No. 19-15382

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JULIA BERNSTEIN; ESTHER GARCIA; LISA MARIE SMITH, on behalf of themselves and others similarly situated

Plaintiffs-Appellees,

v.

VIRGIN AMERICA, INC.; ALASKA AIRLINES, INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
3:15-cv-02277-JST

DEFENDANTS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellants disclose the following:

- Virgin America Inc. has merged with and into Alaska Airlines, Inc.
- Alaska Airlines, Inc. is owned by Alaska Air Group, Inc., which is a publicly held corporation.
- There are no other corporations to disclose under Rule 26.1.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Because this case presents complex issues of first impression in this circuit, Appellants respectfully request oral argument.

INTRODUCTION

Commercial air travel is a uniquely interstate industry. Unlike other workplaces, airplanes do not stay put in one state. And unlike other workforces, flight attendants spend their days traversing dozens of states and cities. Until recently, therefore, everyone had thought that *federal* law regulates flight crews, based on uniform nationwide rules. That way, the same rules apply when a plane takes off in San Francisco, stops in Chicago, moves on to Boston, and then flies to Dallas. That approach gives airlines a workable system for managing flight crews, and protects the federal government's role in regulating those crews' safety responsibilities.

Recently, however, airlines have faced class litigation about whether flight attendants (and pilots) are subject to the wage-and-hour laws of the different jurisdictions that they travel through. These laws cover everything from meal-and-rest breaks to overtime, and from the minimum wage to wage statements. If airlines had to comply with these shifting rules every time a plane crossed a state line, the logistical burdens would be overwhelming.

Here, the district court awarded almost $80 million against Virgin America for violating the California Labor Code. The court held that California law applies to *all* work performed *anywhere* by Virgin's California-resident flight attendants. And it held that California law applies to any work that any class members

performed in California (even if they principally worked elsewhere, and worked in California for only a fraction of a day). Despite this far-reaching view of California law, the court rejected all of Virgin's federal defenses—under the Dormant Commerce Clause, the Federal Aviation Act, and the Airline Deregulation Act.

That view of the law would cripple interstate air travel. It would subject airlines to an impossible tangle of state laws—and an irreconcilable conflict between state and federal law. At best this would create a logistical nightmare for airlines; at worst it would create disruption, delay, and safety risks for passengers. The decision below should be reversed.

STATEMENT OF JURISDICTION

This case was filed in state court and removed to federal court under the Class Action Fairness Act. The district court had jurisdiction under 28 U.S.C. § 1331(d)(2). ER1075-84. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered final judgment disposing of all remaining substantive claims on February 4, 2019. ER1. Appellants filed a notice of appeal on March 4, 2019. ER113.

STATEMENT OF THE ISSUES

1. Whether the Dormant Commerce Clause prohibits applying state wage-and-hour laws to flight attendants who travel through multiple jurisdictions in their daily work.

2. Whether the Federal Aviation Act and the Airline Deregulation Act preempt California's meal-and-rest-break rules as applied to flight attendants.

3. Whether the California Labor Code applies to flight attendants who work principally outside California; and if so, whether the district court erred in finding that Virgin did not pay flight attendants for all hours worked and in imposing penalties.

4. Whether the district court properly certified a class without a manageable trial plan to address individualized inquiries about the coverage of California law, and about the choice-of-law issues raised by Plaintiffs' claims.

STATEMENT OF THE CASE

Virgin America Inc. was a California-based airline that served 24 airports across North America, including 20 outside California. ER1061; ER675 ¶ 4. In December 2016, Alaska Air Group, Inc. acquired Virgin. ER130. Three Virgin flight attendants brought wage-and-hour claims against Virgin under California law on behalf of a putative class. ER49-83. The district court held that California law applied to class members during their interstate work, and awarded them summary judgment and nearly $80 million. ER49-83; ER1-4.

A. Virgin's Flight Attendants Traveled Through Multiple States in Their Daily Work

Virgin flew over 150 daily flights. Over three-quarters took off or landed outside California. ER815, ER817-21; ER672 ¶¶ 7-8; ER52. Virgin's flight attendants thus spent most of their time working outside California—much of it in federal airspace, and in other states. ER247. Indeed, they often crossed more than a dozen jurisdictions in a single day. ER417.

Virgin scheduled its flight attendants to fly "pairings"—a series of flights (often over several days) beginning and ending at the same airport while stopping in many different places in between. ER50. A typical pairing might look like this: JFK-LAX-Dallas-LAX-Seattle-SFO-JFK. ER260. Usually, flight attendants began and ended their pairings where they were "based." ER50. And many flight attendants lived elsewhere, flying to their "base" airport before each pairing. ER50;

ER174; ER1013 ¶ 5, ER1023 ¶ 4; ER1033 ¶ 7; ER1038 ¶ 2, ER1056 ¶ 3. Flight attendants' schedules varied each month because Virgin allowed them to bid for their pairings and then change their schedules later. ER675 ¶ 6.

B. Flight Attendants Earned Above the California Minimum Wage

Virgin paid flight attendants according to a uniform nationwide system, multiplying their pay rate by the number of monthly credits. ER51; Dkt. 101, Ex. 41 at 91-108;[1] ER743-44. Virgin assigned credits for each duty period based on the tasks performed. For example, flight attendants received an hour of credit for each hour of "block time"—the time between "block[ing] out" from the departure gate and "block[ing] in" at the next arrival. ER50-51. They also received a half-hour of credit for each hour of deadheading (time spent flying from one airport to work a flight at another). ER50-51.

Virgin's flight attendants earned a base pay rate of at least $20 per credit-hour, and often more. Dkt. 101, Ex. 41 at App. A. The rate increased for holidays, and for hours over 80 per month. Dkt. 101, Ex. 41 at 100, 102. Thus, flight attendants virtually always earned more than California's minimum wage for each hour worked. ER280-81.

[1] There are no material differences in the Virgin compensation policy between the 2013 Work Rules, included in the appendix, and the 2011 and 2012 versions that governed the beginning of the class period.

Virgin provided wage statements showing the total credits or "hours" earned and the applicable rate, as well as total earnings. ER828-44; ER845-58. The statements included separate line-items for additional credit-generating activity, premium pay rates, and additional payments, as well as withholdings, taxes, and deductions. ER828-44; ER845-58; ER743-44; ER766-67.

C. Federal Law Regulates Flight Attendants

Flight attendants are subject to the federal minimum wage and uniform federal regulations. Indeed, because air transportation is an inherently national enterprise, "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1). The Federal Aviation Administration ("FAA"), in turn, "develop[s] plans and policy for the use of the navigable airspace," and "ensur[es] the safety of aircraft and the efficient use of airspace." *Id*. § 40103(b). To that end, the FAA "promote[s] safe flight of civil aircraft in air commerce by prescribing … regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers." *Id*. § 44701(a)(4). And under that authority, the FAA has promulgated detailed rules about duty and break periods for flight attendants. *See* 14 C.F.R. § 121.467.

FAA rules allow airlines to assign flight attendants to work continuous duty periods of up to 14 hours, with a required break of at least nine hours in between.

Id. § 121.467(b). FAA rules also assign flight attendants a long list of mandatory safety responsibilities. *Id.* §§ 121.391(d), 121.467(a), 121.397(a). Although flight attendants may rest and eat when on duty, they must always remain on call to perform their assigned responsibilities. ER802-03; ER779, ER781.

D. Plaintiffs Sued Virgin Under California Law

Plaintiffs are former Virgin flight attendants. They sued Virgin in state court on behalf of a putative class; Virgin removed to federal court under the Class Action Fairness Act. Plaintiffs alleged that Virgin's payment and scheduling of flight attendants violated California law about the minimum wage, overtime, wage statements, the payment of wages for all hours worked, and meal-and-rest breaks. They also sought penalties under California's Private Attorneys General Act ("PAGA").

1. The District Court Certified a Broad Class of Flight Attendants

Plaintiffs moved to certify a 1400-member class of "all individuals who ha[d] worked as California-based flight attendants" for Virgin since March 2011. ER643. They argued that California law applied to "all time worked within California," even if class members lived and spent most of their time working elsewhere. ER655. They also moved to certify a subclass of California residents, claiming that they were subject to California law for all time worked anywhere in the country. ER655.

Virgin argued that California law applies only to those who work exclusively or principally in California. ER618-22. And the "need for individualized factual proceedings" to determine which class members were subject to California law, Virgin argued, defeated class certification. ER622.

The district court certified the plaintiff class and the primary subclass:

> **Class**: All individuals who have worked as California-based flight attendants of Virgin America, Inc. at any time during the period from March 18, 2011 (four years from the filing of the original Complaint) through the date established by the Court for notice of certification of the Class (the "Class Period").
>
> **California Resident Subclass**: All individuals who have worked as California-based flight attendants of Virgin America, Inc. while residing in California at any time during the Class Period.

ER111.

2. The District Court Denied Summary Judgment to Virgin

a. Virgin moved for summary judgment. It argued that California law did not apply to flight attendants who worked principally outside California—especially for time worked outside the state. ER877-80. Virgin also argued that the Federal Aviation Act, the Airline Deregulation Act, and the Dormant Commerce Clause precluded the application of California law regardless. ER880-86. Finally, Virgin argued that even if California law applied, Virgin complied with it. ER889-91.

b. The district court denied Virgin's motion, expansively reading California law and narrowly construing federal preemption. To determine the

applicability of California law, the court adopted a "multi-faceted approach," looking to employer and employee residency, receipt of pay in California, other connections to California, and temporary absence from the state. ER55-56. Applying that test, the court reached several conclusions. *First*, for flight attendants who were California residents, the court held that California law applied to all work they performed *anywhere*, including outside California—no matter how little they worked in California. ER59-62. *Second*, for flight attendants who were "based" in California, the court held that California law applied for all time they worked in California—even if they principally worked in other states and passed through California only occasionally. ER58. *Third*, for all class members, the court held that California law required off-duty meal and rest breaks whenever they worked four or five continuous hours in California—even if the breaks occurred mid-flight. ER61.

c. The court then determined that federal law imposed no constraints on its sweeping interpretation of California law. In the court's view, subjecting airlines to California wage-and-hour laws does not violate the Dormant Commerce Clause because it does not unduly burden interstate commerce. ER70.

The court also held that the FAA does not preempt the application of California's meal-and-rest-break rules to flight attendants. Although the FAA regulates "the provision of breaks to flight attendants," those regulations are not

"comprehensive, detailed, or pervasive enough to justify federal preemption of the field." ER72. And the court found no conflict between California's break rules and FAA rules that require flight attendants to remain on duty during flights to handle federal safety duties. It thought Virgin could simply "staff longer flights with additional flight attendants in order to allow for duty-free breaks." ER73.

Finally, relying on circuit precedent involving the *trucking* industry, the court held that the Airline Deregulation Act ("ADA") did not preempt California's meal-and-rest break rules. ER73-75.

d. The district court then held that Virgin's wage-and-hour practices violated California law. *First*, unlike federal law, California does not allow employers to "average the total amount earned by an employee over all hours worked in order to comply with [the] minimum wage." ER75. *Second*, Virgin's credit-based overtime policy did not comply with California law. ER80. *Third*, Virgin did not provide state-mandated meal-and-rest breaks. ER81. *Fourth*, Virgin's wage statements did not comply with California's specific requirements. ER79.

e. The district court denied Virgin's motion for reconsideration. ER36, ER534.

3. The District Court Refused to Decertify the Class

Virgin moved to decertify the class. It argued that the district court's interpretation of California law made the class unmanageable. *First*, the court's "multi-faceted" test required an individualized analysis of whether California law could apply to any flight attendant. ER511-21. *Second*, by expanding California law's extraterritorial reach, the district court created a conflict with other state laws, prompting even more individualized questions about which state's laws governed which flight attendants. ER522-26.

The district court denied the decertification motion because it saw no individualized questions. ER29. As to *all* class members, the court held that California law "clearly applie[d]" to all "work performed within California's borders." ER28. And as to the California Resident Subclass, the court held that California law applied to all work they performed in *any* state. ER28-29.

4. The District Court Granted Summary Judgment for Plaintiffs

The district court granted Plaintiffs summary judgment on their claims for "failure to pay for all hours worked, failure to pay overtime, failure to provide meal and rest breaks, and failure to provide accurate wage statements claims." ER17, ER20. The court also imposed PAGA penalties, including heightened penalties for "subsequent violation[s]" starting from the time plaintiffs notified Virgin of the alleged wage-and-hour violations. ER20. The court entered a final

judgment for class-wide damages and penalties totaling $77,763,395.33, plus interest. ER4. Virgin appealed. ER113.

SUMMARY OF THE ARGUMENT

I. The Dormant Commerce Clause makes it unconstitutional to apply a patchwork of state and local laws regulating the wages and hours of flight crews. Otherwise, airlines would face a logistical nightmare, with flight crews subject to a dizzying array of rules varying across the many jurisdictions they traverse every day. Because the burdens on interstate commerce would far exceed any local benefit, California law must yield to the need for a uniform system of federal rules.

II. Even if California could regulate in this area, FAA regulations and the Airline Deregulation Act would preempt California's meal-and-rest-break laws.

A. California law conflicts with FAA rules. *First*, FAA rules authorize airlines to schedule flight attendants to work continuous duty periods up to 14 hours. But California prohibits employees from working more than four hours without a break. Thus, because California prohibits what federal law authorizes, California law must give way. *Second*, California's meal-and-rest-break rules interfere with safety duties that the federal government assigns to flight attendants. Under FAA rules, flight attendants must be continuously on call to handle a range of safety responsibilities. But under California law, flight attendants must take breaks every four hours during which they cannot be on call to assist,

even in emergencies. California law is thus preempted because it impedes the federal safety scheme.

B. California law is preempted for another reason: FAA rules preempt the field because they address the precise subject of duty and break periods for flight attendants. Federal regulators already decided when and for how long flight attendants should take breaks, and they rejected a proposal to require in-flight breaks. Federal law exclusively occupies the field and prohibits states from imposing different rules.

C. Finally, the Airline Deregulation Act expressly preempts California's meal-and-rest-break laws. If applied to flight crews, those laws would have a "significant impact" on air travel. Airplanes cannot operate while flight attendants take state-mandated breaks. California law would thus interfere with tightly scheduled flight operations on crowded runways, leading to cascading disruptions and flight delays.

III. As a matter of state law, the California Labor Code does not apply to flight attendants who work principally outside California. It surely does not apply to work they perform *outside* California, except in narrow circumstances not present here. Thus, because Plaintiffs did not try to show that class members worked principally in California, the district court erred in applying California law to the class.

IV. The district court erred by certifying a broad class of flight attendants without a manageable trial plan to determine which class members are covered by California law. Flight attendants work across dozens of different states; moreover, even those who are based in California often live elsewhere. So determining which state law applies requires a factbound analysis of each flight attendant's ties to California, coupled with still more individualized questions about whether another state has a greater interest in applying its law. Those individualized inquiries foreclose class treatment.

V. The district court misapplied California law. *First*, it wrongly held that Virgin did not pay flight attendants for all hours worked; in fact, Virgin's generous compensation formula did exactly that. *Second*, it erroneously subjected Virgin to heightened penalties for "subsequent violations" under PAGA. The court held that Virgin was "on notice" of violations from the time Plaintiffs first alerted Virgin to their claims—even though there was no finding of a violation until the court's later ruling.

STANDARD OF REVIEW

This Court reviews grants of summary judgment de novo. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 778 (9th Cir. 2006). In deciding whether there is any genuine dispute of material fact, the Court draws all reasonable inferences in favor of the non-moving party. *Yellow Cab Co. of Sacramento v. Yellow Cab Co.*

of Elk Grove, 419 F.3d 925, 927 (9th Cir. 2005). The Court reviews class-certification decisions for abuse of discretion; a "legal error" is a "per se abuse of discretion." *Marlo v. United Parcel Service, Inc.*, 639 F.3d 942, 946 (9th Cir. 2011) (citation omitted).

ARGUMENT

This Court should reverse the decision below. *First*, the Dormant Commerce Clause forecloses all of Plaintiffs' claims because applying state wage-and-hour laws to airlines would excessively burden interstate commerce. *Second*, FAA regulations and the ADA preempt Plaintiffs' meal-and-rest-break claims. *Third*, California law does not apply to the putative class because class members worked principally outside California. *Fourth*, class certification was improper because Plaintiffs failed to present a manageable trial plan to address the individualized choice-of-law inquiries that their claims necessitate. *Fifth*, even if California law applied, Virgin complied with it and should not have been subject to heightened penalties under PAGA.

I. The Dormant Commerce Clause Prohibits States From Regulating Wages and Hours on Interstate Flights

The Dormant Commerce Clause prohibits state and local governments from imposing their own wage-and-hour rules on flight crews that travel throughout the country. Allowing a patchwork of rules would impede the efficient operation of the

nation's air-transportation system, creating an excessive burden on interstate commerce that the Constitution prevents.

A. The Dormant Commerce Clause Prohibits State Laws That Excessively Burden Interstate Commerce

1. The Dormant Commerce Clause "prohibit[s] States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval." *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1794 (2015). Although "[m]ost regulations that run afoul of the Dormant Commerce Clause do so because of discrimination," "courts also have invalidated statutes that imposed other significant burdens on interstate commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012).

The Dormant Commerce Clause requires courts to "weigh the conflicting interests of state and nation." *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 552-53 (1949). A state law violates the Constitution if the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 995 (9th Cir. 2002).

In assessing a state law's burden on interstate commerce, courts must "consider[] 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." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). The burdens are especially severe if states regulate conduct beyond their borders, which heightens the risk of overlapping and potentially conflicting state rules. Thus, if the "practical effect of [a state] regulation is to control conduct beyond the boundaries of the State," it is "invalid regardless of whether [its] extraterritorial reach was intended by the legislature." *Id*.

Even when states regulate within their own borders, it is impermissible to impose undue burdens on interstate commerce by forcing interstate businesses to comply with "varying standards in [different] states." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 773 (1945). The Dormant Commerce Clause thus protects "interstate operations" against the "confusion and difficulty" that would result from a "varied system of state regulation" in areas where there is an inherent "need for uniformity." *Id*. at 774. In such areas, the "multiplication" of rules across different states impedes interstate business by imposing "cumulative burdens … which are not similarly laid on local business." *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256-58 (1938).

2. These concerns are particularly acute if a state law "imposes significant burdens on interstate transportation," which is "inherently national" and "require[s] a uniform system of regulation." *Nat'l Ass'n of Optometrists*, 682 F.3d at 1148. In *Southern Pacific*, 325 U.S. 761, for example, the Supreme Court struck

down an Arizona law regulating train lengths. The Court explained that allowing Arizona to regulate train lengths, "while [they] remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation." *Id*. at 773. Even though Oklahoma was the only other state that actively regulated train lengths, there was a *risk* that others might follow suit. *Id*. at 773 n.3. After all, "[i]f one state may regulate train lengths, so may all the others," and thus railroads "might be subjected" to a patchwork of rules from state to state. *Id*. at 774 n.4, 775.

That would impose severe logistical burdens on railroads or, worse, subject them to "the lowest train limit restriction of any of the states through which [they] pass." *Id*. at 773. The strictest state in the country should not "control [railroad] operations both within and without" its own borders. *Id*. Accordingly, any purported safety benefits of Arizona's train-length rules were too "slight" to "outweigh the national interest in [unimpeded] interstate commerce." *Id.* at 775-76. Such rules, "if any, must be prescribed by a single body having a nation-wide authority." *Id*. at 775. Other interstate-transportation cases illustrate the same point. *See, e.g.*, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (regulation of truck lengths); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (same); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-27 (1959)

(mudguards on trucks); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) ("seating arrangements" on buses).

3. The burdens of non-uniform regulation are especially severe for airlines. Because flight attendants (and pilots) travel through dozens of jurisdictions, often in the same day, their work implicates many different regulatory regimes. Air transportation is thus "in [its] nature national," and "imperatively demand[s] a single uniform rule, operating equally [throughout] the United States." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 625 (1973).

By contrast, no state has a strong interest in regulating flight attendants' wages and hours. *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 525 (1989) (state's interest depends on whether the regulation is a "traditional" state function). Indeed, unlike other employees, flight attendants work mostly outside the jurisdiction of any state. "The United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1). Thus, the airline industry "is unique among transportation industries" because "it is the only one whose operations are conducted almost wholly within federal jurisdiction." S. Rept. 1811, 85th Cong. 2d Sess. (1958).

Another federal court recently recognized the same point, holding that imposing California's wage-statement law "and equivalent state laws" on interstate

flights would violate the Dormant Commerce Clause by "impos[ing] too great an administrative burden on [the] interstate and international airline business." *Ward v. United Airlines, Inc.,* No. C 15-02309, 2016 WL 3906077, at *6 (N.D. Cal. July 19, 2016). Likewise, California courts themselves have struck down a state law requiring airlines to reimburse employees for uniforms, recognizing "the necessity for a uniform rule throughout the [airline's] system." See *United Air Lines, Inc. v. Indus. Welfare Commn.*, 211 Cal. App. 2d 729, 748-49 (1963), *disapproved on other grounds by Indus. Welfare Com. v. Super. Ct.*, 27 Cal. 3d 690 (1980).

B. Applying California's Wage-and-Hour Laws to Airlines Would Excessively Burden Interstate Commerce

This case highlights how subjecting airlines to a patchwork of state wage-and-hour rules burdens interstate commerce.

1. Under Plaintiffs' theory, which the district court adopted, California law applied to all work that class members "performed in California," no matter where they resided or principally worked. ER57-58. If every state applied the same logic, airlines would face an array of different rules for every flight attendant (and pilot). On a single cross-country flight, airlines would be subject to varying requirements for wage statements, overtime, minimum wage, and meal-and-rest breaks, among other things. *See infra* pp. 56-57.

Consider the lead plaintiff here, Julia Bernstein. Though technically based in California, she did not live there, and she typically began and ended each pairing

out of a separate "satellite base" in New York. ER162, 173, 187. In a typical three-day pairing in March 2011, she worked flights from JFK to LAX, to Dallas, back to LAX, to Seattle, to San Francisco, and back to JFK. ER260. Considering just the airports where she worked, her trip would implicate the wage laws of New York, California, Texas, and Washington—on top of the local ordinances of New York City, Los Angeles, San Francisco, Seattle, and Dallas. And because her flights traveled through many other states in between, her work could also (under the district court's logic) implicate the wage laws of Pennsylvania, Ohio, Indiana, Illinois, Missouri, Kansas, Colorado, Utah, Nevada, Oregon, Arizona, and New Mexico. So, the district court's ruling would require Virgin to assess the laws of at least 17 jurisdictions, just for one trip by one flight attendant.

Plaintiffs also argued (and the district court agreed) that California law applied to the California-resident subclass for all work performed in *any* state, even if they spent little of their "total work time in California." ER57. This burdens interstate commerce by allowing California to "project" its law "into other States." *Healy*, 491 U.S. at 334 (citation omitted); *Southern Pacific*, 325 U.S. at 775. As a result of this extraterritorial regulation, California-resident flight attendants are subject to the overlapping demands of California and any other jurisdiction where they happen to work. And "[i]f one state may" apply its law so broadly, *Southern Pacific*, 325 U.S. at 775, then other states can too. This exacerbates the burden by

creating a thorny choice-of-law problem, requiring different states' interests to be weighed to determine which law covers each flight attendant (and pilot). *See infra* pp. 56-57.

Worse yet, airlines cannot predict where flight attendants will work. Not only do schedules vary from month to month, but flight attendants can modify their assigned schedules through adds, drops, and trades. And even then, flights may be rerouted because of cancellations, delays, maintenance issues, or weather patterns. As a result, complying with state wage laws would require tracking thousands of flight attendants every day to see which states they end up in, and then making complex decisions about which state law would apply to each individual for each period.

2. Compared to these significant burdens on interstate commerce, states have no significant interest in applying their wage-and-hour laws to airlines' flight crews. Here, for example, California's interest is particularly weak for the many class members who are not California residents, and who receive their pay elsewhere (many as far as New York or New Jersey). California has only an attenuated interest in how these individuals are paid. Applying California law to regulate their wages on the opposite coast affords no "local" benefit at all. *Pike*, 397 U.S. at 142.

Even for California-resident flight attendants, subjecting them to California wage law yields no real benefit. Flight attendants (like pilots) already earn well above the California minimum wage. Class members earned *more* than the California minimum wage 99.98% of the time. *See* ER281. Virgin incurred penalties only because California (unlike federal law and most states) does not allow "averaging" to satisfy the minimum wage. Thus, while applying California's minimum-wage law would disrupt airlines' longstanding pay practices, it would not even increase flight attendants' pay.

Nor would applying California's wage-statement law yield significant local benefits. It would likely confuse more than help flight attendants to receive multiple different wage statements to satisfy different states' rules. It is more efficient for airlines to provide uniform nationwide statements, which they already do. And federal law provides a backstop by requiring W-2s showing wages and withholdings. 26 C.F.R. § 31.6051-1. Sacrificing the benefits of nationwide uniformity is not worth whatever marginal benefits state regulation might provide.

C. The District Court Misunderstood the Dormant Commerce Clause

The district court's principal reason for rejecting Virgin's Dormant Commerce argument was that Virgin did not prove which other states' laws would apply to Plaintiffs. ER64-65. That reasoning flouts Supreme Court precedent. A law violates the Dormant Commerce Clause if a proliferation of similar laws

would unduly burden interstate commerce. *See, e.g., Southern Pacific*, 325 U.S. at 774 n.4 (striking down state regulation because railroads "might be subjected" to a patchwork of varying state rules); *Healy*, 491 U.S. at 337 (focusing on "the practical effect of this … law … in conjunction with the many other … laws that have been *or might be* enacted throughout the county" (emphasis added)); *cf. Wynne*, 135 S. Ct. at 1802 (striking down state law due to burden if "every State ha[d] the same" type of law).

Indeed, the question is not whether other states *currently* regulate flight attendants as aggressively as Plaintiffs believe California does; that would perversely reward California for imposing unique burdens on interstate commerce. Instead, the question is whether California has enacted the *type* of law that would be unduly burdensome if other states followed suit. The answer is yes. Flight attendants travel through dozens of jurisdictions every day, and complying with each one's idiosyncratic laws would impose a substantial burden.

In addition, regardless of which state and local laws *actually* apply, airlines would face great difficulty just in making that determination. For each jurisdiction, an airline would have to assess statutes, case law, administrative orders, opinion letters, and local ordinances. As even the district court suggested, this would often turn on a "multi-faceted," fact-specific inquiry that could vary from flight to flight, such as where individual flight attendants lived, how much time they spent

working in the jurisdiction, and whether they otherwise had "deep ties" to it. ER56-57.

Contrary to the district court's reasoning, ER66, this case is not "similar" to *Sullivan v. Oracle Corporation*, 662 F.3d 1265 (9th Cir. 2011). That case applied California law to office employees "who worked complete days in California." *Id*. at 1269. It did not consider the burdens of applying state law to employees, like flight attendants, who commonly work in over a dozen jurisdictions a day. The Dormant Commerce Clause prevents that result.

II. Federal Law Preempts California's Meal-and-Rest-Break Rules

Even if the Dormant Commerce Clause allowed states to regulate some work performed by flight crews, federal law would preempt California's meal-and-rest-break rules. Under the Supremacy Clause, "the Laws of the United States" are "the supreme Law of the Land," notwithstanding any contrary state laws. U.S. Const. art. VI, cl. 2. And "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

Federal law may displace state law "either expressly—through clear statutory language—or implicitly." *Whistler Invs., Inc. v. Depository Tr. & Clearing Corp*., 539 F.3d 1159, 1164 (9th Cir. 2008). Implied preemption, in turn, comes in two basic varieties, known as conflict and field preemption. *First*, "state

law is pre-empted if [it] actually conflicts with federal law." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). *Second*, state law is preempted if "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Id*. (citation omitted).

"[P]reemptive intent is more readily inferred in the field of aviation, because it is an area of the law where the federal interest is dominant." *Nat'l Fed'n of the Blind v. United Airlines*, 813 F.3d 718, 724 (9th Cir. 2016) (citation omitted). Indeed, there is no "presumption" against preemption in "area[s] where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 90 (2000). And "in matters of air transportation, the federal presence is both longstanding and pervasive." *Brown v. United Airlines, Inc.*, 720 F.3d 60, 68 (1st Cir. 2013). Accordingly, because this area "is simply not one traditionally reserved to the states," "the presumption against preemption does not apply." *Id*.

Here, imposing California's meal-and-rest-break rules on flight attendants runs into all three types of preemption. *First*, the California rules conflict with FAA regulations. California's break rules would prohibit duty periods specifically authorized by federal law, and would interfere with flight attendants' federal safety duties. *Second*, the FAA has occupied the field by regulating the precise subject of flight-attendant duty and break periods. States cannot impose their own rules to supplement (or contravene) this pervasive federal scheme. *Third*, California's

break rules defy the express preemption clause of the ADA. The ADA preempts state laws that have a significant impact on—and are thus "related to"—airline prices, routes, or services. 49 U.S.C. § 41713(b)(1). California's break rules run afoul of the ADA because imposing them on interstate flight crews would delay and disrupt flight operations, increase prices, and shut down some routes altogether.

A. California's Break Rules Conflict With Federal Law

"[W]here state and federal law directly conflict, state law must give way." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013) (citation omitted). State law creates a conflict if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (citation omitted). California's meal-and-rest-break rules do so in two ways: by prohibiting continuous duty periods that federal law authorizes, and by impeding the federal safety duties assigned to flight attendants.

1. California's rules prohibit flight attendants from working continuous duty periods authorized by federal law

California's meal-and-rest-break laws are preempted because they prohibit the continuous duty periods for flight attendants that FAA rules authorize.

a. State law conflicts with federal law when it "forbids" some action that federal law "authorizes." *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S.

25, 31 (1996). The Supreme Court recognized this principle as far back as *Gibbons v. Ogden*, 22 U.S. 1 (1824). There, New York prohibited certain steamboats from operating in its waters. But Congress had enacted a statute that "licens[ed] ships or vessels to be employed in the coasting trade." *Id*. at 210-11. Writing for a unanimous court, Chief Justice Marshall explained that, because federal law "authorize[d]" steamboats to engage in interstate transportation without state permission, New York could not prohibit them from doing so. *Id*. at 210, 214.

More recently, the Court considered "a federal statute [providing] that certain national banks 'may' sell insurance in small towns." *Barnett*, 517 U.S. at 28 But Florida prohibited banks from selling insurance in the state. *Id*. at 29. Even though it was "possible" to comply with both laws (by refraining from selling insurance), the state law was preempted because "the Federal Statute authorizes national banks to engage in activities that the State statute expressly forbids." *Id*. at 31. Likewise, in *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, (1985), the Court held that a state law restricting spending for certain purposes was preempted by a federal law providing that funds "*may* be used for any governmental purpose." *Id*. at 261 (emphasis added and citation omitted); *see also Fidelity*, 458 U.S. 141, 154-55 (state law prohibiting due-on-sale mortgage clauses preempted by a federal law authorizing them); *United States v. City of Pittsburg*, 661 F.2d 783, 784-85 (9th Cir. 1981) (local rule requiring mail carriers

to obtain "express consent from residents before crossing their lawns" preempted by federal regulations that "authorize[d] postal carriers to cross lawns unless the owner objects"); *Jackson v. United States*, 881 F.2d 707, 713 (9th Cir. 1989) (state law limiting attorney fees preempted by federal law "permit[ting] a "contingency fee" of "up to 25 percent").

And the same principle applies in aviation. For example, when the FAA "explicitly permit[s] '[b]anner [t]owing for the purpose of advertising,'" it "preempt[s] a [local] ordinance that ban[s] the aerial towing of commercial signs." *Skysign Int'l v. City & Cnty. of Honolulu*, 276 F.3d 1109, 1118 n.6 (9th Cir. 2002) (citing *Banner Adver., Inc. v. City of Boulder*, 868 P.2d 1077 (Colo. 1994)).

b. Here, as in *Barnett*, federal law preempts California's meal-and-rest-break rules because they "forbid[]" certain conduct that federal law affirmatively "authorize[s]." 517 U.S. at 31. FAA rules provide that airlines "*may* assign a duty period to a flight attendant only when the applicable duty period limitations and rest requirements … are met." 14 C.F.R. § 121.467(b) (citation omitted). The regulation then provides that flight attendants may be assigned a duty period of up to "14 hours" (enough time to fly across the country and back), followed by "a scheduled rest period of at least 9 consecutive hours." *Id.* § 121.467(b)(1), (2). A "duty period" is "the period of elapsed time between reporting for an assignment involving flight time and release from that assignment." *Id.* § 121.467(a). FAA

regulations thus contemplate that flight attendants will not be "release[d]" from duty until the *end* of the federally authorized duty period.

By contrast, California law prohibits the continuous duty periods that the federal rules authorize. California requires meal breaks every five hours and rest breaks every four hours, "in the middle of each work period." *See* IWC Wage Order No. 9-2001, §§ 11-12; Cal. Labor Code §§ 226.7 & 512. During these breaks, employers "must relieve employees of all duties and relinquish control over how employees spend their time." *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 269 (Cal. 2016) (rest breaks); *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1037 (Cal. 2012) (meal breaks). This contradicts the FAA rule that airlines "may assign" flight attendants to work continuous shifts of 14 hours before they are "release[d]" from duty. 14 C.F.R. § 121.467(a), (b).

Of course, under FAA rules, flight attendants may still rest and eat during flights, and Virgin allowed them to do so in coordination with flight-crew leaders. ER950. But the federal rules require flight attendants to remain *on call* during such "breaks," which California law prohibits.

The conflict between state and federal law here is just as stark as in *Barnett* and *Gibbons*. By prohibiting continuous duty periods of more than four hours, California law says airlines may *not* do precisely what federal law says they

"may." *Barnett*, 517 U.S. at 28. Because of that "direct collision," the state law "must yield." *Gibbons*, 22 U.S. at 210, 221.

c. The district court held that FAA rules do not authorize continuous duty periods, but establish only the "maximum duty period time" while allowing states to impose a *lower* maximum. ER73. That misunderstands the FAA rules, which state that airlines "may assign" duty periods of the specified length. 14 C.F.R. § 121.467(b)(4)-(6). This authorization for airlines to assign continuous duty periods mirrors the statute in *Barnett*, which preempted state law by providing that "national banks 'may' sell insurance in small towns." 517 U.S. at 28. It also echoes the federal law in *Lawrence County*, which preempted the state expenditure restriction by providing that federal funds "may be used for any governmental purpose." 469 U.S. at 261 (citation omitted).

2. The California rules impede federal safety duties

California's meal-and-rest-break rules also conflict with federal law by impeding flight attendants' federal safety duties. FAA rules assign particular duties to flight attendants to ensure passenger safety. But by requiring off-duty breaks, California law interferes with these responsibilities.

a. State law is preempted "if it interferes with the methods by which [a] federal statute was designed to reach [its] goal." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). "If the purpose of the [federal law] cannot

otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (citation omitted).

When a "worker is performing duties pursuant to federal law, a state cannot impose requirements that interfere with the performance of those duties." *City of Pittsburg,* 661 F.2d at 786. In *Pittsburg*, letter carriers had a federal "mandate" to "provide efficient mail delivery service," but a local ordinance prohibited them from taking "short-cuts across lawns." *Id.* at 785-86. Because the ordinance "interfere[d] with [their] federal duty to deliver the mail efficiently," it was preempted. *Id*. *Cf. Carlson v. Charter Commc'ns,* 742 F. App'x 344, 344 (9th Cir. 2018) (state law preempted if it "prevent[s] employers from prohibiting their employees from using marijuana," as that would "preclude [them] from complying with all the requirements of the Drug-Free Workplace Act").

b. Here, applying California's break rules to flight attendants would "frustrate[]" the "operation" and "natural effect" of the federal safety scheme. *Crosby*, 530 U.S. at 373. As described below, FAA rules require flight attendants to be constantly on call and uniformly distributed throughout the cabin to help passengers in an emergency. But California frustrates that purpose by forcing flight attendants (and pilots) to stop working for significant periods. California law thus

impermissibly "interfere[s] with the performance of" the safety "duties" that federal law assigns. *City of Pittsburg,* 661 F.2d at 786.

The federal duties are clear. For example, "[d]uring takeoff and landing," flight attendants must remain "uniformly distributed throughout the airplane," to help passengers with "effective egress … in [the] event of an emergency evacuation." 14 C.F.R. § 121.391(d). The same is true "during passenger boarding or deplaning." *Id.* § 121.394(c). Similarly, "[d]uring taxi," flight attendants "must remain at their duty stations," prepared to "perform duties related to the safety of the airplane and its occupants." *Id.* § 121.391(d). And during the rest of the flight, attendants must shoulder various "cabin-safety-related responsibilities," along with duties assigned by the airlines. *Id.* §§ 121.467(a), 121.397(a).

California's meal-and-rest-break rules are preempted because they prevent flight attendants from remaining on call to perform their federal safety duties. Under California law, an employer "shall not require an employee to work during a meal or rest" break. Cal. Labor Code § 226.7(b). Indeed, employers must not only "relieve employees of all duties" during a break, but they must also "relinquish control over how employees spend their time." *Augustus*, 2 Cal. 5th at 269; *Brinker Rest. Corp.*, 53 Cal. 4th at 1037. During break times, California law thus prohibits airlines from directing flight attendants to "remain at their duty stations," or to stay

"uniformly distributed throughout the airplane"—as federal law requires. 14 C.F.R § 121.391(d).

The off-duty breaks required by California law also clash with the FAA rule that off-duty breaks must last at least nine hours. California requires a meal or rest break every four to five hours for ten to thirty minutes. *See* IWC Wage Order No. 9-2001, §§ 11-12. Federal law, however, requires *any* off-duty break to last for at least nine hours. FAA rules require a "rest period" of "at least 9 consecutive hours" after any "duty period of 14 hours *or less*." 14 C.F.R. § 121.467(b)(2) (emphasis added). And a duty period ends whenever a flight attendant is "release[d]." *Id*. § 121.467. This means that a flight attendant who is released from duty—as California requires for *every* meal and rest break—cannot "commence[]" working again for at least nine hours. *Id*.

Enforcing California break rules would thus require a nine-hour break after every four-hour work period. To comply, airlines would have to take flight attendants off duty mid-flight (with no right to ask them to work for the rest of the flight). Airlines would then need backup teams of replacement flight attendants on board—risking passenger confusion about which flight attendants are on and off duty. This would "frustrate[]" the "operation" and "natural effect" of the federal scheme, which regulates duty and break periods in a more orderly fashion. *Crosby*, 530 U.S. at 373.

c. The district court held that airlines could comply with both the FAA safety rules and California's break rules by "staff[ing] longer flights with additional flight attendants in order to allow for duty-free breaks." ER73. But space constraints make that impracticable. And even if it were possible, forcing airlines to add flight attendants would override FAA rules setting the minimum number of flight attendants required per flight. *See* 14 C.F.R. § 121.391.

In addition, forcing airlines to add flight attendants would frustrate the purpose of the federal rules, which are "designed to suit all operations that require flight attendants *without imposing a significant burden on operators*." 59 Fed. Reg. 42,974, 42,987 (Aug. 19, 1994). For example, because the California and federal rules together would allow flight attendants to work only four hours before taking a nine-hour break, airlines would need at least four full sets of flight attendants (and pilots) to fly across the country and back, instead of the single set allowed by federal law. This would reduce the seats available for passengers, increase prices, and jeopardize the profitability of some routes. *See infra* pp. 43-45.

The district court also held that California law does not conflict with FAA rules because it allows "some flexibility if the nature of the employee's work prevents off-duty breaks." ER38-39. But *Augustus* proves the opposite: It holds that employers must "relinquish *any* control over how employees spend their break time" and "relieve their employees of *all* duties—including the obligation that an

employee remain on call." 2 Cal. 5th at 273 (emphasis added). Although breaks may be "interrupted" or "rescheduled" occasionally, this must be "the exception rather than the rule." *Id.* at 272 & n.14. FAA rules, by contrast, require flight attendants to remain on call *as a rule*.

Nor does it resolve the conflict that California allows employers to "pay a premium" to employees instead of a meal or rest break. ER38. "[T]he prospect that a [party] could 'pa[y] the state penalty' for violating a state-law duty" does not defeat preemption. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 493 n.3 (2013) (citation omitted). Under that approach, conflict preemption would be "all but meaningless." *Id.* After all, parties *always* have the choice to either obey a state rule or pay the penalty.

Finally, the district court said airlines can "request … an exemption" from state law from a California administrative agency. ER39. But because California's meal-and-rest-break rules conflict with federal law, the state has no right to *refuse* an exemption, no right to make employers seek one, and no right to penalize employers who fail to obtain one.

B. Federal Law Occupies the Field

California's meal-and-rest-break rules are also preempted because they intrude on a field that federal law occupies exclusively. Because FAA rules

specifically address duty and rest periods for flight attendants, they leave no room for states to regulate the same subject.

1. Under the doctrine of field preemption, states cannot regulate in an area where "there is a 'federal interest … so dominant… [it] preclude[s] enforcement of state laws on the same subject,'" or where a scheme of federal regulation is "'so pervasive'" that it leaves "'no room for the States to supplement it.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)).

"The essential field preemption inquiry is whether the density and detail of federal regulation merits the inference that any state regulation within the same field will necessarily interfere with the federal regulatory scheme." *Nat'l Fed'n of the Blind*, 813 F.3d at 734. "The first step … is to delineate the pertinent regulatory field; the second is to survey the scope of the federal regulation within that field." *Id*.

The question, moreover, is whether state "regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Thus, if state regulations have the *effect* of intruding on the federally occupied field, they "are preempted regardless of however commendable or different their *purpose*." *S. Pac. Transp. Co. v. Pub. Util.*

Comm'n of Or., 9 F.3d 807, 811 (9th Cir. 1993) (emphasis added and citation omitted).

Applying this framework, this Court has held that "federal law preempts state law claims that encroach upon, supplement, or alter the federally occupied field of aviation safety and present an obstacle to the accomplishment of Congress's legislative goal to create a single, uniform system of regulating that field." *Ventress v. Japan Airlines*, 747 F.3d 716, 722-23 (9th Cir. 2014). Field preemption occurs, however, only when FAA regulations cover the "particular area of aviation commerce and safety implicated by the lawsuit" at hand. *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006 (9th Cir. 2013) (citation omitted).

In *Ventress*, for example, because the FAA had promulgated regulations covering "pilot qualifications and medical standards for airmen," states could not impose their own rules in that field. 747 F.3d at 721. Likewise, in *National Federation of the Blind*, 813 F.3d 718, states could not impose rules addressing "what level of accessibility for blind individuals is required for airport kiosks," since federal law already addressed that precise question. *Id.* at 735.

Many cases in this circuit and others have found broad field preemption in the airline context. *See, e.g.*, *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007) (field preemption of state duty to warn passengers about deep-vein thrombosis); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326-27 (10th Cir.

2010) (field preemption of state rules covering alcohol service on flights); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 371-75 (3d Cir. 1999) (preemption of "entire field of aviation safety"); *French v. Pan Am Express, I*nc., 869 F.2d 1, 5 (1st Cir. 1989) (because "a single uniform system of regulation in the area of air safety was one of the primary object[s] sought to be obtained," the FAA preempted "a state statute regulating the circumstances under which employers may require workers to submit to drug testing" (citation omitted)).

2. Here, the "pertinent regulatory field" is the setting of duty and break periods for flight attendants. Because federal rules address this subject in great "density and detail," *Nat'l Fed'n of the Blind*, 813 F.3d at 734, states may not impose their own additional rules.

Congress mandated federal regulation of duty and break periods for flight attendants. It provided that the FAA "shall … promote safe flight of civil aircraft in air commerce by prescribing … regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers." 49 U.S.C. § 44701(a)(4). And under that authority, the FAA promulgated a detailed set of rules addressing flight attendants' duty and break periods. *See* 14 C.F.R. § 121.467(b).

The resulting "scheme of federal regulation" leaves "no room for the States to supplement it." *Rice*, 331 U.S. at 230. FAA rules not only specify how many

hours flight attendants may continuously work (which varies in considerable detail based on the number of attendants per flight); they also dictate what safety tasks flight attendants must handle while on duty, when their off-duty breaks must occur, and how long they must last. *See supra* pp. 30, 34-35. The rules thus carefully balance duty and rest: If states were to impose a *different* regulatory judgment on the same questions, they would "necessarily interfere with the federal regulatory scheme." *Nat'l Fed'n of the Blind*, 813 F.3d at 734.

In addition, the FAA *rejected* a proposal to "establish provisions for on-board rest" for flight attendants. 59 Fed. Reg. at 42,979. Although the agency "considered" this and various other "rest requirement alternatives" proposed by commenters, it "determined that the rest requirements … adopted in [the] final rule are adequate to ensure that flight attendants are provided the opportunity to be sufficiently rested to perform their routine and emergency safety duties without imposing a significant burden on operators." *Id*. at 42,980. As a result, the FAA's "considered decision[] to refrain from mandating" in-flight breaks precludes California from doing so. *Nat'l Fed'n of the Blind*, 813 F.3d at 733. It makes no difference whether California's rules have different "purposes" than the federal rules. What matters is that they intrude on the federal field of deciding the length and spacing of mandatory breaks. *S. Pac. Transp. Co.*, 9 F.3d at 811.

3. The district court erred by comparing this case to *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc*., 555 F.3d 806, 812 (9th Cir. 2009). There, a pregnant woman claimed that an airplane stairway had been "defectively designed" because it "had only one handrail," causing her to fall and injure herself. *Id*. at 808. The state tort claim was not preempted because federal law had "nothing to say about handrails," or even more generally about how "airstairs" should be designed to prevent falling. *Id*. at 812.

Here, by contrast, federal rules address the precise issue at hand. They specify how long flight attendants may be assigned to work without breaks, and how long breaks must last. And federal regulators considered and rejected in-flight break rules like those that California requires. *Martin* itself recognized why preemption is appropriate here: when federal law regulates in a particular area, it "preempts all state law claims in *that* area." *Id.* at 811.

C. The ADA Preempts California's Break Rules

The ADA also preempts California's break rules. The ADA contains an express preemption clause to "ensure that the States [cannot] undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 378-79 (1992). This clause preempts state laws that are "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). This language is "deliberately expansive." *Morales*, 504 U.S. at 384 (citation omitted). It prohibits

any state or local law that "relates to" airline prices, routes, or services, even if the law is "not specifically designed to affect" airlines, and even if "the effect is only indirect." *Id.* at 386 (citation omitted) This reflects Congress's judgment that airlines should operate under a single, federal regulatory framework, instead of "a patchwork of state … laws, rules, and regulations." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008).

1. The Supreme Court has interpreted the "related to" clause to preempt any state law that has "a *significant impact* on carrier rates, routes, or services." *Id.* at 375 (emphasis added and citation omitted). That is what California's meal-and-rest-break laws would do if applied to flight attendants. The most significant effect would be on airline "services," which this Court has defined as "the provision of air transportation." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-66 (9th Cir. 1998). Forcing flight attendants to take breaks every few hours would delay flights because airplanes cannot operate without a full contingent of flight attendants on duty. Whenever flight attendants take state-mandated breaks, airlines cannot engage in critical operations that affect core services—including boarding, takeoff, landing, and deplaning. *Supra* p. 34.

Moreover, state-mandated break periods would fall at unpredictable times due to weather, maintenance, and other contingencies. So, for example, if a flight were grounded because of a passing thunderstorm, and then were cleared for

takeoff just as state break rules kicked in, the passengers could be left sitting on the tarmac waiting for the flight attendants' breaks to end. And because flights operate on tight schedules and crowded runways, such delays would have ripple effects: One plane delayed by a mandatory break could delay the next plane in the queue, which could delay another from landing, which would cause missed passenger connections, and so on. ER671-72 ¶¶ 4-5. This would significantly impair the core airline "service" of keeping planes running on time. ER671-72 ¶¶ 4-5.[2]

At least three district courts in this circuit have recognized these principles. In *Angeles v. U.S. Airways, Inc.*, No. C 12-05860, 2013 WL 622032 (N.D. Cal. Feb. 19, 2013), Judge Breyer held that the ADA precluded imposing California's break rules on ground crews, which would "directly impact the transportation of passengers and cargo." *Id*. at *9. Similarly, in *Miller v. Sw. Airlines*, 923 F. Supp. 2d 1206 (N.D. Cal. 2013), Judge Alsup held that the ADA preempted California's break rules as applied to "operations agents" who were responsible for "coordinating customer boarding/deplaning," "ascertaining that aircrafts are properly cleaned and provisioned," and "working with gate agents to collect boarding passes and verify boarding counts." *Id*. at 1212-13. And in *Blackwell v.*

[2] The impact would be even more significant on other services such as the "provision of food and drink," which flight attendants handle directly. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (citation omitted). Although this Court has declined to recognize these as "services" under the ADA, it has acknowledged an entrenched circuit split on the issue. *Nat'l Fed'n of the Blind*, 813 F.3d at 727-28. Appellants preserve this issue for further review.

Skywest Airlines, Inc., No. 06cv0307, 2008 WL 5103195 (S.D. Cal. Dec. 3, 2008), Judge Sabraw held that "the interruption of [ground agent] activities to accommodate state rest and meal periods could significantly and impermissibly impact point-to-point air carrier service" by causing "cascading delays." *Id*. at *17.

The same analysis holds for flight attendants. State-mandated breaks in the middle of their shifts would disrupt several stages of airline operations including boarding, safety briefings, takeoff, landing, and disembarking, not to mention in-flight services. Flight attendants are critical to ensuring that all of these operations function smoothly and on time, often within narrow windows of availability on runways and at gates. Allowing state law to interfere with these tightly scheduled operations would have precisely the type of "significant impact" on airline services that the ADA's preemption clause prevents. *Rowe*, 552 U.S. at 375.

Trying to avoid delays by adding flight attendants would not solve the ADA problem because it would have an impermissible significant impact on airline "routes" and "prices." For example, adding just a single additional flight attendant per flight would increase an airline's flight attendant–related costs by "approximately 33%," which includes not only "hourly wages" but also "training, benefits, crew lodging, per diem, and reserve costs." ER463-64 at ¶¶ 80-81 & n.111. These costs would either be passed on to consumers—thus affecting airline

"prices"—or would else make some "routes" unprofitable, forcing airlines to shut them down entirely. ER463-64 ¶¶ 81-82.

2. The district court rejected Virgin's ADA preemption argument based on *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014). In *Dilts*, this Court held that the Federal Aviation Administration Authorization Act ("FAAAA") did not preempt California's meal-and-rest-break rules as applied to the trucking industry. As the district court noted, the FAAAA is "modeled on" the ADA, except that it preempts state laws that are "related to a price, route, or service of any *motor* carrier," instead of any *air* carrier. ER74-75 (quoting 49 U.S.C. § 14501(c) (emphasis added)). The district court found "no persuasive argument" why California's break rules should be preempted for air carriers but not for motor carriers. ER75.

There are good reasons to treat the two differently. As *Dilts* recognized, the FAAAA and the ADA both preempt state laws that have a "'significant impact on carrier rates, routes, or services.'" 769 F.3d at 645 (quoting *Rowe*, 552 U.S. at 375). But when it comes to air carriers, mandatory break rules have a more "significant impact" than they do for motor carriers. While a truck driver can exit the highway to take a meal or rest break at virtually any time, flight attendants (and pilots) cannot do so without risking serious delays that harm passengers.

The Department of Transportation drew this distinction in its amicus brief in *Dilts*, which argued that "the preemption analysis would differ significantly if [California's meal-and-rest-break] law were applied to airline employees." Amicus Br. of the United States in *Dilts v. Penske*, 2014 WL 809150, *25 (9th Cir. Feb. 18, 2014). As the Department explained, "unlike motor carriers, an airline cannot readily interrupt tightly scheduled flight operations to accommodate state-mandated rest breaks for its staff…. Application of the state break law to airlines thus entails significantly different considerations." *Id*.

Dilts itself supports this distinction. The Court explained that although "mandatory breaks" would make truck drivers "take longer to drive the same distance," this would amount to "nothing more than a modestly increased cost of doing business." 769 F.3d at 648. After all, trucking companies could easily "take drivers' break times into account" when planning their services without causing undue disruption. *Id*. For airlines, by contrast, mandatory breaks would threaten to cause unpredictable and cascading flight delays. Airlines cannot plan their schedules around such disruptions, because they cannot predict when a mandatory break might cause a runway backup leading to delays at a major airport. This presents a daunting logistical problem unlike any the trucking industry faces. Moreover, while *Dilts* suggested that trucking companies can easily "hire

additional drivers or reallocate resources in order to maintain a particular service level," *id*., airlines cannot. *Supra* p. 36.

In short, *Dilts* underscores why imposing California's break rules on flights would have a "significant impact" on air travel. California's rules are thus "related to" airline prices, routes, and services, and the ADA preempts them. *Id*. at 645.

III. The California Labor Code Does Not Apply to the Plaintiff Class Because Their Work Occurred Principally Outside California

The California Labor Code did not apply to the Plaintiff class here because class members worked principally outside California. And California law did not apply to the extended stretches of time they worked outside the state, even for California residents. The district court erred in holding otherwise.

1. The California Labor Code provides that its "protections, rights, and remedies … are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, *in this state*." Cal. Lab. Code § 1171.5(a) (emphasis added); *Id.* § 1173 (addressing wages, hours, and conditions of employment for employees "*in this state*") (emphasis added); *Id.* § 1193.5 (same). California law thus regulates employment *in California*.

To effectuate that purpose, the applicability of California law turns on the "job situs" of the employee—i.e., whether the employee works "exclusively, or principally, in California." *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 578 (1996); *Sarviss v. Gen. Dynamics Info. Tech., Inc.*, 663 F. Supp. 2d

883, 900 (C.D. Cal. 2009) ("the determinative issue is whether an employee principally works in California"); *Ward v. United Airlines, Inc.*, No. C 15-02309, 2016 WL 3906077, *3 (N.D. Cal. July 19, 2016) (focusing on "the 'job situs test,' which considers where an employee 'principally' worked").

Two California Supreme Court decisions illustrate the job-situs test. In *Tidewater*, 14 Cal. 4th 557, the court considered whether California law applied to work performed on boats in the Santa Barbara Channel. *Id.* at 561. There was no dispute that the workers were California residents who worked for a California employer. But that did not mean California law applied automatically. The applicability of California law turned on whether the Santa Barbara Channel was California territory, so that the employees worked "exclusively, or principally, in California." *Id.* at 578.

The court explained that it was "not prepared … to hold that [California law] appl[ies] to all employment in California, and never to employment outside California." *Id*. For example, California law would not apply to work performed in the state by "nonresidents" working for "out-of-state businesses" who entered California only "temporarily during the course of the workday." *Id*. The court also said that California law may apply to work performed outside the state only "in limited circumstances, such as when California residents working for a California

employer travel temporarily outside the state during the course of the normal workday but return to California at the end of the day." *Id*.

In *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011), the California Supreme Court reaffirmed the job-situs test. It emphasized *Tidewater*'s holding that California law "might follow California resident employees of California employers who leave the state temporarily … during the course of the normal workday." *Id.* at 1199 (citation omitted). But it rejected the notion that California law "follows California residents wherever they go throughout the United States." *Id.* at 1198.

Sullivan also recognized limits on applying California law "to nonresident[s] who work both here and in other states for a California-based employer." *Id.* at 1194. The court explained that California law would *not* apply to such nonresidents if they passed through California only "temporarily during the course of the workday." *Id.* at 1199. It was only because the employees in *Sullivan* spent "entire days or weeks" working continuously in California that California's daily and weekly overtime laws covered them for those periods. *Id.* at 1200.

Tidewater and *Sullivan* thus establish two basic points. *First*, California law does not apply to those who work "principally" outside California, even if they are California residents working for California employers. *Tidewater*, 14 Cal. 4th at 578. The only exception is when such employees work "entire days or weeks" in

California; the state's law covers them during that time. *Sullivan*, 51 Cal. 4th at 1200. *Second*, even for employees generally covered by California law, California law does not cover work they perform *outside* California, unless they "travel temporarily outside the state during the course of the normal workday but return to California at the end of the day." *Tidewater*, 14 Cal. 4th at 578.

Even if there were any ambiguity about these principles, California law should be construed not to apply to interstate flight crews to avoid the serious Dormant Commerce Clause concerns described above. Indeed, "the canon of constitutional avoidance … *requires* a statute to be construed so as to avoid serious doubts as to [its] constitutionality" if possible. *Friedman v. Boucher*, 580 F.3d 847, 856 (9th Cir. 2009) (emphasis added and citation omitted). Here, such a construction is more than possible. The best reading of the California Labor Code is that it does not apply to those who work "principally" outside California, or to time worked outside California except in the limited circumstances recognized in *Tidewater*.

2. California law did not apply to Plaintiffs' claims because they never tried to prove that class members worked "principally" in California. In fact, the named Plaintiffs spent "just around a quarter of their total work time in California," ER57, and class members collectively worked only 31.5% of their time in California. ER247. In addition, class members worked outside California on 84.5%

of their workdays. ER247. Thus, because there was no evidence that class members worked principally in California, California law did not apply except (at most) for times when they worked "entire days or weeks" in the state. *Sullivan*, 51 Cal. 4th at 1200.

California law also did not apply to time that the California-resident subclass worked "outside California." ER53, ER57-61. As noted above, California law generally does not "follow[] California residents wherever they go throughout the United States." *Sullivan*, 51 Cal. 4th at 1198. Instead, California law applies to work performed outside California only in the "limited" circumstance where employees "travel temporarily outside the state during the course of the normal workday but *return to California at the end of the day*." *Tidewater*, 14 Cal. 4th at 578 (emphasis added). Plaintiffs provided no evidence that members of the California-resident subclass typically returned to California at the end of their work days. To the contrary, because flight attendants' pairings usually lasted several days, many flight attendants who left California on a trip presumably did *not* return to the state at the end of the day.

3. The district court nevertheless refused to apply the job-situs test. Instead, it embraced a "multi-faceted approach" that looked to employer and employee residency, where employees received their pay, whether employees' work outside California was only temporary, and other connections to California.

ER56. But this approach contravenes *Sullivan* and *Tidewater*, which make job situs the touchstone. In *Sullivan*, for example, "[r]ather than focusing on the location of the company or its decisionmakers, the Court focused on the location of the work." *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1062 (N.D. Cal. 2014) (citation omitted). Likewise in *Tidewater*, it was not enough that the employees lived in California and received their pay in California from a California company. The dispositive issue was whether the principal situs of their jobs—the Santa Barbara Channel—was "in California." 14 Cal. 4th at 578. Because it was, California law applied. *Id.*

Here, by contrast, the principal situs of flight attendants jobs' was *not* "in California." *Id.* Their work occurred primarily in other states or the federal airspace, which is federal territory where "[t]he United States Government has exclusive sovereignty." 49 U.S.C. § 40103(a)(1). *Cf. Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019) (holding that California wage-and-hour law does not apply to workers in federal territory on the Outer Continental Shelf). Accordingly, because Plaintiffs did not show that the class members here worked principally "in California," California law did not apply to them except in the limited circumstances recognized in *Sullivan* and *Tidewater*. Nor, for reasons described above, did California law follow the California-resident subclass for work performed elsewhere.

IV. Class Certification Was Improper Because Plaintiffs Do Not Satisfy the Superiority Requirement of Rule 23(b)(3)

The district court erred in certifying a class despite Plaintiffs' failure to present a manageable trial plan under Rule 23(b)(3) to address the complicated and individualized issues that their claims present.

1. "The party seeking class certification has the burden of affirmatively demonstrating that the class meets the requirements of Federal Rule of Civil Procedure 23." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). As relevant here, a class action may be maintained only if "questions of law or fact common to class members predominate over any questions affecting only individual members," and if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Assessing predominance requires a court to consider "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). And, in class actions raising state-law claims, choice-of-law inquiries often present intractable manageability problems. *See Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001), *as amended*, 273 F.3d 1266 (9th Cir. 2001); *see also Lozano v. AT&T Wireless Servs. Inc.*, 504 F.3d 718, 728 (9th Cir. 2007) (noting that "the law on predominance requires the district court to consider variations in state law when a class action involves multiple jurisdictions"). That is because "[w]here the applicable law derives from the law of the 50 states, as opposed to a

unitary federal cause of action, differences in state law will compound the disparities among class members from the different states." *Zinser*, 253 F.3d at 1189 (citation omitted). Therefore, the plaintiff seeking certification of a class "for which the law of [multiple states] potentially applies … bears the burden of demonstrating a suitable and realistic plan for trial of the class claims." *Id.* (citation omitted).

2. Here, California law governs the choice-of-law inquiry, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497 (1941), and California applies the "'governmental interest' analysis." *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 83 (2010). Under that analysis, if there is a "true conflict" between different state laws that apply to the same conduct, then the court must "compare[] the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Sullivan*, 51 Cal. 4th at 1202 (citation omitted).

This leads individualized questions to predominate over common ones in at least two ways. *First*, determining whether California law applies to any particular flight attendant requires an individualized inquiry. Under the job-situs test from *Tidewater* and *Sullivan*, the "principal" place of work will vary based on different flight attendants' individual flight assignments at any given time. Likewise, even

under the district court's "multi-faceted" test, several relevant "factors" vary from one flight attendant to the next. ER56. This includes where flight attendants "reside," how "temporary" their absence from the state might be, and how many "significant connections" they have to the state. ER56. Thus, even with Virgin's uniform pay policy, individual issues about the applicability of California law predominate over common ones. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 945, 947-48 (9th Cir. 2009) (affirming denial of certification in case that required "individualized analysis" to determine whether California law covered class members, despite uniform employer policy).

Second, even when California law applies by its own terms, an individualized choice-of-law analysis is still required to determine whether other states have a greater interest in applying their law instead. *See Zinser*, 253 F.3d at 1189. For example, even if California law covers work performed by some class members in California, the states where those class members *reside* might also claim an interest in regulating their work in California. *See, e.g.*, *Bostain v. Food Exp., Inc.*, 153 P.3d 846, 851-52 (Wash. 2007) (Washington law covers resident interstate truckers wherever they work); *Gonyou v. Tri-Wire Eng'g Sols., Inc.*, 717 F. Supp. 2d 152, 155 (D. Mass. 2010) (in-state residency of employer/employee relevant to applying Massachusetts law to out-of-state work). Likewise, even if California law covers its residents' work in other states, those other states might

also claim an interest in regulating work within their borders. *See, e.g.*, *Tidewater*, 14 Cal. 4th at 578; *Sullivan*, 51 Cal. 4th at 1199-1200; *see also id.* at 1204 (noting that Colorado overtime law governed work performed within its borders).

These questions are not just theoretical. There is a "true conflict" among wage laws in many different jurisdictions where Virgin's flight attendants lived and worked. For example, state minimum-wage rates range from the federal floor of $7.25 to $12.00 per hour. *See, e.g.*, Tex. Labor Code Ann. § 62.051; RCW § 49.46.020. Several local governments, including at least five in California, also set their own minimum-wage rates. *See, e.g.*, San Diego Mun. Code § 39.0107 ($12); San Francisco Admin. Code § 12R.3 ($15.59). And minimum-wage compliance rules also differ: For example, New York and Florida allow "averaging," but California does not. *Compare Williams v. Epic Sec. Corp.*, 358 F. Supp. 3d 284, 301 (S.D.N.Y. 2019), and *Del Rosario v. Labor Ready Se., Inc.*, No. 14-21496, 2015 WL 5016613, *13 (S.D. Fla. Aug. 25, 2015), *with Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 323-24 (2005). Similarly, New York requires certain wage-statement information that California does not, *see* N.Y. Lab. Law § 195(3) (the employer's phone number), and also mandates meal periods (but not rest breaks) at different times, *see* N.Y. Lab. Law § 162.

Accordingly, Plaintiffs had to present "a suitable and realistic plan" to manage the complex choice-of-law inquiries underlying their complaint. *See*

Mazza, 666 F.3d at 588; *Zinser*, 253 F.3d at 1189. They did not. That alone precludes certification under Rule 23. *See id.* at 1190 (affirming that "there was no manageable trial plan adequate to deal with individualized issues and variances in state law"); *see also Ayala v. U.S. Xpress Enters., Inc.*, Case No. EDCV 16-137-GW(KKx), 2016 WL 7586910, *5 (C.D. Cal. Dec. 22, 2016) (denying class certification because there was no "manageable way for the Court to perform a conflict-of-law analysis for each of the 48 states that the putative Class Members reside in").

3. The district court erred in granting class certification anyway. It believed that "no individual analysis is required," ER29, but never addressed how several factors, such as job situs or temporary absence from California, could be determined on a class-wide basis. They cannot be, because these are individualized inquiries that will vary depending on the class member and time period at issue. Nor did the district court address the variability in employee residence or how that would affect the inquiry under the district court's own "multi-faceted" approach. The individualized nature of these questions would overwhelm the case.

The district court's reasons for skirting unavoidable choice-of-law inquiries do not withstand scrutiny either. The court stressed that Plaintiffs "only allege violations of California law." ER30. But Plaintiffs cannot escape complex choice-of-law inquiries simply by crafting their complaint to invoke the law of only one

state. *Cf. Sullivan*, 51 Cal. 4th at 1202 (conducting choice-of-law inquiry even where plaintiffs contended California law applied). If they could, they would be deciding unilaterally for themselves which state has the greatest interest in the conduct at issue. That is not how choice-of-law analysis works. Indeed, whether California has *some* interest in the dispute and whether its law *might* apply by its terms is just the first question that a court must ask. *See Mazza*, 666 F.3d at 589-90. It does not absolve the court from also weighing the interests of *other* states whose laws might also apply. *Id.*

In rejecting the decertification motion, the district court also reasoned that Virgin had not proven which other state's law applied or met its own burden under California's "governmental interest" test. ER30-31 & n.6. In essence, the district court required Virgin to prove which state laws applied to particular class members *before* considering whether such an inquiry is manageable on a class-wide basis. But while Virgin bears the ultimate burden to "demonstrate that foreign law, rather than California law, should apply to class claims," *Mazza*, 666 F.3d at 589-90 (citation omitted), that comes only *after* Plaintiffs show that the choice-of-law inquiry is manageable on a class-wide basis in the first place. If the law of several states "*potentially* applies," then the *plaintiff* bears the burden of showing a manageable trial plan. *Zinser*, 253 F.3d at 1189 (emphasis added); *Ayala*, 2016 WL 7586910, at *5. By improperly shifting the Rule 23 burden away from Plaintiffs

and requiring Virgin to demonstrate the answer to the choice-of-law question before determining manageability, the district court abused its discretion.

V. The District Court Misapplied California Law

A. Virgin Paid Flight Attendants for All Hours Worked

Virgin complied with California's requirement to pay employees for every hour worked. Employers need not pay a straight hourly rate if they instead use a formula to pay a set amount for each duty period, which covers all hours within that duty period. That is what Virgin did here.

California requires "full payment of wages for all hours worked." *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 324 (2005). Recently, two district courts held that airlines satisfied this requirement by using a "formula" to pay flight attendants "for the mix of responsibilities they would have during" each duty period. *Oman v. Delta Air Lines, Inc.*, 153 F. Supp. 3d 1094, 1104 (N.D. Cal. 2015). Because the formula gave flight attendants advance notice of the amount of pay they would receive for the entire duty period, it compensated them for all hours worked during that period; it was not merely a "post-hoc attempt to rationalize a failure to pay for all hours worked." *Id.* at 1104. *See also Booher v. JetBlue Airways*, No. C 15-01203, 2016 WL 1642929, *3 (N.D. Cal. Apr. 26, 2016) (same).

Here, Virgin likewise used a credit-based formula that specified "[t]he credit value *for each duty period*." ER76 (emphasis added); *see also* ER51. There was no

agreed-upon hourly rate; flight attendants were instead informed ahead of time that they would receive a set amount of credits (and pay) for each duty period worked.

The district court erroneously held that the policy did not compensate for "non-block, non-deadheading duty time." ER77. In fact, the formula made clear that credits were assigned for the "block hours, deadhead or ground transportation credit, and minimum duty credit" for *each duty period*. Thus, the resulting pay amount covered *all the hours* in that period. ER76.

B. Virgin Was Not Subject to Penalties for "Subsequent Violations"

The district court wrongly subjected Virgin to heightened PAGA penalties for "subsequent violations."

PAGA imposes penalties for each "initial violation," and heightened penalties for each "subsequent violation." Cal. Lab. Code §§ 2699(f)(2), 558(a), 226.3. A "subsequent" violation does not occur until "after the employer has learned its conduct violates the Labor Code." *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008). This requires an *official determination* of a violation. "Until [an] employer has been notified that it is violating a Labor Code provision (whether or not *the Commissioner or court chooses* to impose penalties), the employer cannot be presumed to be aware that its continuing underpayment of employees is a 'violation' subject to penalties." *Id*. (emphasis added); *see also Vieyara-Flores v. Sika Corp.*, No. EDCV 19-606, 2019 WL 2436998, *5 (C.D. Cal.

June 10, 2019) (noting that "under California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"); *Trang v. Turbine Engine Components Techs. Corp.*, No. CV 12-07658, 2012 WL 6618854, *5 (C.D. Cal. Dec. 19, 2012) (same); *Sanchez v. McDonald's Restaurants of California, Inc.*, No. BC499888, 2017 WL 4620746, *7 (Cal. Super. July 06, 2017) (same).

Here, however, the district court found that Virgin was "on notice" from the time that Plaintiffs expressed *their own opinion* that Virgin was violating California law, even without an official determination. ER20. A plaintiff's unilateral claim is not enough to make an employer "learn" of a violation. *Amaral*, 163 Cal. App. 4th at 1209. Any other rule would produce absurd results, coercing employers to alter their pay practices or risk heightened penalties that can total tens of millions of dollars whenever an employee makes a mere *complaint*.

CONCLUSION

The judgment below should be reversed.

STATEMENT OF RELATED CASES

This Court has certified to the California Supreme Court whether the California Labor Code applies to pilots and flight attendants who do not work principally in California, and whether an airline's predetermined pay formula compensates employees for all hours worked. *See Ward v. United Airlines, Inc.*, 889 F.3d 1068 (9th Cir. 2018); *Oman*, 889 F.3d 1075. Those cases will also consider Dormant Commerce Clause issues raised by the airlines there.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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