No. 21-260

In the Supreme Court of the United States

VIRGIN AMERICA, INC., ET AL., PETITIONERS

v.

JULIA BERNSTEIN, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether generally applicable California labor laws governing employee meal and rest breaks, when applied to California-based flight attendants on intrastate flights, are "related to a price, route, or service of an air carrier," 49 U.S.C. 41713(b)(1), and thus preempted by federal law.

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This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied. Alternatively, the Court could grant the petition, vacate the judgment below, and remand for further consideration of California law and applicable federal requirements.

STATEMENT

Respondents, a class of California-based flight attendants, brought this suit alleging that petitioners violated various California labor laws, including by failing to provide required meal and rest breaks. The district court granted summary judgment to respondents on the meal- and rest-break claims. Pet. App. 29a-78a. The court of appeals affirmed. *Id.* at 1a-28a.

1. a. California generally requires employers across nearly all industries to provide employees who have worked at least five hours per day a 30-minute meal break during which the employee is relieved of duty. Cal. Code Regs. tit. 8, § 11090(11) (2002); Cal. Labor Code § 512(a) (2018). California also requires a second off-duty meal break for those employees who work more than ten hours per day. *Ibid.* In addition to those meal breaks, California generally requires employers in the transportation industry to provide employees with a ten-minute rest break for every four hours worked. Cal. Code Regs. tit. 8, § 11090(12) (2002). The Supreme Court of California has stated that, in general, employees must be "free to come and go as they please" during the breaks, and employers may not require employees to remain "on call" during that time. *Brinker Restaurant Corp.* v. *Superior Court*, 273 P.3d 513, 534 (2012); see *Augustus* v. *ABM Security Services*, 385 P.3d 823, 832 (Cal. 2016). An employer who fails to provide the requisite meal or rest breaks may be liable to each employee for an additional hour of pay per day that a required break was not provided. Cal. Labor Code § 226.7(c) (2020). Employers also may be liable for civil penalties. See Pet. App. 26a-27a.

b. In 2015, respondent Julia Bernstein, a flight attendant, brought this class action against petitioner Virgin America, Inc., her employer, claiming a wide range of violations of California labor laws, including that Virgin America failed to provide the required meal and rest breaks. See Pet. App. 2a-4a. (Virgin America has since merged with petitioner Alaska Airlines, Inc. Pet. ii.) As relevant here, petitioners argued that respondents' meal- and rest-break claims were pre-

empted by the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705.

In the ADA, Congress "largely deregulated domestic air transport," *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 222 (1995), replacing the prior public-utility model for regulating commercial airlines with one favoring "maximum reliance on competitive market forces and on actual and potential competition," ADA sec. 3(a), § 102(a)(4), 92 Stat. 1706. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), Congress included in the ADA a broadly worded preemption provision, now codified at 49 U.S.C. 41713(b)(1). See *Wolens*, 513 U.S. at 223 n.1 (describing the statutory history). Under that provision, "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." 49 U.S.C. 41713(b)(1).

That provision of the ADA served as the model for a similar provision applicable to the trucking industry in the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569, which similarly preempts state laws "related to a price, route, or service of any motor carrier," albeit only "with respect to the transportation of property." 49 U.S.C. 14501(c)(1); see *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 261 (2013).

This Court has recognized that the identical language in the two preemption provisions—"related to a price, route, or service"—should be interpreted identically. See *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364, 370 (2008). The Court also has explained that those provisions have an "expansive

sweep." *Morales*, 504 U.S. at 384 (citation omitted). They preempt 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. *Id.* at 388, 390; see *Rowe*, 552 U.S. at 375; *Wolens*, 513 U.S. at 224. The Court has emphasized, however, that the statutes do not preempt generally applicable state laws that affect prices, routes, or services in merely a "tenuous, remote, or peripheral" manner. *Morales*, 504 U.S. at 390 (citation omitted).

2. The district court denied in relevant part petitioners' motion for summary judgment. Pet. App. 29a-78a. As relevant here, the court rejected petitioners' argument that the ADA preempts application of the California meal- and rest-break laws to respondent flight attendants, at least with respect to purely intrastate flights. *Id.* at 65a-67a; see *id.* at 48a (limiting respondents' meal- and rest-break claims to purely intrastate flights). The court observed (*id.* at 65a-66a) that the Ninth Circuit had held in *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637 (2014), cert. denied, 575 U.S. 996 (2015) (No. 14-801), that the FAAAA did not preempt application of California's meal- and rest-break laws to short-haul intrastate delivery truck drivers. The court in this case explained that the FAAAA was modeled on the ADA, and that petitioners had "offer[ed] no persuasive argument as to why identical language in a statute with an identical purpose should be interpreted differently merely because it applies to a different industry" (here, the airline industry). Pet. App. 67a.

The district court denied petitioners' subsequent motion for reconsideration. Pet. App. 79a-96a. Petitioners' motion relied in part on the government's Ninth

Circuit amicus brief in *Dilts*, which the court of appeals had found "persuasive" and with which it had "agree[d]." 769 F.3d at 650. In its invited brief, the government had argued that the FAAAA did not preempt application of the California meal- and rest-break laws to short-haul truck delivery drivers. The government had reasoned in part that drivers made "many local stops and deliveries during the course of a day" and thus "could presumably take a break before or after one of these many scheduled stops," thereby enabling compliance with the California meal- and rest-break laws without any significant impact on prices, routes, or services. Gov't Amicus Br. at 22, *Dilts*, *supra* (9th Cir. Feb. 18, 2014) (No. 12-55705). The government had emphasized, however, that "the preemption analysis would differ significantly if the state law were applied to airline employees" because "an airline cannot readily interrupt tightly scheduled flight operations to accommodate state-mandated rest breaks." *Id.* at 25. The government had further observed that "federal aviation safety laws and regulations apply in this area and would inform any preemption analysis." *Ibid.*

The district court rejected petitioners' reliance on the government's amicus brief in *Dilts*, however, because of "the limited role that the amicus brief played in the Ninth Circuit's decision," because "the Ninth Circuit did not even mention in its opinion" the portions of that brief discussing the airline industry on which petitioners relied, and because petitioners had "fail[ed] to previously present this argument" to the district court. Pet. App. 85a-86a.

The district court later granted in part respondents' motion for summary judgment, including on their meal- and rest-break claims. 2018 WL 3344316, at *6. Of the

nearly $77.8 million judgment against petitioners, approximately $1.4 million ($601,366.66 in damages and $817,087.50 in civil penalties) was for the meal- and rest-break claims. See Pet. App. 99a-100a.

3. The court of appeals affirmed in part, reversed in part, and vacated in part. Pet. App. 1a-28a. As relevant here, the court affirmed the judgment with respect to the meal- and rest-break claims, holding that the ADA does not preempt application of California's meal- and rest-break laws to the respondent flight attendants. *Id.* at 19a-21a. The court cited and described its earlier decision in *Dilts*, see *id.* at 19a-20a, observed that "[t]he language of the ADA's preemption clause is virtually identical to the language of the FAAA[A]'s," *id.* at 21a, and concluded that "[t]he reasoning of *Dilts* thus applies with equal force here," *ibid.*

The government had filed an amicus brief in this case arguing that the ADA preempted application of the meal- and rest-break laws to the respondent flight attendants because applying those laws would have a "significant impact on the market forces influencing carrier services and prices." Gov't C.A. Amicus Br. 18. The government explained that Federal Aviation Administration (FAA) "regulations contemplate that flight attendants will remain on duty and on call, capable of performing any required safety functions for flights throughout their specified 'duty period,' which the regulations define as the 'period of elapsed time between reporting for an assignment involving flight time and release from that assignment.'" *Id.* at 18-19 (citation omitted). The government then observed that, by contrast, "California law generally prohibits employers from requiring employees to be on duty during the state-mandated meal or rest breaks." *Id.* at 18. Accord-

ingly, the government argued that "as a practical matter, the only time that an off-duty break could occur would be between flights," *id.* at 19-20, and that ensuring sufficient between-flight breaks for all flight attendants likely would require "shift[ing] flight schedules," *id.* at 22, which would constitute a significant impact on prices, routes, or services. See *id.* at 20-23 (describing the "complex choreography" of flight scheduling); see also *id.* at 6-8 (describing the extensive FAA regulations governing flight attendant duties).

The court of appeals did not directly address the government's argument in resolving the ADA preemption issue. Cf. Pet. App. 19a-21a. But in a separate portion of its opinion addressing petitioners' claim that the California laws directly conflict with FAA regulations (a claim that petitioners have not renewed in this Court), the court of appeals held that "airlines could comply with both the FAA safety rules and California's meal and break requirement by 'staffing longer flights with additional flight attendants in order to allow for duty-free breaks.'" *Id.* at 18a (brackets omitted).

DISCUSSION

The petition for a writ of certiorari should be denied. In rejecting petitioners' separate conflict-preemption claim, the court of appeals stated that petitioners could satisfy both California meal- and rest-break requirements and FAA safety requirements by adding extra flight attendants. As explained below, that would be true only if the state-law requirements could be satisfied by an *in-flight* meal or rest break during which the flight attendant remains on call to perform certain safety-related duties, if necessary. If that view of California law is correct and underlay the court's analysis, the court's bottom-line conclusion that the ADA does

not preempt application of the meal- and rest-break laws to intrastate flight attendants also would be correct, because petitioners have not demonstrated that a requirement to provide that type of in-flight break would have a significant impact on prices, routes, or services. Yet it also is possible that the court did not fully understand the relevant FAA requirements. Ultimately, the need to resolve that potentially dispositive issue of state law and its interaction with FAA requirements would make this a poor vehicle in which to review the question presented. Moreover, petitioners do not identify any decision of this Court or another court of appeals that conflicts with the decision below. Certiorari should therefore be denied. In the alternative, the Court may wish to grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration of those issues, including the possibility of partial preemption, see pp. 16-17, *infra*.

1. a. To be preempted under the ADA, a claim must seek to enforce a state law "related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). This Court has provided important guidance on the meaning of that provision in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364 (2008).

In *Morales*, the Court concluded that the phrase "relat[ed] to" reflects a broad and deliberately expansive preemptive purpose, and that the ADA thus preempts state-law claims "having a connection with, or reference to, airline 'rates, routes, or services.'" 504 U.S. at 383-384 (citation omitted). The Court held in *Morales* that a state law "may 'relate to'" a price, route, or service even if it is not specifically addressed to the airline industry or the effect is "only indirect." *Id.* at

386 (citation omitted). At the same time, the Court recognized that "'some state actions may affect airline fares in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* at 390 (brackets and citation omitted). The Court had no occasion in *Morales* to define "'where it would be appropriate to draw the line,'" because the state provisions at issue there—guidelines interpreting general consumer-protection laws in a way that restricted airlines' advertising of their fares—plainly related to (indeed, expressly referred to) airline fares and had a "significant impact" on them. *Id.* at 389-390 (citation omitted).

In *Rowe*, the Court held that the same principles govern the preemptive scope of the similarly worded FAAAA. Applying those standards, the Court held that the FAAAA preempted a Maine statute forbidding licensed tobacco retailers from employing a "delivery service" unless that service followed a particular set of prescribed delivery procedures. 552 U.S. at 371 (citation omitted); see *id.* at 370-372. The Court emphasized that the Maine statute directly focused on motor-carrier services and compelled carriers "to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Id.* at 372. The Court concluded that "[t]he Maine law thereby produce[d] the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Ibid.* (citation omitted).

The Court in *Rowe* noted, however, that the FAAAA does not preempt laws of general applicability that only incidentally affect motor carriers. Citing *Morales*, the

Court stressed that "the state laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services," and not laws that apply to carriers only in their capacity as members of the general public. *Rowe*, 552 U.S. at 375 (citation omitted); see *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 260-261 (2013).

b. In resolving petitioners' ADA preemption claim, the court of appeals reasoned that because its previous decision in *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), cert. denied, 575 U.S. 996 (2015) (No. 14-801), had held that the FAAAA does not preempt application of the California meal- and rest-break laws to short-haul intrastate truck drivers, the ADA must not preempt application of those laws to intrastate flight attendants either. Pet. App. 19a-21a. That reasoning was misguided. As explained above, the ADA and FAAAA preempt state laws of general applicability if they would have a "significant impact" on a carrier's prices, routes, or services. *Morales*, 504 U.S. at 390; see *Rowe*, 552 U.S. at 372-373; *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 222 (1995). That inquiry naturally entails an analysis of the *effects* of the challenged state law on the particular industry. Cf. *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 283 (2014) ("What is important * * * is the effect of a state law, regulation, or provision, not its form."). That *Dilts* found the meal- and rest-break laws not to have a significant impact on short-haul delivery prices, routes, or services when applied to intrastate truck drivers does not resolve whether those laws might have a significant impact on airline prices, routes, or services when applied to flight attendants on intrastate flights. The court did not, however, engage in the req-

uisite industry-specific analysis of any potential impact here.

Such an analysis would begin with the pertinent FAA rules governing flight-attendant responsibilities. The Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, codified as amended at 49 U.S.C. 40101 *et seq.*, authorizes the Administrator of the FAA to "promote safe flight of civil aircraft in air commerce." 49 U.S.C. 44701(a)(5). Under that authority, FAA has promulgated extensive regulations in the interest of ensuring safety, including ones that require air carriers to have a certain minimum number of "flight attendants on board each passenger-carrying airplane when passengers are on board," depending on the aircraft's maximum seating capacity. 14 C.F.R. 121.391(a). Flight attendants must assist with boarding and deplaning of passengers, see 14 C.F.R. 121.394, conduct pre-flight briefing about emergency procedures, see 14 C.F.R. 121.571, 121.573; cf. 14 C.F.R. 121.291, and perform duties required for safe operation of the aircraft throughout takeoff, landing, and other phases of the flight, including to ensure the "effective egress of passengers in [the] event of an emergency evacuation," 14 C.F.R. 121.391(d); see 14 C.F.R. 121.393(b).

FAA regulations also limit the length of time that flight attendants may be on duty to perform flight-related responsibilities. See 49 U.S.C. 44701(a)(4) (authorizing FAA to prescribe "regulations in the interest of safety for the maximum hours or periods of service" for "employees of air carriers"). Those regulations generally prohibit airlines from "assign[ing] a flight attendant to a scheduled duty period of more than 14 hours," 14 C.F.R. 121.467(b)(1), and generally require that a flight attendant be given "a scheduled rest period

of at least 9 consecutive hours" before starting a new duty period, 14 C.F.R. 121.467(b)(2); cf. FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 335(a)(2)(A), 132 Stat. 3280 (directing the FAA to modify the applicable regulation to require a "scheduled rest period of at least 10 consecutive hours"); 86 Fed. Reg. 60,424 (Nov. 2, 2021) (notice of proposed rulemaking to implement that change). FAA regulations do not prohibit airlines from providing flight attendants with breaks in the middle of a duty period—and thus, contrary to petitioners' contention (Pet. 25-26, 29), would not require an airline to provide a nine-hour rest period after a state-mandated meal or rest break. But FAA regulations do require, among other things, that the total duty period—inclusive of breaks—not exceed the applicable maximum duty period, and that the flight attendant be able to perform all required safety-related duties. Cf. 14 C.F.R. 121.397(a), 121.467(a).

The court of appeals and respondents correctly observe that carriers may staff a flight with more than the minimum required number of flight attendants. See Pet. App. 18a; Br. in Opp. 33-36. But carriers must identify in advance which flight attendants will serve as part of the required minimum complement, and those who are so identified remain responsible for carrying out the "necessary functions to be performed in an emergency" throughout the flight—including during any meal or rest break. 14 C.F.R. 121.397(a); see FAA, *Flight Standards Information Management System*, Order No. 8900.1 CHG 310, Vol. 3, Ch. 33, § 4, ¶ 3-3513(E) (Apr. 28, 2022), go.usa.gov/xuQKQ (requiring air carriers that assign extra flight attendants to "identify the required and nonrequired [flight attendants]," and "not assign duties to the extra [flight attendants] wh[ich]

would mandate their presence and duty assignment in the event of an emergency situation, such as an evacuation"); ¶ 3-3513(C) (explaining that "[t]he capability to handle emergency situations and emergency evacuations is based on the complement of required [flight attendants]," not the "extra or nonrequired [flight attendants]").

As noted above, the government filed an amicus brief in this case in the court of appeals explaining that in light of FAA regulations, imposing additional state-law break requirements would have an improper significant impact on prices, routes, or services. See Gov't C.A. Amicus Br. 18-23. The government's position was premised on the assumption that any qualifying meal or rest break for a flight attendant would have to be provided on the ground, not during a flight, which would then potentially require substantial modifications to flight schedules to accommodate the required breaks while also complying with the applicable maximum duty period. See *id.* at 19-21.

The government's assumption that meal and rest breaks would have to occur on the ground, and not in-flight, rested on the view that "California law generally prohibits employers from requiring employees to be on duty during the state-mandated meal or rest breaks." Gov't C.A. Amicus Br. 18. For example, the Supreme Court of California has stated that an employer must "relieve[] its employees of all duty" and "relinquish[] control over their activities" during the 30-minute meal break, which must remain "uninterrupted." *Brinker Restaurant Corp.* v. *Superior Court*, 273 P.3d 513, 536-537 (2012); see Cal. Code Regs. tit. 8, § 11090(11) (2002); Cal. Labor Code § 226.7(b) (2020). Employees also generally must be "free to leave the premises" during meal

breaks. *Brinker*, 273 P.3d at 534; see Cal. Code Regs. tit. 8, § 11090(11)(C) (2002). The Supreme Court of California likewise has stated that "state law prohibits on-duty and on-call rest periods," and that "[d]uring required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." *Augustus* v. *ABM Security Services, Inc.*, 385 P.3d 823, 825-826 (2016).

Accordingly, FAA's requirement that the required complement of identified flight attendants remain on call to respond to emergencies at all times during a flight would, under the understanding of state law set forth in the government's brief in the court of appeals, effectively prevent any in-flight meal or rest break from satisfying the requirements of California's meal- and rest-break laws for those flight attendants. Indeed, respondents' expert proposed a damages calculation that would award the extra hour of compensation only on days when "the time between flights was inadequate to provide a 30-minute meal break or 10-minute rest break for a class member who worked sufficient hours to qualify for a break." Gov't C.A. Amicus Br. 20.

Nonetheless, in addressing petitioners' separate conflict-preemption claim, the court of appeals stated that "airlines could comply with both the FAA safety rules and California's meal and break requirement by 'staffing longer flights with additional flight attendants in order to allow for duty-free breaks.'" Pet. App. 18a (brackets omitted). But as just explained, the assignment of extra flight attendants would not relieve flight attendants identified as part of the minimum required complement from having to remain on call to handle emergencies throughout the flight, including during breaks. See 14 C.F.R. 121.397(a). Accordingly, the

court's statement that "airlines could comply with both the FAA safety rules and California's meal and break requirement" cannot be true unless an in-flight break during which the flight attendant remains on call to respond to emergencies qualifies as a "'duty-free break[]'" under California's meal- and rest-break laws. Pet. App. 18a.

If that view of California law is correct and underlay the court of appeals' decision, the court's bottom-line conclusion regarding ADA preemption also would be correct. That is because airlines could, under that view, satisfy the California meal- and rest-break requirements by providing flight attendants the requisite breaks at some point in their respective duty periods—including during flight (except during taxi, takeoff, and landing, see 14 C.F.R. 121.391(d)), when they remain on call to respond to emergencies. Petitioners have not demonstrated that providing that type of in-flight break—as opposed to an in-flight break during which the flight attendant is relieved of all duties, cf. Pet. 23-24, or a break that can be provided only between flights, cf. Gov't C.A. Amicus Br. 19-20—would have a significant impact on airline prices, routes, or services. To the contrary, petitioners themselves acknowledge (Pet. 7) that "[f]light attendants have ample opportunity to sit and eat on flights" already, suggesting that there would not be such an impact.*

Petitioners assert (Pet. 23-27) that relieving flight attendants of their duties during the flight or adding

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* The Department of Transportation and the FAA have informed this Office that they are prepared to facilitate discussions outside of this litigation with the airlines, unions, and States to address and minimize any other potential disruption to the traveling public that could arise.

flight attendants to flights would have such an impact. But under the above view of California law, it is not clear that either of those changes would be required. As just explained, flight attendants could remain subject to their FAA-imposed duties during an in-flight meal or rest break without running afoul of state law. For the same reason, assigning extra flight attendants would be superfluous and thus unnecessary.

That view of California law as affording the requisite degree of flexibility in this context is, to be sure, contestable. See Cal. Code Regs. tit. 8, § 11090(11) and (12) (2002); *Augustus*, 385 P.3d at 832-834; *Brinker*, 273 P.3d at 536-537. But the Ninth Circuit elsewhere has taken a permissive view of what California law requires in this area. See *Rodriguez* v. *Taco Bell Corp.*, 896 F.3d 952, 956 (2018) (holding that a policy requiring restaurant employees who purchase a discounted meal to remain on the premises during their meal break "satisfies the standard set forth in *Brinker*"). And this Court has "a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988); see *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 167 (1998); but cf. *Leavitt* v. *Jane L.*, 518 U.S. 137, 145 (1996) (per curiam). At a minimum, the need to definitively resolve that potentially dispositive issue of state law would complicate this Court's review, making this case an unsuitable vehicle in which to address more general questions concerning the scope of ADA preemption.

It also is possible that the court of appeals simply misunderstood the FAA requirements concerning extra flight attendants and the interaction of those requirements with California law. Neither the parties nor the

government specifically addressed that interaction in their briefs below. Nor did they address the possibility that the ADA might preempt the California meal- and rest-break laws only to the extent that those laws do not credit an in-flight break during which the flight attendant remains on call to respond to emergencies. Such partial preemption would provide an alternative basis for the court's holding in its conflict-preemption analysis about extra flight attendants. Those complications underscore the unsuitability of this case for review by this Court. The Court could, however, grant the petition for a writ of certiorari, vacate the judgment below, and remand for a fuller consideration of those issues.

c. Petitioners assert (Pet. 21) that the court of appeals nevertheless erred because it supposedly adopted and applied a "categorical rule" that the ADA preempts a state law of general applicability only if the law "'binds' a carrier to a particular price, route, or service." That assertion is overstated. The court did not adopt or apply such a rule in this case; instead, it resolved the ADA preemption issue by applying its previous decision in *Dilts*, *supra*. See Pet. App. 19a-21a. Although the mechanical application of *Dilts* to the circumstances here was misguided, see pp. 10-11, *supra*, the decision below did not purport to adopt or apply the categorical rule that petitioners ascribe to it.

Nor did *Dilts* itself adopt or apply such a rule. *Dilts* stated that the FAAAA preempts "those state laws that are significantly 'related to' prices, routes, or services," and found that as applied to the short-haul truckers in that case, the California meal- and rest-break laws were not preempted because "the laws do not 'bind' motor carriers to specific prices, routes, or services"; do not

"'freeze into place' prices, routes, or services"; and do not "'determine (to a significant degree) the prices, routes, or services that motor carriers will provide.'" 769 F.3d at 647 (brackets and citations omitted). As that discussion indicates, *Dilts* viewed the binding of carriers to specific prices, routes, or services as one way to establish preemption—not as the exclusive test for FAAAA preemption. And the Ninth Circuit has recognized that the FAAAA also preempts state laws that "determine (to a significant degree) the prices, routes, or services that motor carriers will provide." *Ibid.* (brackets and citation omitted). That language is taken directly from this Court's decision in *Rowe*. See 552 U.S. at 372. The Ninth Circuit's preemption test is thus consistent with this Court's precedent and not meaningfully different from the "significant impact" test that petitioners derive (cf. Pet. 17-21) from that precedent. Indeed, the Ninth Circuit in *Dilts* expressly "agree[d] with" the government's invited amicus brief in that case explaining that "state laws * * * are not preempted by the FAAAA unless they have a 'significant effect' on prices, routes, or services." 769 F.3d at 649-650; see Gov't Amicus Br. at 14-16, 18-23, *Dilts*, *supra* (No. 12-55705).

Other Ninth Circuit cases likewise have made clear the court's view that the FAAAA and ADA preempt state laws that have a significant impact on prices, routes, or services, regardless of whether the laws bind carriers to particular prices, routes, or services. For example, in finding that the ADA does not preempt a generally applicable California labor law regarding wage statements, the Ninth Circuit discussed the "binds to" standard to which petitioners object, but then held that "what proves dispositive here is that [the air-

line] has presented no evidence that [its] increased costs would have a 'significant impact' on its prices, routes, or services." *Ward* v. *United Airlines, Inc.*, 986 F.3d 1234, 1243 (2021) (citation omitted).

Similarly, in *Miller* v. *C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (2020), petition for cert. pending, No. 20-1425 (filed Apr. 8, 2021), the Ninth Circuit held that a state-law negligence claim was "'related to' carrier prices, routes, or services" under the FAAAA's preemption provision even though the claim did "*not* 'bind' [the carrier] to 'specific prices, routes, or services.'" *Id.* at 1023-1024 (emphasis added; citation omitted). The court acknowledged its prior use of the "binds to" language, but clarified "that the scope of FAAAA preemption is broader than this language suggests." *Id.* at 1025. And in *California Trucking Association* v. *Su*, 903 F.3d 953 (2018), cert. denied, 139 S. Ct. 1331 (2019) (No. 18-887), the Ninth Circuit reiterated that the FAAAA preempts a state law "that significantly impacts a carrier's prices, routes, or services," as distinguished from one "that has only a tenuous, remote, or peripheral connection." *Id.* at 960.

As those decisions make clear, the Ninth Circuit has adopted and regularly applies a "significant impact" test drawn from this Court's precedent, notwithstanding its use as well of the "binds to" or "freezes" language—which itself echoes language from this Court's cases, see *Morales*, 504 U.S. at 388 (describing the preempted law as having imposed "binding requirements as to how [airline] tickets may be marketed"); *Rowe*, 552 U.S. at 372 (explaining that the preempted "law would freeze into place services that carriers might prefer to discontinue in the future").

2. Further review also is unwarranted because the decision below does not conflict with any decision of this Court or another court of appeals. Petitioners base (Pet. 15-21) an asserted conflict on the Ninth Circuit's supposed adoption of a "binds to" test. But as just explained, the Ninth Circuit has not actually adopted such a test, as exemplified by recent decisions making clear that the "dispositive" consideration is whether application of state law to a carrier "would have a 'significant impact' on its prices, routes, or services," *Ward*, 986 F.3d at 1243 (citation omitted); see *Miller*, 976 F.3d at 1024-1025; *California Trucking Association*, 903 F.3d at 960. And because petitioners have not identified any other court of appeals or state court of last resort that has adopted a "binds to" test, any residual disagreement between Ninth Circuit panels would at most amount to an intracircuit conflict that would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."); see also, *e.g.*, *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

Petitioners' reliance (Pet. 17-21) on decisions from other federal courts of appeals or state courts of last resort is misplaced because none of those decisions involved the application of state labor laws similar to the California meal- and rest-break laws to employees similarly situated to respondents. Cf. *Northwest*, 572 U.S. at 283. Most of the cases that petitioners cite involved state common-law tort or contract claims that have little relation to the meal- and rest-break laws at issue in this case. See *Bower* v. *Egyptair Airlines Co.*, 731 F.3d 85 (1st Cir. 2013), cert. denied, 572 U.S. 1046 (2014); *Onoh* v. *Northwest Airlines, Inc.*, 613 F.3d 596 (5th Cir. 2010);

Witty v. *Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004); *Lyn-Lea Travel Corp.* v. *American Airlines, Inc.*, 283 F.3d 282 (5th Cir.), cert. denied, 537 U.S. 1044 (2002); *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir.), cert. denied, 531 U.S. 1036 (2000); *Travel All Over the World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996); *Koutsouradis* v. *Delta Air Lines, Inc.*, 427 F.3d 1339 (11th Cir. 2005) (per curiam); *Delta Air Lines, Inc.* v. *Black*, 116 S.W.3d 745 (Tex. 2003), cert. denied, 540 U.S. 1181 (2004).

Other cases on which petitioners rely involved laws governing the classification of truck drivers as employees rather than independent contractors. See *Massachusetts Delivery Association* v. *Healey*, 821 F.3d 187 (1st Cir. 2016); *Schwann* v. *FedEx Ground Package System, Inc.*, 813 F.3d 429 (1st Cir. 2016); *Chambers* v. *RDI Logistics, Inc.*, 65 N.E.3d 1 (Mass. 2016); cf. *Bedoya* v. *American Eagle Express Inc.*, 914 F.3d 812 (3d Cir.) (addressing New Jersey worker-classification law), cert. denied, 140 S. Ct. 102 (2019) (No. 18-1382); *Costello* v. *BeavEx, Inc.*, 810 F.3d 1045 (7th Cir. 2016) (addressing Illinois worker-classification law), cert. denied, 137 S. Ct. 2289 (2017) (No. 15-1305). There is no reason to think that application of such a law to flight attendants would have a significant impact on airline prices, routes, or services given that most (and perhaps all) flight attendants already are bona fide airline employees.

Petitioners cite three cases involving generally applicable state labor or employment laws, but each involved the application of those laws to airline employees quite dissimilar to the flight attendants here. See *DiFiore* v. *American Airlines, Inc.*, 646 F.3d 81 (1st Cir.) (law governing tips for service employees, as ap-

plied to curbside skycaps), cert. denied, 565 U.S. 1059 (2011) (No. 11-221); *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003) (employee whistleblower protection law, as applied to former aircraft inspector), cert. denied, 540 U.S. 1182 (2004) (No. 03-904); *Brindle* v. *Rhode Island Department of Labor & Training*, 211 A.3d 930 (R.I. 2019) (law governing time-and-a-half pay on Sundays and holidays, as applied to airport customer service agents), cert. denied, 140 S. Ct. 908 (2020) (No. 19-352). Whether the ADA preempts application of such laws to curbside skycaps, aircraft inspectors, or customer service agents does not lead to any particular conclusion as to whether it preempts application of meal- and rest-break laws to flight attendants on intrastate flights.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to grant the petition, vacate the judgment below, and remand for further consideration of California law and the applicable FAA requirements.

Respectfully submitted.

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MAY 2022