No. 21-396

IN THE

Supreme Court of the United States

DELTA AIR LINES, INC.,

Petitioner,

v.

DEV ANAND OMAN, TODD EICHMANN, ALBERT FLORES, AND MICHAEL LEHR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held that application of California's paystub and pay timing laws to flight attendants based in California does not violate the dormant Commerce Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This case addresses whether California-based flight attendants are covered by California statutes governing the contents of employees' paystubs and the timing of employees' pay. In the decision below, the Ninth Circuit held that applying the statutes to the California-based workers does not violate the dormant Commerce Clause: it does not result in discrimination against out of state employers, directly regulate interstate commerce, or impose a burden on interstate commerce that outweighs the local benefits. Because statutes regulating paystubs and pay timing do not implicate the typical concerns giving rise to successful dormant Commerce Clause challenges, the Ninth Circuit correctly declined to invalidate the California laws as applied to flight attendants based in California.

The decision below is fully in-line with this Court's dormant Commerce Clause jurisprudence and other circuits' interpretation thereof. Like the Ninth Circuit, the Seventh Circuit has held that applying state wage and hour laws to flight personnel presents no dormant Commerce Clause concerns. No circuits have disagreed. Stepping back from the airline industry, circuits uniformly agree with the Ninth Circuit's conclusion that a state law must regulate *commerce* occurring outside the state, typically through price-control statutes, for it to violate the dormant Commerce Clause under the line of cases Petitioner Delta Air Lines, Inc. relies on here.

Delta alleges that California's paystub and pay timing laws impose substantial burdens that give rise

to grave Constitutional issues. Not so. Delta already issues detailed paystubs to its flight attendants. To comply with California's paystub law, Delta must simply add two data points: the employee's rate or rates of pay, and the total hours worked at each rate of pay. Adding that information to paystubs issued to California-based flight attendants will have no effect on interstate commerce or the commercial airline industry. Even less of a concern is California's pay timing requirements, which simply require prompt payment of earned wages within a reasonable time period. Delta began complying with that law long ago, during this litigation, with no effect on commerce or air travel. As such, there is no need for the Court to wade into a state law matter between employer and employee.

Adding to the reasons for denial is the absence of the Airline Deregulation Act ("ADA") in the decisions or briefing below. Delta's heavy reliance on the "deregulatory preferences of the Airline Deregulation Act" in this petition marks the first time Delta has raised the ADA in any briefing. Delta's reliance on the "preferences" of a statute that is not at issue in this case only serves to underscore that the dormant Commerce Clause issue decided by the court of appeals does not warrant this Court's review.

STATEMENT OF THE CASE

1. This case concerns Delta's paystubs and the timing of its payments to flight attendants. At the time this suit was filed, Delta's paystubs did not contain any information about the hours flight attendants worked, their payrates, or the formulas Delta applied to determine flight attendants' pay.

Delta also maintained a practice of paying its flight attendants weeks in arrears, which resulted in flight attendants waiting up to six weeks for full wage payment.

Respondents Todd Eichmann, Michael Lehr, and Albert Flores (hereinafter, "respondents") are current or former Delta flight attendants based out of California airports. Together with another flight attendant, Dev Oman, respondents filed this case, alleging, as relevant here, that Delta violated California Labor Code Section 204, which requires employees to be paid at least twice monthly on regular paydays, and California Labor Code Section 226, which requires employers to provide employees with itemized wage statements that include, among other things, the hours the employee worked and the rates at which they were paid. Respondents also alleged that Delta violated California's minimum wage law by not paying them for time worked on the ground at California airports.

The district court granted summary judgment in Delta's favor, holding that Delta did not violate California's minimum wage law, and that sections 204 and 226 did not apply to the respondents because they did not spend a significant enough part of their working hours in California.

On appeal, the Ninth Circuit certified three questions to the California Supreme Court, including a question about the application of sections 204 and 226. The Ninth Circuit also certified questions to the California Supreme Court in *Ward v. United Airlines, Inc.*, a case involving section 226's application to United pilots and crew members.

2. The California Supreme Court accepted review of both cases and issued decisions on June 29, 2020. The court first held, in *Ward*, that "[a]pplication of section 226 logically depends on whether the employee's principal place of work is in California." *Ward v. United Airlines, Inc.*, 9 Cal. 5th 732, 754, 466 P.3d 309, 320 (2020). The court explained, "that test is certainly satisfied when the employee spends the majority of his or her working hours in California." *Id*. However, the court continued, "that is not the end of the story." *Id*. For workers who do not spend the majority of their time in any one state, including "transportation workers and others," the court concluded that the principal place of work is California "if the worker performs some work [in California] and is based in California, meaning that California serves as the physical location where the worker presents himself or herself to begin work." *Id*. at 755, 466 P.3d at 321. The court explained that this "familiar test," which had been used for decades in the field of unemployment insurance, "supplies clarity and certainty for employers and employees, while also appropriately balancing the Legislature's weighty interest in the protection of California workers, including interstate transportation workers, with similarly weighty considerations of interstate comity and avoidance of conflicts of laws." *Id*. at 756, 466 P.3d at 321.

In this case, the court applied *Ward* to the plaintiffs' section 226 claims and held that, because the plaintiffs do not work the majority of their time in any one state, whether they are "entitled to California-compliant wage statements hinges on whether they were based for work purposes in

California." Pet. App-11. Explaining "that the application of California wage and hour protections to multistate workers . . . may vary on a statute-by-statute basis[,]" *id*. at App-9, the court then considered the plaintiffs' section 204 pay-timing claim, *id*. at App-17. "[B]ecause section 204 works hand in hand with section 226," the court concluded that "there is no reason to interpret section 204's geographic coverage differently from that of section 226." *Id*. Accordingly, the court held that section 204, like section 226, applies "only to flight attendants who have their base of work operations in California." *Id*. at App-5–6.

Finally, the court held that, regardless of whether California's minimum wage laws apply to the work performed on the ground during the flight attendants' stops in California, "the pay scheme challenged here complies with the state requirement that employers pay their employees at least the minimum wage for all hours worked." *Id*. at App-6.

3. Both this case and *Ward* then returned to the Ninth Circuit. In *Ward*, United Airlines argued that the dormant Commerce Clause, the Airline Deregulation Act, and the Railway Labor Act precluded applying section 226 to interstate transportation workers who are based in California and do not perform the majority of their work in any one state. In this case, Delta argued that applying sections 204 and 226 to respondents would violate the dormant Commerce Clause and improperly regulate conduct outside the state. It did not make any arguments under the Airline Deregulation Act or Railway Labor Act.

The Ninth Circuit decided both cases on February 2, 2021, starting, like the California Supreme Court, with *Ward*. The court held that application of section 226 to the pilots and flight attendants in *Ward* does not violate the dormant Commerce Clause. The court first stated that it could "quickly dismiss any suggestion that application of the" California Supreme Court's principles regarding section 226's reach—which it referred to as the "*Ward* test"—"results in discrimination against interstate commerce." *Ward v. United Airlines, Inc.*, 986 F.3d 1234, 1239 (9th Cir. 2021). "Discrimination in this context," the court explained, "means treating similarly situated in-state and out-of-state economic interests differently in a way that favors the in-state interests." *Id*. "The *Ward* test is non-discriminatory because it imposes burdens on private employers evenhandedly, whether they are based in-state or out-of-state." *Id*. at 1240.

The court likewise found no merit "in United's argument that application of the *Ward* test results in direct regulation of interstate commerce." *Id*. The court noted that "United's argument hinges on a line of Supreme Court cases invalidating state laws that had the practical effect of directly regulating commerce occurring wholly outside the enacting State's borders," and pointed out that, in *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), this Court suggested that the rule applied in those cases is "limited to cases involving 'price control or price affirmation statutes.'" 986 F.3d at 1240 (quoting *Walsh*, 538 U.S. at 669). The court explained that

United's argument "obviously fails" under this understanding of those cases. *Id*.

The court's discussion of extraterritoriality did not end there, however. The court also held that United's argument would fail even under a "broad understanding of the extraterritoriality principle." *Id*. The court explained that section 226 "regulates an incident of the employment relationship between employer and employee," and that "California's ties to the employment relationship are sufficiently strong to justify application of § 226's disclosure requirements." *Id*. at 1240–41. "The nexus between the State and the employment relationship," the court explained, "is not so 'casual' or 'slight'—as would be true if California were attempting to regulate commerce occurring wholly outside its borders—as to render application of California's wage-statement law arbitrary or unfair." *Id*. at 1241.

Finally, the court rejected United's argument that application of section 226 "violates the dormant Commerce Clause because the burden imposed on interstate commerce is 'clearly excessive in relation to the putative local benefits.'" *Id*. (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The court noted that United had not provided evidence of the magnitude of costs it would incur if it complied with section 226, and stated that, even aside from that failure, it believed that United "greatly exaggerated the burden of complying." *Id*. at 1242. The court pointed out that "United can easily comply with California law by issuing § 226-compliant wage statements to all pilots and flight attendants whose home-base airport is located in California." *Id*.

The court also noted that although "[s]tate-by-state regulation of the wage statements provided to pilots and flight attendants may increase operating costs," "United has not demonstrated that such regulation will impair the free flow of commerce across state borders or impede operation of the national airline industry." *Id*. "For example," the court explained, "United has presented no evidence to support the conclusion that requiring it to comply with California law that differs from the wage-statement laws of other States will prove so cost-prohibitive as to disrupt the interstate service of its flights." *Id*. The court noted that California's paystub law was "not comparable to the regulations found to impose a significant burden on interstate commerce in cases like *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527–28, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959) (invalidating state regulation of truck mudflaps), and *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 773–74, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) (same as to state law regulating train lengths)." *Ward*, 986 F.3d at 1242. Because United had not "shown a significant burden on interstate commerce," the Court held that "any burden imposed by the *Ward* test cannot be deemed clearly excessive in relation to the putative local benefits of applying California Labor Code § 226 to the employees involved here." *Id*. at 1242 (internal quotation marks and citation omitted).

After holding that application of section 226 to the pilots and flight attendants at issue in *Ward* did not violate the dormant commerce clause, the court held that the *Ward* plaintiffs' claims were not

preempted by either the Airline Deregulation Act or the Railway Labor Act. *Id*. at 1242–44.

4. After issuing its decision in *Ward*, the court of appeals issued a short unpublished decision in this case. *See* Pet. App-1–App-3.

The court first affirmed the district court's entry of summary judgment on the minimum wage claims. Pet. App-2.

The court then turned to sections 204 and 226 and held that, for the reasons stated in *Ward*, application of those laws to flight attendants who are based for work purposes in California and do not perform a majority of their work in any one state does not violate the dormant Commerce Clause. Pet. App-2–App-3. The court reversed the district court's grant of summary judgment to Delta on the section 204 and 226 claims of respondents Eichmann, Flores, and Lehr and remanded to the district court for determinations of whether they meet the *Ward* test and whether Delta complied with sections 204 and 226. *Id*. at App-3. The court affirmed the district court's grant of summary judgment on Dev Oman's section 204 and 226 claims, because the record established that he did not meet the *Ward* test. *Id*.

The court did not address either the Airline Deregulation Act or Railway Labor Act, about which Delta had made no arguments.

Delta moved for *en banc* review, which was denied. In *Ward*, United chose not to petition for *en banc* review and did not to seek this Court's review.

REASONS FOR DENYING THE WRIT

This case does not merit this Court's review. The decision below does not conflict with the decision of any other court of appeals. Delta can easily comply with California's paystub and pay timing laws without affecting interstate commerce. This case does not raise any ADA issues. And the Ninth Circuit correctly held that applying the state laws at issue neither directly regulates interstate commerce nor imposes a clearly excessive burden on interstate commerce. The petition for certiorari should be denied.

I. This Case Does Not Warrant the Court's Review.

A. This Case Does Not Implicate Any Circuit Splits.

The petition does not claim a conflict among the circuits on whether applying state wage and hour laws to flight attendants violates the dormant Commerce Clause, and no such conflict exists. Rather, the Ninth Circuit's decision below agrees with the only other court of appeals to have considered the issue.

The Seventh Circuit addressed the application of state wage and hour laws to flight attendants three years ago in *Hirst v. Skywest, Inc.*, where the plaintiff flight attendants argued that Skywest failed to pay them in accordance with state and local minimum wages laws. 910 F.3d 961, 964 (7th Cir. 2018). The Seventh Circuit rejected the argument that application of state and local wage laws to the flight attendants violated the dormant Commerce Clause. *Id.* at 966–67. Explaining that the "dormant

Commerce Clause serves as a bulwark against local protectionism," the court held that the burden of complying with the state and local minimum wage laws did not have a discriminatory effect on interstate commerce. *Id.* at 967. The court also noted that Congress directly authorized states to regulate the employment relationship through wage and hour laws that exceeded federal protections. *Id.* (citing the Fair Labor Standards Act, 29 U.S.C. § 218). This Court declined review of *Hirst*. *See* 139 S. Ct. 2745 (2019).

In addition to agreeing with the Seventh Circuit's decision in *Hirst*, the decision below agrees with *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021), which was issued by a different Ninth Circuit panel around the same time the Ninth Circuit issued *Ward* and *Oman*. The flight attendant plaintiffs in *Bernstein* alleged that Virgin America violated California's minimum wage, overtime, paystub, pay timing, and meal and rest period laws. *Id.* at 1133. Following the California Supreme Court's decision in this case, the Ninth Circuit held that Virgin America complied with California's minimum wage laws, but affirmed judgment in plaintiffs' favor as to their overtime claims (which Virgin America did not dispute), paystub and pay timing claims, and meal and rest period claims. *Id.* at 1136–44.[1]

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[1] Although Virgin America petitioned for a writ of certiorari in *Bernstein*, it did not seek review of the Ninth Circuit's dormant Commerce Clause holding. *See Virgin America, Inc. v. Bernstein*, No. 21-260.

In support of its dormant Commerce Clause arguments, Virgin America relied on "a 'small number' of Supreme Court cases [which] 'have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory . . . where such laws undermined a compelling need for national uniformity in regulation.'" *Id.* at 1135 (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997)). The Ninth Circuit recognized that this Court's decisions invalidating state regulations dictating the shape of mudflaps on trucks[2] and the length of trains[3] "stand for the principle that state regulations can violate the dormant Commerce Clause in the rare case where an interstate carrier must comply with different and incompatible state requirements, and where that compliance is substantially burdensome." *Bernstein*, 3 F.4th at 1135–36. Because Virgin America identified no conflicting state wage and hour laws and provided no evidence of the burden on interstate commerce imposed by its compliance with California law, the Ninth Circuit was "not persuaded that California's labor laws are similar in character and effect to Illinois's mudflaps decree and Arizona's train-length limitation." *Id.* at 1136.

The *Bernstein* panel issued its decision shortly after the decision below, and *Bernstein* neither cites nor relies on that decision or the Ninth Circuit's decision in *Ward*. Accordingly, *Bernstein*, *Ward*, and *Hirst* represent three circuit decisions agreeing that

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[2] *See Bibb*, 359 U.S. 520.

[3] *See Southern Pacific Company*, 325 U.S. 761.

application of state wage and hour laws to flight personnel does not violate the dormant Commerce Clause. Because no circuit court has held otherwise, there is no circuit conflict for this Court to resolve.

B. Applying State Paystub and Pay Timing Laws to Flight Attendants Does Not Burden Interstate Commerce.

In addition to the lack of a circuit split, there is no compelling need for this Court's review because Delta can easily comply with California's paystub and pay timing requirements at no risk to interstate commerce or the airline industry.

Indeed, Delta has already made simple changes to bring itself into partial compliance. Prior to this case, Delta held back a portion of flight attendants' wages for over a month before payment. But Delta has now modernized its pay schedule so it pays flight attendants all their earned wages soon after the close of each pay period. This change was long overdue, and Delta successfully implemented it with no impact on airline travel or interstate commerce. There is no compelling need for the Court to weigh in on California's pay timing statute—with which Delta presently complies.

Similarly, Delta could easily cure its paystub violations. Delta already knows the total hours its flight attendants work each day and in each pay period. Delta also knows how much it pays its flight attendants. Delta added more information to its paystubs during the pendency of this case, and currently reports the "credited" hours flight attendants earn each pay period and the rate paid for each "credited" hour. Delta could cure its deficient paystubs by simply adding the *actual* hours worked

and the rates of pay. The record contains no evidence of the burden this reporting would impose on Delta or on interstate commerce.

The petition focuses on Delta's four-formula compensation system, but the specifics of Delta's pay plan are immaterial to the dormant Commerce Clause analysis. California law permits a wide variety of compensation structures. Here, the California Supreme Court held that Delta's compensation plan complies with state minimum wage law. Having secured the state high court's blessing on its compensation structure, all that remains is for Delta to report the hours and rates on its paystubs. Doing so will have no impact on interstate commerce or the airline industry.

Delta's petition suggests compliance challenges where none exist. For example, Delta argues that reassigning flight attendants to a different airport base will give rise to grave Constitutional concerns "fraught with regulatory consequences . . . ." Pet. 26. Not so. In our system of federalism, employees are subject to different state laws based on where they work. Nationwide employers across all industries draft state-specific policies and handbooks, and employees are subject to one set of policies or another depending on where they work. When a worker transfers from one location to another, a new set of employment policies may apply.

The same will be true here. California-based flight attendants will receive a California paystub. Flight attendants based elsewhere might receive a different paystub (if Delta chooses to differentiate). When a California flight attendant transfers to a different base, Delta will update the employee's

human resources file and the employee will be subject to the policies, procedures, and paystub format applicable to that base.

There is also no concern about conflicting state legislation. Delta identifies no state laws *prohibiting* the reporting of hourly rates and work hours on a paystub, such that complying with California law would place Delta in violation elsewhere. This case is therefore unlike *Bibb* and *Southern Pacific*, where conflicting state regulations imposed significant burdens on interstate commerce. *See Bibb*, 359 U.S. at 527; *Southern Pacific*, 325 U.S. at 775. For example, the mudflap regulations at issue in *Bibb* would have obligated truckers to change mudflaps at state borders, causing a "significant delay" in commerce, in addition to being "exceedingly dangerous." *Bibb*, 359 U.S. at 527. And in *Southern Pacific*, conflicting state regulations regarding the length of trains substantially burdened railroad operations by forcing long trains to break into several smaller trains at the Arizona border. *Southern Pacific*, 325 U.S. at 772. The result was a "serious impediment to the free flow of commerce . . . ." *Southern Pacific*, 325 U.S. at 775. No similar concerns are present here.

Even if another state's paystub regulations made it impossible to concurrently comply with two different state laws, there is no indication that the hypothetical conflicting state would insist that Delta comply with *its* paystub requirements as to flight attendants based in California. The Court should not accept review of California's paystub requirements to address the extremely unlikely scenario that this hypothetical legislation will come to pass.

C. This Case Is a Poor Vehicle for Addressing the Question Presented.

This case is also a poor vehicle for review of dormant Commerce Clause jurisprudence because the record below contains no evidence of the impact of the state laws on interstate commerce.

The Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations . . . ." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127–28 (1978). For a state law to be invalidated due to the burden of compliance, "the burden imposed on . . . commerce [must be] clearly excessive in relation to the putative local benefits" provided by the statute. *Pike*, 397 U.S. at 142. As the party asserting the dormant Commerce Clause challenge, Delta must provide actual evidence of the alleged burden on interstate commerce. *See Am. Trucking Associations, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 437 (2005) (denying dormant Commerce Clause challenge due to "lack [of] convincing evidence showing that the tax deters . . . interstate activities"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (party with the burden must produce evidence sufficient to support a jury verdict).

Here, the record contains no evidence quantifying the alleged burden. Delta provided no declarations or deposition testimony explaining why it would be difficult to comply with California law. There is no lay or expert testimony detailing how providing a California-compliant paystub or paying employees promptly would interfere with the free-flow of commercial air travel. Delta's "showing" relies solely on counsel's arguments in briefs.

For example, Delta claims the burdens of compliance are "substantial" because of its four-formula compensation framework. Pet. at 26. But Delta does not explain why it cannot simply add the total hours (which it already knows) and the hourly rates (which are just a matter of math) to the paystub. Delta argues it would be burdensome to "screen out California-based employees who work a majority of their time in another state," *id.* at 30, but concedes that flight attendants "spend only a small fraction of their workweek in any one state[,]" *id.* at 5. And Delta argues that the burdens would be increased if the *Ward* test is applied outside sections 226 and 204, but the California Supreme Court was clear that "the application of California wage and hour protections to multistate workers like Oman may vary on a statute-by-statute basis." Pet. App-9–App-10. With no indication of how or whether the California Supreme Court would apply the *Ward* test to other laws, this case offers no occasion for the Court to address the alleged burden associated with a hypothetical expansion of the law.

The problem with the record below is therefore twofold. First, Delta's petition fails to identify a burden on interstate commerce imposed by California's paystub or pay timing laws that comes anywhere close to the "excessive burden" necessary under *Pike*. And second, the alleged burdens Delta identifies are based on arguments in briefs, not evidence in the record. The Court should not accept review of a dormant Commerce Clause case where the moving failed to put evidence in the record necessary for it to meet its burden under the *Pike* balancing test.

D. This Case Does Not Present Any Issues Under the Airline Deregulation Act.

This case also does not warrant the Court's review because it does not present the ADA issues Delta wants resolved. As such it is a very poor vehicle for the Court to determine whether the decision below is consistent with "the deregulatory preferences of the Airline Deregulation Act." Pet. i.

Unlike *Ward*, this case has never involved the ADA. Neither Ninth Circuit decision below addressed the ADA. Pet. App-1–App-3; App-47–App-59. Nor did the district court's summary judgment decisions from which respondents appealed. *Id.* at App-60–App-103. The conspicuous failure of *any* of these decisions to address the ADA is not merely a matter of the courts ruling on other grounds; the ADA appears nowhere in the rulings because Delta never raised it in its briefing.

Although this case does not present any ADA issues, Delta devotes significant space in its petition to discussing the ADA and Ninth Circuit opinions interpreting it. But Delta's disagreement with the Ninth Circuit on an issue that is *not* raised by this case provides no reason to grant review. Delta's focus on that unpresented issue highlights that the dormant Commerce Clause issue decided by the court of appeals does not warrant this Court's review.

II. The Ninth Circuit's Decision is Correct.

1. Review is also unwarranted because the Ninth Circuit correctly applied this Court's dormant Commerce Clause jurisprudence. The California Supreme Court did not create a new rule targeting interstate transportation industries, nor did the

Ninth Circuit advance a circuit-specific interpretation of the dormant Commerce Clause. Instead, the Ninth Circuit properly recognized that a state statute cannot violate the dormant Commerce Clause unless it has an effect on *commerce*. And here, there will be no effect on the flow of goods or people in commerce if Delta provides the required information on employee paystubs and pays its flight attendants on time.

Delta's dormant Commerce Clause argument reaches back to *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In *Baldwin*, this Court considered a New York statute prohibiting the in-state sale of milk bought from out-of-state farmers at a price cheaper than would have been paid to in-state farmers. *Id.* at 521–22. The Court invalidated the statute, holding that "commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another." *Id.* at 524.

This Court's price-control jurisprudence continued in *Healy v. Beer Institute, Inc.*, where the Court addressed a state statute requiring beer shippers to affirm that the prices for products sold in Connecticut were no higher than the prices at which those products were sold in neighboring states. 491 U.S. 324, 328 (1989). This Court recognized a violation of the dormant Commerce Clause because the statute "require[d] out-of-state shippers to forgo the implementation of competitive-pricing schemes in out-of-state markets because those pricing decisions are imported by statute into the Connecticut market regardless of local competitive conditions." *Id.* at 339. This extraterritorial price control doomed Connecticut's legislation.

Delta argues that these price-control cases extend to California's paystub and pay timing requirements. Not so. In rejecting that argument, the Ninth Circuit correctly drew from this Court's decision in *Pharmaceutical Research and Manufacturers of America v. Walsh*, which recognized that a state statute which "does not regulate the *price* of any out-of-state transaction, *either by its express terms or by its inevitable effect*" does not implicate "[t]he rule that was applied in *Baldwin* and *Healy* . . . ." 538 U.S. 644, 669 (2003) (emphasis added); *see also id.* at 674–75 (Scalia, J., concurring) ("the negative Commerce Clause, . . . not lending itself to judicial application except in the invalidation of facially discriminatory action, should not be extended beyond such action and nondiscriminatory action of the precise sort hitherto invalidated.").

Cases since *Healy* and *Walsh* confirm that the dormant Commerce Clause focuses on direct or indirect regulation of *commerce*, not merely on regulations affecting multi-state companies. In *Granholm v. Heald*, for example, the Court reaffirmed that states "may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." 544 U.S. 460, 472 (2005). On this reasoning, the Court rejected Michigan's attempt to regulate out-of-state wine shippers in a way that increased out-of-state wineries' costs as compared to the costs incurred by in-state wineries. *Id.* at 474. The Court also invalidated a New York direct-shipping statute that granted preferential treatment to in-state wineries. *Id.* at 475.

Recently, in *Tennessee Wine & Spirits Retailers Association v. Thomas*, the Court recognized the role of the dormant Commerce Clause in "restrict[ing] state protectionism." 139 S. Ct. 2449, 2461 (2019). Indeed, "cases have long emphasized the connection between the trade barriers that prompted the call for a new Constitution and our dormant Commerce Clause jurisprudence." *Id.* The Court characterized several of its dormant Commerce Clause decisions, including *Granholm* and *Healy*, as "invalidat[ing] state alcohol laws aimed at giving a competitive advantage to in-state businesses." *Id.* at 2470.

The Ninth Circuit was correct in holding that California's paystub and pay timing requirements implicate none of the price control or state protectionism concerns underlying this Court's dormant Commerce Clause jurisprudence, and in rejecting the argument "that application of the *Ward* test results in direct regulation of interstate commerce." *Ward*, 986 F.3d at 1240. The *Healy* line of cases, relied on by Delta, "applies only when state statutes have the practical effect of dictating the price of goods sold out-of-state or tying the price of in-state products to out-of-state prices." *Ward*, 986 F.3d at 1240. Because sections 226 and 204 govern paystubs and pay timing, not the price of goods, Delta's "extraterritoriality challenge obviously fails." *Id.*[4]

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[4] The Ninth Circuit was also correct in holding that sections 226 and 204 are "non-discriminatory because [they] impose[] burdens on private employers evenhandedly, whether they are based in-state or out-of-state." *Ward*, 986 F.3d at 1240. Delta does not argue otherwise.

The decision below is in harmony with other circuits' interpretation of *Healy*. For example, the Second Circuit has recognized there is no *Healy* concern where a statute does not "directly regulate sales" in other states or "prevent other states from regulating . . . sales differently within their own territory." *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2d Cir. 2007). Similarly, the Sixth Circuit found there was no *Healy* issue where Kentucky's price-gouging statute only sought to regulate the price charged to Kentucky consumers, and any "effect on out-of-state commerce . . . [was] entirely dependent upon Amazon's independent decisionmaking" to require market participants to charge the same price in all states. *Online Merchants Guild v. Cameron*, 995 F.3d 540, 559 (6th Cir. 2021). The Sixth Circuit noted "it makes little sense to read the Court's 'practical effect' language so broadly" as to preclude a bevy of consumer protection laws that apply in eCommerce "when [the Court] has held state laws invalid under the doctrine in only three cases over the last century or so, and exclusively in the price-affirmation context." *Id.*

Similarly, the Tenth Circuit rejected application of *Healy* where the statute in question "[wasn't] a price control statute, it [didn't] link prices paid in Colorado with those paid out of state, and it [did] not discriminate against out-of-staters." *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1173 (10th Cir. 2015) (Gorsuch, J.). The Tenth Circuit acknowledged that while "non-price regulations" may "impact price in or out of state[,] . . . without a regulation more blatantly regulating price and discriminating against

out-of-state consumers or producers," the *Baldwin* / *Healy* line of cases does not apply. *Id.* at 1173–74.

Delta cites no circuit authority conflicting with the decision below, and fails to identify any authority extending the *Baldwin* / *Healy* line of cases beyond the traditional concerns of extraterritorial price control and state protectionism. Indeed, in arguing there is no "logical reason that extraterritorial price regulation would be more problematic than extraterritorial wage regulation," Pet. at 28, Delta implicitly concedes that its petition asks this Court to rule, for the first time, that *Healy* extends beyond the boundaries of price regulation and state protectionism and into the regulation of employee paystubs and pay timing—which have no connection to the price Delta charges for an airline ticket.

2. The Ninth Circuit also properly applied the *Pike* balancing test to Delta's dormant Commerce Clause challenge. To prevail under this test, Delta must not only produce evidence of a burden on interstate commerce, it must show the burden is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. That analysis is straightforward because, as discussed above, there is no record evidence supporting Delta's arguments regarding the burden of compliance. Accordingly, only a modicum of local benefit would be necessary for Delta's *Pike* arguments to fail.

Here, the local benefits are substantial. California has a great interest in regulating employment in the state. That interest extends to employees working in interstate commerce who are based in the state. As the Ninth Circuit recognized, California's "contacts with the employment

relationship" between airlines and flight attendants based in the state "are significant enough to give the State an interest in ensuring that [these] employees . . . receive the information they need to determine whether they have been paid correctly." *Ward*, 986 F.3d at 1241.

Delta argues that California's interest in paystubs and pay timing is undermined because sections 226 and 204 exempt public employees. But Delta has the analysis backwards. In California, there is a presumption that statutes do not apply to governmental agencies "absent express words to the contrary." *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729, 736, 95 Cal. Rptr. 3d 53, 57 (2009) (quoting *Wells v. One2One Learning Foundation,* 39 Cal.4th 1164, 1192, 141 P.3d 225 (2006)). It cannot be said that California has little interest in any of the conduct governed by myriads of statutes which, like the paystub and pay timing requirements, follow this presumption.

Also missing the mark is Delta's argument that California would have a limited interest in respondents' employment if respondents worked 50% of the time in another state. Although there is no indication in the record that such an employee would ever exist—i.e., an employee based in California who works 50% of their time in a different singular state—California might yield to another state in this instance not because its interest in the employment relationship is diminished, but because California must "balance[] the Legislature's weighty interest in the protection of California workers, including interstate transportation workers, with similarly weighty considerations of interstate comity and

avoidance of conflicts of laws." *Ward*, 9 Cal. 5th at 756, 466 P.3d at 321.

But this case does not involve the hypothetical employee who is based in California and primarily works in one different state. It involves employees whose strongest state connection is to California because they are based in the state and their work periods start and end in the state. California has a great interest in that employment relationship, and in ensuring that California-based employees are paid on time and receive accurate disclosures about their wages. The court below was correct to recognize that interest in resolving the *Pike* balancing in respondents' favor—especially considering Delta's failure to provide any evidence supporting the alleged burden on interstate commerce.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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