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THE SCOPE OF THE PROPRIETARY POWERS EXCEPTION TO FEDERAL PREEMPTION UNDER THE AIRLINE DEREGULATION ACT

CHRISTOPHER SCOTT MARAVILLA*

I. INTRODUCTION

CONGRESS PREEMPTED AVIATION through the Federal Aviation Act of 1958 (FAA Act)1 and the Airline Deregulation Act of 1978 (ADA).2 The preemption provision of the FAA Act states: "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . ."3 In Northwest Airlines, Inc. v. Minnesota, Supreme Court Justice Robert Jackson described the federal preemption of aviation as follows:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis (sic) onto a runway it is caught up in an elaborate and detailed system of controls.4

In enacting the subsequent ADA in 1978, Congress adopted a bifurcated approach to the federal preemption of aviation. The ADA's explicit preemption provision, section 105(a) (1), states: "[No] State or political subdivision . . . shall enact or enforce

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* Dispute Resolution Officer, Federal Aviation Administration, Office of Dispute Resolution for Acquisition. The views expressed in this article are solely those of the author, and do not necessarily reflect the views of the Department of Transportation, the Federal Aviation Administration, the FAA Office of the Chief Counsel, the Office of Dispute Resolution for Acquisition, or any other organization.

3 FAA Act of 1958 § 1108(a), 72 Stat. 731, 798.
any law, rule, regulation, standard . . . relating to rates, routes, or services . . . ." In section 105(b)(1), Congress left residual authority with airport proprietors: "Nothing in subsection (a) . . . shall be construed to limit the authority of any State or political subdivision . . . or other political agency of two or more States as the owner or operator of an airport . . . to exercise its proprietary powers and rights." The ADA only applies to "air carriers," not aircraft.

Congress was mindful to emphasize proprietary powers as opposed to state police powers. The use of state police powers over aviation was explicitly rejected by the Supreme Court. It is logical for Congress to have separated control over airports from aviation. Congress also grandfathered a series of court decisions granting local airport authorities control over their facilities (such as landing fees, hours of operation, etc.) that did touch upon rates, routes, and services.

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5 ADA of 1978 § 105(a)(1).

 Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1) (2006). The ADA states with regard to proprietary powers:

 This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operate an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

§ 41713(b)(3).

7 § 41713(b)(4). An "air carrier" is "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." § 40102(a)(2). This includes both direct air carriers (those that actually operate the aircraft) and indirect air carriers (entities that offer transportation services to passengers and contract with underlying aircraft operators to provide the actual transportation), which includes public charter operators. 14 C.F.R. § 380.2 (2009).

9 Why should the FAA, for example, be concerned with whether Starbucks or Seattle's Best is located in an airport?

10 The Senate Report on the ADA states that the Act "should not be construed to affect or limit existing proprietary rights of airport operators to manage, operate, or regulate airports." S. REP. No. 95-631, at 99 (1978). The "normal proprie-
However, the courts have never defined what is meant by "proprietary powers" under the statute, preferring to evaluate the situations on a case-by-case basis. In the late 1980s, the Second Circuit, in *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, upheld the authority of the Port Authority to promulgate a perimeter rule around LaGuardia Airport that restricted the routes of long-haul carriers flying into the airport.\(^{11}\) The decision effectively swallowed the federal preemption over rates, routes, and services by creating what is tantamount to an extra-statutory exception to preemption. The rules of statutory construction require "that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity."\(^{12}\) The plain meaning of the language in the ADA preemption provision mandates a restrictive interpretation of the phrase, "related to rates, routes, and services."\(^{13}\) Despite the more permissive rulings in the Second and Tenth Circuits, as well as that of the Colorado Supreme Court, the trend among federal courts, including the Supreme Court, favors a third rail approach to preemption. In other words, if a regulation touches upon the "rates, routes, and services" of an air carrier, it will be preempted.

Since *Western Air Lines*, federal courts have strictly interpreted the federal preemption provision of the ADA, even striking down those regulations with only an indirect or tangential effect on "rates, routes, and services."\(^{14}\) Recently, the Supreme Court's holding in *Rowe v. New Hampshire Motor Transport Ass'n* and the subsequent Second Circuit's holding in *Air Transport Ass'n of America v. Cuomo* both call into question any extant legal exceptions to federal preemption by adopting a strict interpretation of the ADA's preemption provision.\(^{15}\) This article argues that the recent decisions of federal courts, including the Supreme Court, have closed the gap in federal preemption law created by *Western Air Lines*, and adopted a strict definition of "rates, routes, and services" such as Congress intended. While the term proprietary functions . . . such as the establishing of curfews and landing fees which are consistent with other requirements in Federal law." 123 CONG. REC. 90, 30595–96 (1977).

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\(^{11}\) 817 F.2d 222, 226 (1989).
\(^{13}\) Pub. L. No. 95-504 § 105(a), 92 Stat. 1705.
\(^{15}\) Rowe, 552 U.S. at 368, 371; Cuomo, 520 F.3d at 219.
etary power remains undefined, the strict approach to preemption leaves only residual authorities with airport proprietors. This article will: (1) discuss the ADA and the court decisions interpreting the proprietary powers exception to federal preemption and the judicial expansion of those powers; and (2) argue that the ADA’s federal preemption over “rates, routes, and services” related to aviation and the airline industry should be strictly interpreted pursuant to recent case law.

II. THE FEDERAL PREEMPTION DOCTRINE

The Supremacy Clause of the U.S. Constitution invalidates state and local laws that interfere with or contradict federal laws. The doctrine “is the judicial tool by which courts define the contours of federal control of a subject when Congress has legislated pursuant to one of its enumerated powers.” It serves to “define the sphere of control between federal and state law when they conflict, or appear to conflict.” When Congress regulates an area traditionally left to the states, the courts will first assume that Congress has not meant to supersede state law unless it is explicit. The forms preemption may take are where: (1) Congress has explicitly preempted state law (such as in the area of aviation); (2) the regulatory scheme is so pervasive “that Congress left no room for the States to act”; (3) the act touches upon a field where the federal interest is dominant in such a way as “to preclude enforcement of state laws”; or (4) the state law is inconsistent with the results sought by the federal scheme.

Congress has explicitly occupied the field of aviation in the FAA Act and the ADA. Any further inquiry into congressional intent is not necessary in this instance. The FAA Act states: “The United States Government has exclusive sovereignty of the airspace of the United States.” The ADA establishes federal preemption over any “law, regulation, or other provision... related to a price, route, or service...” The Fifth Circuit has held

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18 Id. According to U.S. Supreme Court case law over the past two decades, there is a presumption in favor of federal preemption. Id. at 990.
20 Id.
21 49 U.S.C. § 40103(a) (2006); § 41713(b).
22 § 40103(a).
23 § 41713(b)(1).
that Congress, through the ADA's "express preemption provision," preempted regulations with the exception of proprietary powers.\textsuperscript{24} The Second Circuit, in \textit{British Airways Board v. Port Authority of New York and New Jersey (Concorde I)}, also stated that the "legitimate concern for safe and efficient air transportation requires that exclusive control of airspace management be concentrated at the national level."\textsuperscript{25}

\section*{III. THE PROPRIETARY POWERS EXCEPTION}

Under the ADA, Congress carved out a limited exception for airport authorities to retain some control over their facilities.\textsuperscript{26} Section 41713(b)(3) of the ADA states that "this subsection . . . does not limit a State, political subdivision of a State, or other political authority of at least two States that owns or operates an airport . . . from carrying out its proprietary powers and rights."\textsuperscript{27} Courts have never defined what is meant by "proprietary powers and rights," preferring to adjudicate on a case-by-case basis.\textsuperscript{28} However, the Second Circuit in \textit{Western Air Lines} expanded the proprietary powers and rights clause to permit the Port Authority of New York and New Jersey (Port Authority) to regulate airline routes through the restriction on long-haul carriers flying into LaGuardia Airport (the perimeter rule).\textsuperscript{29} The district court upheld the perimeter rule because there was an absence of specific Federal Aviation Administration (FAA) regulation with regard to the perimeter rule and the rule was reasonable, non-arbitrary, and non-discriminatory.\textsuperscript{30} In other words, for the FAA to act, it must explicitly overrule the perimeter rule through regulations.\textsuperscript{31} While this has been interpreted to apply only to multi-airport authorities,\textsuperscript{32} this interpretation of

\begin{thebibliography}{99}
\bibitem{24} Am. Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 804 (5th Cir. 2000).
\bibitem{25} British Airways Bd. v. Port Auth. of N.Y. & N.J. (Concorde I), 558 F.2d 75, 83 (2d Cir. 1977) (citing City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)).
\bibitem{26} § 41713(b)(3).
\bibitem{27} Id.
\bibitem{28} \textit{Am. Airlines, Inc.}, 202 F.3d at 806.
\bibitem{31} Id. at 958.
\bibitem{32} See \textit{City of Houston v. FAA}, 679 F.2d 1184, 1194 (5th Cir. 1982) (discussing Pac. Sw. Airlines v. County of Orange, No. CV 81-3248 (C.D. Cal. Nov. 30, 1981)). In 1980, the John Wayne Airport authority in Orange County, California, issued a perimeter rule on flights no more than 500 miles away. \textit{Id.} "The FAA inter-
the ADA arguably created precedent for the rights of proprietors to supersede the rights of the federal government to regulate aviation in direct contradiction to Congress's explicit preemption of this area under the ADA. The evolution of the case law demonstrates an expansion of those rights through the allowance of the perimeter rule at LaGuardia and continuing through to cases before the Colorado Supreme Court and Tenth Circuit, followed by a more restrictive approach based on a strict construction of the statute.

A. PRE-ADA CASES

1. City of Burbank v. Lockheed Air Terminal Inc.

The proprietary powers exception to the rule of federal preemption in aviation first arose as dicta in City of Burbank. The Supreme Court struck down a city ordinance on federal preemption grounds stating that for any changes in regulation, "Congress alone must do it." The City Council of Burbank, California, enacted an ordinance prohibiting "so-called pure jet aircraft" from departures from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. Only one scheduled flight was affected by the ordinance. The issue before the Court was whether the ordinance was preempted under the FAA Act of 1958, as amended by the Noise Control Act of 1972.

The Court noted the unique regulatory scheme for the federal preemption of aviation. The FAA Act of 1958 states: "The
United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . .” 39 Sections 307(a) and (c) of the Act provide the FAA Administrator with the authority to regulate the navigable airspace of the United States in order to ensure safety and its efficient use. 40 In addition, the Noise Control Act requires the FAA, after consultation with the cognizant state and federal bodies, to conduct a study of “the (1) adequacy of existing Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft . . . ; (3) identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to local airport operators and local governments to control aircraft noise.” 41

The Court centered its reasoning not on the City of Burbank itself as proprietor of the local airport, but on the exercise of the State of California’s police power through the enactment of the City’s ordinance. 42 The Noise Control Act contains no express provision for federal preemption of noise regulation. 43 However, the Court observed that the “pervasive nature of the scheme of federal regulation of aircraft noise” demonstrates that there is implied preemption in this case. 44 The Court cited both the Senate and House Committee Reports explicitly stating that Congress did not intend to change the preexisting federal preemption regime for aviation, and that Congress also did not wish to alter the powers of local airport proprietors over their facilities. 45 Accordingly, the Court held that the “authority that

39 FAA Act of 1958 § 1108(a), 72 Stat. 731, 798 (as codified at 49 U.S.C. § 1508(a) (1958)).
40 Id. § 307(a), (c).
41 City of Burbank, 411 U.S. at 630 n.4 (citing Pub. L. No. 90-411 § 7(a), 82 Stat. 395 (1972)).
42 Id. at 635 n.14.
43 Id. at 639.
44 Id.
45 Id. at 634 (“No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.”) (quoting H.R. Rep. No. 92-842, at 10 (1972)). The Senate Report stated:
States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the rela-
a municipality may have as a landlord is not necessarily congruent with its police power." The Court explicitly left open the issue on the limits of a municipality's authority as a proprietor.

The issue of regulating noise is "deep-seated in the police power of the States." However, the Court remarked that the authority vested in the Environmental Protection Agency (EPA) and the FAA under the Noise Control Act "seems to us to leave no room for local curfews or other local controls." The Court also stated:

If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.

Justice William Rehnquist, writing for the dissent, disagreed with the majority's ruling that local governments were precluded from regulating aviation-related noise, as in the case with the Burbank ordinance. He argued that Congress did not intend for the Noise Control Act to alter the relationship between local government and the federal government. Rather, the Act only required review by the EPA and FAA. The dissent remarked:

A local governing body that owns and operates an airport is certainly not, by the Court's opinion, prohibited from permanently closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility. Even though the local government's decision in each case were motivated entirely because of the noise associated...
with airports, I do not read the Court’s opinion as indicating that such action would be prohibited by the Supremacy Clause merely because the Federal Government has undertaken the responsibility for some aspects of aircraft noise control.\textsuperscript{54}

The statutes, according to the dissent, do not “reflect ‘the clear and manifest purpose of Congress’ to prohibit the exercise of ‘the historic police powers of the States’ which our decisions require before a conclusion of implied preemption is reached.”\textsuperscript{55}

B. **Reasonable, Non-Arbitrary, and Non-Discriminatory Regulation**

The U.S. Court of Appeals for the Second Circuit first raised the issue of the reasonableness of Port Authority regulations pursuant to its proprietary powers in *British Airways Board v. Port Authority of New York and New Jersey (Concorde I).*\textsuperscript{56} Developed in a joint venture, the British and French governments set out to test their new supersonic aircraft, the Concorde, in trans-Atlantic flights into New York’s John F. Kennedy Airport (JFK) and Dulles International Airport, located just outside Washington, D.C.\textsuperscript{57} The Secretary of Transportation, William T. Coleman, issued a detailed noise regulation in response to the testing.\textsuperscript{58} In the regulation, however, Coleman explicitly exempted the Port Authority by recognizing its authority to refuse landing rights for “any legitimate and legally binding reason.”\textsuperscript{59} Subsequently, after raising concerns over the Concorde’s noise impact, the Port Authority banned its flights altogether from JFK.\textsuperscript{60} Air France and British Airways brought suit challenging the Port Authority’s ban.\textsuperscript{61} In limiting the Port Authority’s regulatory power as an airport proprietor, the court held, relying on the Commerce Clause, that “[i]t is clear to us that the Port Authority is vested only with the power to promulgate reasonable, non-arbitrary and non-discriminatory regulations.”\textsuperscript{62}

On a second appeal after remand, the court had to determine the legality of what constituted a *de facto* total ban on Concorde

\begin{footnotes}
\item\textsuperscript{54} Id. at 653.
\item\textsuperscript{55} Id.
\item\textsuperscript{56} 558 F.2d 75 (2d Cir. 1977).
\item\textsuperscript{57} Id. at 79–80.
\item\textsuperscript{58} Id. at 80.
\item\textsuperscript{59} Id. at 81.
\item\textsuperscript{60} Id.
\item\textsuperscript{61} Id.
\item\textsuperscript{62} Id. at 84.
\end{footnotes}
flights. The Port Authority had refused to promulgate generally applicable noise regulations over a one-and-a-half year span. The Port Authority’s indefinite ban—without issuing a uniform noise regulation—was struck down as unreasonable. The court was concerned “that impermissible parochial considerations [would] unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.” The Port Authority’s regulations must avoid even the appearance of being an irrational or arbitrary action. Accordingly, any Port Authority regulation issued pursuant to its proprietary powers is limited by its reasonableness.

C. THE COEXTENSIVE REGULATION OF AVIATION: THE FAA AND THE PORT AUTHORITY

Even prior to Western Air Lines, case law in the Second Circuit recognized the Port Authority’s unique regulatory authority in the field of aviation as almost coextensive with that of the federal government. Aircraft Owners and Pilots Ass’n v. Port Authority of New York was the first congestion case and challenged the take-off and landing fees issued by the Port Authority of New York. The Port Authority increased the take-off fee from five to twenty-five dollars for all general aviation aircraft landing or taking off from the three major airports during peak hours. The Port Authority’s express rationale for the increase was to attempt to relieve congestion and achieve “maximum efficient operation” at the three major airports. The desire was to influence general aviation aircraft operators to use alternate airports during peak air traffic periods. The court held:

Unquestioningly broad as are the powers of the Administrator with respect to the regulation of air traffic, it is evident in this and in other contexts that the Administrator has not so pervasively regulated the movement of aircraft that he has excluded the existence of areas of proper airport regulation. . . . [T]here is room for the operation of Port Authority Regulations which have

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63 British Airways Bd. v. Port Auth. of N.Y. & N.J. (Concorde II), 564 F.2d 1002, 1004 (2d Cir. 1977).
64 Id.
65 Id. at 1011.
66 Id. (citing Douglas v. Seacoast Prods., 431 U.S. 265 (1977)).
67 Id. at 1005.
69 Id. at 96, 98.
70 Id. at 98.
71 Id. at 98, 102.
the effect of curtailing activities not forbidden by federal regulation, and, indeed, contemplated as specifically permissible by federal regulation, in the absence of other competent prohibition.\textsuperscript{72}

The court reasoned that even if the Port Authority of New York's take-off and landing fee could be considered as a restrictive regulation of air traffic, it was still one that restricted air traffic at the three major New York airports "within an area left unrestricted by the [FAA's] partially restricting high density regulation."\textsuperscript{73} Thus, the court reasoned that the Port Authority's rule was "[u]nited in general purpose with the high density regulation."\textsuperscript{74} The Port Authority merely sought "to restrict the traffic restricted by the federal regulation, but to do so in a direction of restriction and for an aim common to both sets of regulations."\textsuperscript{75} As the owner and airport operator, the Port Authority of New York possessed the authority to establish such changes to their fee schedules as it had always done, and "that general authority is unchallenged . . . in the absence of direct conflict with existing FAA regulations."\textsuperscript{76}

In \textit{Port of New York Authority v. Eastern Air Lines, Inc.},\textsuperscript{77} the Port Authority of New York's rules and regulations restricting the use of two runways at LaGuardia Airport by jet aircraft were challenged.\textsuperscript{78} The issue was whether the regulations in question conflicted or interfered with the FAA's authority to direct air traffic at LaGuardia.\textsuperscript{79} The court held that the "Port Authority's regulations do not conflict or interfere with the authority of the FAA to control air traffic."\textsuperscript{80} The court reasoned that the FAA Act of 1958 granted the FAA the "authority to regulate the flight of aircraft through the navigable airspace of the United States and to assign the use of airspace . . . as may be necessary to insure[ ] safety."\textsuperscript{81} Conversely, the Port Authority "also has power and authority to regulate land structures and the use of its runways at its airports."\textsuperscript{82} In upholding the Port Authority's

\textsuperscript{72} \textit{Id.} at 104–05.
\textsuperscript{73} \textit{Id.} at 105.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 106.
\textsuperscript{78} \textit{Id.} at 747.
\textsuperscript{79} \textit{Id.} at 751.
\textsuperscript{80} \textit{Id.} at 752.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
regulations, the court found it unnecessary to decide preemption because the "issue here is whether the FAA has actually attempted to exercise such power and authority in opposition to the Port Authority's regulations and has thus frozen the area."\textsuperscript{83} It should be noted that the FAA itself did not intervene in the case.\textsuperscript{84} The court's reasoning also mirrors that in the later Western Air Lines case—absent FAA regulations, the Port Authority of New York has the power to regulate air traffic into and out of LaGuardia Airport. Similarly, in Midway Airlines, Inc. v. County of Westchester, New York,\textsuperscript{85} the court held that:

No federal law prohibits Westchester County... from temporarily refusing to grant additional access to [the Airport] pending a reasonable period during which the County may study the status quo arrangement and develop rational and nondiscriminatory rules for allocating scarce space and landing and takeoff slots, consistent with local environmental and safety needs.\textsuperscript{86}

D. Post-ADA Cases

1. Perimeter Rules

a. City of Houston v. Federal Aviation Administration

The Fifth Circuit upheld the perimeter rule established by Department of Transportation (DOT) regulations, which limited flights into National Airport\textsuperscript{87} in order to direct more flights to the fledgling Dulles Airport.\textsuperscript{88} The regulations prohibited planes from servicing the airport from a distance of greater than

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 753.


\textsuperscript{86} Id. at 440.

\textsuperscript{87} Now Ronald Reagan National Airport.

\textsuperscript{88} City of Houston v. FAA, 679 F.2d 1184, 1186 (5th Cir. 1982). Judge John R. Brown wrote a colorful opinion, and the following excerpt illustrates his approach: "The Administrative Procedure Act... will serve as our flight plan, and the Supreme Court as air traffic control." Id. Another such passage:

Our Nation's Capital, Washington, D.C., attracts millions of visitors each year, be it for pleasure or for business. Nestled in the green hills of the Mid-Atlantic region, snug and snug along the banks of the beautiful Potomac River, this celebrated town of "Northern charm and Southern efficiency" offers visitors a potpourri of museums, art galleries, monuments, historic sites, parks, Panda bears, politicians, and a climate that is charitably described as ghastly. And for one group of travelers, Washington offers something else: our federal government, with its milch cow departments and regulatory agencies. For the business traveler, Washington is Mecca.

\textit{Id.}
1,000 miles. The City of Houston and American Airlines challenged the perimeter rule.

The court first noted that the Washington, D.C. metropolitan area is serviced by three airports: National Airport, Dulles International Airport, and Baltimore–Washington Airport. Dulles serviced most of the nonstop flights to the West Coast and international flights. However, Dulles was also underutilized. While Dulles’s capacity could handle “1800 passengers per hour, the total daily average passenger load is less than 7000,” which is still “deceptive” based on the fact that “the majority arrive or depart late in the afternoon, when the crowded West Coast flights are scheduled.” The FAA, “like any prudent entrepreneur, seeks to increase business and has resorted to the regulatory process to attempt to transfer ‘long-haul’ flights to Dulles.”

The DOT perimeter rule was not promulgated based on “operational or safety considerations” nor was it meant to “placate area residents.” The court cited three concerns as the FAA’s rationale for the rules: “(1) to assure the full utilization of Dulles; (2) to preserve the short- and medium-haul nature of National; and (3) to eliminate the inequity that the prior rule . . . created.”

The court found that the DOT and FAA complied with the Administrative Procedure Act in enacting the perimeter rule. The court rejected Houston’s proposal of an alternative perimeter rule as well, stating: “[Houston is] acting, apparently, on the theory that a perimeter rule is arbitrary, capricious, irrational, and unconstitutional if it excludes Houston but hunky-dory if not.” The court also upheld the FAA’s authority to promulgate a perimeter rule at National, finding that “[t]he

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89 Id. at 1187.
90 Id.
91 "If Washington is the city of cherry blossoms, National is a faded bloom." Id. at 1186.
92 "National’s younger and substantially more glamorous sister." Id. at 1187.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
98 Id. at 1188.
99 Id.
100 Id. at 1190.
101 Id. at 1192.
Federal Aviation Act and the FAA's status as proprietor of National and Dulles provide independent support for its decision."\textsuperscript{102} The statutory restriction on airport proprietors to affect rates, routes, and services does not apply to the FAA.\textsuperscript{103} The court reasoned:

Why did Congress specify such a limited role? To avoid the interference with the preeminent authority of the federal government in the field of aviation, Congress, in § 1305, sought to prevent the proprietor of a rural airstrip from infringing upon the federal government's turf. FAA obviously plays a different role. Houston and American claim, in effect, that the FAA may not take certain actions for fear of interfering with itself.\textsuperscript{104}

The court stated: "Nothing could be more certain than that the restrictions of § 1305 do not bind the FAA, an arm of the federal government which just happens to own two airports."\textsuperscript{105} As the court explicitly observed, "the FAA is not the typical airport proprietor."\textsuperscript{106}

b. *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*

The perimeter rule promulgated by the Port Authority of New York and New Jersey prohibits direct flights of more than 1,500 miles into LaGuardia Airport.\textsuperscript{107} LaGuardia is a relatively small airport consisting of 680 acres and 72 aircraft gates.\textsuperscript{108} The perimeter rule was first established in the late 1950s under an informal arrangement between the Port Authority and the airlines.\textsuperscript{109} Western Air Lines brought suit challenging the pe-

\textsuperscript{102} Id. at 1193.
\textsuperscript{103} Id. at 1194.
\textsuperscript{104} Id.
\textsuperscript{105} Id. The reasoning suggests that the ability to impose a perimeter rule affecting rates, routes, and services is exclusive to the FAA and not applicable to other state or multi-state authorities. But see, W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J., 658 F. Supp. 952 (S.D.N.Y. 1986), aff'd, 817 F.2d 222 (2d Cir. 1987).
\textsuperscript{106} City of Houston, 679 F.2d at 1194.
\textsuperscript{107} W. Air Lines, 658 F. Supp. at 953. Flights to and from Denver were grandfathered into the rule. Id.
rimeter rule at LaGuardia. The U.S. District Court for the Southern District of New York upheld the Port Authority's perimeter rule, holding that where the FAA is silent, a multi-airport proprietor may enact a perimeter rule to ease ground congestion, which is a proprietary function of the airport authority under § 41713(b)(3) of the ADA. The case acknowledged the FAA's authority to preempt the perimeter rule. The court held: “[I]n the absence of conflict with FAA regulations, a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor.”

In other words, where the FAA is silent, the Port Authority, as a multi-airport proprietor, may promulgate a perimeter rule pursuant to its proprietary powers.

Section 41713(b)(1) of the ADA establishes federal preemption of rates, routes and services. The court recognized that the FAA has authority in this area under the ADA and case law. The court found that the “perimeter rule may be fairly characterized as a regulation touching this area . . . .” The court also stated that the City of Houston court “implied that the result might have been different had the proprietor not been the FAA . . . .” Despite its recognition that the perimeter rule affected routes under § 41713(b)(1) and that City of Houston was distinguishable because the FAA promulgated the perimeter

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111 Id. at 957-78.
112 See id. at 958 & n.12.
113 This reasoning was explicitly rejected by the U.S. Supreme Court. Morales v. Trans World Airlines, 504 U.S. 374, 386-87. In analyzing the ADA under its ERISA cases, the Court rejected the approach that “pre-emption is limited to inconsistent state regulation.” Id. The Court stated: “The pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA’s substantive requirements.” Id. (quoting Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 829 (1988)).
115 Id.
118 Id. at 955.
119 Id. at 957.
rule in that case, the court went on to use the proprietary powers exception to uphold the Port Authority's perimeter rule.120

After finding that the rule was not preempted, the court applied the Concorde I reasonableness test to the Port Authority's perimeter rule.121 The court first observed that all regulations naturally discriminate.122 In City of Houston, the Fifth Circuit said it was an accident of geography, not deliberate discrimination, that prevented the airlines from flying directly from the western states into National.123 They could still fly into the airport, just not directly.124 The Western Air Lines court reasoned that the inquiry must rest on the reasonableness and non-arbitrary nature of the regulation at hand.125 The test is "whether the discrimination is reasonable in light of the legitimate objectives sought to be achieved."126 The court found the perimeter rule was reasonable127 because:

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120 Id. at 958 ("This Court sees no real distinction between the FAA's interest, as proprietor of an airport system, to manage its congestion problems by use of a perimeter rule, and the interest of the Port Authority, as proprietor of LaGuardia, Kennedy, and Newark, to do the same.").

121 Id.

122 Id. at 959 (citing Global Int'l Airways v. Port Auth., 727 F.2d 246 (2d Cir. 1984)).

123 Id. at 958.

124 Id.

125 Id.

126 Id. at 959.

127 First, the perimeter rule was intended to reduce groundside congestion at the airport. Id. at 959–60. At the time, LaGuardia consisted of 40% leisure travelers and 60% business travelers, but now LaGuardia consists of a majority of leisure travel at 55% and with 45% business travel. Port Auth. Of N.Y. & N.J., LaGuardia Airport: September 2006 Traffic Report (Nov. 16, 2006). The court found that increased long-haul flights with leisure travelers would result in increasing congestion at the gates. W. Air Lines, 658 F. Supp. at 959. In 1980, LaGuardia had 317,633 plane movements and 17,467,962 passengers. Facts and Information About LaGuardia Airport, supra note 108. In 2004, this increased to 398,957 plane movements and 24,435,619 passengers. Id. However, LaGuardia's "groundside facilities can handle more passengers than now use the airport." Congestion Management Rule for LaGuardia Airport, 71 Fed. Reg. 51,360, 51,867 (proposed Aug. 29, 2006) (to be codified at 14 C.F.R. pt. 93). The Port Authority also currently seeks to increase passengers to 28.5 million. See id. at 51,367 n.19. Accordingly, the court found that increased long-haul flights would place a heavier demand on ticketing, baggage claim facilities, and public areas. W. Air Lines, 658 F. Supp. at 959. Since there were an additional 6,967,657 passengers in 2004—far exceeding the 1,550,000 passenger increase the Port Authority was concerned about in 1984—the court found that lifting the perimeter rule would affect passenger services. Id.; Congestion Management Rule for LaGuardia Airport, 71 Fed. Reg. at 51,367. In terms of ground congestion at LaGuardia, the Central Terminal Building is the most critical of the terminals. In
it reduced groundside congestion;
(2) it maintained LaGuardia as a short and medium haul airport, catering to business customers; and
(3) an abundance of long-haul and leisure travelers would;
   (a) result in increasing congestion at the gates;
   (b) place a heavier demand on ticketing, baggage claim facilities and public areas;
   (c) increase use of parking lot facilities; and
   (d) cause roadway and terminal frontage access to become more congested.\textsuperscript{128}

The perimeter rule was also found not to be arbitrary because of the careful study and review done by the Port Authority.\textsuperscript{129} Access to New York City would remain unimpeded due to the remaining airports.\textsuperscript{130} It was observed that there may be other means available to the Port Authority to alleviate congestion at LaGuardia, but the court declined to “second guess the actions of the Port Authority as long as they are reasonable.”\textsuperscript{131} Accordingly, the Second Circuit affirmed the decision on the merits as a “well-reasoned opinion.”\textsuperscript{132}

c. Supreme Court of Colorado: \textit{Arapahoe County Public Airport Authority v. Centennial Express Airlines}

The Supreme Court of Colorado attempted to strengthen proprietary powers. In \textit{Arapahoe County Public Airport Authority v.}...
Centennial Express Airlines, Inc., the Arapahoe County Public Airport Authority prohibited Centennial Express Airlines from scheduling services at Centennial Airport. Centennial Airport is near Denver, Colorado, and from its inception in 1967 it has grown into "one of the largest and busiest general aviation facilities in the country." The Arapahoe County Airport Authority received approximately $30.1 million in grants from the FAA to fund additional construction. Pursuant to its grant agreement with the FAA, the Authority agreed to multiple assurances. The one relevant in this case is that the Authority "will make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." However, under another assurance, the Authority "may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Designed as a general aviation reliever airport, the Authority prohibited scheduled passenger service from Centennial Airport. The Authority resisted all efforts to bring passenger service to the airport, which included "asserting [to the DOT that] . . . the Authority did not have to approve applications for scheduled passenger service . . . ." On December 20, 1994, Centennial Express commenced scheduling passenger service from Centennial.

The issue before the court was whether "the ban on scheduled passenger service [was] preempted by federal law." The Colorado Supreme Court upheld the restrictions as part of the airport's proprietary powers because the regulation concerned an area of local and regional planning, it would not lead to an inconsistent or conflicting state regulation, and did not undermine the ADA. The court noted that "[b]ecause the regula-
tion concerns an area of local and regional planning, it will not lead to inconsistent or conflicting state regulations." The prohibition "also survives scrutiny under the plain meaning of the ADA preemption provision because it does not regulate the manner in which airport users conduct their business." The Authority also was "not regulating airline fares or routes because the ban on scheduled service does not delineate what airlines can charge or where they can fly." The court stated:

There are no cases that address the specific question posed by the present case. Nevertheless, we believe that an airport proprietor's ban on scheduled passenger service falls squarely within the proprietor's exception. While regulations concerning aircraft noise and ground congestion restrict the manner in which airport users conduct their operations, a ban on scheduled service seeks to accomplish a more fundamental goal in setting the boundaries of permissible operations at the airport. The power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or even contemplated.

Despite Centennial Express's argument to the contrary, Colorado state law gives the Authority power over its facilities; therefore, the prohibition on scheduled passenger service is not preempted. Similarly, in Montauk-Caribbean Airways, Inc. v. Hope, the Second Circuit held that under the proprietor's exception a municipality could prevent a seasonal aircraft operator from expanding its operations to year-round service.

E. THE TENTH CIRCUIT

The Tenth Circuit case of Arapahoe County Public Airport Authority v. FAA arose from the same facts and circumstances as the


144 Centennial Express, 956 P.2d at 594.
145 Id. at 594-95.
146 Id. at 595.
147 Id.
148 COLO. REV. STAT. ANN. § 41-3-106 (West 2004) (granting the Authority power "[T]o provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport, landing field, and navigation facilities... and to exercise such powers as may be required or consistent with the promotion of aeronautics and the furtherance of commerce and navigation by air... ").
149 Centennial Express, 956 P.2d at 596.
150 Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 97 (2d Cir. 1986).
Colorado Supreme Court case.\textsuperscript{151} While the state litigation was pending,\textsuperscript{152} the FAA had not yet promulgated its Final Agency Decision on whether the Authority had violated any of the grant assurances.\textsuperscript{153} The FAA Director of the Office of Airport Safety and Standards issued an initial determination in the case on August 21, 1988, deciding that the prohibition on scheduled passenger service at Centennial Airport was discriminatory, and, thus, the Authority was in breach of its obligations under the grant assurances.\textsuperscript{154} The Director’s determination was ultimately affirmed on appeal by the FAA Associate Administrator for Airports, who then issued the FAA’s Final Agency Decision.\textsuperscript{155}

The issue before the court was whether control over safety at the airport comes under the rubric of the proprietary powers exception to the preemption of aviation under the ADA.\textsuperscript{156} Consequently, the Authority\textsuperscript{157} argued that it, “and not the FAA, determines whether scheduled passenger service will be prohibited at the Airport as necessary for the safe operation of the airport and to serve the civil aviation needs of the public.”\textsuperscript{158} Following the Supreme Court’s decision in \textit{Morales}, the court “easily” concluded that “the Authority’s ban is connected with and relates to both services and routes.”\textsuperscript{159} The court observed that “[b]y banning scheduled passenger service, the Authority has affirmatively curtailed an air carrier’s business decision to offer a particular service in a particular market.”\textsuperscript{160} The court next noted that the “ban also significantly impacts the scope of services available to public citizens desiring to travel by air from Centennial Airport.”\textsuperscript{161} The Tenth Circuit then mentioned that “[t]he effect of such a ban further extends to route determinations because the carrier cannot conduct regular operations over any route involving the banned airport.”\textsuperscript{162} The court

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{151} 242 F.3d 1213, 1216–17 (10th Cir. 2001).
\item \textsuperscript{152} The FAA was not a party to the state litigation. \textit{Id.} at 1217.
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.} at 1221–22.
\item \textsuperscript{157} The court noted that the Authority relied on the decision of the Colorado Supreme Court, which it stated “has no bearing on our decision.” \textit{Id.}
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.} at 1222.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\end{enumerate}
\end{footnotesize}
stated: "Having determined the Authority's ban on scheduled passenger service constitutes a state regulation of air carrier service and routes, the ban is permissible only if it constitutes an exercise of the Authority's proprietary power."\(^{163}\)

However, the court side-stepped the issue of whether safety at an airport was a proprietary power.\(^{164}\) The court stated: "For purposes of this review, however, we will assume, without deciding, that regulatory conduct related to safety and civil aviation needs may fall under the 'proprietary powers' umbrella . . . ."\(^{165}\) The court rejected the notion that so long as an airport proprietor invokes the notion of safety, it enjoys "carte blanche" authority to regulate.\(^{166}\) Noting that all regulation must be reasonable,\(^{167}\) the court proceeded to find that the prohibition was not.\(^{168}\) The court also stated: "Because the record supports the FAA's findings . . . we hold the Authority has exceeded its legitimate scope of power as a state or local government under 49 U.S.C. § 41731(b) [sic] and the Supremacy Clause of the United States Constitution."\(^{169}\)

IV. THE LIMITS TO THE EXCEPTION

The federal preemption of a state law may be express—typically as provided in a preemption clause of a federal statute—or implied, either because the state law is an obstacle to accomplishing the full purpose and objective of Congress with respect to a federal law (conflict preemption) or because the existence of a comprehensive federal regulatory scheme implies that Congress intended to occupy the entire field of regulation (field preemption).\(^{170}\) The scope of preemption turns on congressional intent.\(^{171}\) The precise scope of an airport owner's proprietary powers has not been clearly defined.\(^{172}\) Local proprietors

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\(^{163}\) Id.

\(^{164}\) Id. at 1223.

\(^{165}\) Id.

\(^{166}\) Id. at 1222–23.

\(^{167}\) Id. at 1223.

\(^{168}\) Id. at 1224.

\(^{169}\) Id. (should read 49 U.S.C. § 41713(b)).


play an "extremely limited role" in the regulation of aviation. Since Western Air Lines, courts, including the Supreme Court, have strictly interpreted the ADA's preemption provision to limit the reach of local airport proprietors in the regulations of air traffic.

A. Morales v. Trans World Airlines

The federal preemption of aviation underwent a sea change in Morales v. Trans World Airlines, Inc., with Justice Scalia writing for the majority. The Supreme Court stated that Congress's intent in enacting the preemption provision of the ADA was "[t]o ensure that the States would not undo federal deregulation with regulation of their own . . . [by] prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier." The issue before the Court was "whether the [ADA] pre-empts the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes." In enacting the ADA, Congress determined that "'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services.'" Prior to the ADA, the Civil Aeronautics Board, the predecessor agency to the FAA, regulated airfares and had the authority to take administrative action against airlines engaged in deceptive trade practices under the FAA Act of 1958. However, no provision of the FAA Act of 1958 expressly pre-empted the states from regulating intrastate airfares and enforcing state deceptive trade practice laws. The Court noted that "[t]o ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier."

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173 Id.
175 Id. at 378–79.
176 Id. at 378.
177 Id.
178 Id.
179 Id. The FAA Act of 1958 has a "saving clause," which provides: "Nothing . . . in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." Pub. L. No. 85-726 § 1106, 72 Stat. 731, 798.
180 Morales, 504 U.S. at 378–79.
In 1987 the National Association of Attorneys General (NAAG) adopted the Air Travel Industry Enforcement Guidelines (ATIEG), which contained detailed standards for governing the content and format of advertising by airlines.\(^{181}\) Seven states, including Texas, sent a memorandum to all of the major airlines stating that many of them were not in compliance with the new ATIEG.\(^{182}\) The memorandum stated that it was only advisory at that time and the states would not be taking any immediate action.\(^{183}\) The airlines filed suit challenging the ATIEG on the basis that the states' attempts to regulate airlines' fare advertisements through state consumer protection laws were preempted by the ADA.\(^{184}\) The Supreme Court struck down the state regulations, holding that they relate to airline "rates, routes, or services" and are thus preempted under the ADA.\(^{185}\)

The Court noted that "[t]he question ... is one of statutory intent, and we . . . 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'"\(^{186}\) The Court first stated that section 1305(a)(1) expressly preempts state laws "relating to rates, routes, or services of any air carrier," with the key phrase in the provision being "relating to."\(^{187}\) The Court observed: "The ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' and the words thus express a broad pre-emptive purpose."\(^{188}\) The Court then analogized the phrase "relating to" under the ADA with the same phrase under the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA).\(^{189}\) The Court concluded that "a state law 'relates to' an employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with, or reference to, such a plan.'"\(^{190}\) The Court proceeded to adopt the same standard for the pre-emp-

\(^{181}\) Id. at 379.
\(^{182}\) Id. at 380.
\(^{183}\) Id. at 379.
\(^{184}\) Id. at 380.
\(^{185}\) Id. at 391.
\(^{186}\) Id. at 383 (quoting FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990)).
\(^{187}\) Id.
\(^{188}\) Id. (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)).
\(^{189}\) Id. at 383–84 (citing 29 U.S.C. § 1144(a) (preempting all state laws "insofar as they . . . relate to any employee benefit plan").
\(^{190}\) Id. at 384 (citing Shaw v. Delta Airlines, Inc., 463 U.S. 85, 97 (1983)).
tion provision of the ADA: "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted."\(^{191}\)

The ATIEG were aimed primarily at print advertisements of airline fares.\(^{192}\) The guidelines also had parallel restrictions on broadcast advertisements.\(^{193}\) They required "clear and conspicuous disclosure . . . of restrictions such as limited time availability, limitations on refund or exchange rights, . . . advance-purchase and round-trip purchase requirements."\(^{194}\) The Court found that these restrictions "relate to" airline rates.\(^{195}\) The guidelines together established binding requirements on the marketing of airline tickets.\(^{196}\) Under the Texas law, for example, violations of the ATIEG would grant consumers a private right of action against the airlines for any failure to provide an advertised fare, which effectively created an enforceable right to that fare whenever the advertisement failed to include disclaimers and limitations.\(^{197}\) Economically, the state laws had the effect of regulating air rates as contemplated by the ADA.\(^{198}\) In other words, the ATIEG "would have a significant impact upon the airlines' ability to market their product, and . . . the fares they charge."\(^{199}\) The Court also stated:

In any event, beyond the guidelines' express reference to fares, it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares. Advertising "serves to inform the public of the . . . prices of products and services, and thus performs an indispensable role in the allocation of resources."\(^{200}\)

The Court noted that its holding does not "as Texas contends, set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines."\(^{201}\) It went on to say, "state laws preventing obscene depictions . . . would similarly 'relat[e] to' rates; the connection would obviously be far

\(^{191}\) Id.
\(^{192}\) Id. at 387.
\(^{193}\) Id.
\(^{194}\) Id.
\(^{195}\) Id. at 388.
\(^{196}\) Id.
\(^{197}\) Id.
\(^{198}\) Id.
\(^{199}\) Id. at 389.
\(^{200}\) Id. at 388.
\(^{201}\) Id. at 390.
more tenuous." The Court did observe that: "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner’ to have a pre-emptive effect."

The dissent took issue with the majority’s use of ERISA statutory language as a basis for interpreting the ADA’s express pre-emption provision. The dissent agreed with the majority’s plain language interpretation of the phrase “relating to.” The dissent argued that for “any state law that relates directly to rates, routes, or services, the presumption against pre-emption of traditional state regulation counsels” against interpreting the ADA “to pre-empt every traditional state regulation that might have some indirect connection with, or relationship to, airline rates, routes, or services unless there is some indication that Congress intended that result.”

*National Helicopter Corp. of America v. City of New York* dealt with New York City regulations of Manhattan’s East 34th Street Heliport. In May 1996, New York City’s Economic Development Corporation (EDC), which “administer[s] the City’s heliports, issued a Request for Proposals [(RFP)] for a new fixed-base operator” with use restrictions based on the city’s zoning laws. The RFP was challenged on the basis that the zoning laws as applied to the heliport were preempted. The Zoning Resolution required heliports to hold a special permit to operate.

The EDC argued that it acted in its capacity as the proprietor and owner of the heliport, and it was extensively involved in
the permit application process and the subsequent RFP.\textsuperscript{213} The EDC intended the regulations to reduce operations at the heliport by forty-seven percent and also to impose a curfew on its use.\textsuperscript{214} The court looked at the reasonableness of the restrictions under the test earlier articulated in the Concorde cases and upheld the regulations and curfews aimed at the reduction of operations at the heliport.\textsuperscript{215} The restrictions on sightseeing, however, were held to be preempted because it curtailed routes for the flights of helicopters from the heliports.\textsuperscript{216}

In \textit{Air Transport Ass'n of America v. City and County of San Francisco}, a lower court in the Ninth Circuit further strengthened the federal preemption of aviation over the residual rights of airport proprietors.\textsuperscript{217} The city and county of San Francisco owns and operates San Francisco International Airport.\textsuperscript{218} Accordingly, the city enacted an ordinance barring discrimination with regard to employers providing fringe benefits to domestic partners.\textsuperscript{219} The issue before the court was whether the ordinance related to rates, routes, or services under the ADA.\textsuperscript{220} The ordinance would be preempted only if there were a substantial connection with the air carriers' rates, routes, or services.\textsuperscript{221} The court reasoned that by raising barriers to air carriers' use of a particular airport through restrictions on how airlines provide benefits to their employees, the ordinance would interfere with the potential for full market competition.\textsuperscript{222} To the extent that the ordinance affects market competition, it would be preempted.\textsuperscript{223} The court held that the rationale for the proprietary powers exception “extends beyond purely financial concerns . . . [and applies where airport owners have] 'a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the city's human environment.'”\textsuperscript{224} The city's insistence on nondiscriminatory policies is not an exercise of its

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proprietary powers. But the court did not decide this issue because it was not briefed.

American Airlines, Inc. v. Department of Transportation dealt with the Wright Amendment restricting flights from Dallas Love Field Airport in Texas. Pursuant to a Civil Aviation Board order in 1964, the cities of Dallas and Fort Worth constructed a regional, jointly-operated airport (D/FW Airport). In 1968, the cities adopted the 1968 Regional Airport Concurrent Bond Ordinance, of which section 9.5 states, the cities must “take such steps as may be necessary, appropriate and legally permissible . . . to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport.”

Southwest Airlines refused to move from Love Field, and their right to use the airport was upheld in subsequent litigation. The Wright Amendment was passed to ban interstate travel from Love Field in response to Southwest’s being granted permission from the Civil Aviation Board to provide interstate service. In

225 Id.
226 Id. at 1191.
227 Am. Airlines, Inc. v. Dep’t of Transp., 202 F.3d 788, 793 (5th Cir. 2000).
228 Id.
229 Id.
230 Id. at 793 (quoting Sw. Airlines Co. v. Tex. Int’l Airlines, Inc., 546 F.2d 84, 103 (5th Cir. 1977) (“Southwest Airlines Co. has a federally declared right to the continued use of and access to Love Field, so long as Love Field remains open.”)).
231 The Wright Amendment reads:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a
1997, Congress passed the Shelby Amendment, which defined the term “passenger capacity of 56 passengers or less” in the commuter airline exemption to “include[ ] any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.” Plans were made by various airlines for service from Love Field Airport. However, suits were filed in state court to prevent the new services. The Department of Transportation issued a “Declaratory Order” ruling that “the ability of the City of Dallas to limit the type of airline service operated at Love Field is preempted by the Wright and Shelby Amendments.” The ordinance was not “aimed at alleviating noise, pollution, or congestion at Love Field.” The court did not limit scope of proprietary rights to those previously recognized. The court held that the ADA preempted the ordinance’s restrictions.

In Rowe v. New Hampshire Motor Transport Ass’n, Justice Stephen Breyer delivered the opinion of the Court, addressing the issue of “whether a federal statute that prohibits States from enacting any law ‘related to’ a motor carrier ‘price, route, or

person providing service to a point outside of Texas from Love Field on November 1, 1979 may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be con-
strued to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979.


233 Am. Airlines, Inc., 202 F.3d at 795.

234 Id.

235 Id.

236 Id. at 807.

237 Id. at 808.

238 Id.

service’ pre-empt two provisions of a Maine tobacco law, which regulates the delivery of tobacco to customers within the State." The Supreme Court held that the Maine law was pre-empted. In 1980, Congress proceeded to deregulate trucking under the Motor Carrier Act of 1980. In 1994, Congress pre-empted state trucking regulations in the Federal Aviation Administration Authorization Act of 1994. Congress used the identical language for the federal preemption of aviation under the ADA, stating: "[A] State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Maine enacted An Act to Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors. The two relevant sections concern the prohibition on non-Maine licensed tobacco retailers to receive tobacco orders, and the requirement that a tobacco retailer must use a special delivery service which “provides a special kind of recipient-verification service.” The delivery service requires certification that: (1) the purchaser is the same as the person to whom the order is addressed; (2) that they are of legal age; (3) that they are the one who signs for the delivery; and (4) if under twenty-seven years of age, they must show a valid, state-issued photo identification.

The Court, in following its interpretation of the same language under the ADA in Morales, noted that “‘when judicial interpretations have settled the meaning of a existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.’” In Morales, the Court had held that “Congress’[s] overarching goal [is] helping assure transporta-

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241 Id.


244 Id. (quoting 49 U.S.C. § 14501(c)(1)).

245 Id. (quoting 2003 Me. Laws 1089).

246 Id. (quoting Me. Rev. Stat. Ann. tit. 22, § 1555-C(1)).

247 Id. at 668–69 (citing Me. Rev. Stat. Ann. tit. 22, § 1555-C(3)(C)).


249 Id. at 370 (quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85 (2006)).
tion rates, routes, and services that reflect ‘maximum reliance on competitive market forces,’ thereby stimulating ‘efficiency, innovation, and low prices,’ as well as ‘variety’ and ‘quality.’” The Court, following Morales, held that the Maine provisions were preempted. The Maine law has “the very effect that the federal law sought to avoid, i.e., a State’s direct substitution of its own governmental commands for ‘competitive market forces’ in determining (to a significant degree) the services that motor carriers will provide.” While the regulation is less direct for carriers because it directs shippers, nonetheless, the Maine law affects carriers, who “will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation,” market forces would dictate. Maine argued that an exception to preemption exists for citizens’ public health particularly where the law, as here, is directed at keeping cigarettes out of the hands of minors. The Court disagreed, noting that the federal law does not carve out such an exception. The Act “explicitly lists a set of exceptions . . . ,” but the list says nothing about public health. The Court noted that the legislative history did not show that Congress even contemplated such an exception, “[a]nd to allow Maine directly to regulate carrier services would permit other States to do the same.”

In Air Transport Ass’n of America v. Cuomo, the Second Circuit held that “the PBR [Passenger Bill of Rights] is preempted by the express preemption provision of the Airline Deregulation Act.” In the winter of 2006 to 2007, after long ground delays at New York airport runways, the New York Legislature enacted PBR. The PBR required:

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250 Id. at 371 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992)).
251 Id.
252 Id. at 372.
253 Id.
254 Id. at 374.
255 Id.
256 Id. (citing 49 U.S.C. § 14501(c)(2)-(c)(3) (2006)).
257 Id. Justice Scalia’s concurrence went so far as to state that, with regard to legislative history, he would join the Court’s opinion “except those portions . . . that rely on the reports of committees of one House of Congress to show the intent of that full House and of the other—with regard to propositions that are apparent from the text of the law, unnecessary to the disposition of the case, or both.” Id. at 378.
258 Id. at 375.
259 Air Transp. Ass’n of Am. v. Cuomo, 520 F.3d 218, 220 (2d Cir. 2008).
1. Whenever airline passengers have boarded an aircraft and are delayed more than three hours on the aircraft prior to takeoff, the carrier shall ensure that passengers are provided as needed with:
   (a) electric generation service to provide temporary power for fresh air and lights;
   (b) waste removal service in order to service the holding tanks for on-board restrooms; and
   (c) adequate food and drinking water and other refreshments.260

The PBR also required consumer complaint information to be posted conspicuously with a statement of rights.261 The court held that the PBR was preempted because it relates to a price, route, or service of an air carrier under the ADA.262

The Second Circuit did not define “service” but concluded that “requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relates to the service of an air carrier.”263 The court explicitly followed the Supreme Court’s holding in Rowe, finding that the PBR substituted New York state regulations in lieu of market forces that could lead to type of patchwork state regulation of services specifically rejected by the Supreme Court in Rowe.264 Rowe did not read an exception for public health by state authorities in the preemption provision.265 The holding in Cuomo brings into doubt the exception to the federal preemption of aviation created by the Western Air Lines court for the Port Authority. While the ADA does carve out an exception for proprietary powers, the interpretation was expansive enough to include airline routes. The Supreme Court showed a reluctance to extend an exception to public health under the Maine statute, and would likely interpret the ADA narrowly.

V. CONCLUSION

The trend in preemption case law calls into question the earlier holding in Western Air Lines.266 In Morales, the Supreme

260 Id. (quoting N.Y. GEN. BUS. LAW § 251-g(1) (McKinney 2007)).
261 Id. (quoting N.Y. GEN. BUS. LAW § 251-g(2)).
262 Id. at 221.
263 Id. at 222.
264 Id. at 223–24.
265 Id. at 224.
Court held that "'[s]tate enforcement actions having a connection with, or reference to' carrier 'rates, routes, or services' are preempted.'"\textsuperscript{267} The \textit{Morales} Court also held that such regulation may be indirect and yet still be preempted by the federal law.\textsuperscript{268} The state law may be consistent or inconsistent with the federal regulation, it does not matter.\textsuperscript{269} This language calls into question the holding in \textit{Western Air Lines} that so long as the FAA does not regulate, the Port Authority may. Finally, law is preempted, which makes a "'significant impact' related to Congress'[s] deregulatory and pre-emption-related objectives."\textsuperscript{270}

\begin{footnotesize}
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\item \textsuperscript{267} \textit{Rowe}, 552 U.S. at 370 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)).
\item \textsuperscript{268} \textit{Id.} (citing \textit{Morales}, 504 U.S. at 386).
\item \textsuperscript{269} \textit{Id.} (citing \textit{Morales}, 504 U.S. at 386–87).
\item \textsuperscript{270} \textit{Id.} at 371 (citing \textit{Morales}, 504 U.S. at 390).
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