Docket No. 19-15382 (L), 20-15186

In the

United States Court of Appeals

For the

Ninth Circuit

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

Plaintiffs-Appellees,

v.

VIRGIN AMERICA, INC. and ALASKA AIRLINES, INC.,

Defendants-Appellants.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 3:15-cv-02277-JST · Honorable Jon S. Tigar

BRIEF OF *AMICI CURIAE* AIRLINES FOR AMERICA, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, REGIONAL AIRLINE ASSOCIATION, AND INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PANEL REHEARING OR REHEARING *EN BANC*

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Air Transport Association of America, Inc., d/b/a Airlines for America, has no parent corporation and does not issue stock. No publicly held company owns more than 10% of Airlines for America.

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Dated: May 3, 2021

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INTEREST OF AMICI CURIAE[1]

Airlines for America is the nation's oldest and largest airline trade association, representing passenger and cargo airlines. The Chamber of Commerce of the United States of America is the world's largest business federation. The Regional Airline Association is a trade association that represents 18 regional airlines—specializing in the use of smaller aircraft, appropriately sized for operations on smaller, lower density routes—and approximately 90 non-airline members. The International Air Transport Association is a nongovernmental international trade association founded by air carriers engaged in international air services. Each amicus routinely files briefs in courts around the Nation, and each participated as amicus before the panel.

Ensuring the uniformity of the laws and regulations governing interstate transportation through proper application of preemption principles is vitally important to amici's members. Their members operate under myriad complex federal regulatory regimes, which, properly construed, will often preempt the application of state and local law. The panel's decision threatens to upset this

[1] All parties have consented to the filing of this brief. Undersigned counsel certifies that this brief was authored in full by amici and their counsel, no party or counsel for a party authored or contributed monetarily to this brief in any part, and no other person or entity—other than amici, their members, and their counsel—contributed monetarily to this brief's preparation or submission.

regulatory stability by construing critical preemption protections out of existence, thereby subjecting amici's members to exactly the sort of patchwork of state and local regulation that federal preemption is intended to prevent.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The panel held that California's meal-and-rest break law—which requires meal and rest breaks at regular intervals, *see* IWC Wage Order No. 9-2001, §§ 11-12; Cal. Labor Code §§ 226.7 & 512—is not preempted by federal law, either under the doctrine of conflict preemption or the express preemption clause of the Airline Deregulation Act ("ADA"). That decision warrants en banc review because of the panel's doctrinal errors, and because of the serious practical consequences of the panel's decision for the Nation's commerce.

The most obvious adverse consequences of the panel's decision will fall on airlines, including regional airlines and the communities they serve. California law requires employers to provide breaks that "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 (2016). And California law requires that employees be "free to leave the premises," *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1036 (2012), which obviously is impossible when a plane is in the air. Yet the panel held that airlines are required to comply with these

requirements with respect to flight attendants, but it never explained how, as a practical matter, an airline is supposed to do that.

There are only two options. Neither is remotely realistic, and each would create the problems that federal preemption is meant to avoid.

First, the district court believed that airlines should give flight attendants mid-flight breaks. But federal law precludes flight attendants from taking mid-flight breaks. And even if compliance with California law were possible, the inevitable effect of this proposed solution would be to decrease airline services and increase prices.

Second, Plaintiffs' expert suggested that airlines should schedule longer ground times so flight attendants can take breaks between flights. A law that requires airlines to reschedule their routes is clearly one that is "related to an [airline] price, route, or service," 49 U.S.C. § 41713(b)(1), and thus is obviously preempted by the ADA. And the practical problems such a requirement would cause are immense. Delaying flights and reworking flight schedules is no small thing. Flight schedules are tightly choreographed nationwide, and, as the federal government explained to the panel, state rules requiring scheduling changes would interfere with that choreography and result in delays throughout nationwide route networks. *See generally* Br. for the United States as *Amicus Curiae* In Support of Appellants ("U.S. Br."), Dkt. 41.

These practical problems, moreover, extend beyond airlines. Most obviously, the Federal Aviation Administration Authorization Act ("FAAAA") includes a preemption provision that was "copied" in relevant part from the ADA, and courts construe these provisions in tandem. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008). Thus, the panel's preemption decision will limit the scope of the FAAAA and will similarly interfere with the prices charged and the routes driven by interstate trucking companies.

It is no surprise that Congress enacted broad preemption provisions for these industries. Both air and ground transportation are integral to the Nation's commerce, which is precisely why Congress sought to establish national uniformity in these areas. Preemption of patchwork state regulation has helped create cost-effective and efficient transportation networks throughout the United States. The panel's decision undermines those achievements, directly contrary to Congress's manifest purpose.

Virgin America's petition for rehearing should be granted.

ARGUMENT

I. THE PANEL'S DECISION WILL HARM THE AIRLINE INDUSTRY, INCLUDING REGIONAL AIRLINES, IN THE PRECISE MANNER FEDERAL PREEMPTION WAS MEANT TO PREVENT

A. The Panel's Decision Will Result In Severe Practical Consequences For Airlines

1. The panel held that Virgin America was required to comply with California's meal-and-rest break laws vis-à-vis its flight attendants. Those laws require employers to provide duty-free breaks at regular intervals: "Employers must afford employees uninterrupted … periods in which they are relieved of any duty or employer control and are free to come and go as they please." *Brinker*, 53 Cal. 4th at 1037. But the panel never explained how airlines could actually comply with California law in practice. That is because they cannot.

Two compliance options emerged in the district court. Neither is remotely realistic.

First, the district court proposed that an airline "could staff longer flights with additional flight attendants in order to allow for duty-free breaks" mid-flight. *Bernstein v. Virgin Am., Inc.*, 227 F. Supp. 3d 1049, 1072 (N.D. Cal. 2017). Setting aside the obvious conflict preemption problem (federal regulations do not allow in-flight breaks, *infra* at 10-11), adding more flight attendants would deprive the flying public of otherwise-available seats, reducing the core service offered by airlines. Reallocating seats would also be exceedingly costly. Airlines would have

to pay the salaries of the additional flight attendants *and* would lose revenues by allocating seats to flight attendants.

It gets worse. Relieving a flight attendant of duty mid-flight, even if allowed by federal law, would trigger a mandatory *nine-hour* rest period under federal regulations. 14 C.F.R. § 121.467(b)(2). Thus, any flight attendant who takes a mid-flight break would be unavailable to work another flight for nine hours. This, in turn, would put an immense strain on airlines' ability to staff flights, requiring fewer flights, much longer ground times, many more flight attendants, or some combination of the three.

Second, an airline could schedule longer delays between flights, so flight attendants can take a state-law required break before the plane takes off again. This was the approach adopted by Plaintiffs' damages expert, *see* Dkt. 343, Ex. A at 18-19, whose calculations formed the basis for the district court's damages award. The Department of Transportation ("DOT") explained in its amicus submission the major problems with this approach: requiring longer ground times between flights staffed by flight crew subject to California law "would significantly interfere with [the] complex choreography" required for our interstate system of air transportation to work. U.S. Br. 21. "And, because air traffic is so intricately coordinated, changes to the scheduling of even intrastate flights to

accommodate breaks would have a significant impact throughout the country and internationally." *Id*. at 22.

Layering federal regulations atop state law again makes the problem worse. It is not actually possible for an airline to provide flight attendants a short break between flights because federal law requires a nine-hour rest period once a flight attendant is released from duty. *Supra* at 6. So as a practical matter, an airline would have to swap in a new flight attendant after every break, causing all the same problems described above and more.

Using new flight attendants or flight attendant crews poses additional problems—problems that would adversely affect flight attendants in addition to airline operations. Flight attendants usually fly "trip pairings"—i.e., multi-segment flights that begin and end at the same airport. For example, an entirely intra-state trip pairing for a Los Angeles-based flight crew might include the following itinerary: Los Angeles-Oakland-San Diego-Sacramento-Los Angeles. But if the original flight attendants must be replaced in the middle of the pairing—say, in San Diego—the new crew will have to be flown in from a base airport to San Diego to staff the rest of the itinerary, which itself may cause delays (airlines typically do not have crews waiting around at non-base airports). As the government explained, "this solution would often require airlines to hire two flight attendants to

do the work of one, stranding both in airports outside of their home base for significant periods." U.S. Br. 23.

Both options, moreover, presuppose that airlines know when they build their schedules which flight attendants are flying which flights. But logistical necessity requires that schedules be built first, then crew assigned later. And flight attendants have negotiated for tremendous flexibility to add, drop, or trade trips, which means that airlines do not know which flights would need backup crew and which routes would need longer ground times. So the only possible compliance options would be to add more flight attendants or schedule longer ground times for *all* flights.[2]

2. These compliance options are even less realistic for regional airlines. These airlines specialize in the use of smaller planes that are appropriately sized for markets with fewer passengers traveling at once. These smaller aircraft have a lower revenue potential compared to larger mainline aircraft. Similarly, with fewer seats over which to amortize cost increases, additional labor costs associated with additional crew can push these fragile routes from positive to negative margins. An accompanying requirement to reallocate revenue seats from paying passengers to newly-mandated back-up flight attendants would further erode revenue potential

[2] Staffing an additional flight attendant on all flights would increase annual labor costs at national airlines by *hundreds of millions of dollars per airline*.

at the same time that costs are increasing. The logical consequence of compliance will be the unavoidable cancelation of marginally-profitable routes and associated loss of service at smaller airports, which has happened recently at a number of airports in the Circuit. *See* Br. of RAA In Support of Defendants-Appellants ("RAA Br."), Dkt. 32-1, at 7-8, 19-20, 25-28. Fourteen of California's airports, in fact, are serviced exclusively by regional airlines—and those communities are uniquely threatened by the panel's decision.

Nor can regional airlines schedule longer ground times. Regional airlines' scheduling practices allow little time between landings and takeoffs, and during most or all of that time crewmembers complete post- and pre-flight duties. *Id*. at 9, 27-28. Adding longer waits between flights would not only delay their passengers, but also the schedules of their mainline partners and passengers throughout interconnected route networks, since regional airline passengers generally travel beyond their first destination on connecting flights. *Id*. at 9-10, 27-28.

Compliance may also result in smaller communities becoming ineligible for the Essential Air Service ("EAS") program subsidies, resulting in withdrawal of service, to devastating effect in those communities. The EAS program was intended to ensure that small communities served by carriers before deregulation

would not lose air service afterwards due to their marginal profitability.[3] Indeed, the entire premise of the EAS program is that smaller communities are highly vulnerable to market forces, and many today cannot be served without federal subsidization. But communities are generally ineligible for EAS subsidies if their per-passenger subsidies exceed certain limits. And the additional costs required by compliance with California's meal-and-rest-break law (as well as any other similar state or local law in the Circuit) will push certain routes above these limits.

B. California's Meal-and-Rest Break Law is Conflict Preempted As Applied to Flight Attendants

The practical problems just described explain why application of California's meal-and-rest break law to flight attendants is clearly preempted under both strands of conflict preemption: impossibility preemption and obstacle preemption.

1. Impossibility preemption occurs when it is impossible for a regulated entity to comply with its federal and state-law duties simultaneously. *Arizona v. United States*, 567 U.S. 387, 399 (2012). The panel held that application of California's meal-and-rest break law was not conflict preempted because "[i]t is physically possible to comply with federal regulations prohibiting a duty period of

[3] *See* https://www.transportation.gov/policy/aviation-policy/small-community-rural-air-service/essential-air-service.

longer than fourteen hours and California's statutes requiring ten-minute rest breaks and thirty-minute meal periods at specific intervals." Petition Appendix ("Pet. App.") 22. The panel did not say how airlines actually could comply with both federal regulations and California law. As explained, one possibility would be to rearrange flight schedules to allow time for breaks between flights, *see supra* at 6-7, but that would be so obviously preempted under the ADA that it is safe to assume the panel did not mean that. So the only other option is the district court's approach—adding more flight attendants to the plane so one "shift" could take a mid-flight break.

But adding more flight attendants does not avoid impossibility preemption either. Flight attendants are required on board primarily for passenger safety. And the FAA, pursuant to its statutory mandate to ensure flight safety, does not permit flight attendants—no matter how many are staffed on a plane—to take breaks mid-flight. As the federal government explained, pervasive federal regulations require flight attendants to "be on call for the duration of a flight in order to provide safety services, which would prohibit any off-duty break during the flight." U.S. Br. 23; *see id*. at 18-19 (flight attendants must "remain on duty and on call"). If anything, this is even less of an option for regional airlines (which the panel simply ignored)—regional flights are often too short to allow both for California-complaint breaks and for flight attendants to perform necessary duties during

takeoff and landing. *See* RAA Br. 23-24. Yet under California law employers "must relieve employees of all duties and relinquish control over how employees spend their time." *Augustus*, 2 Cal. 5th at 269. Thus, airlines cannot comply with California law because federal law requires the opposite.

That is the very definition of impossibility.

2. The panel failed even to acknowledge obstacle preemption, which preempts state laws that would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000). Indeed, the panel's error here is striking, because this is such a clear case for obstacle preemption.

a. Relieving flight attendants of duty mid-flight would clearly compromise the FAA's interest in flight safety. And even assuming it were theoretically possible for flight attendants to take breaks mid-flight, adding more flight attendants to a plane would stand as an obstacle to Congress's objective of creating an "efficient" and "affordable" system of interstate transportation. 49 U.S.C. § 40101(a). As explained above, mid-flight breaks would trigger a nine-hour rest period, which would sideline flight attendants for huge swaths of the workday. *Supra* at 6. This, in turn, would require airlines to reschedule their flights, hire more flight crew, decrease the number of flights they offer, and ultimately raise prices for consumers.

Even setting aside the nine-hour rule, there would be fewer seats available for the flying public, and flights would be less affordable because seats occupied by additional flight attendants cannot be sold to paying passengers. *See Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 383 (5th Cir. 2004) ("reduc[ing] the number of seats on the aircraft" will "inexorably" raise ticket prices). It would plainly frustrate Congress's and DOT's objectives if a state were to require fewer seats on a plane, even for intrastate flights. California cannot effect the same result by requiring the airlines to staff flights with more flight attendants, especially when the result would be to deprive smaller California communities of transportation services that Congress specifically tried to protect. *See supra* at 8-10.

b. Plaintiffs' proposed alternative—requiring longer ground times—is no better. In fact, it is probably worse. Requiring longer wait times between flights would "plainly frustrate" Congress's and the DOT's objective of "efficient" transportation. U.S. Br. 26. And because of the interconnected nature of interstate route networks, requiring longer ground times in California (or for California flight crew, regardless of where the plane is located) will necessarily delay flights across the Nation. *See supra* at 6-7. A state law that adversely affects airline staffing, scheduling, route planning, and pricing quite clearly stands as an obstacle to Congress's objective of maintaining efficiency and uniformity in air carrier rate and route regulation.

C. California's Meal-and-Rest Break Law Is Also Preempted Under The ADA

The ADA expressly preempts state laws "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The Supreme Court has always construed this language "broadly," giving it "expansive" sweep. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (quotations omitted). As relevant here, a state law that significantly affects an airline's prices, routes, or services is preempted, even if "the effect is only indirect." *Id.* at 386 (quotations omitted).

That is true of California's meal-and-rest break laws as applied to flight attendants for many of the reasons just explained. To take just one, "shift[ing] flight schedules to accommodate the state-mandated breaks …. would plainly affect the frequency and regularity of service," U.S. Br. 21-22, and thus would directly impact airlines' routes and services—a prohibited impact under the ADA, as the DOT explained to the panel, *see id*.

The panel reached a contrary result because it read the ADA so narrowly that only laws that *directly bind* airlines to *particular* prices, routes, or services are preempted. As Virgin America's petition explains, that construction is plainly inconsistent with controlling Supreme Court precedent and with the precedent of several other circuits. Pet. 13-18. It is also illogical: by their nature, generally-applicable background law do not bind airlines to *particular* prices, routes, or services. Indeed, that construction was inconsistent with *this Court's* precedent

just several months ago. The "binds to" test was articulated in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014), which construed the FAAAA's express preemption provision (materially identical the ADA's) in an intra-state trucking case. *Id*. at 646. But last October, the Court in *Miller v. C.H. Robinson Worldwide*, 976 F.3d 1016 (9th Cir. 2020)—another FAAAA case—rejected the argument that the "binds to" test states a general rule of preemption, holding that although cases like *Dilts* had stated "that preemption occurs only when a state law operates in this way …. the scope of FAAAA [and ADA] preemption is broader than this ['binds to'] language suggests." *Id.* at 1024-25. Indeed, *Miller* explained that the "binds to" test "does not make sense" in the context of generally-applicable background laws (those laws *by definition* never bind carriers "to a particular price, route or service," *id*. at 1025), yet the Supreme Court has on several occasions held generally-applicable laws preempted. *Id*.; *see also* Pet. 13.

But two more recent decisions have now seemed to settle the "binds to" test as the law of the Circuit. The panel here adopted *Dilts*'s legal rule foreclosing preemption for laws of general applicability that do not "*bind*[] the carrier to a particular price, route, or service." Pet. App. 23-24 (quoting, *Dilts*, 769 F.3d at 646). And even more recently, another panel adopted a similar approach in *California Trucking Association v. Bonta*, __ F.3d __, 2021 WL 1656283 (9th Cir. April 28, 2021). There, the Court held categorically that "a generally applicable

state law is not 'related to a price, route, or service' … unless the state law *'binds* the carrier to a particular price, route or service' or otherwise freezes them into place." *Id.* at *8 (quoting *Dilts*, 769 F.3d at 646). The Court thus dismissed the plaintiffs' evidence showing that the law had a significant effect. *Id*. at *9-10. As Judge Bennett explained in dissent, this Court's precedent now conflicts with Supreme Court precedent and "creates a circuit split." *Id*. at *18 (Bennett, J., dissenting). En banc review is warranted to bring this Court's cases in line with Supreme Court and sister-circuit precedent.

II. THE PANEL'S APPROACH TO PREEMPTION WILL HARM NOT ONLY AIRLINES BUT THE NATION'S COMMERCE MORE GENERALLY

Although the airline industry is the panel decision's most obvious target, its decision will have a direct—and severely negative—impact on industries far beyond airlines. Indeed, the panel decision deals a significant blow to Congress's ability to create a national market for industries integral to interstate commerce, and to ensure that states do not create a patchwork of complex regulations where Congress has required national uniformity.

Take, for example, the panel's approach to conflict preemption. That doctrine's importance is not limited to aviation—any industry engaged in interstate commerce has a strong interest in ensuring that the conflict preemption doctrine retains its vitality. By imposing an impossibly high standard for conflict

preemption, the panel's decision will put companies heavily regulated by the federal government in the untenable position of having to figure out how to comply with conflicting federal and state regulations. *See supra* at 10-11. And by failing even to consider whether California's meal-and-rest break law is obstacle preempted, the panel's decision will open the door for state regulations that frustrate even the most plainly expressed congressional objectives. *See supra* at 12-13.

The most obvious impact, though, will be on the trucking industry. The airline and trucking industry share a common feature—they both involve constant crossing of state lines in a manner integral to the Nation's commerce. And they likewise share a common regulatory history. In 1978, Congress deregulated the airline industry, and included the express preemption provision at issue here, precluding state laws "related to prices, routes, or services" of air carriers. *Rowe*, 552 U.S. at 368-69. "In 1980, Congress deregulated trucking." *Id.* at 369. "And a little over a decade later, in 1994, Congress similarly sought to pre-empt state trucking regulation" through the FAAAA, "borrow[ing] language from the Airline Deregulation Act of 1978." *Id.*; *see also* H.R. Conf. Rep. No. 103–677 (1994), at 83 (motor carriers will enjoy "the identical intrastate preemption of prices, routes and services as that originally contained in" the Airline Deregulation Act). Courts,

including this Court, apply their construction of the FAAAA to the ADA and vice versa. *See, e.g.*, *Rowe*, 552 U.S. at 368-69; *Miller*, 976 F.3d at 1024-25.

Unsurprisingly, then, the practical consequences of the panel's decision will reach not only airlines but ground transportation companies. One need look no further than California's meal-and-rest break law to see why. As DOT recently concluded as applied to the trucking industry, California's meal-and-rest break laws harm "the efficient operation of an interstate delivery system," including because of "increases in administrative and operations headcount, changes to delivery and logistics programs, revision of routes, and changes to compensation plans." *Int'l Bh'd of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841, 856-58 (9th Cir. 2021). Yet the panel's decision necessarily means that the FAAAA does not preempt these laws as applied even to interstate trucking, despite this substantial impact on trucking prices, routes, and services.

That consequence cannot be reconciled with Congress's express intent. FAAAA preemption has fostered the "competitive market forces" and innovation necessary for the development of a national cargo transportation industry that can handle the nation's massive volume of shipments. *Rowe*, 542 U.S. at 371. Relying on Congress's mandate in the FAAAA, carriers have implemented extensive, integrated transportation and package-handling networks to process millions of packages a day, and these networks use processes and procedures that do not vary

simply because an airplane or a truck crosses state lines. Indeed, they cannot do so. As with aviation, any variation can cause disruptions that might send ripple effects throughout the entire transportation network. Any disruption at any point in these operations—for example, a 30 minute break meal break under California law—can adversely affect the delivery of thousands of packages in transit. A delay of just a few minutes in sorting and loading, for instance, can cause UPS to miss guaranteed delivery commitments for every package loaded at a given facility. *See N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 70 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008).

As a result of ADA and FAAAA preemption, both ground and air carriers can place their hubs, route their networks, and design their services based on the needs of their customers and their businesses, *not* state regulation. These are precisely the benefits Congress contemplated when it eliminated state regulation through the ADA's and FAAAA's express preemption provisions. But by reducing these preemption provisions to a virtual nullity, the panel's decision threatens to erase these gains, and will clearly frustrate Congress's goal of creating an efficient and affordable system of interstate transportation, thus undermining and severely burdening interstate commerce.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Circuit Rule 29-2(c)(2) because it contains 4,193 words, exclusive of the portions of the brief that are exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: May 3, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kirstin E. Largent