19-15382

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JULIA BERNSTEIN, ESTHER GARCIA, LISA MARIE SMITH
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

BRIEF OF AMICI CURIAE ASSOCIATION OF FLIGHT ATTENDANTS-COMMUNICATION WORKERS OF AMERICA, AFL-CIO IN SUPPORT OF AFFIRMANCE

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Corporate Disclosure Statement

Under Federal Rule of Appellate Procedure 26.1, *amicus curiae* Association of Flight Attendants – Communication Workers of America, AFL-CIO ("AFA") disclose the following:

AFA is a labor organization that does not have a parent corporation, and no publically-held corporation owns ten percent or more stock in Association of Flight Attendants – Communication Workers of America, AFL-CIO.

Dated this 3rd day of January, 2020.

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Amicus curiae Association of Flight Attendants-Communication Workers of America, AFL-CIO (AFA) is a labor organization that, under the Railway Labor Act ("RLA"), represents over 50,000 flight attendants at 20 airlines, including Alaska Airlines, Inc., and the former Virgin America, Inc. flight attendants who continued their employment as Alaska flight attendants after the Alaska-Virgin merger. AFA's mission is to negotiate better pay, benefits, working conditions, and work rules at its members' airlines, and to improve flight attendants' safety on the job. AFA's Constitution provides that it "will provide legal assistance to members in matters arising out of their employment to the extent that such action is within the recognized purpose of AFA-CWA in protecting and advancing the welfare and security of all airline flight attendants collectively and individually." Because of its decades of experience representing flight attendants, AFA has particular insight into airlines' operations and practices and flight attendants' working conditions that is helpful to the Court. AFA seeks to fulfill its mission through the submission of this amicus curiae brief.[1]

[1] All parties have consented to the filing of this brief. AFA's undersigned counsel certifies that this brief was authored solely by the undersigned counsel and no party or person, other than AFA and its counsel, has contributed financially to the preparing or submitting of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Just as other employers, including employers engaged in interstate transportation, airlines are subject to state regulation of the working conditions of employees. There is nothing inherent in the airline industry that provides airlines with an exemption from the normal reach of state law. The United States Constitution is respectful of states' rights to regulate in the traditional arena of employment conditions. Here the California regulations at issue do not offend the Dormant Commerce Clause and Congress has not acted through its regulatory actions to displace those regulations.

ARGUMENT

I. CALIFORNIA'S NON-DISCRIMINATORY REGULATION OF WAGES AND HOURS OF EMPLOYEES ENGAGED IN INTERSTATE AIR TRANSPORTATION DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. California Has A Traditional Interest In Regulating The Wages And Hours Of California Based Flight Attendants.

As the district court below correctly observed, "'under our constitutional scheme the States retain broad power to legislate protection for their citizens in matters of local concern such as public health' and has held that 'not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States.'" *Bernstein v. Virgin Am., Inc.*, 227 F. Supp. 3d 1049, 1064–65 (N.D. Cal. 2017) (quoting *Nat'l Ass'n of Optometrists & Opticians*

v. Harris, 682 F.3d 1144, 1148–49 (9th Cir. 2012) (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976)) (internal quotations and citations omitted).

Here the flight attendants who comprise the relevant plaintiff Class are all domiciled in California (assigned to work from an airport in California, hereinafter referred to as based in California), and Class claims are limited to time worked within California. ER 111, 643. A Subclass is comprised of flight attendants who are both based in and reside in California, and for that subclass claims include compensation for time spent working both within and outside California. *Id*.

Significantly, Virgin's headquarters were in California, where it received state subsidies tied to placing its headquarters there, where it trained its flight attendants, from where it operated very close to all of its flights, from where it paid its flight attendants, and from where it paid California unemployment insurance and disability insurance premiums for all its flight attendants and, in all respects except wage and hour laws, treated its flight attendants as subject to California law. ER 57, 949-50, 828-58, 1158, 1244, SER 334, 342, 343, 797-806, 1043 1220, 1219, 1264-1271, 1427, 1431, 1433, 1436, 1438-1439.

Thus, application of California law in this case to California based employees of a California headquartered company is consistent with that state's "strong public policy of protecting its workers," as the lower court held. *Bernstein*,

227 F. Supp. 3d at 1060 (citing *Sullivan v. Oracle Corp*., 51 Cal.4th 1191, 1198, 127 Cal.Rptr.3d 185, 254 P.3d 237 (2011). *Indus. Welfare Com. v. Superior Court,* 27 Cal.3d 690, 702, 166 Cal.Rptr. 331, 613 P.2d 579 (1980)).

Yet, before this Court, Virgin maintains that California cannot, and indeed no state can, regulate work performed in-flight or on the ground, simply because it is an airline. Dkt. 24 at 21-22.[2] That position finds no support in the law and should be rejected by this Court.

B. Employment Conditions In Air Transportation Are Not Immune From State Regulation.

Virgin asks this Court to reach the unprecedented conclusion that California may not regulate the working conditions of employees of a California based employer and working from a California based location, and indeed, no state has the authority to do so. Appellant's Brief (Dkt. 24) at 17. This extraordinary claim rests on two premises. First that airlines believe that the "same rules" should apply as to flight attendant working conditions, no matter where the airline operates, and that this is a "workable system." Dkt. 24 at 1. However that system, to the extent it exists, is the result of collective bargaining between the airline carrier and flight attendant unions, under the Railway Labor Act (RLA). Thus it is a matter or negotiated conditions, not a uniformity required by law. As this Court recently

[2] In its arguments below, Virgin did not seriously contest the application of California law to non-flight work performed in California. *Bernstein,* 227 F. Supp. 3rd at 1061.

explained, "The RLA does *not* provide for, nor does it manifest any interest in, national or systemwide uniformity in substantive labor rights." *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 919 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1445, 203 L. Ed. 2d 681 (2019).

Second, the contention is premised on the unsound assertion that "inherently national" interstate transportation "require[s] a uniform system of regulation." *Id*. *Amicus curiae* Airlines for America (A4A) similarly insists that "the laws and regulations governing the airline industry must be "uniform" across the United States," and that the courts have repeatedly recognized this rule in the context of Commerce Clause jurisprudence concerning non-discriminatory potentially applicable state laws that allegedly substantially burdened airlines Dkt. 30 at 3, 12.

Despite this bold declaration of courts' recognition of established exclusive uniformity of regulation of all interstate transportation, including airline operations, and the concomitant exclusion of all state regulation, the cases cited by Virgin and A4A to support that bold assertion say no such thing.

A4A cites a comment in *Cooley v. Bd. of Wardens of Port of Philadelphia, to Use of Soc. for Relief of Distressed Pilots, Their Widows & Children*, 53 U.S. 299, 319 (1851), for the proposition that the "dormant Commerce Clause precludes state regulation of those subjects that, by their very nature, "imperatively deman[d] a

single uniform rule, operating equally on the commerce of the United States." Dkt. 40 at 4. However, there the Court held that Pennsylvania did not offend the Commerce Clause when it regulated vessel pilots through the "different systems enacted by the states, in conformity with the circumstances of the ports within their limits." *Cooley*, 53 U.S. at 320.

Similarly, quoting an isolated sentence in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444 (1960), A4A contends that a "'state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary.'" Dkt. 30 at 12. But, as in *Cooley*, the Court in *Huron* held that Detroit could regulate air pollution emitted by ships' boilers, despite federal regulation of vessels' boilers to protect the safety of shipping, explaining that:

> In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, * * * never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

Huron, 362 U.S. at 443–44. *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 413 (9th Cir. 1978), also cited by A4A for the same proposition that states are precluded by the Commerce Clause from regulation interstate air transportation,

Dkt. 30 at 12, had nothing to do with state regulation of air travel whatsoever. It involves a dispute concerning pleading rules in personal injury action under treaties concerning *international* travel, the Warsaw Convention and the Montreal Agreement. *Id*.

Similarly A4A cites another case involving foreign travel, *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 107 (1948) for the statement contained therein that "air travel is '[a] way of travel which quickly escapes the bounds of local regulative competence,' and thus 'call[s] for a more penetrating, uniform and exclusive regulation by the nation ...'". Dkt. 30 at 3. That statement was made in the context of determining a challenge to the award of a foreign overseas transportation route by the Civil Aeronautics Board to one carrier over another under the federal Civil Aeronautics Act, and the intersection of the power of the United State President in that decision. Again, the case cited by A4A did not involve a state law regulation in any way.

A4A reaches beyond reason by analogizing its members airplanes to federal enclave, citing *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1886, 204 L. Ed. 2d 165 (2019) to support that false analogy. Dkt. 30 at 5, 27-28. *Parker* concerned the exclusive federal jurisdiction under the Outer Continental Shelf Lands Act (OCSLA), 67 Stat. 462, 43 U.S.C. § 1331 *et seq.*, over the subsoil

and seabed of the Outer Continental Shelf and held that California wage and hour law was not adopted as surrogate federal law on the federal enclave.

None of these cases concern wage and hour regulation for flight crew. Courts that have addressed that specific issue have held that local regulation is permissible. *Air Transp. Ass'n of Am. v. Washington Dep't of Labor & Indus.*, No. 18-CV-05092-RBL, 2019 WL 5103299, at *6 (W.D. Wash. Oct. 11, 2019) (citing *Hirst v. Skywest, Inc.*, 910 F.3d 961, 967 (7th Cir. 2018) (upholding minimum wage requirement); *Mendis v. Schneider Nat'l Carriers Inc*, No. C15-0144-JCC, 2016 WL 6650992, at *6 (W.D. Wash. Nov. 10, 2016) (upholding rest break requirement) and the decision here below).

Thus, Virgin has not demonstrated that the need for federal regulation of airspace has ousted California's regulatory reach as to California based flight attendants working for a California headquartered airline.

C. The Regulations Enforced Here Do Not Impede Interstate Commerce And So Are Not Foreclosed By The Dormant Commerce Clause.

Virgin similarly pushes Dormant Commerce Clause case law beyond the limits of their reasoning to apply their holdings that state regulation has been constitutionally ousted to the very different circumstances here. Virgin and the *amici* supporting it fail to acknowledge that Commerce Clause jurisprudence respects the states' autonomy in determining what is in the best interest of their workers, as well it reflects commitment to the nation as one economic whole.

Concern about discrimination by one state against other states was a "central concern of the Framers [and of their] conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, __ U.S. __, 139 S. Ct. 2449, 2461 (2019) (internal quotations omitted). Hence, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to "'advanc[e] a legitimate local purpose.'" *Id*. (quoting *Dep't. of Revenue of Ky. v. Davis*, 553 U.S. at 337-38 (2008)).

However, absent discrimination, the law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, (1970). This balancing preserves states' traditional rights to legislate on all subjects relating to the health, life, and safety of their citizens, despite incidental burdens on interstate commerce. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978).

State laws frequently survive this *Pike* scrutiny because its test reflects that fact that "the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy." *General Motors*, 519 U.S. at 338

(citing The Federalist Nos. 7 (A. Hamilton), 11 (A. Hamilton), and 42 (J. Madison), No. 51 (J. Madison), *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal.")). That autonomy in practice means that a nondiscriminatory state statute will be sustained unless it is unreasonable or irrational. *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991).

Here, Virgin does not contend that California wage and hour laws discriminate against out of state businesses. ER 63. Indeed, as an in-state business this argument would be unavailing. *Alaska Airlines*, 951 F.2d at 983 (To succeed on a discriminatory–effect theory, a plaintiff must show a law favors "in-state industry over out-of-state industry.") Nevertheless, Virgin cites a case in which the Supreme Court held that New York violated the Dormant Commerce Clause by discriminating in its statute against Vermont milk producers, for its assertion that national interests must be weighed against the state's interests here. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 552-53 (1949).

More to the point, but still well off the mark as applied here, is Virgin's reliance upon cases that do involve non-discriminatory state regulations, but whose doctrine is limited to circumstances not present here: the regulation of the physical

instrumentalities of interstate commerce. The effort to shoehorn this case under the rubric of Commerce Clause "national uniformity" cases like *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959), *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) and *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662 (1981), fails.

These cases, and others like them, rely on a Commerce Clause "national uniformity" doctrine that has been limited to regulations that interfere with the physical instrumentalities of interstate commerce such as the aircraft themselves. *Am. Can Co. v. Or. Liquor Control Comm'n*, 15 Or. App. 618, 636, 517 P.2d 691 (1973) ("The law surrounding the concept of impediments to the flow of interstate commerce relates consistently to the actual instrumentalities of interstate commerce, i.e., railroad, truck, air and other of the actual means of transportation of goods across state lines"); *Whitaker v. Spiegel Inc.*, 95 Wn.2d 408, 623 P.2d 1147, 1155 (1981), *opinion amended*, 95 Wn.2d 661, 637 P.2d 235 (1981) (noting that in *Bibb* and related cases, "the burden usually envisioned in the balancing cases relates to the actual instrumentalities of interstate commerce, i.e., the mode of transportation that permits free physical flow of goods"). Were it otherwise, an interstate operator could object to every state law that applied to it. *See Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 279 (1961).

Here, California does not regulate Virgin's aircraft; nor does it require reconfiguring of planes. It simply requires that certain rest and meal breaks be paid or payment be made for missed breaks, and that Virgin's wage practices comply with California law.

Even if the "national uniformity" doctrine applied, as the Supreme Court explained, before a state's regulation may be struck down, the plaintiff must carry the heavy burden of proving that the benefits accorded by the challenged statute are illusory. *Kassel*, 450 U.S. at 671 (If the state's "justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce."). *See also*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445, (1978) (Striking down state regulations concerning whether trucking companies could haul single or double truck trailers across the state because the state "virtually defaulted in its defense of the regulations as a safety measure.")

This standard is consistent with Dorman Commerce Clause analysis in any context: where the challenged law is non-discriminatory, only where it imposes undue burdens and only "when the asserted benefits of the statute are in fact illusory" does it offend the Commerce Clause. *UFO Chuting of Haw., Inc. v. Smith*, 508 F.3d 1189, 1196 (9th Cir. 2007) (citation omitted); *Alaska Airlines*, 951

F.2d at 983 (Only if the burdens of the statute "so outweigh the putative benefits as to make the statute unreasonable or irrational" is the Commerce Clause violated).

Here, the benefits of the state regulations at issue are well documented, and as the court below recognized "serve important public policy goals" and provide "significant local benefits," by "ensur[ing] that workers are paid for all hours worked." ER 56, ER 70. Unable to show illusory benefits, Virgin's *Pike* challenge must fail.

Finally, Virgin cites *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989), Dkt. 24 16-17, for the proposition in Commerce Clause analysis of state statutes with extraterritorial application, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, itself, turned on the fact that the challenged statute impermissible operated *wholly outside* the regulating state by forcing an out-of-state merchant to seek regulatory approval in another state before undertaking a transaction in the regulating state. Here, of course, that is not the case. Pursuant to the lower court's rulings, the reach of California law is limited to work performed in California by California based flight attendants, and to work

performed in California or elsewhere for California headquartered Virgin by resident flight attendants domiciled in California. ER 111, 643.

And significantly, Virgin has not shown, as it must to be entitled to summary judgment, that the burden imposed on it is clearly excessive. *Pike*, 397 U.S. at 142. Virgin and the *amici* supporting it speculate, without evidence, that California is not the only state that could have sought to apply its wage and hour laws to Virgin flight attendants. However, in assessing burdens on interstate commerce, federal courts refuse to indulge litigants' empirical speculations about how state and local regulations *might* result in practical harms to economic actors. In *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010), this Court rejected a Commerce Clause challenge to a regulation on the distribution of alcoholic beverages where the plaintiff urged the Court "to infer that th[e] scheme necessarily has the effect it fears." Judges "must be reluctant to invalidate a state statutory scheme … simply because it *might* turn out down the road to be at odds with our constitutional prohibition against state laws that discriminate against Interstate Commerce," especially "where neither facial economic discrimination nor improper purpose is an issue." *Id*. (emphasis in original). *Cf., Colon Health Ctrs. Of Am., LLC v. Hazel*, 813 F.3d 145, 159 (4th Cir. 2016) (speculative cost-benefit analysis is properly directed to legislature, not court).

Additionally, as the flight attendants point out, it is unrealistic to assume that any other state would seek to apply its law to the Subclass of California residents who are domiciled in California, perform some work in California, and employed by a California airline. Dkt. 54 at 4, 33. And as to the Class of Virgin employed, California based but not California resident flight attendants, the claim is only as to work performed in California; therefore it is also unrealistic to assume that any other state would seek to regulate that work. Dkt. 54 at 32-33.

Turning to somewhat more likely, but as yet unrealized burdens, Virgin and the *amici* supporting it contend that it would be costly to comply with California's wage and hour laws, and in particular providing rest and meal breaks would require Virgin to increase its staffing by one flight attendant or pay for missed breaks. Virgin has not attempted to comply so again this is prediction, not fact. Putting aside for the moment the fact that Virgin failed to apply for a state law variance on rest breaks or for meal breaks on flights longer than five hours and that most of Virgin's flights were under five hours, even assuming Virgin would have incurred the extra costs of compliance that it alleges, that is not a clearly excessive burden. Increased operational considerations do not constitute an undue burden sufficient to create a violation. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-8 (1978). Even in the limited context of cases involving "national uniformity" in regulation of equipment courts only consider costs along "with

other factors," *Bibb*, 359 U.S. at 526; they never alone show an unconstitutional burden. *Nationwide Freight Sys. v. Ill. Comm. Comm'n*, 784 F.3d 367, 374–75 (7th Cir. 2015); *Barclays Bank Int'l Ltd. v. Franchise Tax Bd.*, 19 Cal. App.4th 1742, 1454–55 (1992). Thus the requirements to pay overtime or for missed breaks or costs associated with additional staffing cannot be considered as a component in the weight of burden Virgin faces under California regulation.

Nor is an undue burden established by the potential for delayed flights and disrupted flight schedules that Virgin and *amici* supporting it predict. First, even if the effect of applying California law would be as Virgin describes it (which is not accurate, as explained below at D.1), staffing flights with additional flight attendants would eliminate any potential for delay. Second, that sort of harm to Virgin, and as its *amici* contend, to a particular industry, does not suffice to support a claim that interstate commerce is excessively burdened. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987). *See also, Exxon*, 437 U.S. at 127-28 ("[T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations").

As to the professed concern about managing a "patchwork" of conflicting laws, this is yet more misdirection. As explained below, it is unlikely that any other state would have sought to regulate the wages and hours of Virgin's flight attendants. However, even if that had happened, this "patchwork" theory

misunderstands what is a legally significant "conflict." A genuine legal conflict exists only when it is impossible to simultaneously comply with the rules of two different legal regimes. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) ("No conflict exists… 'where a person subject to regulation by two states can comply with the laws of both.'"). But laws that merely differ—i.e., by requiring differing minimum requirements or "floors"—do not conflict because a person can simultaneously satisfy each law by following the jurisdiction with the highest floor. *Hartford Fire*, 509 U.S. at 799; *accord DeMarco v. Stoddard*, 223 N.J. 363, 382-83, 125 A.3d 367 (N.J. 2015); *Exile v. Miami-Dade Cty.*, 35 So.3d 118, 119 (Fla. 3d DCA 2010); *Air Transp. Ass'n of Am. v. Washington Dep't of Labor & Indus.*, 2019 WL 5103299, *3-10. Here, there is no conflict because Virgin could comply simultaneously with both schemes.

D. Federal Law Does Not Preempt California's Regulation.

1. The Federal Aviation Administration regulation does not preempt California's regulation of Flight Attendants Wages and Hours of Work.

The Federal Aviation Administration (FAA) regulation in effect at the time of the proceeding below, 14 C.F.R. § 121.467(b)(1) provides that airlines are limited in most circumstances to assigning no more than 14 hours in a duty period to a flight attendant, with a minimum nine consecutive hour rest period

between duty periods.[3] Virgin contends this regulation along with other regulations requiring flight attendants to perform certain tasks during boarding, during flight, and during deplaning so occupy the field that there is no room for California or any other state to regulate it to require rest and meal breaks; and it also argues that California's requirements are in such conflict with federal regulation that conflict preemption applies to invalidate California's requirements.

Virgin's arguments again outstrip reality, as the flight attendants adequately demonstrate in their response brief that flight attendants could be provided with rest and meal breaks during their duty periods. Dkt. 54 at 58-63. AFA additionally notes that it is common for flight crews to have periods of time *during their duty periods* during which they are not being required to perform duties that would interfere with rest or consuming a meal. These rest periods do not trigger a nine (or 10) hour rest period because they are taken during the duty period. During duty periods, flight attendants when not in flight, could take time to rest or consume a meal without the need for additional staffing, without requiring a nine (or 10) hour rest period to commence,

[3] Congress increased the rest period to 10 consecutive hours, but the concomitant regulation has yet to be updated. https://www.federalregister.gov/documents/2019/09/25/2019-20682/flight-attendant-duty-period-limitations-and-rest-requirements (last visited January 3, 2020)

because the rest or meal period could occur during the up to 14 hour duty period. In fact, flight attendants often work split-duty shifts in which there is a rest period during their duty time, which could even include sleeping between flights. Indeed, for pilots working split-duty shifts, the FAA requires transportation to and from a suitable accommodation for resting. *See* CFR 14 § 117.15 and/or § 117.27.

As to Virgin's concern that a break time could occur when a flight attendant needed to be boarding or deplaning passengers, that could be accomplished by use of reserve flight attendants who are sitting reserve in an airport to be available to substitute for flight attendants who become unable to begin their flight or become ill and cannot remain on duty. See *Air Transp. Ass'n of Am. v. Washington Dep't of Labor & Indus.*, No. 18-CV-05092-RBL, 2019 WL 5103299, at *9 (W.D. Wash. Oct. 11, 2019)(discussing Virgin's reserve practices).

During flight, as the district court observed, to provide rest breaks (or meal periods on flights lasting more than four hours), Virgin would likely need to staff the flight with an additional flight attendant. Thus, the federal duty/rest period requirement does not actually conflict with California's regulation; nor do California's regulations impair the safety duties of flight attendants, such that field preemption would occur.

Finally, even if there were instances where the federal and state rules conflicted, Virgin had not attempted to obtain a waiver from California that could have allowed it to comply simultaneously with both the federal and state regulations. Without having done so, it is pure speculation that both state and federal rules could not be accommodated.

2. The Airline Deregulation Act does not preempt California's regulation of Flight Attendants Wages and Hours of Work.

The Airline Deregulation Act (ADA) does not, and was never intended to, shield airlines from background employment laws of general applicability. As this Court has consistently—indeed, quite recently—made clear, such laws are only tenuously connected to and have no significant impact on airlines' rates, routes, and services. They do not trigger ADA preemption.

Virgin begins with the unremarkable statement that if flight attendants took breaks they would not, during the break, be attending to boarding, takeoff, passengers, or deplaning. From that banal statement, Virgin illogically leaps to the conclusion that flights would be delayed because "airplanes cannot operate without a full contingent of flight attendants on duty." Dkt. 55 at 42. From that illogical conclusion, Virgin and its *amici* contend that there will result a cascade of other flight delays down the line. *Id*. at 43. However, as demonstrated above, and in the flight attendants brief, the delays predicted are merely speculative and airlines can utilize higher staffing when necessary, or pay for missed breaks, and can therefore

operate on time, either by utilizing their line-holder and reserve flight attendants in a different manner, or simply paying additional wages when that is not possible.

Even if these predictions had any basis in reality—they do not—they still do not implicate the ADA because these predictions would result only from the airline's voluntary decision to impose them on the flying public rather than accept cost-absorbing alternatives in deciding how to respond to rest and meal break and overtime requirement. While the ADA insulates airlines from regulations that *bind* them to specific rates, routes, or services, it does not allow them to evade a law by *threatening* to impose negative externalities on air travelers and then mischaracterizing those threats as necessary and inescapable results of the law.

a. *The ADA preemption standard.*

The ADA preempts states from enacting or enforcing any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The "key phrase" to its preemptive force is "relating to," which means "having a connection with or reference to airline rates, routes, or services." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 384 (1992) (internal citation and quotation marks omitted). Two additional principles distinguish permissible and impermissible state regulation: (1) a law is not safe from preemption merely because its effect on rates, routes, or service is "only indirect"; and (2) a state law is not preempted if it affects

rates, routes, or services "in only a tenuous, remote, or peripheral manner." *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 370-71 (2008).[4]

Impermissible "relating to" occurs only when a state law "acts immediately and exclusively upon price, route, or service or where the existence of a price, route, or service is essential to the law's operation." *City & Cty. of San Francisco*, 266 F.3d at 1071 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997)) (internal alterations omitted). And impermissible "connecting with" occurs not by express command but when a law has the practical effect of "bind[ing] the air carrier to a particular price, route, or service…." *Id*. at 1072. In other words, the two terms correspond to "direct" and "indirect" forms of impermissible regulation.

This Court has further refined the tests for impermissible relation and connection. First, an indirect regulation must have a "significant impact" on one or more of the protected subjects to trigger preemption. *Dilts*, 769 F.3d at 645-46; *see also Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (prevailing wage law not "related to" trucking

[4] *Rowe* itself was a case that interpreted the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), a law which applied the ADA's deregulatory regime to the trucking industry. *Rowe*, 552 U.S. at 370.The FAAAA therefore includes a preemption provision "nearly identical" to the ADA's. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 2014). Because of this similarity, case law interpreting the scope of preemption in one statute "is instructive" for understanding the same in the other. *Id*.

company's prices, routes, or services because it did not "*acutely* interfer[e] with the forces of competition") (emphasis in original). Second, a state law is unlikely to have a significant impact on a protected subject if it regulates activity "one or more steps away" from the point where the carrier forms a "contractual relationship" with its customer. *Dilts*, 769 F.3d at 646. Thus:

> generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide. Such laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment…Nor does a state law meet the "related to" test for FAAAA preemption just because it shifts incentives and makes it more costly for motor carriers to choose some routes or services *relative* to others, leading the carriers to reallocate resources or make different business decisions.

Id. at 646-47 (emphasis in original). Applying this reasoning to a challenge to California's meal and rest break laws, *Dilts* held that such statutes were "normal background rules for almost *all* employers doing business in the state of California." *Id*. at 647 (emphasis in original).

In the context of the FAAAA, this Court recently observed that whether a law is a "generally applicable labor protection" is a "critical," though non-dispositive, factor in the ADA preemption analysis. *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 966 (9th Cir. 2018). Two other determinative factors are "where in the chain of a…business [the law] is acting to compel a certain result (*e.g.*, consumer

or workforce) and what result it is compelling (*e.g.*, a certain wage, non-discrimination, a specific system of delivery, a specific person to perform the delivery)." *Id*. *Su* found the FAAAA did not preempt California's common law test for independent contractor misclassification, since it was (1) a general labor standard that (2) affected a trucking companies' relationship with its workforce, not customers, and (3) gave rise to certain employee benefits, not any directive on business operations. *Id*. at 964-65. *Su* decisively rejected the notion that California's misclassification standard affected rates, routes, or services because the potential for drivers to be classified as employees shifted the trucking companies' economic incentives, and in turn, influenced decisions about their business models. *See id*. at 965.

Both *Dilts* and *Su* also rejected the argument that applying employment statutes would lead to an "impermissible 'patchwork' of state specific laws." *Dilts*, 769 F.3d at 647. The only "patchworks" condemned by the ADA are those significantly "related to" price, routes, or services. Since employments laws do not so relate, any "patchwork" thereof is "permissible," as it involves only normal background rules that may be—and traditionally are—regulated on a state-by-state basis. *Dilts*, 769 F.3d at 647-48; *Su*, 903 F.3d at 967, n.11. *See also*, *Yoder*, 181 F. Supp. 3d at 713-14 (rejecting FAAAA preemption theory challenging applicability of California wage and hour laws, including "requirement to keep accurate

employment records"); *Valadez v. CSX Intermodal Terminals, Inc.*, No. 15-cv-05433-EDL, 2017 WL 1416883, at *4-5 (N.D. Cal. Apr. 10, 2017). *Cf., Air Transport Association of America v. Port of Seattle*, C14-1733-JCC, 2014 WL 12539373, at *1 (W.D. Wash. Dec. 19, 2014) (Rejecting A4A's attempt to stop the Port's labor and employment policy for Sea-Tac Airport, including "employment standards" dealing with "time off" and "reporting and enforcement requirements.")

b. *Virgin fails to show the California's regulation connects with or refers to rates, routes, or services.*

Virgin and its *amici* do not and could not allege that the California law regulates "in reference to" rates, routes, or services, insofar as such regulations "act[] *immediately and exclusively* upon" these subjects or that the "existence of a price, route, or service is *essential* to the law's operation." *Air Transport Ass'n*, 266 F.3d at 1071 (emphasis added). No provision of the California law addresses or even contemplates these subjects. Its terms can be enforced undisturbed regardless of the rates and routes airlines set or the services they choose to provide. Neither does the California law have any "connection with" rates, routes, or services. The hypothetical connections the Virgin draws are extremely remote. *Su* demonstrates the remoteness of the link. First, the California regulations are "generally applicable" employment laws, a "critical" factor in this Court's analysis. *Su*, 903 F.3d at 966. Second, the point in the "chain" of an airline's business where the California law "act[s] to compel a certain result" is its

workforce, not its customers. *Id*. Third, the "result" the law compels certain pay and work break practices, rather than imposing "a specific system of delivery, a specific person to perform the deliver," or the like. *Id*. Accordingly, the undisputed facts show the connection between the California law at issue here and rates, routes, or services is too tenuous to warrant preemption.

Indeed, the Virgin's causal theory perfectly illustrates a remote causal chain that in no way qualifies as have a "binding" practical effect, as it begins many steps removed from the point where an airline selects a rate, route, or service, and merely shifts the airlines' "incentives" by marginally decreasing workforce availability, which could be addressed with ameliorative action. *Dilts*, 769 F.3d at 647. Here, the record before the Court thus establishes that any effect of the California law on fares, routes, or services is, at most, tenuous or remote and not sufficient to support preemption.

CONCLUSION

Because of the foregoing, this Court should affirm.

Respectfully submitted this 3rd day of January, 2020.

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STATEMENT OF RELATED CASES

Air Transport Association Of America, Inc. v. The Washington Department Of Labor & Industries And Joel Sacks and The Association Of Flight Attendants-Communication Workers Of America, AFL-CIO, No. 19-35937, is pending before this court.

Dated this 3rd day of January, 2020.

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I hereby certify that on the date noted below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

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FOR THE NINTH CIRCUIT

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