens of complying with California wage-and-hour laws are substantial, especially because the formulas Delta uses to pay its flight attendants are keyed to the unique regulatory requirements and practical constraints of interstate air travel, and do not involve any set hourly rate. Moreover, the decision below creates divides within Delta's previously unified work force, with flight attendants based at California airports receiving different wage statements than flight attendants (including Respondent Oman) based elsewhere. Moreover, decisions to change a flight attendant's base airport now come fraught with regulatory consequences. And that is just sections 204 and 226. If the "logic" of the decisions below is extended to the entirety of California wage-and-hour law, then the burdens on interstate commerce would be even more substantial, and yet California would still have only a minimal interest in workers who spend a majority of their time elsewhere.

Indeed, California would concede that it has no sufficient interest in respondents who spend roughly 10% of their workweek in California, if only they spent 50-plus percent of their time in any other state, even one that did not regulate wage statements at all. California does not have any greater interest in Respondents just because they spend 90% of their time in interstate commerce. California's effort to regulate them anyway plainly runs afoul of the Commerce Clause.

B. The Ninth Circuit's Reasoning is Deeply Flawed.

Against all of this, the Ninth Circuit concluded that there is no Commerce Clause violation here. It could do so only by deeming the prohibition on extraterritoriality limited to a small subset of cases and downplaying California's avowed effort to create special rules for "interstate transportation workers" lest they escape the regulation of some state. The Ninth Circuit's analysis is fundamentally misguided.

The Ninth Circuit began its analysis by casting doubt on the continued viability of the rule against extraterritorial regulation of interstate commerce articulated in *Healy*. *See* App.2-3; *Ward*, 986 F.3d at 1240. Citing its own precedent, the court explained that it "ha[s] read" this Court's decision in *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), as "holding that the extraterritoriality principle derived from the *Healy* line of cases now applies only when state statutes have the practical effect of dictating the price of goods sold out-of-state or tying the price of in-state products to out-of-state prices." *Ward*, 986 F.3d at 1240 (citing *Assn. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013)). But this Court has never given *Healy* so cramped a reading, before or after *Walsh*. *See, e.g.*, *Tenn. Wine & Spirits*, 139 S. Ct. at 2471 (citing *Healy* with approval); *Granholm v. Heald*, 544 U.S. 460, 487 (2005) (reaffirming principle that when "a state statute directly regulates" interstate commerce, the Court has "generally struck down the statute without further inquiry"). Nor is there any logical reason that

extraterritorial price regulation would be more problematic than extraterritorial wage regulation.

Having cast doubt on *Healy*'s continuing vitality, the Ninth Circuit then breezily concluded that, even assuming *Healy* were applicable, California's approach was permissible. In doing so, the court did not even purport to apply any of the principles stated in *Healy* that govern whether a state has directly regulated interstate commerce by projecting its regulations extraterritorially. *See* p.19, *supra*. Instead, in the court's view, "[t]he salient question … is whether California's ties to the employment relationship are sufficiently strong to justify its assertion of regulatory authority over the contents of an employee's wage statements." *Ward*, 986 F.3d at 1240. Pointing to the fact that employees "must be based for work purposes in California and perform at least some work in California," the court held that the "nexus between the State and the employment relationship is not so casual or slight—as would be true if California were attempting to regulate commerce occurring *wholly* outside its borders—as to render application of California's wage-statement law arbitrary or unfair." *Id.* at 1241 (quotation marks omitted).

That ignores both what the California Supreme Court said about its rule and what this Court said in *Healy*. As to the former, the California Supreme Court was forthright that it was extending California wage-and-hour law beyond California's territorial jurisdiction and regulating 100% of the workweek of workers who spend the vast majority of their workweek elsewhere. It specifically rejected a regime

in which it would only regulate time spent in California for one in which it would regulate all the time of interstate transportation workers who do not spend the majority of their time in California. As to the latter, *Healy* instructed that courts must "evaluate[] not only … the consequences of the statute itself, but also … how the challenged statute may interact with … regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." 491 U.S. at 336. Under the Ninth Circuit's reasoning, *every* state could apply laws to interstate transportation workers like flight attendants so long as there was some "nexus" between the law and the employment relationship. Under the Ninth Circuit's lax standard, that nexus would be readily established in myriad conflicting ways—for example, as noted, a state could conclude that the nexus is satisfied based on, *inter alia*, employee residency, employer residency, or where the employee spends the plurality of his work time. Under that standard, a patchwork of conflicting laws would proliferate. *But see CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (collecting cases where Court "invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations").

The Ninth Circuit's conclusion that California's approach does not excessively burden interstate commerce likewise lacks merit and reinforces its incorrect holding as to extraterritoriality, for the court wholly failed to properly account for the burdens on interstate commerce. The court glibly suggested that interstate air carriers could "easily" comply with Section 226 by "issuing §226-compliant wage

statements to all pilots and flight attendants whose home-base airport is located in California." *Ward*, 986 F.3d at 1242. But the California rule first requires airlines to screen out California-based employees who work a majority of their time in another state, and then attempt to fit the square peg of Delta's air-travel-specific wage formulas into the round hole of state regulation designed for ordinary hourly employees.

The Ninth Circuit also failed to account for the distinctively federal nature of interstate air travel. Indeed, the court explicitly stated that Section 226 does not "regulate[] in an area that requires national uniformity," *Ward*, 986 F.3d at 1242, which cannot be squared with Congress' contrary judgment in the ADA, with this Court's precedents addressing other interstate transportation industries, or with common sense. And when the Ninth Circuit grudgingly acknowledged, in the very next breath, that there might be "aspects of the interstate transportation industry that require national uniformity," it nevertheless concluded that "employee wage statements are not among them" because compliance with California law purportedly would not "disrupt … interstate service." *Id.* But that is not the standard. States can impermissibly regulate extraterritorially, burden interstate commerce, and interfere with Congress' deregulatory intent while stopping short of disrupting interstate service. The Ninth Circuit seemed to think compliance with California wage-and-hour law is straightforward because no other jurisdiction is actively regulating flight attendant wage statements. But that vacuum is a product of no state's having a valid interest in directly regulating interstate commerce as well as the

federal government's deregulatory policy. The Ninth Circuit mistook the deliberate absence of federal regulation as an invitation for direct state regulation of interstate commerce. That erroneous view cannot stand.

II. The Question Presented Warrants The Court's Review In This Case.

This Court's intervention is imperative, both to correct the Ninth Circuit's disregard for fundamental Commerce Clause principles and to prevent California from imposing unprecedented state regulations on employees who concededly spend the vast majority of their workweek outside of California and are actively engaged in interstate commerce. In addition to the immediate burdens that Delta will bear under Sections 226 and 204 as a result of the Ninth Circuit's holding, *see* pp.29-30, *supra*, the court's erroneous ruling paves the way for greater burdens under California law and the law of other states. The California Supreme Court framed the question broadly as whether "various California wage and hour laws [apply] to flight attendants who work primarily outside California's territorial jurisdiction." App.5. And the Court's reasoning would authorize other states to seize on the same or different relatively minimal connections to regulate interstate transportation workers who spend the majority of their workweek out-of-state.

The Ninth Circuit gave the green light to California's erection of special rules for interstate transportation workers who spend the majority of their time elsewhere by reading the Commerce Clause narrowly and calling into question its prohibition

against extraterritorial regulation. As problematic as that decision is, it does not stand alone. It is part of a pattern of recent Ninth Circuit decisions that read both the Commerce Clause and the ADA narrowly, with the net result that states within the Ninth Circuit have a broad path to regulate what Congress has chosen to leave unregulated. In each of those cases, the Ninth Circuit has declined to apply federal law that protects airlines from patchwork burdens on a quintessentially interstate industry. These decisions—which are or will soon be the subject of other petitions for certiorari—collectively demonstrate that this Court must step in to provide a much-needed course correction.

For example, the Ninth Circuit has complemented its cramped view of the Commerce Clause with an exceedingly narrow view of the ADA's preemption provision. The ADA provides that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. §41713(b)(1). This Court has described that clause as "broad," "deliberately expansive," and "conspicuous for its breadth." *Morales*, 504 U.S. at 383-84. The Ninth Circuit, by contrast, has read the clause far more narrowly. In *Ward*, the Ninth Circuit reiterated its holding from *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), that only those state laws that "bind" air carriers "to specific prices, routes, or services" are preempted. *Ward*, 986 F.3d at 1243. On that basis, it rejected United's argument that Section 226 is preempted by the ADA, a ruling that binds Delta on remand unless it is reviewed and reversed.

The Ninth Circuit's "binds" test ignores the broader language of the statute—and is irreconcilable with this Court's precedents holding that the ADA preempts state laws "having a connection with" rates, routes, or services. *Morales*, 504 U.S. at 384; *see also Northwest*, 572 U.S. at 284-85; *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 (1995).

The Ninth Circuit has applied its overly restrictive reading of ADA preemption in at least two other recent cases applying state employment laws to interstate air carriers. In *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021), *pet. for cert. filed* (U.S. Aug. 19, 2021), the Ninth Circuit held that mandatory meal and rest break requirements imposed by California law are not preempted by the ADA and are applicable to flight attendants. Those requirements would force flight attendants to take meal and rest breaks mid-flight, and in turn force airlines to staff additional flight attendants to cover those breaks. The obvious disruptions to how airlines provide "services" were unconvincing to the Ninth Circuit, which concluded that because the meal and rest break requirements are generally applicable and do not "bind[]" an airline to a particular rate, route, or service, they are not preempted by the ADA. *Id.* at 1141 (emphasis omitted).

Likewise, in *Air Transport Ass'n of America, Inc. v. Washington Department of Labor & Industries*, __ F. App'x __, 2021 WL 3214549 (9th Cir. July 29, 2021), the Ninth Circuit held that applying Washington's paid-sick-leave law to flight attendants and pilots does not violate the Commerce Clause and is not preempted by the ADA. The Washington law prohibits employers

from penalizing employees for using sick leave or requiring medical verification for sick leave absences of fewer than three days. Wash. Rev. Code §49.46.210(3); Wash. Admin. Code §296-128-660(1). The airline industry's trade group sued to enjoin the law, arguing that it deprives airlines of their most important means of preventing sick leave abuse, which causes flight crew shortages and is thus highly disruptive to air travel. As in *Ward* and *Bernstein*, the Ninth Circuit held that ADA preemption did not apply because the paid sick leave law does not itself "bind" an airline to any particular rate, route, or service. 2021 WL 3214549, at *2. As in this case, moreover, the court rejected a Commerce Clause objection, concluding that an increase in flight delays is not a substantial burden on interstate commerce, the expense or impossibility of complying with multiple states' paid sick leave laws is not a relevant consideration, and paid sick leave laws are not an aspect of the interstate transportation industry that demands national uniformity. *Id.*; *see Ward*, 986 F.3d at 1242.

These decisions demonstrate that the Ninth Circuit's narrow reading of both the Commerce Clause and the ADA creates an untenable dynamic for the airline industry.[2] With the ADA's preemption provision effectively disarmed by the Ninth Circuit's

[2] The Ninth Circuit recently applied its *Dilts* test to uphold the application of a California law to the trucking industry, notwithstanding a federal preemption provision materially similar to the ADA's. A petition for certiorari is pending. *See Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644 (9th Cir. 2021), *pet. for cert. filed* (U.S. Aug. 9, 2021).

flawed "binds" standard, and the Commerce Clause read to greenlight even expressly extraterritorial applications targeted to "interstate transportation workers," the national policy of federal deregulation is all but a dead letter within the confines of the Ninth Circuit. The combined effect of the Ninth Circuit's refusal to enforce Commerce Clause principles and its cramped interpretation of ADA preemption creates enormous, unjustified obstacles to operating an interstate air carrier within the Ninth Circuit.

This Court's intervention is thus plainly warranted to rein in the Ninth Circuit's hostility toward the interstate transportation industry and restore a proper understanding of the federal nature of interstate air travel. This case presents an ideal vehicle for doing so, as it presents a purely legal question that was thoroughly addressed in the decision below, the California Supreme Court's certification opinion, and the accompanying California Supreme Court and Ninth Circuit opinions in *Ward*. Furthermore, Delta is not based in California, at least one named Respondent (Lehr) does not reside in California, and all Respondents undisputedly spend the vast majority of their working time outside California; accordingly, this case allows the Court to account for these important facts when evaluating the regulation of interstate commerce here and California's purported interests in applying its wage-and-hour law extraterritorially. Finally, the remaining legal question is dispositive: if Commerce Clause principles preclude application of Sections 204 and 226 to Respondents, this case is over.

This case would also present an appropriate companion case to cases addressing the Ninth Circuit's unduly narrow reading of the ADA. Both the ADA and the Commerce Clause pose important limits on states' ability to regulate interstate transportation workers in a distinctly interstate industry, and yet the Ninth Circuit has read both provisions to allow all manner of state regulation. Granting this petition and one or more of the petitions raising ADA issues would allow the Court to consider how the ADA's preemption provision and Commerce Clause principles work together to ensure that interstate air travel remains unobstructed by state efforts to regulate that quintessentially federal endeavor. At a bare minimum, the Court could grant one of the ADA preemption cases and hold this petition in the meantime. The one option that has nothing to recommend it is to do nothing and to consign the airline industry to ever-more-erroneous Ninth Circuit jurisprudence that deems state law paramount and federal law's preference for deregulation irrelevant.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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