No. 19-15382

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellees,

v.

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

Appellants.

On Appeal from the United States District Court
Northern District of California
No. 3:15-cv-02277-JST

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF APPELLEES

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INTRODUCTION AND STATEMENT OF INTEREST

The issue presented in this case is whether federal law precludes California from applying its labor laws to certain airline employees who are based in California and have significant contacts with the State. The State has a substantial interest in that question. California has enacted a broad and comprehensive array of worker protections in its Labor Code and Industrial Welfare Commission's Wage Orders to promote the State's strong public policy of protecting employees. This framework includes requirements that workers must be paid minimum wage for all time worked, paid overtime for all overtime hours worked, and afforded meal and rest breaks.

Appellant Virgin America argues that federal law exempts it from these important worker protections, and that California law cannot apply to its California flight attendants because their jobs may require them to perform work outside of the State. Virgin contends that the California standards as applied to it here are invalidated by the dormant Commerce Clause, and at least partially preempted by the Federal Aviation Act and the Airline Deregulation Act. The State of California has an important interest in the Court's resolution of these claims and respectfully submits this amicus curiae brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

SUMMARY OF ARGUMENT

This case concerns a certified class of California-based flight attendants employed by Virgin, and a certified subclass comprised of California residents ("Plaintiffs"). California law applies to these employees. The Industrial Welfare Commission ("IWC"), the agency charged with regulating wages, hours, and working conditions in California, has concluded that airline employees in California are covered by state wage and hour laws. And the specific California-based plaintiff class at issue here has sufficient contacts with California to warrant and justify the application of California law, despite sometimes working outside of California.

The application of California's wage and hour laws to the flight attendants here does not violate the dormant Commerce Clause because it does not result in any burden, much less an excessive burden, on interstate commerce. Virgin's contrary claim relies on the incorrect premise that permitting state regulation of flight attendants' employment conditions would require the application of the laws of every jurisdiction a flight passes through. To the contrary, the application of California law to California employees entails no such administrative complications. Moreover, any differing state rules regarding pay that could theoretically apply to members of a flight crew do not pose any practical impediment for interstate

operations. Flight services offered by Virgin and other airlines will continue to operate as normal regardless of the wage laws that apply on payday.

California's meal and rest break rules are likewise not preempted by the Federal Aviation Act ("FAA") or the Airline Deregulation Act ("ADA"). The claimed conflict between California's break rules and federal requirements misconstrues both the flexibility of California law and the scope of the FAA's mandates. Further, the FAA addresses aviation safety; it does not occupy the different field of worker protections and related employment conditions. California's break rules also do not implicate the ADA's prohibition on state requirements that relate to the "rates, routes, or services" of airlines. California's generally applicable employment regulations neither have an effect on flight operations, nor concern the types of "services" addressed by the federal statute.

ARGUMENT

I. CALIFORNIA-BASED FLIGHT ATTENDANTS ARE SUBJECT TO CALIFORNIA LAW.

California has a deep-rooted public policy in favor of protecting its workers. Employees are entitled to the protections of California law where their employment has sufficient contacts with the State, rendering them California employees, even if their work takes them outside California's

borders. Here, the record below reveals that the plaintiff class of California-based flight attendants maintains sufficient connections to the State to bring them within the scope of California's worker protections.

A. California has a Strong State Policy in Favor of Protecting Workers, Including Flight Attendants.

California law reflects a longstanding state policy of protecting the rights of workers. The state Labor Code provides: "[i]t is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions…." Cal. Lab. Code § 90.5. California courts have consistently recognized that these laws "reflect the strong public policy favoring protection of workers' general welfare and society's interest in a stable job market." *See Cash v. Winn*, 205 Cal. App. 4th 1285, 1297 (2012) (internal citations and quotation marks omitted); *Flowers v. Los Angeles Cty. Metro. Transp. Auth.*, 243 Cal. App. 4th 66, 82 (2015).

The laws primarily at issue here, regarding payment for all hours worked, payment of overtime, and the provision of meal and rest periods, go to the core of these worker protections. California's minimum wage laws "reflect a strong public policy in favor of full payment of wages for all hours worked." *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 324 (2005). As to

overtime protections, the California Legislature has declared and reaffirmed that "the eight-hour workday is the mainstay of protection for California's working people." *Corder v. Houston's Rests., Inc*., 424 F. Supp. 2d 1205, 1207 (C.D. Cal. 2006) (internal citation and quotation marks omitted). And in recognizing the "adverse impact" resulting from requiring employees to "work long hours and substantial periods of time without meal or rest periods" the Legislature mandated meal and rest period requirements "to protect the welfare of California employees." *Id*. In light of this strong public policy, California courts have recognized that worker protection laws "are to be liberally construed with an eye to promoting such protection." *See Indus. Welfare Com. v. Super. Ct.*, 27 Cal. 3d 690, 702 (1980).

Virgin is incorrect in arguing that "no state has a strong interest in regulating flight attendants' wages and hours." Opening Br. at 19. Here, California's employment laws demonstrate that the state has important interests in ensuring that workers based here, including the 16,000 flight attendants employed in the state[1], are protected from unfair labor practices.

[1] U.S. Department of Labor, Bureau of Labor Statistics: Occupational Employment Statistics for Flight Attendants (May 2018) (available at https://www.bls.gov/oes/current/oes532031.htm#(1)).

California wage and hour practices are governed by the California Labor Code and the Wage Orders promulgated by the IWC. *See* Cal. Lab. Code §§ 1173, 1185. The Labor Code broadly affords its protections to "all individuals… who are or who have been employed, in this state." Cal. Lab. Code § 1171.5(a).

Under its broad statutory authority, the IWC has prescribed various minimum requirements with respect to wages, hours, and working conditions across several identified industries and occupations. *Indus. Welfare Com.*, 27 Cal. 3d at 700. Wage Order 9 sets forth minimum requirements for the transportation industry, and specifically includes employees of airlines and "all operations and services in connection therewith." Cal. Code Regs. tit. 8, § 11090(2)(N).[2] Further, Wage Order 9 sets forth several specific categories of exemptions, including exempting employees covered by collective bargaining agreements from certain provisions, and exempting airline employees from overtime where caused by a temporary modification to their schedule at the employee's request, but does not otherwise qualify or limit its general application to airline

[2] In its publication entitled "Which Wage Order," dated March 2013, the California Department of Labor Standards Enforcement further specifies that airline employees are included within Wage Order 9. (Available at: https://www.dir.ca.gov/dlse/WhichIWCOrderClassifications.PDF)

employees. Cal. Code Regs. tit. 8, § 11090(1)(E), (N); *see Goldthorpe v. Cathay Pac. Airways Ltd.*, 279 F. Supp. 3d 1001, 1004 (N.D. Cal. 2018) (explaining that regulatory protection ". . . is a necessary undertaking in situations where an employee lacks [the] protection" of a collective bargaining agreement).

While the Labor Code and remaining Wage Orders carefully carve out several narrow exceptions to certain wage and hour laws, addressing specific industries ranging from camp counselors to carnival ride operators, flight attendants do not fall in any exempted category.[3] This omission in a detailed statutory and regulatory scheme, which addresses the specific conditions in the wide range of industries and employees in California, signifies that California law applies to all other covered employees—including flight attendants who may temporarily work outside of the state. *See Sullivan v.*

[3] By way of further example, California minimum wage laws do not apply to student employees, camp counselors, and program counselors of organized camps (Cal. Lab. Code § 1182.4); participants in national service programs such as AmeriCorps (Cal. Lab. Code § 1171); and outside salespeople (*Id.*). California overtime laws do not apply to a range of categories of employees, including for example: public employees in the amusement and recreation industry (Cal. Code Regs. tit. 8, § 11010(1)(C)); ambulance drivers (Cal. Code Regs., tit. 8, § 11050(3)); some union employees (Cal. Lab. Code § 514); carnival ride operators employed by a traveling carnival (Cal. Code Regs. tit. 8, § 11010(1)(F)); and executive, administrative, and professional employees (Cal. Lab. Code § 515).

Oracle Corp., 51 Cal. 4th 1191, 1197 (2011). ("The Legislature knows how to create exceptions . . . when that is its intent.").

In *Goldthorpe*, the district court considered the provisions of Wage Order 9 as applied to California-based pilots for Cathay Pacific Airways who routinely worked flights between California and Hong Kong. The court explained that "[t]he language of the Wage Order strongly suggests that the Industrial Welfare Commission intended for California wage and hour law to cover California-based transportation workers while they are traveling elsewhere as part of their jobs." 279 F. Supp. 3d at 1003-04. The court concluded that California law applied to the pilots' work, because the state's wage and hour laws, including Wage Order 9, were designed to protect workers and prevent exploitation. *Id.* at 1004-05.

B. California Wage and Hour Laws Apply to the California-Based Flight Attendants Here.

Virgin claims its California-based flight crews are unprotected by California labor law because those crews perform a principal amount of their work outside of California.[4] That is incorrect, because the employees are

[4] The State agrees that "[i]f an employee resides in California, receives pay in California, and works exclusively, or principally, in California, then that employee is a 'wage earner of California' and presumptively enjoys the protection of IWC regulations." *Tidewater Marine*

based in California and maintain substantial connections to the state. California, and no other state, is the location of the employer-employee relationship at issue here. California uses a multi-faceted approach to determine whether the contacts to the State are sufficient to warrant application of its labor protections. Virgin's exclusive focus on the "job situs" test is an incorrect statement of California law.

In this case, the workers here are entitled to the State's worker protections because when all of the circumstances are considered, they are properly characterized as California employees with significant connections to California. This is true even though the employees do not necessarily work a majority of their time in California. *See Goldthorpe*, 279 F. Supp. 3d at 1005.

As flight attendants, the most significant connection is that all employees included in the class are based in California; by definition, these employees frequently and regularly work in California by beginning and ending their flight pairings here, creating a connection stronger than any other state that they pass through or fly over. As California-based flight

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Western Inc. v. Bradshaw, 14 Cal. 4th 557, 578 (1996). However, Virgin is mistaken in asserting that this principle leads to the conclusion that the flight attendants in this case are not entitled to the protections of the Wage Orders.

attendants, the Class worked a quarter of their total work time on average in California (ER 28, 57), which is significant given that much of their time is spent working in the air. The unique nature of the industry, which results in some flight attendants working regularly outside of California despite being based in California, does not alter the fact that California is the home base of the employment relationship. *See Goldthorpe*, 279 F. Supp. 3d at 1005 ("…the plaintiffs are based in California, the nature of their work prevents them from being in one location for the majority of their working hours, and they perform more work in California than anywhere else. California has a strong interest in protecting workers who fit this description.").

The "job situs" test proposed by Virgin, under which employees must work exclusively or principally in California in order for California law to apply, is not an accurate formulation with which to assess the employees' status under state law. *See Goldthorpe*, 279 F. Supp. 3d at 1003 ("[I]t is wrong to assume, as a categorical matter, that California's wage and hour laws may only protect employees who do the large majority of their work in California.").

Although the California Supreme Court has not considered the application of California law under circumstances similar to those here, its cases make clear that the mere fact that these California-based employees

perform some of their work outside of California does not immunize Virgin from the application of California labor standards.

In *Tidewater Marine Western Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996) and *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1197 (2011), the California Supreme Court considered whether California law applied in certain non-traditional circumstances. In both cases, the Court made it clear that job situs was only one of several factors warranting consideration.

In *Tidewater*, for example, the Court explained that "California's territorial boundaries are relevant" to the question of the applicability of California law, but that it was "not prepared . . . to hold that IWC wage orders apply to *all* employment in California, and *never* to employment outside California." *Tidewater*, 14 Cal. 4th at 578. The Court explained that other relevant factors include residency in California and receiving pay in California. *Id.* at 579. And although the employees at issue there performed their work within the State, the Court observed that California law could apply to California resident employees who leave the state "temporarily . . . during the course of the normal workday." *Id.*

In *Sullivan*, the Court considered whether a California corporation was required to comply with California overtime requirements when its non-resident employees worked for extended periods in California. The Court

elaborated that other factors relevant to determining the application of state labor law could include the employer's residency, the duration of time worked in California, and the principal work location of the employees. 51 Cal. 4th at 1199-1200.

These cases support a multi-faceted approach that looks at the specific employer, industry, and employment relationship to determine whether the employees are covered by California law. Here, in the particular context of the airline industry, the fact that the employees are California-based and have regular and ongoing contact with California warrants the application of California law under the multi-faceted approach rooted in *Sullivan* and *Tidewater*. Once deemed California employees, flight attendants do not shed their entitlement to California state-law protections simply because they sometimes leave the state as part of their job; as California employees, their employment is governed by California law.

II. APPLICATION OF CALIFORNIA'S WAGE AND HOUR LAWS HERE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

The Constitution's Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic

protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (internal quotation marks omitted). Its application "was 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." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) (internal quotation marks omitted).

The Supreme Court has used a "two-tiered approach" to analyze dormant Commerce Clause challenges. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578 (1986). A state statute will be generally struck down if it "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests." *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 444 (9th Cir. 2019) (internal citation omitted). Laws that do not directly regulate or discriminate against interstate commerce, like those at issue here, will be upheld under the *Pike* balancing approach if they "effectuate a legitimate local public interest" "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Sullivan v. Oracle*

Corp., 662 F.3d 1265, 1271 (9th Cir. 2011). "Even in the context of dormant commerce clause analysis, the Supreme Court has frequently admonished that courts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation." *Pac. Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994) (internal citation and quotation marks omitted).

Here, Virgin's sole argument is that application of California's labor laws to the Plaintiff Class here would violate the dormant Commerce Clause because the purported burdens imposed on interstate commerce are clearly excessive as compared to the local benefits under *Pike*. This Court has repeatedly recognized that few laws are invalidated under that standard. *See Rosenblatt*, 940 F.3d at 452 ("[o]nly a small number of . . . cases invalidating laws under the dormant Commerce Clause have involved laws that were genuinely nondiscriminatory but still imposed a clearly excessive burden on interstate commerce") (internal quotation omitted; alterations in original); *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015). Further, this Court has made clear that under *Pike*, a challenger has to demonstrate a significant burden or interference on interstate commerce. *Rosenblatt*, 940 F.3d at 453; *Chinatown Neighborhood Ass'n*, 794 F.3d at 1147. The significant burden alleged must be supported

by evidence and specific details rather than conclusory statements. *See S.D. Myers, Inc. v. City & Cty. of S.F.*, 253 F.3d 461, 471 (9th Cir. 2001) (conclusory statements about the burden of regulation at issue without specific details insufficient); *Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008) ("[a]ny balancing approach, of which *Pike* is an example, requires evidence").

Virgin has established no such evidence here. Virgin claims a burden exists because interstate transportation is inherently national. However, application of California's generally applicable labor laws to the flight attendants here regulates only the employment conditions of California employment relationships; it does not regulate or interfere with any activities requiring national uniformity.

Virgin cites to a number of interstate transportation cases to argue that application of California law to flight attendants here "imposes significant burdens on interstate transportation, which is inherently national and require[s] a uniform system of regulation." Opening Br. at 17-18 (internal citations and quotation marks omitted). However, *Southern Pacific Co. v. Arizona*, the case on which Virgin principally relies, dealt specifically with physical hurdles to interstate movement caused by an Arizona law regulating train length. The Supreme Court reasoned that uniform regulation of train

length "is practically indispensable to the operation of an efficient and economical national railway system," and that the Arizona law "materially impede[s] the movement of appellant's interstate trains through that state." 325 U.S. 761, 771, 773 (1945).

The other cases Virgin cites similarly deal with regulations of the physical components and equipment of interstate transportation that interfered with movement across state lines. Opening Br. at 18-19. These laws were found to be unconstitutional not because they happened to touch upon the transportation industry, but because they "impede[d] the free and efficient flow of interstate and foreign commerce." *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 179–80 (1978).

The California worker protections at stake here are fundamentally distinct from these types of laws. Laws that apply equally to the employment conditions of all California airline employees do not interfere with the free flow of goods and services. *See S.D. Myers, Inc.*, 253 F.3d at 471. An airplane faces no barriers flying into and out of California simply because employees on that airplane are covered by policies which comply with California law.

Virgin also suggests that state employment laws categorically violate the dormant Commerce Clause when applied to airlines. Opening Br. at 15.

However, airlines are not immune from state regulation simply because they operate across state borders, and there is no precedential support for such position. *See Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 985 (9th Cir. 1991), *as amended on denial of reh'g* (Jan. 9, 1992) (flight noise level ordinance did not result in dormant Commerce Clause violation); *Hirst v. Skywest, Inc.*, 910 F.3d 961, 967 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 2759 (2019) (flight attendants' state and local wage claims not precluded by dormant Commerce Clause where airline failed to allege discrimination against interstate commerce).

Virgin next claims that complying with California wage and hour laws will impose a "substantial burden on interstate commerce" because, it argues, "airlines would face an array of different rules for every flight attendant (and pilot)," and thus a typical flight would implicate the wage laws of not only each airport's state, but also each state traveled through. Opening Br. at 20. In the sole hypothetical example it provides, Virgin claims that one of plaintiff Bernstein's flight pairings would implicate the wage laws of 17 other jurisdictions. *Id.* at 21.

Virgin's claim rests on the mistaken premise that a multiplicity of state laws would apply to the wages paid to its California-based flight attendants. Virgin ignores that the very reason California law applies to

California-based flight attendants (including plaintiff Bernstein) is due to the contacts with California under the multi-faceted test, including most significantly that they are based in the State. These connections cannot be simultaneously maintained by another state since flight attendants can only be based in one state.[5] It is difficult to conceive of a situation in which a flyover or layover state would have sufficient contacts or state interests to apply its laws, and neither Virgin nor its Amici has articulated such a situation. Virgin's speculation of potential burdens is "entirely conjectural" and fails to establish a significant burden as required. *See Sullivan*, 51 Cal. 4th at 1201.

Virgin next argues that it would be overly challenging for airlines to determine which laws apply to their flight crews. Opening Br. at 24. However, this alleged "great difficulty" is also insufficient to establish a significant burden under *Pike*. In our federal system, businesses that operate and have employees in different states are required to comply with the laws of each the jurisdictions in which they operate. A state's exercise of its traditional police power will not be set aside unless a challenger can

[5] In the rare case where another state does claim an interest in applying its laws due to similar connections with the state, and where such laws create an actual conflict with California law, a conflict of laws analysis exists for such purpose. *See Sullivan,* 51 Cal. 4th at 1202.

establish the kind of significant burden on interstate commerce that is excessive in relation to the putative local benefits with which the dormant Commerce Clause is concerned. The purported business inconvenience in determining applicable legal obligations is not such a burden. *See Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154 (9th Cir. 2012) (no "significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating") (footnote omitted). Indeed, Virgin already engages in a similar analysis when it determines which state laws to follow for the purpose of withholding state income taxes. ER102.

Virgin has not alleged that the application of California law under the circumstances here would violate the extraterritoriality doctrine of the dormant Commerce Clause as articulated in *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); nevertheless, Virgin cites to *Healy* in support of its *Pike* claim. This reliance on *Healy* is misplaced, because the dormant Commerce Clause only invalidates a state statute "that directly controls commerce occurring *wholly outside the boundaries* of a State." *Healy*, 491 U.S. at 336 (emphasis added); *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1179 (9th Cir. 2011). The California statutes at issue here address compensation practices and employment conditions for flight attendants who

are based in California and have significant connections to California. The application of California law here does not have the effect of regulating activities occurring "wholly outside" the State. *See Pac. Merch. Shipping Ass'n*, 639 F.3d at 1178.

Even if Virgin had demonstrated the kind of substantial burden that requires the State to come forward with a legitimate local interest, California has a compelling interest here. Virgin must be able to show that the asserted burdens on interstate commerce are clearly excessive in relation to the putative local benefits. *See Rosenblatt*, 940 F.3d at 451. Burdens on interstate commerce will outweigh the benefits only if the "asserted benefits of the statute are in fact illusory." *S.D. Myers, Inc.*, 253 F.3d at 472 (internal citation omitted).

Here it is clear that the benefits of protecting California workers from unfair labor standards are far from illusory. As a result, the balancing approach required under *Pike* yields lopsided results, with the paramount state interest in protecting its workers on one end, and a complete absence of significant burdens to interstate commerce on the other.

As explained above, California has a strong interest in ensuring the workplace rights of the class members, all of whom are based in California. The wage laws at issue are of such fundamental importance to protecting

workers that the Legislature has made them unwaivable and has attached criminal liability to violations by employers. Cal. Lab. Code §§ 1194, 1199. These laws reflect the "state's strong commitment to safeguard " and exist "for the and benefit of employees." *Naranjo v. Spectrum Sec. Servs., Inc.*, 40 Cal.App. 5th 444, 471 (2019), *as modified on denial of reh'g* (Oct. 10, 2019) (internal citations and quotations omitted). The California Legislature has created a strong remedial framework with the goal of protecting workers, and nowhere within the statutory scheme is there any indication that airline employees were intended to be exempt from such protections.

There are countless employers and industries that operate on an interstate basis, and Virgin offers no reason why its airline should enjoy blanket protection from state employment regulation with respect to its California employees under the dormant Commerce Clause without making the required showing of a substantial burden on interstate commerce. *See Harris*, 682 F.3d at 1148 ("a state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce").

III. CALIFORNIA MEAL AND REST BREAK RULES ARE NOT PREEMPTED BY FEDERAL LAW.

Virgin also argues that California's meal and rest break ("MRB") rules are preempted by the FAA and the ADA. Preemption analysis is governed by Congressional intent; "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1191 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 567 (2018) (internal citations and quotation marks omitted).

Specifically, Virgin contends that the safety duties and 14-hour duty period authorized by the FAA conflict with California MRB requirements; that the FAA occupies the field of regulating duty and break requirements for aircrews; and that the MRB rules impermissibly relate to a "price, route, or service" of air carriers in violation of the ADA. Properly understood, however, the MRB rules do not conflict with any federal requirement or regulate within any federally occupied fields, and they are not related to any price, route, or service of air carriers within the meaning of the ADA.

A. California's Meal and Rest Break Rules.

California's meal break requirement is triggered after an employee works for five hours, and a second meal break entitlement is triggered after ten hours. Cal. Code Regs. tit. 8, § 11090(11)(A)-(B). To satisfy the requirement, employers have three alternative choices: provide a 30-minute meal break in which the employee is relieved of all duty; consent to a

mutually agreed-upon waiver if the shift will end within the hour; or obtain a written on-duty meal period agreement if the nature of work prevents an employee from being relieved of all duty. *Id*. at (11)(A)-(C); *Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1039 (2012). Employers are liable for premium pay constituting one additional hour of pay at the employee's regular rate if they fail to do one of these options. Cal. Code Regs. tit. 8, § 11090(11)(D); *Brinker*, 53 Cal. 4th at 1039; Cal. Lab. Code § 226.7.

In order to provide an off-duty meal period, an employer must relieve employees from duty and relinquish control over their activities, permitting employees "a reasonable opportunity to take an uninterrupted 30-minute break." *Brinker*, 53 Cal. 4th at 1040. The California Supreme Court has recognized that "[w]hat will suffice may vary from industry to industry." *Id.* If meal breaks must be taken on the premises (i.e., on board a flight), "a suitable place for that purpose shall be designated." Cal. Code Regs. tit. 8, § 11090(11)(E). Further, California law imposes no strict timing requirements, other than requiring the first meal period no later than the end of the fifth hour of work, and a second meal period no later than the end of the tenth hour of work. *Brinker*, 53 Cal. 4th at 1041.

California law requires an off-duty rest period be authorized and permitted for every four hours of work or major fraction thereof. Cal. Code Regs. tit. 8, § 11090(12)(A). During a rest break, employees should have freedom to use the time for their own purposes; the employer cannot exert broad control by requiring that employees stay on call. *Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th 257, 269 (2016) (holding that security guards cannot remain on duty during rest periods). If a rest break is interrupted for some reason, such as an emergency, employers may offer the employee another replacement rest break, or pay the applicable premium of one additional hour of pay at the employee's regular rate. *Id.* at 272. Though rest breaks should fall in the middle of work periods, the California Supreme Court has recognized that ideal scheduling may be impracticable under certain circumstances. *Brinker*, 53 Cal.4th at 1031-32. Where employees must remain on site for rest periods, employers need only provide "[s]uitable resting facilities." Cal. Code Regs. tit. 8, § 11090(13)(B).

B. California's Meal and Rest Break Rules Do Not Conflict with Safety Requirements Under the Federal Aviation Act.

In order to fit the requirements of myriad industries, California's MRB rules reflect a measured flexibility that accommodates the scheduling demands of various types of work. In light of the various ways in which the

MRB rules can apply flexibly to fit an employer's requirements, the rules are fully compatible with the safety regime required under the FAA.

First, California's MRB rules do not conflict with the FAA's authorization of 14-hour duty periods as Virgin argues, any more than they conflict with the eight-hour day in most industries. Virgin contends that the MRB rules conflict with the FAA-authorized duty period under the mistaken rationale that any meal and rest breaks necessitate the termination of a duty period, both frustrating the assignment of 14-hour duty periods and requiring the commencement of 9-hour break periods. Opening Br. at 30, 34. But, as acknowledged by Virgin, FAA rules already allow flight attendants to rest and eat during flights. *Id.* at 30. California's MRB rules would merely inform when California flight attendants should be entitled to meal and rest breaks during a full 14-hour duty period (or portion thereof) as authorized by the FAA.

Second, California's MRB rules do not conflict with the FAA's requirements concerning the in-flight duties of flight attendants. Based on the FAA regulations, there is a minimum required number of flight attendants on board each flight that must remain on-duty and available to assist with "cabin-safety-related responsibilities," along with duties assigned by the airlines. 14 C.F.R. §§ 121.467(a); 121.397(a); 14 C.F.R. § 121.391(a).

The FAA requires that these flight attendants engage in safety-related obligations during takeoff, landing, and taxi, and during boarding and deplaning. 14 C.F.R. §§ 121.391(d); 121.394.

Given these requirements, there must be a sufficient number of flight attendants who are on-duty for the entirety of the flight in order to satisfy the FAA's staffing requirements. These flight attendants are thus unable to take off-duty meal and rest breaks. *See Augustus*, 2 Cal. 5th at 270 (on-call breaks "do not satisfy an employer's obligation to relieve employees of all work-related duties and employer control."). In order to provide off-duty meal and rest breaks for flights that trigger such breaks in the air, Virgin could opt to add an additional flight attendant in order to maintain compliance with FAA staffing requirements, and stagger breaks to ensure sufficient flight attendants are on duty at any given time. In the rare event of an in-flight emergency, any interrupted off-duty breaks could either be replaced or compensated by a wage premium.

Alternatively, if Virgin chooses not to add an extra flight attendant to its flights triggering MRB requirements, it has other avenues for compliance. With regards to meal breaks, because the nature of the work prevents employees from being relieved of all duty, Virgin can enter into on-the-job paid meal break agreements with its flight attendants in order to comply with

the law. Cal. Code Regs. tit. 8, § 11090(11)(C). Virgin could thus meet its meal break obligation by providing its flight attendants with 30-minute on-duty meal periods during down time on the flight. *See L'Chaim House, Inc. v. Dep't of Indus. Relations*, 38 Cal. App. 5th 141 (2019). This approach is wholly consistent with requirements under the FAA; in fact, Virgin admits that its flight attendants are not actively on-duty for a full 14 hours, and that flight attendants are permitted to rest and eat during flights in coordination with their flight-crew leaders. Opening Br. at 30.

As an alternative to providing off-duty rest breaks, Virgin could seek relief from the requirement by applying for an exemption from such requirement from the California Department of Labor Standards Enforcement ("DLSE"), which is authorized to grant such request where it "would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer." Cal. Code Regs. tit. 8, § 11090(17); *Augustus*, 2 Cal. 5th at 269, FN. 12 (noting that the exemption is an option for compliance, and that defendant had requested and received two exemptions). The DLSE could then provide an exemption from all or part of the rest break requirements; for example, it could exempt Virgin from the requirement that it make an off-duty break available to its flight attendants, while still requiring a rest break premium to be paid as a wage supplement to

compensate for not being afforded with off-duty rest breaks. Virgin has not availed itself of the prescribed accommodation here, and instead seeks a general exemption from the Court.

In short, Virgin has several options for compliance with California's MRB rules while maintaining compliance with the FAA's requirements. There is no irreconcilable conflict between the two regulatory schemes.

C. The FAA Does Not Occupy the Field of Working Conditions or Employee Welfare.

Virgin's field preemption argument similarly fails. States may not regulate "conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012). As Virgin recognizes, field preemption only occurs when FAA regulations cover the "particular area of aviation commerce and safety implicated by the lawsuit." Opening Br. at 38 (*quoting Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006 (9th Cir. 2013)). Virgin contends that the MRB rules are preempted because they attempt to occupy the "pertinent regulatory field" of the "setting of duty and break periods for flight attendants." *Id.* at 39. This position misconstrues the nature of the FAA regulations.

Through the FAA, Congress intended to occupy the field of airline safety. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007). The mandated duty and rest periods prescribed by the FAA are directly related to that regulation of aviation safety, as their explicit purpose is to ensure that flight crews can adequately perform their safety-related obligations. For that reason, the rest periods required by the FAA refer to periods *between* the completion of a scheduled duty period and the commencement of a subsequent duty period. 14 C.F.R. § 121.467(b)(7). Despite the similar nomenclature, FAA rest periods are plainly different than the MRB mandated by California law, which are short breaks that occur *during* (not between) active work periods.

Further, the FAA does not mandate or prohibit any type of on-board rest for the well-being of flight attendants. *See* Flight Attendant Duty Period Limitations and Rest Requirements, 59 Fed. Reg. 42974-01, 1994 WL 445111. Nor does the FAA generally address the working conditions and general welfare of employees in the aviation industry. In fact, as Virgin points out, the FAA considered and rejected a proposal to establish provisions for on-board rest for flight attendants, finding its rest requirements sufficient for routine and emergency safety duties. *Id.* at 42,979-80. This omission in the FAA's coverage does not suggest that

California's break laws are precluded, but instead confirms that the FAA only considered duty and rest periods for flight attendants in the context of aviation safety. The FAA thus leaves open to state regulation the area of mandated in-flight breaks, which concern the welfare and safety of the workers.

In contrast, California's MRB rules exist as part of a generally applicable regulatory scheme in the field of workers' rights, working conditions, and general welfare. *See Cardenas v. McLane FoodServices, Inc.*, 796 F. Supp. 2d 1246, 1257-58 (C.D. Cal. 2011); *Cash*, 205 Cal. App. 4th at 1297. MRB rules "have long been viewed as part of the remedial worker protection framework." *Brinker*, 53 Cal. 4th at 1027 (internal citation and quotation marks omitted). The legislative history of the IWC's 1976 Wage Orders indicates that a "meal period is necessary for the welfare for employees" and that the "general health and welfare of employees requires periods of rest during long stretches of physical and/or mental exertion." Statement of Findings by the IWC of the State of California in Connection with the Revision in 1976 of Its Orders Regulating Wages, Hours, & Working Conditions, Aug. 13, 1976. It cannot be inferred that Congress intended to preempt the states' worker protections that apply generally to employees, including flight attendants, simply by the existence of a federal

regulatory scheme addressing conditions that enable flight attendants to advance the safety of the passengers. *Capron v. Office of Attorney Gen. of Mass.*, 944 F.3d 9, 24 (1st Cir. 2019) ("the mere fact that a state law implicates the interests of persons who are the subject of federal regulation . . . does not alone provide a basis for inferring that the federal regulatory scheme was intended to preempt a field that encompasses such a state law, at least when it concerns a matter of such quintessentially local concern as employment."). There is no field preemption here because the FAA duty and break requirements regulate in the field of airline safety, while California's MRB rules apply generally to protect the welfare of all workers.

D. California's Meal and Rest Break Rules Are Not Preempted by the Airline Deregulation Act.

Virgin further argues that the MRB rules are preempted by the express preemption provision of the ADA, which prohibits state enactments related to the "price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The ADA's express preemption clause applies only to state laws that have a "forbidden significant effect" on rates, routes, or services. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992); *Montalvo*, 508 F.3d at 469.

Virgin contends that the most significant effect of applying California's MRB rules would be on "services", because Virgin claims "breaks every few hours would delay flights because airplanes cannot operate without a full contingent of flight attendants on duty." Opening Br. at 42. But as explained above, the applicable FAA regulation requires that a certain number of flight attendants be "on board," and generally available for safety duties. 14 C.F.R. § 121.391. If a flight attendant takes a break on a flight to have a meal, use the restroom, or take a nap, the flight is not suddenly grounded or halted, impairing flight operations.[6] Further, Virgin's claim that "state-mandated break periods would fall at unpredictable times" (Opening Br. at 42) again misunderstands the scheduling flexibility, discussed above, for breaks and other alternative options for complying with the rules, up to and including paying a premium for a break that cannot be taken.

[6] This Court has concluded that "services" for purposes of ADA preemption refers to the "provision of air transportation to and from various markets at various times," and does not broadly encompass "the various amenities provided by airlines" including in-flight meal or beverage services. *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 726 (9th Cir. 2016) (concluding that California's antidiscrimination statutes regulating airline kiosks do not pertain to an airline "service" under the ADA) (internal citations omitted). However, given the flexibility inherent in the MRB rules, such breaks would not have any "significant impact" on such ancillary services, either.

Because Virgin fails to understand the flexibility written into California's wage and hour laws, it also misguidedly asserts a burden that could come from assigning additional personnel to stagger breaks and minimize any possible disruption as creating an "impermissible significant impact on airlines 'routes' and 'prices'" by increasing costs. Opening Br. at 44. Even if there were such a burden required, Virgin does not proffer specific details regarding the substantiality of such increased costs for its business, or articulate any such cost increase could compel a change in routes or prices. *Air Transp. Assn. of America v. City & Cty. of S.F.*, 266 F.3d 1064, 1074 (9th Cir. 2001) (no preemption where carrier could opt to pay costs of compliance with city ordinance or forego route, but not compelled to do one or the other). Further, as this Court made clear in *Dilts*, state laws are not preempted simply because they might "lead[] the carriers to reallocate resources or make different business decisions." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647 (9th Cir. 2014) ("even if state laws increase or change a motor carrier's operating costs, broad law[s] applying to hundreds of different industries with no other forbidden connection with prices, routes, and services—that is, those that do not directly or indirectly mandate, prohibit, or otherwise regulate certain prices, routes, or services—are not preempted") (internal citation and quotation marks omitted).

Generally applicable state employment statutes that – like virtually all regulations – impose some costs and require businesses to make market-based decisions are not the types of regulations preempted by the ADA. *Dilts*, 769 F.3d at 647 (With respect to law governing motor carriers, "California's meal and rest break laws plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt. They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly.").

CONCLUSION

For the foregoing reasons, the judgement of the district court should be affirmed.

Dated: January 3, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 7,274 words excluding the parts exempted by Fed. R. App. P. 32(f). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it because it uses a proportionately spaced Times New Roman font and has a typeface of 14 points.

Dated: January 3, 2020

/s/ Satoshi Yanai
Satoshi Yanai

CERTIFICATE OF SERVICE

I certify that on January 3, 2020, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 3, 2020

/s/ Satoshi Yanai
Satoshi Yanai