No. 19-352

IN THE

Supreme Court of the United States

ROBIN BRINDLE, KATHLEEN BROWN, SANDRA CARTER, MARCIE LAPORTE, AND KELVIN RAMIREZ,

Petitioners,

v.

DELTA AIR LINES, INC., AND THE RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), preempt Rhode Island's blue law, which gives employees the right not to work on Sundays and holidays and requires time-and-a-half pay for all employees that elect to work on those days?

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondent Delta Air Lines, Inc. is a publicly traded corporation. Delta has no corporate parent, and no publicly held corporation owns 10% or more of Delta's stock.

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STATEMENT

1. Since the late 1970s, the Airline Deregulation Act has stopped states from "enact[ing] or enforc[ing] a 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 words "related to" in the Act convey a broad preemptive purpose, as they do in express preemption provisions of other federal statutes. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383–384 (1992). The Airline Deregulation Act thus preempts more than state laws that expressly refer to rates, routes, or services; it also preempts state "laws of general applicability," *id.* at 386, when they have a "significant effect" or "significant impact" on an airline's rates, routes, or services, *id.* at 388–389.

2. Blue laws are state laws of general applicability that proscribe work and other activities on Sundays and holidays. In recent decades, many states have weakened or eliminated their blue laws, as the people no longer want their local governments to require a statewide day of rest. This case concerns the remnant of Rhode Island's blue law.

Rhode Island used to prohibit commercial and recreational "activity on Sunday, other than acts of 'necessity and charity,' in the absence of a valid license or permit authorizing such activity." *City of Warwick* v. *Almac's, Inc.*, 442 A.2d 1265, 1267 (R.I. 1984) (quoting and discussing the law). Anyone who violated the blue law himself, or who caused his "children, servants or apprentices" to violate the law, was subject to a fine.

See *id.* at 1267 n.2. A business owner could obtain a Sunday sale license, but even then could not force employees to work. Working on Sunday was always "strictly voluntary," and employees who showed up to work on Sunday had to be paid extra—at least one-and-a-half times their regular hourly rate. *Id.* at 1268.

In 1998, the Rhode Island General Assembly amended the state's blue law. See 1998 R.I. Session Laws Ch. 98-73. The amendments did not repeal the blue law entirely. The state still empowers employees to refuse to work on Sundays and still requires employers to pay time-and-a-half to all employees who show up to work on Sunday:

> Work performed by employees on Sundays and holidays must be paid for at least one and one-half (1½) times the normal rate of pay for the work performed; provided: (1) that it is not grounds for discharge or other penalty upon any employee for refusing to work upon any Sunday or holiday enumerated in this chapter; (2) any manufacturer which operates for seven (7) continuous days per week is exempt from the requirement of subdivision (1).

R.I. Gen. Laws § 25-3-3(a). This law, Section 25-3-3, is the blue law at the center of this case.

3. Petitioners are customer service agents who work for Delta at T.F. Green Airport in Rhode Island. In 2011, they filed claims against Delta, arguing that

Delta owes them time-and-a-half for working on Sundays. Delta countered that, as applied to airlines, Section 25-3-3 is preempted under the Airline Deregulation Act. See generally Pet. App. 2a–3a.

The Rhode Island Department of Labor and Training adjudicated Petitioners' claims. Delta called two witnesses, the president of the Rhode Island Airport Corporation and a Delta station manager at T.F. Green Airport. Relying on their experience, the witnesses testified about what would happen if Section 25-3-3 weren't preempted. Because Sundays and holidays are major air travel days, the witnesses testified that paying for an entire day of work at time-and-a-half would seriously curtail the number of employees Delta would use on Sundays and, therefore, would reduce the preboarding services Delta provides on Sundays. See Pet. App. 61a–62a. The hearing officer accepted the witnesses' testimony, found that enforcing Section 25-3-3 would significantly affect Delta's services at T.F. Green Airport, and held that the Airline Deregulation Act preempts Section 25-3-3 as applied.

4. The superior court affirmed on alternative grounds. First, the court recognized that Section 25-3-3 is a blue law and is designed to reduce or eliminate services offered on Sundays and holidays. See Pet. App. 29a–32a & n.8. Section 25-3-3 accomplishes that goal by significantly increasing the cost of providing services on Sundays and holidays and by "provid[ing] that an employee cannot be discharged * * * for refusing to work on Sundays or holidays." *Id.* at 30a. As applied, Section 25-3-3 has a "direct impact" on Delta's services. *Id.* at 31a.

The superior court further held that Section 25-3-3 would be preempted even if it were an ordinary wage law, for it would still have a significant, indirect impact on Delta's services. See Pet. App. 32a–36a. Petitioners challenged the hearing officer's significant-impact finding because Petitioners contended that Delta needed experts or quantitative evidence to prove a significant impact. See *id.* at 22a; see also *id.* at 5a–6a. The superior court disagreed and held that Delta could use lay witnesses to prove a significant impact. See *id.* at 35a–36a.

5. The Supreme Court of Rhode Island unanimously affirmed. The court did not address the superior court's primary holding that Section 25-3-3 directly regulates Delta's services. Instead, the court addressed the superior court's alternative holding that complying with Section 25-3-3 "will significantly impact the prices, routes, and services of airline carriers." Pet. App. 8a; see *id.* at 10a.

The Supreme Court of Rhode Island held that Delta could not demonstrate a significant impact simply by showing that "§ 25-3-3 may impose costs on airlines and therefore adversely affect fares." Pet. App. 12a. More is needed, and here the court found that Delta had "demonstrated that compliance with § 25-3-3 goes far beyond a mere increase in labor costs." *Id.* at 13a. Delta's witnesses showed that Section 25-3-3 "would have a direct impact on an airline's decisionmaking process concerning discretionary services, customer interaction, and staffing," *id.* at 14a, and would reduce flight frequency, see *id.* at 15a. The court rejected Petitioners' argument that Delta could prove a significant impact only with quantitative or

empirical evidence. See *id.* at 13a–14a. The court joined with the First Circuit in holding that "[e]mpirical evidence in this regard is not necessary." *Id.* at 13a (citing *Mass. Delivery Ass'n* v. *Coakley*, 769 F.3d 11, 21 (CA1 2014), and *N.H. Motor Transp. Ass'n* v. *Rowe*, 448 F.3d 66, 82 n.14 (CA1 2006)).

REASONS FOR DENYING THE PETITION

I. The Question Petitioners Want This Court To Decide Is Not Presented In This Case.

Petitioners ask this Court to decide whether the Airline Deregulation Act "exempts airlines from state and local wage regulation." Pet. *i*; see *id.* at 4 ("Because of the decision below, there is now a conflict among the lower courts over whether the Airline Deregulation Act preempts state and local wage regulation."). In Petitioners' view, the Airline Deregulation Act never preempts state wage laws. See *id.* at 4–5 ("The ADA cannot preempt Rhode Island's time-and-a-half statute without also preempting *all* state and local laws that could raise an airline's labor costs * * *."). Petitioners did not advance that categorical argument below, and the Supreme Court of Rhode Island did not render a categorical holding. Instead, the parties disputed, and the Supreme Court of Rhode Island decided, whether the testimony of Delta's lay witnesses is sufficient evidence for proving that Section 25-3-3 has a forbidden significant impact on Delta's services. The question presented in the petition for certiorari is not actually presented in this case, so this Court should deny further review.

In *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992), this Court held that the Airline Deregulation Act preempts state laws that "have a significant impact on" rates, routes, or services. *Id.* at 388–390. Below, Petitioners accepted that *any type* of state law—even a state wage law—could have a "significant impact" on an airline's rates, routes, or services. Petitioners began their state-court petition for certiorari conceding that, "For ADA pre-emption to attach, the statute or regulation must have a 'significant impact' on the rates, routes, and services." Mem. in Support of Pet'n for Writ of Cert. at 1–2, No. 16-324 (R.I. S. Ct. Nov. 16, 2016). And Petitioners admitted that a state wage law could have a forbidden "significant impact" if "the cost" of compliance "is sufficiently onerous." *Id.* at 11; see *id.* at 10–11 ("[T]he airlines must establish a connection between the increased cost, and a significant impact on rates, routes, or services.").

Guided by *Morales* and focusing on the quantum of Delta's evidence, Petitioners argued that the central question in this case is whether Delta "had produced legally sufficient evidence to establish that R.I.G.L. § 25-3-3 had the 'significant impact' upon routes, rates, and services under the ADA." *Ibid.* Below, Petitioners' Question Presented asked the Supreme Court of Rhode Island to decide "Whether Delta Airlines met its burden of proof in demonstrating that R.I.G.L. § 25-3-3's requirement of time-and-a-half wages for Sundays and holidays creates a 'significant impact' on airline rates, routes, and services, and is therefore preempted by the ADA." Pet'rs Br. at 8, No. 16-324 (R.I. S. Ct. Apr. 19, 2018).

Petitioners did not argue that state wage laws, as a class, are never preempted. Petitioners did not argue that, as a matter of law, Delta could *never* prove that Section 25-3-3 has a significant impact on rates, routes, or services. Petitioners objected only to the sufficiency of the evidence Delta proffered, criticizing it as "nothing more than the say-so of non-expert witnesses, unsupported by any facts regarding industry conditions." *Id.* at 9.

The Supreme Court of Rhode Island decided the case as Petitioners narrowly framed it. Accepting without deciding that Section 25-3-3 is an ordinary wage law, rather than an extraordinary blue law, the court analyzed only whether Delta's evidence of a significant impact was sufficient, and the court held that it was. See Pet. App. 13a–15a. The court did not hold that state wage laws are *always* preempted as applied to airlines (an argument Delta didn't make). On the contrary, the court disclaimed that reasoning, holding that "the fact that § 25-3-3 may impose costs on airlines * * * is inconsequential" because accepting that fact "'would effectively exempt airlines from'" a wide variety of state laws. *Id.* at 12a (quoting *DiFiore* v. *Am. Airlines, Inc.*, 646 F.3d 81, 89 (CA1 2011)).

Until now, the parties have been fighting over whether Section 25-3-3 has an impermissible "significant impact" on Delta's rates, routes, or services. Yet now, to make it seem like the Supreme Court of Rhode Island broke from the pack, Petitioners reinvent their case. Indeed, the phrases from *Morales*—"significant impact" and "significant effect"—though they appeared on almost every page of the parties' briefs below, appear nowhere in the petition for certiorari.

This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Petitioners may not ask this Court to answer questions the lower courts did not answer. In a case arising out of state courts, a petitioner's eleventh-hour change of course has jurisdictional implications, for this Court has no jurisdiction to review a judgment from a state's highest court unless the questions presented were properly raised and passed on by the state court. See *Crowell* v. *Randell*, 35 U.S. 368, 391 (1836); see also S. Ct. R. 14(g)(i). Petitioners' question presented was neither raised nor passed on by the Supreme Court of Rhode Island. To be sure, that court decided a federal question—just not the same federal question that Petitioners ask this Court to answer. Petitioners' bait-and-switch undermines their petition, for it is either a substantial vehicle problem or an irremediable jurisdictional defect. The petition should be denied.

II. There Is No Split On The Scope Of The Airline Deregulation Act's Express Preemption Provision.

Cobbling together dicta and focusing on bottom-line results, Petitioners construct a theory that the Airline Deregulation Act never preempts state labor laws. See Pet. 5–10. To our knowledge, only the First Circuit has actually considered that question (in a decision Petitioners omit from their petition), and that court ruled the other way: "We refuse the Attorney General's invitation to adopt such a categorical rule exempting from preemption all generally applicable state labor laws." *Coakley*, 769 F.3d at 20. Like the Supreme Court of Rhode Island, the First Circuit held

that "we must carefully evaluate even generally applicable state laws for an impermissible effect on carriers' prices, routes, and services. The court must engage with the real and logical effects of the state statute, rather than simply assigning it a label." *Ibid.*

Read fairly, the state and federal decisions Petitioners catalog do not conflict with the decision below. See *ibid.* (concluding that the categorical rule "is contradicted by the very cases" Petitioners catalog in their petition). There is no methodological conflict; the Supreme Court of Rhode Island stated and applied the Airline Deregulation Act consistently with the decisions in those cases. Nor is there a conflict in outcomes; Section 25-3-3 is a unique and onerous blue law, unlike the garden variety employment laws the other courts upheld. Those courts upheld state laws because the transportation companies involved in the proceedings did not prove a forbidden, significant impact on their rates, routes, or services. Some of those courts even recognized the possibility that a state wage law might go too far and have such a significant impact—as the Supreme Court of Rhode Island found here. For convenience, we take down each decision in the order Petitioners cite them:

- Pet. 5–6: *S.C. Johnson & Son, Inc.* v. *Transp. Corp. of Am.*, 697 F.3d 544 (7th Cir. 2012) — Tort claims alleging bribery and racketeering were not preempted because they had a "tangential effect" on the airline. See *id.* at 559–561. In dictum, the court observed that "minimum wage laws" are ordinarily not preempted. *Id.* at 558. At the same time, the court rejected that certain categories of state law are always

or never preempted. See *id.* at 550 ("[W]e are not looking at a simple all-or-nothing question."). The court said nothing about blue laws and correctly recognized that the Airline Deregulation Act preempts any "laws of general applicability with a *significant effect* on rates, routes, or services." *Ibid.* (emphasis added).

- Pet. 6: *Filo Foods, LLC* v. *City of SeaTac*, 357 P.3d 1040 (Wash. 2015) — A $15 minimum wage was not preempted because its effect on airline services was "indirect and tenuous." *Id.* at 1058. Like the Supreme Court of Rhode Island—indeed, in nearly verbatim language—the court acknowledged that the "fact that [a state law] may impose costs on airlines and therefore affect fares is inconsequential." *Ibid.* Far from announcing a categorical rule immunizing state wage laws from preemption, the court observed that state laws that "merely regulate[] 'how the airline behave[d] as an employer'" are "*likely* not" preempted, leaving open the possibility that a particular wage law might go too far. *Ibid.* (emphasis added) (quoting *DiFiore*, 646 F.3d at 88). The court said nothing about blue laws.

- Pet. 6: *Amerijet Int'l, Inc.* v. *Miami-Dade County*, 627 F. App'x 744 (CA11 2015) (unpublished) — A local minimum wage was not preempted because "additional labor and costs" associated with "record-keeping, inspection, and reporting" did not have a "significant effect" on the airline's services. *Id.* at 750–751. The court said nothing about blue laws.

- Pet. 7: *People ex rel. Harris* v. *Pac Anchor Transp., Inc.*, 329 P.3d 180 (Cal. 2014) — State rules on classifying workers were not preempted because

their effect on rates, routes, or services was too indirect. See *id.* at 189. The court's statement that federal law "does not preempt generally applicable employment laws that affect prices, routes, and services," *id.* at 188, was written in the part of the opinion addressing *facial* preemption, not in the part addressing whether the state law had a significant impact and was preempted *as applied*, see *id.* at 189–190. The court said nothing about blue laws.

- Pet. 7: *Lupian* v. *Joseph Cory Holdings LLC*, 905 F.3d 127 (CA3 2018) — State law regulating expense deductions from employee paychecks was not preempted on its face. See *id.* at 138. Because the appeal had been certified on a Rule 12 motion, the court remanded and reserved deciding whether the law was preempted as applied. See *id.* at 135 ("We cannot say, particularly at this procedural juncture, that the IWPCA has a significant impact on carrier rates, routes, or services of a motor carrier or that it frustrates the FAAAA's deregulatory objectives."). The court said nothing about blue laws.

- Pet. 7: *Bedoya* v. *Am. Eagle Express Inc.*, 914 F.3d 812 (CA3 2019), *cert. denied* 140 S. Ct. 102 (Oct. 7, 2019) — State law regulating worker classification was not preempted. See *id.*at 816. Like the Supreme Court of Rhode Island, the court observed that "laws of general applicability may nonetheless be preempted where they have a significant impact on the services a carrier provides." *Id.* at 821. The court did not categorically carve out state employment laws from preemption, but cautiously observed that "laws regulating labor inputs, such as wage laws, * * * are *less likely* to be preempted." *Id.* at 822 (emphasis

added). Like *Lupian*, the appeal had been certified on a Rule 12 motion, and the court remanded for further proceedings. See *id.* at 816. The court said nothing about blue laws.

- Pet. 7: *Gary* v. *Air Grp., Inc.*, 397 F.3d 183 (CA3 2005) — Retaliation claim brought under state whistleblower protection law was not preempted. See *id.* at 189. The court said nothing about blue laws, but strongly intimated that the Airline Deregulation Act would preempt a state law that gives employees the right to refuse a work assignment (like Section 25-3-3) because the law would "have the potential to interrupt service." *Ibid.*

- Pet. 8: *Costello* v. *BeavEx, Inc.*, 810 F.3d 1045 (CA7 2016) — State law regulating deductions from employee paychecks was not preempted. See *id.* at 1055–1057. The court embraced the First Circuit's opinion in *Coakley*, rejecting a categorical carve out for state labor laws, see *id.* at 1053, and emphasized that such laws will be "*often* too 'remote'" and "*often* too tenuously connected" to rates, routes, or services to be preempted, see *id.* at 1054 (emphases added). The court said nothing about blue laws.

- Pet. 8: *Californians for Safe & Competitive Dump Truck Transp.* v. *Mendonca*, 152 F.3d 1184 (CA9 1998) — State prevailing wage law was not preempted simply because it led a trucking company to raise prices, use independent contractors, and re-

route equipment "to compensate for lost revenue." *Id.* at 1189. The court said nothing about blue laws.[1]

- Pet. 8: *Dilts* v. *Penske Logistics, LLC*, 769 F.3d 637 (CA9 2014) — Meal and rest break laws were not preempted. See *id.* at 647–650 & n.2. Among the reasons the court gave for its holding was that the trucking company had not shown "an actual or likely significant effect on prices, routes, or services." *Id.* at 650 (citing an amicus brief filed by the Secretary of Transportation). The court said nothing about blue laws.

- Pet. 8: *Cal. Trucking Ass'n* v. *Su*, 903 F.3d 953 (CA9 2018) — Worker classification rule was not preempted because the plaintiff's complaint was "devoid of any allegations that [the rule], in any significant way, impacts its members' prices, routes, or services." *Id.* at 966. After noting that *Mendonca* and *Dilts* "involved generally applicable labor protections," the court cautioned that identifying a state law as such is not "in and of itself, sufficient to show it is not preempted." *Ibid.* The court said nothing about blue laws.

- Pet. 8–9: *Watson* v. *Air Methods Corp.*, 870 F.3d 812 (CA8 2017) — Wrongful discharge claim was not preempted. See *id.*at 817–820. The court repeated the widely stated views that state labor laws are not often preempted and that, however, any law of general applicability could be preempted if its impact on rates,

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1 In one paragraph without analysis, *Allied Concrete & Supply Co.* v. *Baker*, 904 F.3d 1053 (CA9 2018), applied *Mendonca* in a case challenging California's prevailing wage law. *See id.* at 1068.

routes, or services is significant enough. *Id.* at 819. The court said nothing about blue laws.

- Pet. 9: *Tobin* v. *Fed. Express Corp.*, 775 F.3d 448 (CA1 2014) — Homeowner's negligence, privacy, and emotional distress claims, arising out of a misdelivered package of marijuana, were preempted because they challenged a shipper's services (package handling, address verification, and delivery). See *id.* at 454. The court's statement that state employment laws are not preempted is clearly dictum and did not *sub silentio* overrule the *Coakley* decision the court issued three months earlier; indeed, the court reiterated that preemption under the Airline Deregulation Act is not categorical but "calls for an individualized assessment of the facts underlying each case." *Id.* at 456.

- Pet. 9: *DiFiore* v. *Am. Airlines, Inc.*, 646 F.3d 81 (CA1 2011) — State tipping law was preempted as applied to airlines and baggage porters. See *id.* at 88. The porters argued the law was aimed at airlines as employers, but the court correctly perceived that complying with the law would "directly regulate[] how an airline service is performed and how its price is displayed to customers." *Ibid.* Like the Supreme Court of Rhode Island, the court recognized that state laws are not preempted simply because they "impose[] costs on airlines." *Id.* at 89. This law, however, did more.

- Pet. 9–10: *Schwann* v. *FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (CA1 2016) — State worker classification law was preempted as applied to delivery drivers because it had a significant impact on delivery services (by eliminating the "economic incentive to keep costs low, to deliver packages efficiently, and to

provide excellent customer service") and on routes (by changing the "incentives that could render their selection of routes less efficient"). *Id.* at 439.

Delta and Petitioners cited many of these decisions in their lower-court briefs. Presumably, if there were truly a "consensus" that the Airline Deregulation Act never preempts state labor laws, Pet. 10, the Supreme Court of Rhode Island would have at least hinted at it or expressed disagreement with one of the decisions Petitioners rely on. The court didn't, however, because its decision is entirely consistent with the preemption framework that this Court has announced and that the other courts have applied. There is no conflict that warrants this Court's review.

III. The Extent Of Section 25-3-3's Impact On Delta's Services Is A Factbound Question That Does Not Warrant Further Review.

In the end, Petitioners only complain that the Supreme Court of Rhode Island erred in finding that Delta proved that Section 25-3-3 has a significant impact on its services at T.F. Green airport. (Though, they studiously avoid using the phrase "significant impact" anywhere in their petition.) But, a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. The Court should stand by that norm here; indeed, the ultimate issue depends on the credibility of the witnesses who testified before a state administrative hearing officer, which this Court is not well suited to review.

Petitioners' attack on the merits of the decision below does them no good. See Pet. 10–13. Inexplicably, they ignore the court's clear holding that Section 25-3-3 is not preempted just because it "may impose costs on airlines." Pet. App. 12a–13a. Instead, Petitioners accuse the court of endorsing preemption of any state law that raises airlines' costs, from which Petitioners oh-so rapidly conclude that airlines now may "enslav[e] their workers and forc[e] them to work for no pay." Pet. 12. But see U.S. Const. amend. XIII, § 1. That's ludicrous, and if this is how Petitioners plan to brief the merits, the Court should not give them the chance.

The Supreme Court of Rhode Island was right that Section 25-3-3 "goes far beyond a mere increase in labor costs." Pet. App. 13a. Petitioners' contrary contention pretends that Section 25-3-3 is a run-of-the-mill wage law that does nothing more than require time-and-a-half pay on Sundays. See Pet. 13; see also *id.* at 1 (selectively quoting Section 25-3-3). Section 25-3-3 is a classic blue law. See Pet. App. 29a–32a. It lets employees choose whether to work on Sundays—it shields them from repercussions if they elect to stay home, and it guarantees them time-and-a-half if they elect to come in. See R.I. Gen. Laws § 25-3-3. Its logical effect is to shift control of Delta's Sunday operations from the airline to its employees. If more than a few of Delta's employees at T.F. Green Airport elected not to show up on any given Sunday (perhaps to watch the Patriots play another Super Bowl), the airline's operations would be crippled, and Section 25-3-3 would stop Delta from being able to do anything about it. Section 25-3-3 "relates to" Delta's services just as much as a law that forbids all business on Sundays.

The Supreme Court of Rhode Island reasonably applied the Airline Deregulation Act's preemption framework to a one-of-a-kind Sunday-closing law—Section 25-3-3. No other state or federal court has considered whether the Airline Deregulation Act preempts a comparable blue law. Insofar as this Court has any interest in revisiting the scope of the Act's express preemption provision or in considering whether state employment laws are categorically never preempted, the Court should wait for a case involving an actual and commonplace employment law.

CONCLUSION

The petition should be denied.

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