**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 other 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

# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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## STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The Federal Aviation Administration (FAA), an operating administration of the Department of Transportation (DOT), has exclusive authority to regulate all aspects of aviation safety. *See, e.g.*, *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir. 2007). In the context of commercial airline safety, FAA has issued comprehensive regulations and orders pursuant to that authority, including regulations that prescribe required duties and safety-related training for flight crewmembers and regulations that limit crewmembers' maximum working hours to avoid safety issues related to fatigue.

Congress has also directed FAA to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C. § 40103(b)(1). In doing so, FAA has engaged in collaborative efforts to maximize the efficient use of airspace, a task that requires a constant assessment of consumer demand and environmental hazards, as well as the resources of airports and airlines, such as available runways, gates, and flight crewmembers.

In other respects, Congress has largely deregulated the airline industry. The Airline Deregulation Act of 1978 eliminated regulations that governed airline rates and routes, and inaugurated a regulatory model that favored "maximum reliance on competitive market forces and on actual and potential competition." Pub. L. No. 95-504, sec. 3(a) § 102(a)(4), 92 Stat. 1705, 1706. Congress ensured that state regulation would not interfere with this new scheme by expressly preempting state

laws "related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b)(1).

As the Supreme Court and this Court have recognized, this preemption provision has an expansive scope. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-87 (1992); *see also Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc). It broadly prohibits all state laws that reference or have a connection to airline prices, routes, or services, even if their effect is indirect, as long as the effect is not too "tenuous, remote, or peripheral." *Morales*, 504 U.S. at 383-87; *see also Rowe v. New Hampshire Motor Trans. Ass'n.*, 552 U.S. 364, 370, 390 (2008). As this Court has explained, the critical question in determining whether a state law falls within the Airline Deregulation Act's expansive scope is whether the law undermines the purposes of airline deregulation, by guiding airline decisions which ultimately will have an impact on prices, routes or services—decisions that Congress intended to be left to the forces of competition. *Charas*, 160 F.3d at 1265-66.

At issue in this case are California's laws governing meal and rest breaks, which generally require that employers grant employees who have worked at least five hours per day a 30-minute meal break during which the employee is entirely relieved of duty. Cal. Lab. Code §§ 226.7(b), 512(a); Cal. Code Regs. tit. 8, § 11090 (hereinafter "Order 9-2001"), subds. 2(N), 11(C). In general, employees are not deemed to be entirely relieved of duties within the meaning of California law unless they are free to leave the

working premises and are not on call. *See generally Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012). The law also requires a second, off-duty meal break for those employees who work more than 10 hours per day. Cal. Lab. Code § 512(a). Employers must also give employees a 10-minute, off-duty "rest period" for every four hours worked. Order 9-2001, subd. 12(A); *see generally Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d 823 (Cal. 2016).

Plaintiffs—a class of California-based flight attendants—claim that their former employer, Virgin America, failed to provide them with these state-mandated breaks. The district court here agreed and awarded plaintiffs damages for their employer's failure to provide breaks at airports between intrastate flights. The court also suggested that airlines could comply with California law by relieving their attendants from duty during the course of intrastate flights. The court further held that application of the California statute would not be preempted by federal law because airlines could physically comply with both state and federal law by hiring additional flight attendants, scheduling longer flights, and staggering the flight attendants' breaks.

All aspects of this holding raise serious preemption concerns. As an initial matter, state-mandated breaks between flights would significantly disrupt the tight choreography of flight takeoffs and landings at airports. Even if such breaks were limited only to intrastate flights, as the district court believed, such flights would need to be scheduled around the availability of attendants, rather than the other significant concerns that usually dominate scheduling decisions, such as gate availability,

passenger demand, connecting flights, air traffic congestion, and environmental factors. Moreover, California is far from the only state that requires such breaks. If the district court were correct, airline schedules would have to take into account a patchwork of conflicting and overlapping meal and rest break laws across the country. And the court's suggestion that airlines might avoid these consequences by hiring additional flight attendants disregards the complexities and costs of such arrangements.

Applying state laws to longer flights would pose additional obstacles and result in further costs. FAA's regulations require that flight attendants be available to perform routine safety duties for the duration of the flight and be on call to assist with mandatory safety responsibilities in emergencies. FAA regulations contemplate that flight attendants will be able to take short, on-duty breaks: attendants may certainly eat on airplanes, and they spend significant amounts of time sitting down. But state mandated breaks of the type envisioned by California law—both because of their length and the requirement that the employee be relieved of all employer control—plainly conflict with the deregulation of airline prices and services, as well as with the purposes and objectives of federal safety regulations and attempts to maximize efficient use of the navigable airspace.

## STATEMENT OF THE CASE

### A. Statutory Background

#### 1. The Airline Deregulation Act of 1978 and the Federal Aviation Act of 1958

Two provisions of federal law are central to determining whether California meal and rest break laws are preempted as applied to flight attendants: the Airline Deregulation Act of 1978 and the Federal Aviation Act of 1958.

First, in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, Congress "largely deregulated domestic air transport." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995). Prior to the law's enactment, airline fares and routes were regulated by the Civil Aeronautics Board. *Id.* In enacting the new legislation, Congress determined that "maximum reliance on competitive market forces" would be best further "efficiency, innovation, and low prices" as well as the "variety [and] quality . . . of air transportation services." Sec. 3(a), § 102(a)(4), (9), 92 Stat. at 1706-07; *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992).

The Airline Deregulation Act included an express preemption provision, prohibiting States from enforcing any law "relating to the rates, routes, or services of any air carrier." Sec. 4(a), § 105(a)(1), 92 Stat. at 1708 (codified at 49 U.S.C. § 41713(b)(1)).[1] As the Supreme Court has explained, this preemption has an

[1] The statute now prohibits any law "relating to a *price*, route, or service." 49 U.S.C. 41713(b)(1) (emphasis added). Congress altered the language as part of the

"expansive sweep." *Morales*, 504 U.S. at 384. It bars not only those state laws that make "reference" to airline rates, routes, and services, but also those laws of general applicability that have a "significant impact" on such rates. *Id.* at 390; *see also Wolens*, 513 U.S. at 222; *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc).

Second, the Federal Aviation Act of 1958, codified as amended at 49 U.S.C. § 40101 *et seq.*, authorizes the Administrator of the Federal Aviation Administration (FAA) "to 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). The Administrator may also prescribe "regulations and minimum standards for other practices, methods, and procedure[s] the Administrator finds necessary for safety in air commerce." *Id.* § 44701(a)(5).

Pursuant to this authority, FAA has promulgated a regulation specifying that an air carrier "may assign a duty period to a flight attendant only when" certain "duty period limitations and rest requirements . . . are met." 14 C.F.R. § 121.467(b). Generally, no carrier "may assign a flight attendant to a scheduled duty period of more than 14 hours." *Id.* § 121.467(b)(1). The regulations define "duty period" to

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recodification of Title 49 of the U.S. Code in 1994, but expressed that the revision made no substantive change to the law. Pub. L. No. 103-272 § 1(a), 108 Stat. 745, 745; *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222-23, 233 n.1 (1995).

mean "the period of elapsed time between reporting for an assignment involving flight time and release from that assignment." *Id.* § 121.467(a). Flight attendants who have worked a duty period of 14 hours or less, generally "must be given a scheduled rest period of at least 9 consecutive hours" before they are again scheduled to work. *Id.* § 121.467(b)(2). The regulations provide exceptions to this rule—thereby allowing longer duty periods or shorter rest periods—in limited circumstances. *Id.* § 121.467(b)(3)-(9). During a flight attendant's mandated rest period, the carrier may not "assign [the] flight attendant to perform any duty." *Id.* § 121.467(b)(11); *see also id.* § 121.467(a) (defining "[r]est period").

In issuing these regulations, FAA recognized that "[f]light attendants are crewmembers who perform essential routine and emergency safety duties" aboard flights. *Flight Attendant Duty Period Limitations & Rest Period Requirements*, 59 Fed. Reg. 42,974, 42,974 (1994); *see also* 14 C.F.R. § 121.467(a) (defining "[f]light attendant" as any individual "other than a flight crewmember" who is assigned to duty in an aircraft "and whose duties include but are not necessarily limited to cabin-safety-related responsibilities"). Because of the scope of flight attendant responsibilities, FAA regulations require air carriers to have a minimum number of "flight attendants on board each passenger carrying airplane when passengers are on board," 14 C.F.R. § 121.391(a), in part to assist with pre-flight demonstration of emergency procedures, *id.* § 121.291, and to be able to assist throughout takeoff and landing in order to assist with the "effective egress of passengers in [the] event of an emergency evacuation," *id.*

121.391(d); *see also id.* § 121.397(a) (requiring air carriers to specify each crewmember's functions in the event of an emergency evacuation).

### 2. California Meal and Rest Break Laws

The California Labor Code generally prohibits employers from requiring employees to work "during a meal or rest . . . period mandated pursuant to an applicable regulation, standard, or order of the Industrial Welfare Commission." Cal. Labor Code § 226.7(b). California's statutes, regulations, and court decisions spell out these requirements in more detail.

#### a. Meal Breaks

By statute, employers generally must provide employees who work more than five hours per day with a "meal period of not less than 30 minutes," and must provide employees who work more than 10 hours per day with a "second meal period of not less than 30 minutes." Cal. Lab. Code § 512(a). If the employee works no more than 12 hours, one of the two breaks may be waived by mutual consent. *Id.*; *see also* Cal. Order 9-2001, subds. 2(N), 11(A)-(B).

In *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012), the California Supreme Court clarified that in the absence of a waiver, California law "requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work," but does not "impose additional timing requirements." *Id.* at 537. Generally speaking, the employer must relieve the employee of all duty and employer control

during this break. *Id.* at 533. In other words, the employee must be free to leave the premises, without any work-related responsibilities, during the entire 30-minute period. *Id.* at 533; *see also* Order 9-2001, subd. 11(C). Employers do not have an affirmative obligation to ensure that the employee stops working, but they do have an obligation to make reasonable efforts to ensure that the employee can take a 30-minute uninterrupted break, free from all responsibilities. *Brinker*, 273 P.3d at 535-37.

On-duty meal breaks (breaks occurring on the jobsite) are permissible under California law "only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement" the employer and employee mutually agree to an "on-the-job paid meal period." *Id.* at 533. California interprets the circumstances justifying on-duty meal periods very narrowly, and any agreement consenting to on-the-job breaks may be revoked by the employee at any time. *See generally Abdullah v. U.S. Security Associates, Inc.*, 731 F.3d 952, 958-60 (9th Cir. 2013).

**b. Rest Breaks**

California's Industrial Welfare Commission has also issued an order requiring employers in the transportation industry, including airlines, to provide their employees with a 10-minute "rest period" for every four hours worked. Order 9-2001, subd. 12(A). The California Labor Commissioner is authorized to grant an employer an exemption from rest period requirements, if "after due investigation, it is found that the enforcement of [the rest period requirements] would not materially affect the

welfare or comfort of employees and would work an undue hardship on the employer." *Id.* subd. 17.

In contrast to the required meal breaks, employers may never require their employees to remain "on call" during these mandatory rest periods. *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d 823, 832 (Cal. 2016). Although the short length of the required rest period means that "one would expect that employees will have to remain on site or nearby," employers may not "compel[ ] employees to remain at the ready and capable of being summoned to action" during the rest period. *Id.* at 833. However, in the case of exigent or exceptional circumstances that interrupt a break, employers may "reasonably reschedule a rest period." *Id.* But the employer may not force employees to "shoulder an affirmative responsibility to remain on call, vigilant, and at the ready during their rest periods." *Id.* at 833.

**c. Penalties**

By statute, an employer who fails to provide an employee a meal or rest period in accordance with state law must "pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided." Cal. Lab. Code § 226.7(c); Order 9-2001, subds. 11(D), 12(B).

Employees may also bring a private claim under California Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.*, after notifying the California Labor and Workforce Development Agency and the employer about the

specific violations that have occurred, Cal. Lab. Code § 2699.3. That law allows employees to seek civil penalties against his employer on behalf of himself and other current or former employees, a portion of which must be awarded to the state. Cal. Labor Code § 2699.

### B. Factual Background and Prior Proceedings

**1.** This appeal arises out of a class action filed in 2015 on behalf of flight attendants working for Virgin America, Inc., a former California-based airline. Virgin, which has since been acquired by Alaska Air Group, Inc, previously served airports across North America. Virgin scheduled its flight attendants to fly "pairings"—a series of flights (often over several days) to various destinations but always beginning and ending at the same airport. ER50. Each pairing consists of one or more "duty periods" within the meaning of the federal regulations. *Id.* Plaintiffs alleged that Virgin violated the California Labor Code by, among other things, failing to provide required meal and rest breaks, failing to pay minimum wage for all hours worked, and failing to provide accurate wage statements.

Suit was originally filed in state court but was removed under the Class Action Fairness Act. The district court certified a 1400-member class of all "California-based flight attendants," ER111, and ultimately granted summary judgment to the class on several state-law claims, including the meal and rest break claims, ER5-ER20. The court determined that plaintiffs could not press claims for breaks that had been denied outside of California because they had failed to overcome the presumption

against extraterritoriality. It concluded, however, that the California Labor Code applied to work performed in California, ER8-9, ER57-62, and that plaintiffs could recover with respect to any meal and rest break that should have occurred while the plaintiffs worked in California. ER62. The court noted, for example, that plaintiffs flew back and forth between Los Angeles, San Francisco, and San Diego, and should have been afforded California meal and rest breaks on those days.[2] *Id.*

The district court rejected Virgin's arguments that California's meal and rest break laws were preempted as applied to flight attendants. ER, 9-10, ER70-75. The court concluded that the federal government had not occupied the field of "meal and rest breaks for flight attendants" because the FAA had issued only a single regulation, 14 C.F.R. § 121.467(b), on the subject—a regulation that the court did not consider to be sufficiently detailed or expansive to occupy the field. ER72.

The court further rejected Virgin's arguments that California law conflicted with federal law. ER9, ER73. Virgin had argued that California's regulations conflicted with federal law in two respects. First, it urged that federal law does not permit flight attendants to be relieved of all duties during in-flight breaks. Second, it noted that federal law permits duty periods of up to 14 hours, before requiring a rest period. The court concluded, however, that Virgin could comply with both federal

[2] The court held that California wage and hour law could be applied to all of plaintiffs' other claims, including their claims that they had not been paid for all hours worked in airports outside of California. This brief does not address this aspect of the court's decision.

and state law. *Id.* The court stated that federal law "merely establishes the maximum duty period time and the minimum rest requirements" between duty periods, but does not prohibit more frequent rest periods during a duty period. ER73. Thus, the court held, Virgin could comply with both federal and state law by "staff[ing] longer flights with additional flight attendants in order to allow for duty-free breaks" during a rest period. *Id.*

The court also rejected Virgin's argument that the Airline Deregulation Act expressly preempts California's meal and rest break laws. ER9-10, ER73-75. The court treated that question as having effectively been decided by this Court in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (2014), *cert. denied*, 135 S. Ct. 2049 (2015), which held that the identical express preemption provision in the Federal Aviation Administration Authorization Act (FAAA Act), 49 U.S.C. § 14501(c), does not preempt the application of California's meal and rest break laws to the drivers of short-haul commercial motor vehicles operating entirely intrastate. *Dilts*, 769 F.3d at 640-42. This Court concluded in *Dilts* that the meal and rest break laws were not "related to" the prices, routes, or services of such motor carriers, because motor carriers could comply with state law simply by "hir[ing] additional drivers" or "reallocate[ing] resources," neither of which would have a significant impact on prices, rates, or services. *Id.* at 647-48.

**2.** Virgin moved for reconsideration, in part on the basis of the amicus brief filed by the United States in *Dilts*. ER36-42. In that brief, the United States had

argued that the California meal and rest break laws were not preempted as applied to drivers of short-haul commercial motor carriers in intrastate commerce, but observed that airline employees presented "significantly different considerations":

> [T]he preemption analysis would differ significantly if the state law were applied to airline employees. . . . [U]nlike motor carriers, an airline cannot readily interrupt tightly scheduled flight operations to accommodate state-mandated rest breaks for its staff. Moreover, federal aviation safety laws and regulations apply in this area and would inform any preemption analysis. Application of the state break law to airlines thus entails significantly different considerations.

Brief for the United States as Amicus Curiae in Support of Appellants and Reversal at 25, *Dilts*, 769 F.3d 637 (No. 12-55705), 2014 WL 809150. The district court declined to reconsider, noting that this Court had not discussed the government brief's caveat about airline employees. ER39-42.

**4.** The court entered a final judgment for class-wide damages and penalties totaling $77,763,395.33, plus interest. ER4. The court also imposed civil penalties, including heightened penalties for "subsequent violation[s]" starting from the time plaintiffs had notified Virgin of the alleged wage and hour violations. ER20.

Of the total amount, the court awarded $601,367 in damages and restitution and $817,087 in civil penalties for failing to breaks compliant with California law. ER2-3. The court based that amount based on evidence provided by plaintiffs' expert. The expert calculated those damages by evaluating all days that the flight attendants had an intra-California flight and were working sufficient hours to trigger California's break laws. Dkt. No. 343 Ex. A at 18-19. The expert then examined the

duty periods and flight schedules to identify any gap in the flight attendant's schedule—time between de-boarding and the report in period before the next flight—that would have allowed for a 10 minute rest break or 30 minute meal break taken entirely off duty. *Id.* If there was not enough time in between flights, then the expert concluded that the attendant had not been given a break within the meaning of the California regulations, and damages were awarded for that denial. *Id.*

Virgin America appealed. ER113.

## ARGUMENT

### STATE-MANDATED OFF-DUTY BREAKS FOR FLIGHT ATTENDANTS ARE PREEMPTED BY FEDERAL LAW

In legislating pursuant to its enumerated powers, Congress may preempt state laws explicitly, as it has done through the Airline Deregulation Act, *see Morales v. Trans World Airlines*, 504 U.S. 374, 378-79 (1992), or by implication, *Whistler Invs., Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1164 (9th Cir. 2008). Courts will find implied preemption in two circumstances. First, courts will find preemption "when Congress 'so thoroughly occupies a legislative field,' that it effectively leaves no room for states to regulate conduct in that field." *Whistler Invs.*, 439 F.3d at 1164 (quotations omitted). Second, courts will find preemption when state law "conflicts" with federal law, such as when "compliance with both federal and state requirements is impossible" or when the "state law poses an obstacle to the accomplishment of Congress's objectives." *Id.* State-mandated off-duty breaks of the type envisioned by

California law are impose significant burdens on the scheduling of flights and frustrate the purposes of the Airline Deregulation Act and other federal regulations. Accordingly, they are preempted by federal law.

**A. 1.** The Airline Deregulation Act expressly preempts any state law that is "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

The Supreme Court has twice interpreted the scope of the "related to" language of the Airline Deregulation Act's express preemption clause, and in both circumstances, it has emphasized the language's broad reach. In *Morales v. Trans World Airlines, Inc.*, several airlines had sued to enjoin state Attorneys General from enforcing state laws banning deceptive airline advertising. The Court explained that the Act preempts not only those laws that reference airline prices, routes, or services, but also any laws of general applicability that "hav[e] a connection with" rates, routes, or services, even if the connection is "only indirect," unless that effect is "tenuous, remote, or peripheral," as is the case, for example, with regard to "state laws against gambling," *Morales*, 504 U.S. at 384, 386, 390-91 (quoting *Shaw v. Delta Airlines*, 463 U.S. 85, 100 n.21 (1983)). The Court held that the state laws at issue were preempted because the laws "would have a significant impact upon the airlines' ability to market their product," and were therefore "related to" airline rates. *Id.* at 390-91; *see also Rowe v. New Hampshire Motor Trans. Ass'n*, 552 U.S. 364, 370 (2008) (interpreting the similarly worded FAAA Act).

In *America Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), a group of participants in American Airlines' frequent flyer program challenged American's retroactive imposition of new limitations to the seats available and dates that frequent flyer credits could be used under the Illinois Consumer Fraud and Deceptive Practices Act. The Court there held that the consumer fraud law was preempted because the law's prohibition on deceptive practices "guide[d] and police[d] the marketing practices of airlines, like the law at issue in *Morales*," and was therefore "related to" airline prices. *Id.* at 227-28; *see also id.* at 234 (recognizing that DOT is the Airline Deregulation Act's "experienced administrator").

This Court has interpreted these decisions as establishing a general principle that the Airline Deregulation Act "preempt[s] only state laws and lawsuits that would adversely affect the economic deregulation of the airlines." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc). Applying this standard, this Court has held that state regulations that interfere with market forces have a "significant impact" on the prices, rates, and services, and therefore are preempted. *See, e.g.*, *King Jewelry, Inc. v. Federal Express Corp.*, 316 F.3d 961 (9th Cir. 2003) (preempting state regulations on the scope of liability for loss or damage to cargo); *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1198 (9th Cir. 1999) (same); *cf. Montalvo v. Spirit Airlines*, 508 F.3d 464, 475 (9th Cir. 2007) (remanding to the district court to determine whether reconfiguring seats would have a "significant effect" on airline rates).

In contrast, other state laws, such as those governing "run-of-mill personal injury claims," are not preempted because they do not significantly interfere with "the forces of competition within the airline industry," and are related to the purpose of federal deregulation only in a "peripheral manner." *Charas*, 160 F.3d at 1265 (quoting *Morales*, 503 U.S. at 390); *see also Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009) (no preemption of personal injury claims for defective handrail design); *Air Transport Ass'n of Am. v. City & County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001) (no preemption of city ordinance conditioning lease of city-owned airport property on the contractor's promise not to discriminate against protected classes).

**2.** There can be no serious question that applying California's meal and rest break laws to flight attendants will have a significant impact on the market forces influencing carrier services and prices. California law generally prohibits employers from requiring employees to be on duty during the state-mandated meal or rest breaks. *See* Cal. Code tit. 8 § 11090, subd. 11(C); *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 536-37 (Cal. 2012) (meal breaks); *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d 823, 832 (Cal. 2016) (rest breaks); *id.* at 833 (employees on a mandated break cannot be required to be "on call, vigilant, [or] at the ready"). But FAA regulations contemplate that flight attendants will remain on duty and on call, capable of performing any required safety functions for flights throughout their specified "duty period," which the regulations define as the "period of elapsed time between

reporting for an assignment involving flight time and release from that assignment," 14 C.F.R.. § 121.467(a), which generally extends up to 14 hours, but can extend up to 20 in specified circumstances, *id.* § 121.467(b)(4), (5), (6).

The regulations recognize that flight attendants have "cabin-safety-related responsibilities" that could arise throughout a flight, 14 C.F.R. § 121.467(a), including in the event of an emergency, 14 C.F.R. §§ 121.391(d), 121.397(a), for which flight attendants receive mandatory and recurrent training, 14 C.F.R. § 121.421, *id.* § 121.427. Some of these are routine safety duties, such as "ensuring that carry-on baggage is correctly stowed; verifying that exit seating requirements are met, that passenger seat belts are fastened, and that galley service items are properly stowed; and conducting passenger briefings before takeoff." *Flight Attendant Duty Period Limitations and Rest Requirements*, 59 Fed. Reg. 42,974-01, 42,974 (Aug. 19, 1994) (final rule) ("Flight attendants are crewmembers who perform essential routine and emergency safety duties."). Others duties involve responsibilities in the event of an emergency, such as "conducting land and water evacuations, controlling inflight fires, handling passengers who threaten the safety of other passengers on the flight, managing medical emergencies such as passenger illness or injury, managing inflight emergencies such as smoke or fire in the cabin, and managing turbulent air penetrations, airplane decompression, and hijackings." *Id.*

These tasks are critical, and federal regulations contemplate that attendants will be on-duty and on-call to perform them during flight. Thus, as a practical matter, the

only time that an off-duty break could occur would be between flights: after the passengers leave an attendant's first flight, and before the flight attendant checks in for a second flight. Relieving attendants of all duty while inflight or even taxiing would clearly interfere with the duties prescribed by federal regulations.[3]

Plaintiffs' expert appears to have recognized as much, and he looked to the time between flights when calculating damages for denied meal and rest breaks. Dkt. No. 343 Ex. A at 18-19. The expert examined the class members' flight schedules to determine whether they provided a 30-minute break between intra-state flights. *Id.* The expert calculated damages—which the court awarded—whenever the time between flights was inadequate to provide a 30-minute meal break or 10-minute rest break for a class member who worked sufficient hours to qualify for a break under California law. *Id.*

The impact of applying California law in this fashion is apparent. As explained in a 2005 report by the Government Accountability Office, commercial aircraft

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[3] In addition, relieving flight attendants of all duties during flight would have a significant impact on airline services, as is prohibited under the Airline Deregulation Act. This Court has previously held that "services" under the Airline Deregulation Act refers to "such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided," not to the "dispensing of food and drinks." *Charas*, 160 F.3d at 1266; *but see Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (en banc). In contrast to the provision of food and drink, the routine and emergency safety services provided by flight attendants play a significant role in providing the "services" contemplated by this Court in *Charas*. Without attendants to perform these critical safety tasks, airlines could not provide frequent, reliable, or safe transportation. *See also infra* p.22-23.

operate under tight schedules that require the careful coordination and availability of runways, gates, and crewmembers. *Initiatives to Reduce Flight Delays and Enhance Capacity are Ongoing but Challenges Remain*, GAO-05-755T at 4-5 (May 26, 2005), *available at* https://www.gao.gov/products/GAO-05-755T (GAO Report). In order to maximize the efficient and safe use of the navigable airspace, 49 U.S.C. § 40103(b)(1), FAA coordinates with airlines on a number of strategic planning initiatives designed to manage air traffic around thunderstorms, en-route congestion, and congestion of airport terminals. *See* GAO Report at 7-9. In light of these concerns, the provision of regular, frequent, and safe air services requires significant coordination and scheduling of aircraft takeoff, landing, and taxi time—particularly in congested airports serving major metropolitan areas. *Id.* at 4-5; *see also, e.g.*, *Operating Limitations at New York LaGuardia Airport*, 83 Fed. Reg. 47,065-01 (Sept. 18, 2018), and *Operating Limitations at John F. Kennedy International Airport*, 83 Fed. Reg. 46,865-01 (Sept. 17, 2018). Further, as noted in the GAO report, delays in one airport—due to any cause—can easily snowball into delays at other airports throughout the country. GAO Report at 4-5.

Requiring airlines to release their flight attendants from duty to comply with state-mandated breaks would significantly interfere with this complex choreography. Flight attendants working in paired flights frequently must move quickly from gate to gate in order to prepare a subsequent flight for a safe departure. In order to allow flight attendants off-duty breaks during this time, air carriers would need to choose between unpalatable options, all of which significantly affect rates and services. First,

airlines might need to shift flight schedules to accommodate the state-mandated breaks. That result would plainly affect the frequency and regularity of service, particularly because of the complexities of other concerns that dominate scheduling decisions, including gate availability, airport infrastructure, aircraft availability, airport takeoff and landing slots, passenger demand, weather or mechanical failures, connection times, air traffic congestion, airport noise or access restrictions, and environmental factors. 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.

Alternatively, as the district court suggested, the air carriers could hire additional flight attendants, and potentially swap out attendants between flights to allow for off-duty breaks. But proceeding in this manner would create its own difficulties. Flight attendants, like the plaintiffs here, often work in flight "pairings": coordinated flights that allow the attendant to fly to and from one city, always returning to the attendant's home base. If providing attendants with a state-mandated break caused them to be replaced by a relief attendant on the next regularly scheduled flight, the first attendant could be abandoned in an airport that is not their home base for a significant period. Furthermore, due to the nature of air travel, hiring additional attendants does not guarantee that relief attendants will be available to rotate onto the next regularly scheduled flight. Unless the airport at which the state-mandated break must occur is that new attendant's home base, the attendant would need to be flown

to the airport to provide this relief. In other words, 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.

The extent of the potential impact of the district court's ruling is also apparent from its statement that air carriers might comply with California law by providing breaks during flight. The court appeared to believe that air carriers could comply with California law by some combination of lengthening flight times, increasing the number of attendants, and staggering their duty-free breaks, so that the minimum number of flight attendants required by federal law remained on duty at all times. The district court's solution underscores the significant impact state-mandated off-duty breaks would have on the prices, rates, and services of air carriers. First, as discussed above, federal regulations contemplate that flight attendants 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. Second, scheduling longer flights so that breaks could take place before a flight attendants' mandatory duties during takeoff, landing, or taxiing (as the district court believed appropriate) would plainly and directly affect airline routes and services. Third, even assuming an on-call rotation system would comply with California law, the additional cost of that system would include not only the salaries of the additional attendants on board but the loss of revenue resulting from their use of seats that might otherwise have been occupied by paying passengers.

**3.** The district court's mistaken analysis was heavily influenced by its belief that this case is controlled by *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014) which held that the identically worded FAAA Act did not preempt California's meal and rest break requirements with respect to short-haul intrastate motor carriers.

As the United States noted in its amicus brief in *Dilts*, mandating duty-free breaks for flight attendants raises concerns not present in applying the California law to truckers. The rest breaks at issue in *Dilts* did not threaten significant delays and disruptions. As this Court recognized, short-haul intrastate truck drivers "already must incorporate" frequent breaks for fuel, pickups, and deliveries into their routes. *Dilts*, 769 F.3d at 648. Thus, employers could comply with state-mandated breaks with only modest (if any) changes to their services, routes, and prices—they could simply tack the required break onto a prescheduled stop. Resuming a route after a break is a similarly simple matter: the driver need simply reenter the vehicle. To the extent that the additional time required to take a break might indirectly cause slight delays in delivery times, that problem could be solved by having a few additional drivers on the road and "staggering their breaks for any long period in which continuous services is necessary." *Id.* 748-49. Nothing in the record of *Dilts* suggested that this would have a significant impact on prices. *Id.*

In contrast, flights do not make frequent stops along prescheduled routes. And unlike trucks which may resume their route nearly immediately following a break, once a flight is grounded, it is not a simple matter to resume the route. To the

contrary, all flight takeoffs and landings are subject to considerable external constraints. *See supra* pp.19-23. Further, as discussed above, staggered breaks are not a simple option in airline travel. While commercial motor vehicle companies may be able to put a few additional trucks on the road to ensure that packages are delivered timely, the same is not true for air carriers, who are limited in the number of flights (and seats) they may offer each day by external factors such as airport infrastructure, federal regulations, and air traffic congestion.

The concerns raised by California's laws are exacerbated because California is one of many states that mandates meal or rest breaks. The reasoning here, if applied generally, would create a patchwork of requirements that interfere with flight scheduling and that result is irreconcilable with the purposes of the Airline Deregulation Act. *See Rowe*, 552 U.S. at 373 (explaining that preventing such "regulatory patchwork[s]" was a central purpose to the preemption provisions).

**B.** Because California's meal and rest break laws are explicitly preempted by the Airline Deregulation Act, the Court need not reach the question whether application of California law here would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000). Plainly, however, for many of the same reasons already discussed, application of the California requirements to flight attendants would raise significant questions as to whether

California's scheme posed a significant obstacle to the full implementation of the scheme enacted by Congress.

As noted, federal regulations comprehensively govern flight attendants' safety responsibilities and air safety generally. *See also Montalvo*, 508 F.3d at 470. And, as discussed *supra*, breaks between flights would plainly frustrate a variety of federal regulations, orders, and policies designed to ensure the safe and efficient use of navigable airspace. The district court's reasoning would exacerbate the enormous complexities of airline scheduling and managing airport traffic by making flight attendants subject to a patchwork of varying state laws governing meal and rest breaks.

The district court mistakenly believed that implied preemption was not a concern because FAA regulations "merely establish[ ] the maximum duty period time and minimum rest requirements" between duty periods, but does not prohibit rest periods during that duty time. ER9, ER35, ER73. It was therefore not a "physical impossibility" to comply with California law and FAA regulations. *Id.* But state law may be preempted even when compliance with both state and federal law is physically possible. *Geier*, 529 U.S. at 873. The federal scheme was designed to ensure that flight attendants will have sufficient rest to carefully undertake their safety-related duties "without imposing a significant burden on operators." 59 Fed. Reg. at 42,987. As discussed, a requirement of off-duty breaks does exactly that, while also interfering with FAA's comprehensive regulations designed to protect safety.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's determination that California meal and rest break laws are not preempted as applied to flight attendants.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(a)(7)(B) because it contains 6,700 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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## CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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