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Administrative and Constitutional Law --Preemption--Forth Worth Court of Appeals Holds That Rate and Route Restrictions in the Bond Ordinance Between Forth Worth and Dallas is Preempted By the Airline Deregulation Act--*Legend Airlines, Inc. v. City of Forth Worth*, 23 S.W.3d 83 (Tex. App.- Fort Worth 2000, No Pet. H.).

ADMINISTRATIVE AND CONSTITUTIONAL LAW—PREEMPTION—FORT WORTH COURT OF APPEALS HOLDS THAT RATE AND ROUTE RESTRICTIONS IN THE BOND ORDINANCE BETWEEN FORT WORTH AND DALLAS IS PREEMPTED BY THE AIRLINE DEREGULATION ACT—*Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83 (Tex. App.—Fort Worth 2000, No Pet. H.).

THE AIRLINE DEREGULATION ACT ("ADA") expressly prohibits a state or a state's political subdivision from enforcing a law or regulation "related to a price, route, or service of an air carrier."[1] Interpretation of this statutory language played a prominent role in the 1992 case of *Morales v. Trans World Airlines, Inc.*, in which the Supreme Court held that the ADA preempted advertising guidelines regarding airline fares because "the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge."[2] Recently, in *American Airlines v. Wolens*, the Court extended the reach of the ADA preemption to state regulation of air carriers, but did not extend the preemption to state law actions based on breaches of private contracts.[3] Both of these holdings interpret the preemption provision of the ADA broadly without analyzing whether advertising guidelines or frequent flyer provisions are within the scope of the preemption provision. But since neither of these two cases involved a questionable preemption situation that would affect airline fares or routes in a tenuous or remote manner (such as a private contract action between municipalities that was entered into before the federal preemptive provision took effect), the Court was reluctant to express its opinion about where an appropriate line should be drawn in state actions concerning the scope of the preemption provision of the ADA.[4]

Consequently, relying on this same incomplete analysis, the Fort Worth Court of Appeals held that the ADA preempted the

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[1] 49 U.S.C. § 41713(b) (1994).

[2] 504 U.S. 374, 390 (1992).

[3] 513 U.S. 219, 222 (1995).

[4] *See Morales*, 504 U.S. at 390.

City of Dallas from restricting flights out of Love Field.[5] But in reaching its conclusion, the court failed to address the critical issue concerning the scope of the ADA preemption provision: whether Congress intended to interfere with existing private contractual obligations, such as the provisions contained in the 1968 Regional Airport Concurrent Bond Ordinance ("Bond Ordinance") between the cities of Dallas and Fort Worth.

In 1964, the Civil Aeronautics Board issued an order recommending that Dallas and Fort Worth consolidate commercial air passenger service out of one airport.[6] As a result of this order, the two cities entered into an agreement that created the Dallas-Fort Worth International Airport ("DFW") and made each city a co-owner.[7] The cities also authorized bond issuances to finance the construction of DFW.[8] Under the Bond Ordinance, cities were to "take such steps as may be necessary, appropriate, and legally permissible . . . to provide for the orderly, efficient and effective phase-out at Love Field . . . of any and all Certificated Air Carrier Services, and to transfer such activities to [DFW].'"[9] But one exception to this consolidation resulted from a Fifth Circuit Court of Appeals decision,[10] which held "Dallas could not force Southwest to vacate Love Field as long as Love Field remained open, because Southwest was not a federally certificated air carrier and [Southwest] was flying only intrastate routes."[11] As a result of this decision and the Bond Ordinance provisions, each of the major air carriers (except for Southwest Airlines) agreed to provide air services exclusively at DFW.[12]

The passage of the ADA in 1979, which prohibits states from enacting or enforcing any law or regulation "related to a price, route, or service of an air carrier,"[13] was the first step taken by Congress in its plan to federally deregulate the airline industry, thus resulting in the consolidation of airline operations at DFW. The federal preemption provision was intended to preserve

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[5] *See* Legend Airlines, Inc. v. City of Fort Worth, 23 S.W.3d 83, 92 (Tex. App.—Fort Worth 2000, *no pet. h.*).

[6] *See id.* at 86.

[7] *See id.*

[8] *See id.* at 87.

[9] *Id.* (quoting the Bond Ordinance).

[10] Southwest Airlines Co. v. Tex. Int'l Airlines, Inc., 546 F.2d 84, 103 (5th Cir. 1977).

[11] *Legend*, 23 S.W.3d at 87.

[12] *See id.*

[13] *See* 49 U.S.C. § 41713(b)(1) (1994).

"maximum reliance on competitive market forces"[14] by ensuring that the states would not undo federal deregulation with state regulation of their own.[15] As a result of this legislation, "Southwest applied for and obtained federal certification to begin interstate [flights]."[16] Moreover, Southwest's success in obtaining federal authority to offer interstate service out of Love Field led to the passage of the Wright Amendment, which prohibited the Civil Aeronautics Board and the Department of Transportation ("DOT") from certificating interstate flights out of Love Field, except for commuter airlines with less than fifty-six passengers or carriers that do not offer ticketing or service beyond Texas and the four-state perimeter consisting of Louisiana, Arkansas, Oklahoma, and New Mexico.[17]

The effect of the Wright Amendment was apparent when Astraea Aviation Services, Inc. wanted to provide air service out of Dallas, but the DOT concluded "such service would be contrary to the Congressional goals underlying the Wright Amendment."[18] In addition, the opinion concluded that "whether long-haul service should be allowed at Love Field 'is a question that needs to be resolved by Congress.'"[19] While Astraea's appeal was pending, Congress passed the Shelby Amendment, which increased service to Love Field by expanding the commuter airline exception to include larger aircraft and adding three additional states to the Love Field service area—Kansas, Alabama, and Mississippi.[20] As a result of the expanded service area and the enactment of the Shelby Amendment, Legend Airlines, a start-up, planned to offer new interstate service from Love Field.[21]

In October of 1997, Fort Worth filed the initial lawsuit against the City of Dallas and Legend Airlines in reaction to its pro-

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[14] *Morales*, 504 U.S. at 378.

[15] *See id.*

[16] *Legend*, 23 S.W.3d at 87.

[17] *See id.* at 87-88; *see also* Southwest Airlines Co. v. Tex. Int'l Airlines, Inc., 396 F. Supp. 678, 686 (N.D. Tex. 1975) (court order permanently enjoining Dallas, Fort Worth, American Airlines, and the DFW Airport Board from litigating the validity and enforceability of the Bond Ordinance as it relates to Southwest's right to the continued use of Love Field), *aff'd*, 546 F.2d 84.

[18] *Legend*, 23 S.W.3d at 89.

[19] *Id.*

[20] DOT Appropriations Act of 1998, Pub. L. No. 105-66, § 337(a) – (b), 111 Stat. 1425 (1997); *see also* International Air Transportation Competition Act of 1979, *Pub. L. No. 96-192*, §§ 29(a)(2), (c), 94 Stat. 35 [The Wright Amendment].

[21] *See infra* Appendix for a chronology of events that culminated in the current litigation.

posed start-up, and asked the trial court to declare that Dallas was contractually bound by the Bond Ordinance to limit flights from Love Field to the four contiguous states bordering Texas: Louisiana, Arkansas, Oklahoma, and New Mexico.[22] Dallas and Legend Airlines defended this suit and also filed a separate lawsuit in federal court in November 1997, arguing that federal law preempted their obligations under the Bond Ordinance.[23] Furthermore, Dallas's federal lawsuit was consolidated with a similar suit filed by Continental Airlines, resulting in them being added as a defendant in Fort Worth's suit.[24] The DFW Airport Board filed a cross-claim against Continental asserting that the DFW private contractual agreements barred signatory airlines from offering interstate air service out of Love Field.[25]

In August 1998, at the request of Dallas, Fort Worth, Legend, and several members of Congress, the DOT started its own proceeding.[26] However, in October of 1998, the state trial court denied Dallas and Legend's motions to defer to the primary jurisdiction of the DOT and held that: 1) the Bond Ordinance was valid and enforceable, and it was not preempted by federal law; 2) neither the ADA nor the Wright or Shelby Amendments allowed interstate passenger service from Love Field to points beyond Texas and the four-state perimeter; and 3) Dallas was obliged under the Bond Ordinance to prohibit interstate passenger service beyond this area.[27] As a result of the trial court's decision, both Dallas and Legend Airlines appealed to the Fort Worth Court of Appeals.[28]

In December 1998, however, the DOT concluded that: 1) Dallas's commitments under the Bond Ordinance do not restrict services at Love Field that are authorized by federal law; 2) Dallas's ability to limit the type of airline service operated at Love Field is preempted by both the Wright and Shelby Amendments; and 3) the "commuter airlines exception" allows any airline operating certain aircraft to make long-haul flights to or from Love Field.[29] Consequently, the City of Fort Worth and American Air-

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[22] *See Legend*, 23 S.W.3d at 89.

[23] *See id.*

[24] *See id.* at 89-90.

[25] *See id.* at 90.

[26] *See id.*

[27] *See id; see also* Love Field Serv. Interp. Proc., DOT Decl. Order No. 98-12-27, 58 (1998).

[28] *See Legend*, 23 S.W.3d at 90.

[29] *See id.*

lines appealed the DOT's order to the Fifth Circuit, which affirmed the order.[30]

"The underlying rationale of the preemption doctrine . . . is that the Supremacy Clause [of the United States Constitution] invalidates state [and local] laws that 'interfere with or are contrary to, the laws of congress.'"[31] The preemption provision of the ADA provides a good example of this rationale and illustrates Congress's desire to define explicitly the extent to which federal enactments preempt state law.[32] However, in analyzing an airline preemption issue, the court of appeals's analysis was incomplete because its conclusion was based solely on the statutory language of the ADA, which states Congress's intent to explicitly preempt *route* restrictions.[33] The court's analysis overlooked the possibility that the ADA preemption provision was not meant to interfere with private contractual agreements, such as a Bond Ordinance.

Defining the scope of a preemption provision is critical in properly analyzing preemption questions.[34] Although the Supreme Court in previous airline deregulation cases has had to determine the specific meaning of certain statutory phrases of the ADA,[35] the Court has never considered whether Congress intended for the ADA to extend to private contractual agreements.[36] Some lower courts have considered this issue and concluded that private contract actions involving breach of contract[37] and negligence[38] are outside the scope of the ADA preemption provision and are viable claims.

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[30] *See id.*; American Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 813 (5th Cir. 2000), *cert. denied*, ___ U.S. ___ (2000).

[31] Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (internal citation omitted).

[32] *See Legend*, 23 S.W.3d at 93; *see also* Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 778 (5th Cir. 1990).

[33] *See Legend*, 23 S.W.3d at 92.

[34] *See Wolens*, 513 U.S. at 232 (holding that the ADA was not meant to resolve private contract claims in federal court relating to airline rates, routes, and restrictions); *see also* Duncan v. N.W. Airlines, Inc., 208 F.3d 1112, 1114-15 (9th Cir. 2000) (concluding that smoking on flights was not preempted under the ADA since it did not constitute or relate to a "service" as it is defined in the ADA).

[35] *See Morales*, 504 U.S. at 375 (concluding that the "relating to" language found in the preemption provision of the ADA meant having "a connection with or reference to airline rates, routes, or services").

[36] *But cf. Wolens*, 513 U.S. at 232-233 (concluding that private contractual agreements between the airlines and passengers are outside the scope of the ADA preemption provision).

[37] *See id.* at 232.

[38] *See* Cont'l Airlines, Inc. v. Kiefer, 920 S.W.2d 274, 283 (Tex. 1996).

Not all lower courts have reached this conclusion. When confronted with an airline preemption question, some lower courts (such as the Fort Worth Court of Appeals) have applied traditional preemption analysis, which allows avoidance of the ADA preemption doctrine only if the restrictions fall within an airport owner's proprietary rights and powers, and that the restrictions are "limited to [a] reasonable, non-arbitrary, and nondiscriminatory" advancement of a local interest.[39] However, the Fort Worth Court of Appeals dismissed this claim by concluding that the enforcement of the Love Field restrictions for competitive reasons was neither a reasonable nor a non-arbitrary advancement of a local interest.[40] Alternatively, the ADA preemption doctrine could be avoided if the state action affecting airline routes was "'too tenuous, remote, or peripheral [in] manner' to have preemptive effect."[41]

Writing for the Fort Worth Court of Appeals, Chief Justice John Cayce stated that without persuasive reasons, such as a mandate from Congress, state laws and regulations should not be preempted by federal statute.[42] Thus, "[p]reemption questions require an examination of congressional intent, whether express or implied."[43] In addition, the examination of intent requires an analysis of the scope of the preemption provision to determine whether a state law in conflict with a federal statute is preempted.[44] Hence, the court of appeals had to decide whether the Bond Ordinance, which was organized between private parties under the laws of a particular state, was more analogous to a private contractual arrangement or to a regulation under state law.

In analyzing the language of the ADA, Congress expressly preempted state regulation of air carriers "related to a price, route,

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[39] Nat'l Helicopter Corp. of Am. v. City of New York, 137 F.3d 81, 88-89 (2nd Cir. 1998); *see* 49 U.S.C. § 41713(b)(3) (1994); *see also* American Airlines, 202 F.3d at 810 (holding that the DOT's order was reasonable in preventing airport owners from exercising their proprietary rights and powers to restrict services at Love Field).

[40] *See Legend*, 23 S.W.3d at 95 (the court also stated that even if the restrictions were reasonable, under Supreme Court mandate, they "must give 'controlling weight' to reasonable DOT interpretations of the ADA.").

[41] *Morales*, 504 U.S. at 390 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983)).

[42] *Legend*, 23 S.W.3d at 93.

[43] *Id.*

[44] *See id.*

or service of an air carrier."[45] As a result, the court of appeals held that the Bond Ordinance was more similar to a state regulation and was thus preempted by the ADA[46] because it put restrictions on interstate service *routes* that airlines could provide out of Love Field, and it also required the transfer of all interstate flights from Love Field to DFW.[47]

Moreover, in determining that the ADA preempted the Bond Ordinance, the Fort Worth Court of Appeals focused on the preemption language of the ADA that prohibited a political subdivision of a state from enforcing a law or regulation related to a "route,"[48] rather than the nature of the Bond Ordinance, which was a private agreement between the cities and the airlines that respectively served them. As evidence of a private agreement, all of the airlines[49] signed a voluntary agreement to provide exclusive services out of DFW in accordance with the terms of the Bond Ordinance in exchange for benefits.

By holding that the provisions of the Bond Ordinance are preempted by the ADA, the court of appeals is in effect giving its blessing to the cities and the airlines, who signed exclusive arrangements with each other, to breach obligations that each promised to honor. And by giving each city the power to void existing contractual obligations, the purpose and objectives of Congress in passing the ADA are undermined.

Justice Dauphinot's dissent focused on two significant issues. First, she argued that despite the DOT's order and the Fifth Circuit's decision to uphold that order, "Dallas is contractually obligated [under the Bond Ordinance] to prohibit scheduled interstate passenger service to or from Love Field to points beyond the four contiguous states [states other than Louisiana, Arkansas, Oklahoma, and New Mexico]."[50] Specifically, section 9.5(A) of the Bond Ordinance requires Dallas to close Love Field to all Certificated Air Carrier Services (defined as aircraft operations that provide interstate services on a regular basis by commercial air carriers according to published flight sched-

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[45] 49 U.S.C. § 41713(b)(1) (1994).

[46] *See Legend*, 23 S.W.3d at 92.

[47] *See id.; see also* W. Air Line, Inc. v. Port Auth., 658 F. Supp. 952, 955 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied sub nom* Delta Air Lines, Inc. v. Port Auth., 485 U.S. 1006 (1998).

[48] 49 U.S.C. § 41713(b)(1) (1994).

[49] *But see Southwest Airlines*, 546 F.2d at103 (declaring that Southwest Airlines has a right to the continued use and access to Love Field, so long as Love Field remains open).

[50] *Legend*, 23 S.W.3d at 118 (Dauphinot, J., dissenting).

ules), unless the flights are necessary in the interest of public safety or necessary for prudent and efficient operations at the Regional Airport.[51] "The purpose of [this provision was] to ensure adequate revenues from operations at DFW to cover the operating expenses of DFW and to repay the DFW revenue bonds."[52] By concluding that the ADA preempts this provision of the Bond Ordinance, the majority opinion potentially caused severe public policy consequences because there is now a greater possibility of a revenue shortfall without the strict compliance of the airlines with the provisions of their agreement. Thus, Justice Dauphinot concluded that public policy would be better served if federal law did not preempt Dallas's obligation under the Bond Ordinance.

Justice Dauphinot also argued that preemption of an existing private contractual agreement violated due process.[53] Because both Dallas and Fort Worth entered into the Bond Ordinance before the ADA was passed, application of the ADA to the Bond Ordinance would result in a retroactive application of a statute,[54] thus violating the cities' due process rights in two ways.[55] First, Fort Worth detrimentally relied on the Bond Ordinance when it decided to demolish the Greater Southwest International Airport.[56] Second, the Bond Ordinance required both Dallas and Fort Worth to repay the revenue bonds out of the revenues earned by DFW.[57] Consequently, a loss of revenue at DFW Airport due to increased interstate flights from Love Field affected the ability of both Dallas and Fort Worth to repay the revenue bonds.[58] Because the primary purpose of the ADA was to maximize competition among the airlines, it is unlikely that the ADA will be held to have violated the cities' due process rights.

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[51] *See id.* at 118-119 (under the terms of the Bond Ordinance, the cities, each with respect to its own airport, agree to take such actions as shall be necessary, appropriate, and legally permissible to provide for the efficient phase-out of all Certificated Air Carrier Services at Love Field).

[52] *Legend*, 23 S.W.3d at 120-21 (Dauphinot, J., dissenting).

[53] Due process is a novel issue that has never been addressed by any court. *See Legend*, 23 S.W.3d at 120–21; *see also Wolens*, 513 U.S. 219; *Morales*, 504 U.S. 374.

[54] The Supreme Court has held that in order for retroactive legislation to survive a due process challenge, it must be shown that the legislation is justified by a rational legislative purpose. *See* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984).

[55] *See Legend*, 23 S.W.3d at 120 (Dauphinot, J., dissenting).

[56] *Id.*

[57] *Id.* at 120-21.

[58] *Id.* at 121.

In conclusion, the ADA was designed to promote "maximum reliance on competitive market forces."[59] Extending the ADA preemption provision to private contract matters will cause uncertainty and an unnecessary restriction on the freedom to contract. Cities and airlines that sign written contracts must be made to honor their obligations. Based on previous decisions, the scope of the ADA has only been considered in light of the "rate, route, or service" language, but not in the nature of municipal contractual relationships. But by analyzing ADA preemption issues under a broader framework that considers the nature of the relationship between the parties, states will have more freedom to contract and regulate air commerce. Because the court of appeals did not consider the nature of the existing contract between the cities, congressional objectives for the regulation of airlines have been undermined, and important preemption questions remain unresolved.

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[59] *Morales*, 504 U.S. at 378.

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APPENDIX

SOME KEY EVENTS IN THE EVOLUTION OF LOVE FIELD AND ONE OF ITS PRIMARY CARRIERS, LEGEND AIRLINES:

1968: Dallas and Fort Worth establish a bond agreement to build Dallas/Fort Worth International Airport. In it, both pledge to promote the optimum development of D/FW Airport.

1979: Congress passes the Wright Amendment to the International Air Transportation Competition Act of 1979. When carrying more than 56 passengers, direct commercial flights from Love Field are limited to destinations within Texas and four adjacent states.

October 9, 1997: Congress passes the Shelby Amendment. It expands direct flights from Love Field to Kansas, Alabama and Mississippi and clarifies that airplanes reconfigured with 56 seats or fewer can offer long-haul service.

October 10, 1997: After Legend Airlines, Inc. and Continental Airlines Inc. prepare to launch long-haul flights, the city of Fort Worth and American Airlines Inc. sue those airlines and the city of Dallas, which owns Love Field, in state district court in Fort Worth.

October 16, 1998: The Fort Worth district court sides with the city of Fort Worth and American Airlines. Legend Airlines appeals the ruling.

December 22, 1998: The U.S. Department of Transportation rules that reconfigured planes can be used for long-haul flights at Love Field. Fort Worth and American Airlines subsequently sue the Department of Transportation in the Fifth U.S. Circuit Court of Appeals in New Orleans.

February 2000: The Fifth U.S. Circuit Court of Appeals decides in favor of Legend Airlines and the Department of Transportation.

March 2000: Fort Worth and the Dallas/Fort Worth Airport Board appeal to the U.S. Supreme Court.

April 2000: Legend Airlines launches its long-haul flights from Love Field.

May 2000: American Airlines revives long-haul flights from Love Field and joins the U.S. Supreme Court appeal. The Fort Worth Court of Appeals reverses the earlier ruling by the state district court in Fort Worth, citing the Fifth Circuit Court of Appeal's decision.

June 29, 2000:	The U.S. Supreme Court denies certiorari petitions filed by the City of Fort Worth, the Dallas/Fort Worth Airport Board, and American Airlines asking the high court to review the decision of the Fifth Circuit Court of Appeals.
October 2000:	For the third month in a row, Legend Airlines carries more people on average aboard each of its flights at Dallas Love Field than rival American Airlines.
November 30, 2000:	Legend Airlines announces it has lost $4 million more of revenue in the third quarter than it did in the second quarter because of climbing jet fuel costs and increases in other expenses, officials said. Although there was an 82 percent jump in revenue, the Dallas airline suffered a net loss of $14.8 million from July to the end of September. Previously, the airline had lost $10.8 million during the second quarter.
December 2, 2000:	Legend Airlines announced that it has suspended operations pending while searching for additional sources of funds.

Source: *Not Always a Smooth Ride*, DALLAS MORNING NEWS, December 3, 2000, at 31A.


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS

ELEVENTH CIRCUIT HOLDS THAT REGULATIONS PROHIBITING THE SALE OF RELIGIOUS LITERATURE AT MIAMI INTERNATIONAL AIRPORT ARE CONSTITUTIONAL BECAUSE THEY ARE REASONABLE IN LIGHT OF THE PRIMARY PURPOSE OF THE FACILITY – *Iskcon Miami, Inc. v. Metro. Dade County*, 147 F.3d 1282 (11th Cir. 1998).

IN THE 1992 CASE *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*,[1] the Supreme Court held that a New York Port Authority ban on solicitation of religious materials in airport terminals was constitutional because the prohibition was reasonable in light of an airport's primary purpose.[2] But the Court found the Port Authority's ban on distribution of religious materials in airport terminals to be unconstitutional because it was an unreasonable restriction on free speech.[3] The Court distinguished between distribution (which refers to the handing out of materials), solicitation (which refers to asking for contributions), and sale (which refers to seeking payment for a product or service, like charging money for literature). While a majority of the Court clearly decided the solicitation and distribution issues, no majority of the Court directly addressed a ban on the sale of literature,[4] thus leaving the lower courts without clear guidance when confronted with the selling of religious materials in airport terminals.[5] In *ISKCON Miami, Inc. v. Metro. Dade County*, the Florida appeals court correctly determined that the same factors considered by the Supreme Court regarding solicitation of religious materials in a public forum should also be applied when ruling on the sale of such literature at Miami International Airport ("MIA").[6] The Florida court attached the same concerns that the Supreme Court associated with solicitation—disruption and intrusion—to their analysis of the sale of literature at MIA

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[1] *See* 505 U.S. 672 (1992), 505 U.S. 830 (1992). The several opinions comprising the Court's rulings in the two *Lee* cases are reported separately in the reporter series. Discussion of the opinions is commonly consolidated, and the opinions are referred to collectively as "*Lee*."

[2] *See Lee*, 505 U.S. at 684.

[3] *See id.* at 831.

[4] *See id.* at 672.

[5] *See ISKCON Miami, Inc. v. Metro. Dade County*, 147 F.3d 1282, 1287 (11th Cir. 1998).

[6] *See id.* at 1287.

and ruled that a Dade County Code regulation prohibiting the sale of religious materials at MIA did not violate the constitutional rights of International Society for Krishna Consciousness, Inc. ("ISKCON").[7]

In June 1995, Dade County altered its laws concerning solicitation of literature at MIA.[8] The new regulation provided: "No person shall solicit alms or contributions of money . . . for religious, charitable, or other purpose, and receive money or other articles of value, whether in the form of cash, checks, credit or debit vouchers . . . in the public areas of the Terminal."[9] Furthermore, the regulation gave the Director of MIA ("Director") authority to "prescribe . . . restrictions applicable to First Amendment activities at the Airport"[10] and that these restrictions "shall be reasonable . . . and made only after a finding . . . that the restrictions are necessary to avoid injury . . . or to assure the safe and orderly use of the Airport facilities by the public."[11]

The plaintiff, ISKCON, is composed of followers of the Krishna faith. Because of a strong belief in the power of their scriptures, ISKCON members must distribute their literature and solicit support for the religion in public areas.[12] ISKCON has been doing this at MIA since 1974.[13]

Soon after the laws were changed, ISKCON filed this action in the United States District Court for the Southern District of Florida claiming that the regulations "unconstitutionally prohibit solicitation of funds" for their religion "and the sale of religious literature throughout MIA."[14] ISKCON also argued that, by restricting the areas where ISKCON can distribute their literature, the Director had "unreasonably restricted [the group's] ability to engage in the free distribution of literature and other First Amendment activities."[15]

The parties cross-moved for summary judgment and the court ruled in favor of the County. Upon appeal, the Eleventh Circuit

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[7] *See id.* at 1287, 1291.

[8] *See id.* at 1284.

[9] *Id.* at 1285 (quoting METROPOLITAN DADE COUNTY, FLA., CODE ch. 25, § 25-2.2(a) (1995)).

[10] *Id.* (quoting §25-2.2(c)).

[11] *Id.* (quoting §25-2.2(d)).

[12] *See ISKCON Miami,* 147 F.3d at 1285 .

[13] *See id.*

[14] *Id.*

[15] *Id.*

upheld the regulations against ISKCON's First Amendment challenge.[16]

The Eleventh Circuit affirmed the lower court's decision, ruling that the regulations were reasonable restrictions and the regulation granting discretion to the Director to choose specific areas for distribution was not unconstitutional.[17] Relying primarily on the Supreme Court decisions and opinions in *Lee*,[18] the Eleventh Circuit ruled that the same problems that justified a governmental ban on solicitation in airport terminals in *Lee* also rendered a like restriction on the sale of Krishna literature at MIA reasonable.[19]

The court found solicitation to be similar to sale because both entail action by those being solicited.[20] In both instances, the solicitee must stop and decide whether or not to contribute.[21] If the individual decides to contribute, that person has to grab his wallet or checkbook and make payment, all of which take up time and space in busy airport terminals. Following the Supreme Court in *Lee* and *United States v. Kokinda*,[22] the Eleventh Circuit determined that solicitation

> "disrupts passage and is more intrusive . . . than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to solicitation."[23]

The court clarified what it felt was a major contrast between solicitation and sales: "Common sense differences between literature distribution, on the one hand, and solicitation and sales, on the other, suggest that the latter activities present greater crowd control problems than the former."[24] Also, the court considered the stress associated with facing solicitors and the potential for fraud or coercion by solicitors as legitimate factors for upholding the regulations. "The ban on solicitation and sale of literature . . . was implemented to address . . . instances of abu-

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[16] *See id.* at 1282, 1285.

[17] *See* 147 F.3d at 1282, 1287.

[18] *See Lee*, 505 U.S. 672, 505 U.S. 830.

[19] *See ISKCON Miami*, 147 F.3d at 1287.

[20] *See id.*

[21] *See id.*

[22] 497 U.S. 720 (1990).

[23] *ISKCON Miami*,147 F.3d at 1287 (quoting *Kokinda*, 497 U.S. at 734).

[24] *Id.* at 1287 (citing Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981)).

sive conduct and misrepresentation on the part of ISKCON members engaged in solicitation and the sale of literature."[25] The court drew from *Lee* for support: "[F]ace-to-face solicitation presents risks of duress that are an appropriate target of regulation."[26] The Eleventh Circuit found further backing in the Supreme Court's ruling in *United States v. Kokinda*,[27] that "this description of the problems associated with the sale of literature in a busily traversed airport rings of 'common sense,' which is sufficient . . . to uphold a regulation under reasonableness review."[28] Therefore, the court determined that due to crowd control concerns in a busy airport terminal, "the prohibition on solicitation and sale of literature at MIA is a reasonable restriction on speech."[29]

To determine what constituted a reasonable restriction, the court focused on the nature and purpose of MIA.[30] Getting passengers to-and-from the airplanes is the primary purpose of the airport. MIA was not built to be a forum for the practice of First Amendment rights. The court ruled that MIA grounds, including the parking lot and sidewalks, "are intended by the County to be used for air travel-related purposes, 'not to facilitate the daily commerce and life of the neighborhood or city.'"[31] Therefore, the court decided "it is certainly reasonable . . . to conclude that solicitation and sales of literature would be inconsistent with the particularly hectic nature of the airport . . . at MIA."[32] This reasoning was synonymous with the Supreme Court's finding in *Hague v. Comm. for Indus. Org.*, where it was determined that "it cannot fairly be said that an airport terminal has as a principal purpose of promoting the free exchange of ideas. To the contrary . . . the purpose of the terminals is . . . the facilitation of passenger air travel, not the promotion of expression."[33] Applying the primary purpose test for determining reasonability of First Amendment restrictions is an established

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[25] *ISKCON Miami*, 147 F.3d at 1288.

[26] *Lee*, 505 U.S. at 689-90.

[27] 497 U.S. 720 (1990).

[28] *Id.* at 734.

[29] *ISKCON Miami*, 147 F.3d at 1288.

[30] *See id.* at 1289.

[31] *Id.* (quoting *Kokinda*, 497 U.S. at 728). In *Kokinda*, the Supreme Court upheld a Postal Service regulation that banned solicitation anywhere on postal property including the post office buildings and the nonpublic sidewalks surrounding the post offices.

[32] *ISKCON Miami*, 147 F.3d at 1289-90.

[33] 307 U.S. 496, 515 (1939).

practice by the courts,[34] providing them with solid backing for decisions regarding this controversial area of free speech.

By wisely choosing to base its ruling on simple and legitimate concerns for the passengers, the court put itself in a position to rebuke each of ISKCON's arguments easily. For instance, ISKCON tried to distance itself from *Lee* by claiming that the *Lee* Court was mostly concerned with congestion in the terminal, whereas Dade County's reasoning for the prohibition was driven by worries about fraud.[35] The court countered by pointing out that *Lee* rested on more than merely the problems of congestion. Among the factors cited in *Lee* for the ban was "the coercive aspects of face-to-face solicitation that make regulation appropriate."[36] The court cited Chief Justice Rhenquist's diatribe in *Lee* regarding unscrupulous solicitors preying on naïve passengers to show that there was more to their upholding of the MIA ban than congestion worries: "[T]he unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase . . . . The targets of such activity frequently are on tight schedules . . . mak[ing] such visitors unlikely to stop and formally complain to airport authorities."[37]

ISKCON also tried to discredit the ban by arguing that a straight-out prohibition was unreasonable because any problems surrounding the sale of literature at MIA can be handled through regulation.[38] Here, the court pointed out that, as a non-public forum where travel is the ultimate goal, restrictions on non-travel activities like sale of literature do not deserve consideration of less restrictive alternatives. "[A] restriction on speech in a non-public forum will be upheld as long as it is reasonable."[39] "[I]t need not be the most reasonable or the only reasonable limitation."[40]

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[34] *See* Gen. Media Communs., Inc. v. Cohen, 131 F.3d 273, 284-285 (2d Cir. 1997) (upholding constitutionality of congressional act prohibiting the sale of sexually explicit materials at military exchanges), *cert. denied*, 524 U.S. 951 (1998); United States v. Gilbert, 920 F.2d 878, 886 (11th Cir. 1991) (finding injunction prohibiting personal protest inside courthouse and in adjoining portico constitutional).

[35] *See ISKCON Miami*, 147 F.3d at 1288-90.

[36] *Id.* at 1288.

[37] *Id.* at 1288-89 (quoting *Lee*, 505 U.S. at 684).

[38] *See id.* at 1289.

[39] *Id.*

[40] *Id.* (quoting *Kokinda*, 497 U.S. at 730).

ISKCON also tried to put space between this matter and *Lee* by correctly showing that the *Lee* ban was only for the terminal, while the MIA ban extended to the parking lot and sidewalks.[41] Once again, the court rebutted this argument by putting the well being of the passengers first.[42] Although the court acknowledged that the availability of nearby spaces is a factor when considering reasonableness of free speech prohibitions,[43] it argued that other factors, mainly the comfort and safety of passengers, were more compelling than creating space for sales of literature. The court took into consideration the affidavit of an MIA employee to prove that their concerns for passenger safety were well founded: "It is certainly reasonable for the County to conclude that solicitation and sales of literature would be inconsistent with the particularly hectic nature of the airport sidewalks at MIA."[44] The court thus concluded, "the sidewalks are . . . extremely congested areas where passengers check their baggage . . . skycaps wheel carts full of luggage . . . and taxis, vans and private vehicles drop off and pick up passengers . . . . [E]ven a brief delay of persons in these areas can lead to extreme congestion and danger of an accident."[45]

Curiously, ISKCON did not pursue a content-based argument. ISKCON could have alleged that the County was cleverly hiding its distaste for the Krishna religion behind a veil of frivolous safety concerns. In other words, they could have argued that the Director's restrictions were influenced by the religious content of the literature for sale, rather than any concern for overcrowded facilities. The Supreme Court pulls no punches when it comes to content-based prohibitions: In a non-public forum, restrictions on speech are permissible so long as they are "not an effort to suppress expression merely because public officials oppose the speaker's view."[46] Would the director place like restrictions on Girl Scouts or Leukemia Society members selling goods to raise funds for their respective causes? Because ISKCON did

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[41] *See ISKCON Miami*, 147 F.3d at 1289.

[42] *See id.*

[43] *See Gilbert*, 920 F.2d at 886 (noting that "the availability of alternative channels of communication" is a factor bearing on the reasonableness of a free speech prohibition).

[44] *ISKCON Miami*, 147 F.3d at 1289-90.

[45] *Id.* at 1289(quoting Affidavit of Winona (Kickie) K. Davis, R-1-19-Exh. 1 ¶14).

[46] Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983).

not broach this issue, the County never had to respond to the question.

However, even had ISKCON raised a compelling content-based argument, the County would have likely found solace in its application of the reasonableness test within the context of the intended purpose of MIA.[47] By ruling that "[t]he reasonableness of the Government's restriction of access to a non-public forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances," the Supreme Court provided clear backing for the prohibitions.[48]

The Eleventh Circuit in *ISKCON Miami* took a prudent approach to handling a sensitive matter despite skewed guidance from the Supreme Court.[49] The *Lee* Court's ambiguous opinion regarding the sale of literature in airports[50] will undoubtedly trouble courts in the future, especially when it comes to restrictions on sales or solicitation of religious literature in airport terminals. If confronted with such First Amendment claims, courts would be wise to follow the lead of the Eleventh Circuit by applying a simple reasonableness test based on the persons and purpose of the location involved. When dealing with the most complex and explosive issues, such as ISKCON's First Amendment claims, the simplest approach has proven to be the best.

Richard Deutsch

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[47] *See ISKCON Miami*, 147 F.3d at 1286.

[48] *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 809 (1985).

[49] *See ISKCON Miami*, 147 F.3d at 1286; *Lee*, 505 U.S. 672, 505 U.S. 830.

[50] *See Lee*, 505 U.S. 672, 505 U.S. 830.


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Wellons v. Northwest Airlines, Inc.—Defining "Service" Under the Airline Deregulation Act: Why the Majority of Circuits Are Wrong.

THE AIRLINE DEREGULATION ACT of 1978 ("ADA") includes a preemption provision that prevents states from implementing any "law, regulation, or other provision having the force and effect of law related to a *price, route, or service* of an air carrier."[1] Congress, unfortunately, did not define "service."[2] Consequently, the courts have been inundated with state law claims against air carriers and have been forced to interpret the preemption language of the ADA.[3] Recently, in *Wellons v. Northwest Airlines, Inc.*,[4] the Sixth Circuit was faced with the unenviable task of defining and then interpreting the term "service" under the ADA. Courts are usually reticent in interpreting statutes when given as little guidance as Congress has provided for the ADA and the term "service." Despite this reticence, the Sixth Circuit held that racial discrimination claims based on a state statute[5] and other common law claims, including intentional infliction of emotional distress, fraud, and misrepresentation, were not preempted by the ADA "[b]ecause the plaintiff's claims bear only the most tenuous relation to airline rates, routes, or services."[6] In circumscribing the issue to "racial" state law claims rather than state law claims in general,[7] the Sixth Cir-

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[1] 49 U.S.C. § 41713(b)(1) (1994) (emphasis added).

[2] *See* 49 U.S.C. App. § 1301 (11) (1988) (recodified at 49 U.S.C. § 40102 (2000)).

[3] More specifically, the courts have been cornered into defining "service" under the ADA. *See, e.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992) (The Supreme Court recognized that "[d]ual economic regulation by federal and state agencies has produced a conflict"); Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998); West v. Northwest Airlines, Inc., 995 F.2d 148, 151 (9th Cir. 1994) (state law tort claims are too tenuous to airline regulation); Somes v. United Airlines, Inc., 33 F. Supp. 2d 78, 84 (D. Mass. 1999) (discussing whether the ADA preempted state law tort claims).

[4] 165 F.3d 493 (6th Cir. 1999).

[5] The racial discrimination claim was based on Michigan's Elliot-Larsen Civil Rights Act. *See id.* at 494.

[6] *Id.*

[7] The court was also wrong in basing its decision primarily on what three other circuits have done rather than basing its decision on sound reasoning. "Unwill-

cuit misinterpreted Congress's intent and deviated from Supreme Court precedent.

In 1993, Brenda Wellons ("Wellons"), an African-American woman, resigned from her job as a reservation agent for Northwest Airlines ("Northwest") after five years of service.[8] Wellons resigned because she had been involved in a serious automobile accident and needed long-term therapy; Northwest denied her requested medical leave of absence.[9] Wellons averred that Northwest management assured her that when her therapy was complete, she could reapply and would be rehired. In reliance on management's promise to her, Wellons reapplied for her old job after completing six months of therapy. Her application was refused. She was informed that Northwest had a policy against rehiring any employee who had been separated from Northwest for less than one year.[10] Wellons alleged that she was never informed of Northwest's "rehiring" policy for former employees, that a former white female reservation agent in a similar position was rehired by Northwest within one year,[11] and that she was still qualified for her old job as a reservation agent.[12]

On September 9, 1996, Wellons brought a three-count complaint against Northwest claiming state law intentional infliction of emotional distress, state law fraud and misrepresentation, and racial discrimination in violation of Michigan's Elliot-Larson Civil Rights Act.[13] Northwest removed the case to federal district court and moved for summary disposition.[14] The district court granted the 12(b)(6) motion and rejected Wellons's motion for reconsideration.[15] In February 1997, Wellons appealed the district court decision to the Sixth Circuit Court of Appeals.[16] The Sixth Circuit reversed.[17]

The procedural issue before the Sixth Circuit was whether the district court was correct in dismissing Wellons's state law tort

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ing to create a circuit split as far as race is concerned, we hold that Ms. Wellons' state law race discrimination claims are not preempted." *Id.* at 496.

[8] *Id.* at 496-97.

[9] *Id. at 497.*

[10] *Wellons*, 165 F.3d at 497.

[11] *Id.*

[12] *See id.*

[13] MICH. COMP. LAWS ANN. § 37.2202 (West 2000).

[14] Wellons v. Northwest Airlines, Inc., 999 F. Supp. 941 (E.D. Mich. 1996).

[15] *See Wellons*, 165 F.3d at 497.

[16] *Id.*

[17] *Id.* at 493.

claims.[18] But the Sixth Circuit chose to construe this critical issue narrowly. Judge Nelson, writing for the majority, ruled only that the ADA does not preempt common law tort claims based on racial bias,[19] and thus dodged the tougher issue of whether Congress's intent was for the ADA to federalize aviation liability by preempting all tort claims predicated on state law.[20]

Regardless of whether one applies the narrow issue that the majority framed or the broader issue the Sixth Circuit should have addressed, Wellons's claim should still be preempted. The ADA preempts all common law tort claims related to a price, route, or service of an air carrier.[21] Working within the parameters of this preemption mandate, Wellons's claim was properly dismissed because "*all* employment-related activities undertaken by a regulated airline are 'related to' its provision of 'services' to its patrons."[22]

In this case, the dissent (rather than the majority) correctly framed the issue and determined the conclusions of law.[23] The majority is too concerned with splicing the definition of "service" and using its clairvoyant ability to deduce if Congress "intended" preemption for employment discrimination cases based on race.[24] The majority missed the proverbial forest by its focus on the trees. In dealing with federal preemption of state law, the Supreme Court has held that the "ultimate touchstone" is whether Congress intended, via legislation, to exclusively federalize the regulation of a particular subject matter.[25] Obviously, in enacting the ADA, Congress chose to forestall state regulation of the commercial airline industry in favor of exclusive federal control. It is not the court's place to circumscribe and erode this preemption because it "cannot believe" Congress intended "this" or "that."

In a brief majority opinion, Judge David A. Nelson began his preemption analysis by pointing out the presumption that federal laws are not intended to replace state laws,[26] and that pre-

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[18] *Id.* at 494.

[19] *Id.*

[20] The dissent deemed this issue to be *critical*, however. *See id.* at 497 (Krupansky, J., dissenting).

[21] 49 U.S.C. § 41713(b)(1) (2000).

[22] *Wellons*, 165 F.3d at 496 (Krupansky, J., dissenting) (emphasis added).

[23] *See generally* 49 U.S.C. § 41713(b)(1) (2000).

[24] *See Wellons*, 165 F.3d at 495.

[25] *See id.* at 497 (Krupansky, J., dissenting) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) concerning federal preemption of ERISA).

[26] *See Wellons*, 165 F.3d at 493.

emption is inappropriate without clear and unambiguous intent by Congress.[27] The remainder of the opinion sought more to explain away existing precedent than to offer any theoretical basis for the decision.[28] Judge Nelson noted and then summarily dismissed Supreme Court precedent on the preemption issue as "inapplicable" because of disparate factual contexts.[29] Judge Nelson reconciled *Morales v. Trans World Airlines, Inc.*[30] and the court's decision in the instant case by pointing to the dissimilarities in facts between the two cases. In *Morales*, the Supreme Court held that the ADA preempts any state attempt to regulate airfare advertising under state deceptive advertising law.[31] Therefore, Judge Nelson reasoned that *Morales* and *Wellons* were distinguishable because *Morales* dealt with advertising and *Wellons* dealt with racial discrimination. The majority used the same reasoning to reconcile *American Airlines, Inc. v. Wolens*,[32] which addressed state consumer fraud acts under the ADA, and the instant case.

Judge Nelson next distinguished the present case from two state court cases that Northwest relied upon. First, in *Belgard v. United Airlines*,[33] a Colorado court of appeals held that a class action brought under a Colorado statute banning discrimination based on a perceived handicap was preempted by the ADA, because the suit had a "connection with" the airline's services.[34] Second, in *Fitzpatrick v. Simmons Airlines, Inc.*,[35] a Michigan appellate court dismissed a case by a baggage handler whose employment had been terminated based on his inability to meet the mandatory height and weight rules because it was preempted under the ADA. The Michigan court held that a "law that restricts an airline's selection of employees, based upon their physical characteristics, must necessarily have connection with and reference to, and therefore must be one 'relating to'

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[27] *Id.*

[28] *See id.* at 495-96.

[29] Id. at 495 (the court states that "[t]he United States Supreme Court has made it clear that . . . the 'related to' language does not vitiate the normal presumption against preemption").

[30] 504 U.S. 374 (1992).

[31] *See Wellons*, 165 F.3d at 495.

[32] 513 U.S. 219, 223-24 (1995).

[33] 857 P.2d 467 (Colo. Ct. App. 1992), *cert. denied*, 510 U.S. 1117 (1994).

[34] *Wellons*, 165 F.3d at 495 (discussing *Belgard*, 857 P.2d at 470-471).

[35] 555 N.W.2d 479 (Mich. Ct. App. 1996).

[airline services]."[36] The Sixth Circuit did not disagree with the holdings in the above cases, but rather distinguished *Belgard* and *Fitzpatrick* because they dealt with *physical* discrimination, which might have some bearing on individual's ability to render safe "service."

Judge Nelson saw no relationship between racial discrimination and "service" under the ADA.[37] Therefore, because "neither air safety nor market efficiency is appreciably hindered by the operation of state laws against racial discrimination," "[a]n employee's race, as opposed to his eyesight or physical size, has no arguable connection to safety."[38] Ostensibly, Judge Nelson's argument, that racial discrimination in any context is wrong, makes sense. But the issue is whether Congress intended to federalize the remedy for racial discrimination within the aviation industry, and not whether racial discrimination is wrong *per se.*

In his conclusion, after a brief and superficial discussion, Judge Nelson stated that he is "[u]nwilling to create a circuit split as far as race is concerned"[39] and then reversed and remanded the case. In such an important constitutional matter it is unfortunate that the majority based its short opinion largely on its unwillingness to split from the three previous circuits that, correctly or incorrectly, previously adjudicated the issue.

With the enactment of the ADA, "Congress has unequivocally evidenced an intent to forestall *all* state regulation of commercial airlines in any and all particulars *related to* their prices, routes, and services, in favor of *exclusive* federal regulation."[40] The majority missed the point by separating alleged discrimination based on physical conditions[41] (such as handicaps) and non-physical conditions (such as race or gender). The issue is not how tangentially related alleged racial discrimination is to the term "services" under the ADA, but rather whether Congress intended to federalize employment issues for air carriers. Since employees inherently create airline "service" to customers, any issue relating to airline employees (hiring, firing, reprimanding, training) is preempted by the ADA and, therefore, must be re-

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[36] *Wellons*, 165 F.3d at 495 (quoting *Fitzpatrick*, 555 N.W.2d at 481) (internal citations omitted).

[37] *Id.* at 495.

[38] *See id.* at 496.

[39] *Id.*

[40] *Id.* at 504 (Krupansky, J., dissenting) (emphasis added).

[41] *See id.* at 496.

solved exclusively by federal law. It is not the court's place to second-guess Congress's intent in preempting state law.

Commercial aviation is a complex business[42] that leaves no part of the nation (or the world) untouched. Therefore, it is not surprising that Congress felt it prudent to create a uniform set of laws for the commercial aviation industry. The ADA creates "efficiency, innovation, and low consumer prices" because it "prevent[s] states from eviscerating federal deregulation by substituting state regulation."[43]

According to Supreme Court precedent, a recovery of damages based on a state tort claim is commensurate with state regulation.[44] In *San Diego Bldg. Trades Council v. Garman*, the Supreme Court held that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[45] The majority has frustrated congressional intent in promulgating the ADA by allowing a broad range of state tort claims.[46]

Although this preemption seems harsh, it is important to note that just because state law is preempted, a potential plaintiff is not left without an avenue for redress. The majority would have air carrier "victims" believe that the ADA excludes them from asserting their First Amendment right to petition the courts.[47] Rather, plaintiffs must use *federal* law to assert their rights. In the instant case, the only reason Wellons was forced to seek relief under state law was because the statute of limitations had

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[42] The airline industry has exploded since 1978, much to the credit of the ADA, employing over one million people and annually providing air transportation to over five hundred million passengers. Mathew J. Kelly, Comment, *Federal Preemption By the Airline Deregulation Act of 1978: How Do State Tort Claims Fare?*, 49 CATH. U. L. REV. 873, 873 (2000).

[43] *Wellons*, 165 F.3d at 500 (Krupansky, J., dissenting).

[44] San Diego Bldg. Trades Council v. Garman, 359 U.S. 236 (1959).

[45] *Id. at 247.*

[46] "[A] State . . . 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." 9 U.S.C. § 41713(b)(1) (2000) (emphasis added). *See Morales*, 504 U.S. at 383 (regarding the "related to" clause, Congress "expressed a broad pre-emptive purpose").

[47] "The right to petition is the capstone right of the First Amendment, but . . . it is seldom discussed or invoked in constitutional jurisprudence." Raymond Ku, *Antitrust Immunity, The First Amendment and Settlements: Defining the Boundaries of the Right To Petition*, 33 IND. L. REV. 385, 389 (2000).

run on the analogous federal statutes.[48] So the only burden the ADA creates is requiring a heightened awareness of federal pleading rules for plaintiff's attorneys when dealing with aviation issues.

Under the U.S. Constitution, Congress legislates and the courts interpret. In enacting the ADA, Congress unambiguously intended to "federalize" commercial aviation in the United States. Aviation is a "national" means of transportation that requires unified regulations to both keep airfares low (which helps the "national" economy) and keep U.S. air carriers competitive internationally. With the *Wellons* decision, the Sixth Circuit, by ignoring Supreme Court guidance,[49] has effectively allowed state regulation by allowing state tort claims,[50] and thus, has frustrated Congress's clear intent in promulgating the ADA—to create a uniform set of regulations so that the "national" aviation industry can thrive.

Joshua Iacuone

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[48] The plaintiff was granted leave to amend her complaint so she could plead federal civil rights claims; however, they were barred by the statute of limitations. *See Wellons*, 165 F.3d at 494 n.1.

[49] *See id.* at 497 (Krupansky, J., dissenting) (citing *Pilot Life Ins. Co.*, 481 U.S. at 45 as stating that in the context of federal preemption of ERISA, courts should look at the totality of the subject in deciding if federal law preempts an issue).

[50] *See Garman*, 359 U.S. at 247 (finding state tort action commensurate with state regulation).


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WHAT IS AN "ACCIDENT" IN THE INTERNATIONAL AIR? THE FIRST CIRCUIT HOLDS THAT AN "ACCIDENT" HAS A FLEXIBLE APPLICATION AND REQUIRES ASSESSMENT OF CIRCUMSTANCES THROUGH DISCOVERY. *Langadinos v. American Airlines, Inc.*, 199 F.3d 68 (1st Cir. 2000).

ARTICLE 17 of the Warsaw Convention states that an international air carrier shall be liable for damages sustained if the accident took place on board the aircraft.[1] Although the Warsaw Convention does not define "accident," the Supreme Court, in *Air France v. Saks*, ruled that "liability under Article 17 [of the Warsaw Convention] arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."[2] The courts have since struggled over the definition and the scope of the word "accident."[3] In *Langadinos v. American Airlines, Inc.*,[4] the First Circuit analyzed the Supreme Court's definition of "accident," interpreting it to require a flexible application and assessment of the circumstances through discovery. In light of this holding, Langadinos's claim that American Airlines violated Article 17 of the Warsaw Convention by continuing to serve alcohol to an intoxicated passenger who then assaulted Langadinos should survive a motion to dismiss.[5]

On June 13, 1996 Langadinos was on an American Airlines flight headed from Boston to Paris.[6] When Langadinos asked a flight attendant for aspirin, she ignored him and continued "spoon-feeding ice cream into the mouth of passenger Christopher Debord."[7] Debord stared at Langadinos "in a conspicuous and strange fashion" and then "whispered something into the flight attendant's ear."[8]

Later in the flight Langadinos went to use the lavatory. Debord grabbed Langadinos's testicles, "causing 'excruciating

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1 Warsaw Convention, Art. 17, 49 U.S.C. § 40105 (2000).
2 470 U.S. 392 (1985).
3 *See* Wallace v. Korean Air, 214 F.3d 293 (2d Cir. 2000).
4 Langadinos v. Am. Airlines, Inc., 199 F.3d 68 (1st Cir. 2000).
5 *See id.* at 69.
6 *See id.*
7 *Id.*
8 *Id.* at 70.

pain.'"[9] Debord then proceeded to pull Langadinos's hand to his own groin.[10] Langadinos notified the flight crew about the assault. The attendant involved in the spoon-feeding to Debord dismissed the accusation, while another crewmember said they would have Debord arrested in Paris.[11] No action was taken against Debord in Paris.[12]

Langadinos filed a compliant against American Airlines in the District of Massachusetts alleging common law tort and a breach of the Warsaw Convention.[13] The complaint was later amended to allege that American knew Debord was intoxicated and continued to serve him alcohol.[14] American did not answer the complaint, but filed a motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6).[15] The district court granted American's motion and dismissed the complaint.[16] Langadinos appealed the district court's dismissal of the amended complaint alleging a violation of the Warsaw Convention.[17]

The First Circuit had to decide whether the Warsaw Convention allows a plaintiff to recover when the airline continues to knowingly serve alcohol to an intoxicated passenger and that passenger allegedly assaults another.[18] The First Circuit reversed the district court's granting of the 12(b)(6) motion and found that Langadinos's claim survived the definition of accident under the Warsaw Convention.[19] Using the Supreme Court's definition in *Saks*, the court found that "accident" could encompass recovery for torts committed by fellow passengers.[20] Generally, "accidents" have been found only where airline personnel play a proximate role to the tort action. In *Potter v. Delta Air Lines*, the Fifth Circuit did not find an "accident" where an injury resulted from a passenger dispute over a seat, and no airline personnel were involved.[21] In addition, the court in *Stone v.*

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9 *Id.*

10 *See Langadinos*, 199 F.3d at 70.

11 *Id.*

12 *Id.*

13 *See id.*

14 *See id.*

15 *Langadinos*, 199 F.3d at 70 (quoting FED. R. CIV. P. 12(b)(6)).

16 *See id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 70-71.

21 98 F.3d 881, 883-84 (5th Cir. 1996).

Continental Airlines held that one passenger punching another does not constitute an "accident."[22]

In arriving at the scope of the word "accident," the Supreme Court in *Saks* looked to the practices of other countries. They found that other countries interpreted the word "accident" broadly, using a flexible application.[23] The court here, following the flexible application of the term "accident," found the claim to allege enough airline involvement to survive a motion to dismiss. Langadinos alleged that Debord came across as "intoxicated, aggressive and erratic,"[24] American knew about this behavior, and despite their knowledge of Debord's state, they continued to serve him alcohol. The court, citing *Saks,* said that because there was a chain of events that lead to the "accident," Langadinos must prove that he did suffer an injury and that American's serving Debord alcohol lead to that injury.[25]

The court did not say whether American was responsible for the alleged assault. *Saks* requires that the definition of accident should be flexibly applied only "*after* assessment of *all the circumstances* surrounding a passenger's injuries."[26] The court said this determination cannot be made until discovery has been completed.[27]

The court dismissed American's argument that Langadinos's complaint addressed only emotional injuries.[28] Langadinos alleged he suffered a physical injury, namely "'excruciating pain' in the groin area;" the court found this is enough to survive a motion to dismiss.[29] American argued that the pleading is defective because Langadinos pled his complaint too generally to include American's over-serving of alcohol; therefore it should not be credited in a review.[30] The court agreed with American that without the claim of over-serving, Langadinos would not have a Warsaw Convention accident claim because there would be no connection between American and the alleged assault.[31] The rudeness of the crew prior to and after the accident does not create a causal connection between American and the as-

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22 905 F. Supp. 823 (D. Haw. 1995).
23 *Saks,* 470 U.S. at 404-05.
24 *Langadinos,* 199 F.3d at 71.
25 *Id.*
26 *Id.* (quoting *Saks,* 470 U.S. at 405).
27 *Langadinos,* 199 F.3d at 71.
28 *See id.*
29 *Id.* at n.3.
30 *Id.* at 72.
31 *Id.*

sault; over-serving is the only link. The court pointed to the amended complaint, which alleged that before the assault American served Mr. Debord liquor even though he had "aggressive and erratic behavior" and that American continued to serve him even though they knew he was intoxicated.[32] The court held this complaint was not defectively pled because it alleged a connection with American and the assault by over-serving. American further argued the phrases "erratic" and "aggressive" did not adequately describe Mr. Debord's behavior, and requested Langadinos to provide more detail in the amended complaint.[33] The court disagreed with American and noted that Federal Rules of Civil Procedure only require a "short and plain statement of the claim."[34] The court did not require more than the rules do.

American also argued the complaint should be dismissed since it alleged "willful" misconduct on the part of American.[35] The court held that under the Warsaw Convention the complainant could seek damages above the $75,000 cap. Langadinos will have to prove American engaged in "willful" misconduct in order to remove the $75,000 cap.[36] The court further held American's objection was misplaced since an argument of willful misconduct goes only to damages.[37]

The First Circuit ruled that Langadinos's alleged assault could be a proximate result of American Airlines knowingly serving alcohol to an intoxicated passenger. The Supreme Court has said that the definition of liability under Article 17 should be "flexibly applied" after all of the passenger's injuries have been taken into account.[38] The First Circuit was correct in vacating the motion to dismiss following the *Saks* reasoning. Langadinos's injuries had not been assessed, therefore the motion to dismiss should not have been granted. In addition, a reasonable trier-of-fact could have found a causal connection between the over-serving of alcohol and the alleged assault.

The court did not decide whether a passenger could recover for mental injuries in conjunction with physical injuries.[39] The

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[32] *Id.*
[33] *Langadinos*, 199 F.3d at 72.
[34] *Id.* (referring to FED. R. CIV. P. 8).
[35] *Langadinos*, 199 F.3d at 71.
[36] *Id.*
[37] *See id.*
[38] *Saks*, 470 U.S. at 405.
[39] *Langadinos*, 199 F.3d at 71.

court refused to explore the issue of recovery for mental injures, although the Supreme Court has ruled an air carrier is not liable where there are no physical injuries as a result of an accident.[40] The issue of mental injuries was not before the First Circuit. Langadinos alleged he suffered physical injuries, and the court found this met the Article 17 requirement that physical injuries must be suffered in order to bring a Warsaw claim.

The First Circuit did not consider how the *Saks* Court analyzed the definition of the word "accident."[41] The Supreme Court in *Saks* said that it is the "cause" of the injury, which must satisfy the definition, rather than just the occurrence of the injury alone.[42] Even though the court did not address this aspect of the definition of "accident," Langadinos's claim satisfied *Saks* by alleging that American had a causal connection to the assault by over-serving an intoxicated man. Instead, the court adequately analyzed precedent[43] and looked at how other circuits resolved similar claims[44] to arrive at the conclusion that an accident will include recovery for torts committed by other passengers if the cause of the injury involved airline personnel.[45]

The controversy among the judges in *Wallace v. Korean Air*[46] shows the trouble a court can have in determining whether a claim based on a Warsaw Convention Article 17 violation is valid. The *Wallace* court struggled with how closely tied the alleged accident has to be to the actual operation of an aircraft and whether the accident involves a risk "characteristic of air travel."[47] The First Circuit did not struggle in interpreting *Saks*. The *Saks* Court gave approval to a lower court case, *Oliver v. Scandinavian Airlines Sys.*, where a drunken passenger who was continually served alcohol fell and injured a fellow passenger.[48] The First Circuit relied on this case to arrive at the conclusion that Langadinos's claim survived the flexible application of "accident" set forth in *Saks*. Langadinos's claim stemmed from the same type of chain of events: Debord appeared intoxicated,

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[40] *See* E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991).

[41] *See Saks*, 470 U.S. at 405.

[42] *Id* at 399 ("The drafters of the Warsaw Convention . . . specified that air carriers would be liable if the accident *caused* the passenger's injury.").

[43] *See Langadinos*, 199 F.3d at 70 (analyzing *Saks*, 470 U.S. 392 (1985)).

[44] *See Langadinos*, 199 F.3d at 71 (quoting *Potter*, 98 F.3d at 883-84).

[45] *Langadinos*, 199 F.3d at 71.

[46] 214 F.3d 293 (2d Cir. 2000).

[47] *See id.* at 300.

[48] *See Saks*, 470 U.S. at 405 (quoting Oliver v. Scandinavian Airlines Sys., 17 CCH Av. Cas. 18, 283 (D. Md. 1983)).

American knew about it, and American continued to serve him alcohol.

Although the First Circuit had only to decide whether the complaint stated a claim upon which relief could be granted, in doing so, the court analyzed the law for an Article 17 Warsaw Convention violation.[49] The court interpreted the *Saks* "accident" definition correctly to "flexibly apply" to the circumstances, once an assessment of the circumstances is made, and to require airline personnel involvement in the tort.[50] The conclusion that an accident claim under the Warsaw Convention requires flexible application and assessment of the circumstances follows the reasoning of the precedent under Article 17.

Lorin Runnels

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[49] *Saks*, 470 U.S. at 405.

[50] *Langadinos*, 199 F.3d at 70-71 (quoting *Saks*, 470 U.S. at 405; *Potter*, 98 F.3d at, 883-884).

Garvey v. National Transportation Safety Board: THE FAA GETS ITS CAKE AND EATS IT TOO

THE FEDERAL AVIATION ACT provides for a "split enforcement regime" of aviation rules and regulations.[1] Congress delegated rule-making and enforcement duties to the Federal Aviation Administration (FAA), but assigned adjudicatory authority to the National Transportation Safety Board (NTSB).[2] Consequently, an airman who is "adversely affected" by an FAA order may "appeal the order to the National Transportation Safety Board."[3] The viability of that appeal, however, has been substantially emasculated by the D.C. Circuit Court's opinion in *Garvey v. National Transportation Safety Board.*[4] Citing the plain language of the Federal Aviation Act, the *Garvey* court proclaimed that the NTSB is "bound by all validly adopted interpretations of laws and regulations the Administrator carries out . . . unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law."[5] As a result of employing this high standard, the court undermined an airman' s ability to obtain fair appellate review of FAA enforcement actions as well as the fundamental objective of aviation regulations generally: safety in our skies.[6]

On June 19, 1994, Captain Richard Merrell departed from Los Angeles as the pilot-in-command of Northwest Airlines Flight 1024.[7] As the non-flying pilot for this flight, Merrell's duties included communicating with Air Traffic Control (ATC).[8] While performing these duties, Merrell incorrectly acknowl-

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[1] Garvey v. Nat'l Transp. Safety Bd., 190 F.3d 571, 576 (D.C. Cir. 1999) (discussing the Federal Aviation Act, 49 U.S.C. § 44701 (2000)).

[2] *See* 49 U.S.C. § 44701(a) (2000); *see also* 49 U.S.C. § 1133 (1999).

[3] *See* 49 U.S.C. § 44709(d) (2000).

[4] *See Garvey,* 190 F.3d at 576.

[5] *See id.* (*citing* 49 U.S.C. §44709(d)(3) (2000)); *see also* Hinson v. Nat'l Trans. Safety Bd., 57 F.3d 1144, 1148 (D.C. Cir. 1995) (discussing the same provision).

[6] *See* John S. Yodice, *Questioning Clearances,* A.O.P.A. PILOT, June 1999, *at* <http://aopa.org/members/files/pilot/1999/pc9906.html> (last visited Sept. 11, 2000).

[7] *See Garvey,* 190 F.3d at 574.

[8] *See* Valentine v. Merrell, NTSB Order No. EA-4530 at 2 (1997), *rev'd sub nom.* Garvey v. Nat'l Trans. Safety Bd., 190 F.3d 571 (D.C. Cir. 1999).

edged (or "read back") a clearance intended for another flight.[9] Because both Merrell and the intended flight crew simultaneously acknowledged the clearance, the stronger transmission (from the intended flight crew) blocked out (or "stepped on") Merrell's acknowledgment.[10] The controller, therefore, neither heard nor corrected Merrell.[11]

Unaware of his error, Merrell's flight complied with the clearance and started climbing to the altitude assigned to the other airplane.[12] At that point, controllers observed the altitude deviation and instructed Merrell to return immediately to his assigned altitude.[13] Before he could comply, however, Merrell had climbed 1,200 feet past his assigned altitude and the standard vertical separation of 1,000 feet between airplanes was lost.[14]

On November 3, 1995, the FAA issued an enforcement order against Merrell.[15] The FAA alleged that Merrell had violated three separate Federal Aviation Regulations: two governing compliance with air traffic control clearances, and one catch-all regulation that prohibits the "careless or reckless operation" of an aircraft.[16] Merrell appealed the action to NTSB Administrative Law Judge (A.L.J.), William R. Mullins, who affirmed the FAA order.[17] Judge Mullins concluded that the controller's failure to hear Merrell's acknowledgment "did not absolve 'Captain Merrell of his responsibility to hear that [the] initial clearance' was for another aircraft."[18]

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[9] *Garvey*, 190 F.3d at 574.

[10] *Id.*; *see also Valentine*, NTSB Order No. EA-4530 at 2 (1997).

[11] *Garvey*, 190 F.3d at 574.

[12] *Id.*

[13] *Id.*

[14] *Id.* According to Section 4-5-1 of FAA Publication 7110.65M (entitled *Air Traffic Control*), air traffic controllers must provide a minimum of 1,000 feet of vertical separation between aircraft operating under Instrument Flight Rules (I.F.R.) below 29,000 feet. *See Air Traffic Control*, 7110.65M § 4-5-1 (Eff. Aug. 10, 2000) *at* <www.ama500.jccbi.gov/site/library/7110-65/m/chap4/chap4sec5.pdf.> (last visited Dec. 1, 2000).

[15] *Garvey*, 190 F.3d at 574.

[16] *See* 14 C.F.R. § 91.123(a) (1995) (prohibiting deviations for clearances absent an amended clearance, the existence of an emergency, or in response to a traffic collision hazard); 14 C.F.R. § 91.123(e) (1995) (prohibiting the operation of an aircraft according to instructions issued to a pilot of another aircraft); 14 C.F.R. § 91.13(a) (1989) (prohibiting the operation of aircraft "in a careless or reckless manner so as to endanger the life or property of another").

[17] *Garvey*, 190 F.3d at 574-75. Because Merrell filed a timely report of the incident, the FAA waived sanctions against Merrell. *Id.* at 574.

[18] *Id.*at 575.

On appeal, the NTSB reversed.[19] According to the Board, Merrell's mistake constituted only "an error of perception" and the evidence did not support the conclusion that Merrell "was performing his duties in a careless or otherwise unprofessional manner."[20] Therefore, Merrell's actions did not so greatly affect "safety in air commerce or air transportation" to require affirmation of the FAA order.[21]

The Court of Appeals for the District of Columbia reversed the NTSB by relying on a footnote from *Hinson v. National Transportation Safety Board* in which the court concluded that Congress has "unambiguously direct[ed] the NTSB to defer to the FAA's interpretations of its own regulations."[22] Further, the Hinson court analogized the Federal Aviation Act's split-enforcement regime to that of the Occupational Safety and Health Act.[23] Consequently, the court reasoned that the same deference due the Secretary of Labor was due to the Administrator of the FAA.[24] To overcome that deference, an airman must show that the FAA's interpretation is "arbitrary, capricious, or otherwise not according to law."[25]

According to the court of appeals, the Administrator's interpretation in this case was not arbitrary or capricious.[26] In light of the "catastrophic consequences of noncompliance with ATC transmissions," the FAA had interpreted its regulations harshly, but justifiably, and "consistent[ly] with the regulation."[27] In essence, the "unforgiving environment of aviation"[28] necessitated such an interpretation. The FAA was reasonable, therefore, to ensure diligence by holding pilots to "an exacting standard of accountability."[29]

Although Judge Garland wrote for a unanimous panel, the aviation community's reaction to *Garvey* has been almost uni-

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19 *Valentine*, NTSB Order No. EA-4530 at 2.

20 *Id.* at 4. The Board also reaffirmed its holding upon a motion for reconsideration. *See* Garvey v. Merrell, NTSB Order No. EA-4670 (1998).

21 *Garvey*, NTSB Order No. EA-4670. *See* 49 U.S.C. § 44709(f) (2000) (discussing judicial review).

22 *Hinson*, 57 F.3d at 1148, n.2 (stating that 49 U.S.C. § 44709(d)(3) and not case law governs whether the "NTSB owes deference to the FAA.")

23 *See id.* (citing Martin v. OSHRC, 499 U.S. 144, 147, 150-57 (1991)).

24 *See Garvey*, 190 F.3d at 577-78.

25 *See id.* at 580 (quoting 49 U.S.C. § 44709(d)(3) (2000)).

26 *Id.* at 581.

27 *Id.* at 580-81.

28 *Id.* at 581.

29 *Id.*

formly critical. For example, the Air Line Pilots Association (A.L.P.A.) concluded that its members "[came] out the losers in the FAA's successful legal appeal."[30] Furthermore, the Aircraft Owners and Pilots Association (A.O.P.A.) criticized the decision by reminding the court that § 44709 of the Federal Aviation Act also allows the NTSB to reverse an FAA order if the Board finds that "safety in air commerce or air transportation . . . do[es] not require affirmation of the order."[31] A.O.P.A. also claimed that *Garvey* "frustrates the intent of Congress that a pilot have a federal agency independent of the FAA to review FAA enforcement actions."[32]

In its decision, the court correctly applied a portion of the governing law, but ignored another relevant section. On one hand, the court correctly looked to *Auer v. Robbins*[33] to determine whether the NTSB should have deferred to the FAA's interpretation of 14 C.F.R. § 91.123(a) and (e).[34] In *Auer*, the Supreme Court held that an appellate tribunal must defer to an agency's interpretation that is not "plainly erroneous or inconsistent with the regulation."[35] Looking beyond *Auer*, too, the appellate court also correctly found that "the NTSB need not follow [the interpretation] if it is 'arbitrary, capricious, or otherwise not according to law.'"[36] On the other hand, however, the court disregarded the statutory provision that allows the NTSB to overturn an FAA order if the interest of safety does not warrant affirmation.[37] Such misguided interpretation of applicable law produces two results: the *Garvey* court fails to promote aviation safety as fully as it should, while simultaneously an airman's ability to obtain fair appellate review is eroded by needlessly binding the NTSB.

Regulatory interpretations that undermine aviation safety subvert the goal of "safety in air commerce"[38] as well as rise to the

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[30] Jan Steebnik, *ALPA, NTSB Lose Appeal on 'Interpretive Rule'; Pilots Hit with Full Responsibility to Adhere to Clearances*, AIR LINE PILOT MAGAZINE, November 1999 *at* http://safety.alpha.org.library/alp.novinterpretrule.htm (last visited Dec. 1, 2000).

[31] Yodice, *supra* note 6; *see also* 49 U.S.C. § 44709 (d)(1)(A) (2000).

[32] *See* Yodice, *supra* note 6.

[33] 519 U.S. 452, 461 (1997).

[34] *See Garvey*, 190 F.3d at 580.

[35] *See Auer*, 519 U.S. at 461.

[36] *See Garvey*, 190 F.3d at 580.

[37] *See* 49 U.S.C. § 44709(d)(1)(A) (2000).

[38] *Id.*

level of "arbitrary or capricious"[39] and therefore need not be affirmed. While the court correctly surmised that "catastrophic consequences"[40] might result from a pilot's failure to adhere to a clearance or instruction, the court erred by placing full responsibility on flight crews to ensure that clearances are correctly followed.[41] The court erroneously accepted the Administrator's view that the only means to ensure that "pilots exercise unflagging diligence in monitoring, understanding, and obeying clearly transmitted ATC instructions" is to "hold pilots to 'an exacting standard of accountability.'"[42] Because the pilot and the controller operate as a team, both should bear the responsibility to ensure that clearances are understood and executed promptly and correctly.

In the Airman's Information Manual (AIM),[43] the FAA acknowledges the mutually dependent role of controllers and pilots. According to the AIM:

> pilots should read back *those parts* of ATC clearances and instructions containing altitude assignments or vectors as a means of *mutual verification.* The readback of the "numbers" serves as a double check *between pilots and controllers* and reduces the kinds of communications errors that occur when a number is either "misheard" or is incorrect.[44]

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[39] *See id.* § 44709(d)(3).

[40] *Garvey*, 190 F.3d at 582.

[41] *See* Yodice, *supra* note 6.

[42] *See Garvey*, 190 F.3d at 581.

[43] Aeronautical Information Manual, *Official Guide to Basic Flight Information and ATC Procedures*, at <http://www.faa.gov/ATpubs/AIM/index.htm.> (last visited Dec. 1, 2000) [hereinafter AIM]. Although not regulatory, the FAA publishes the AIM to provide pilots with the proper procedures for flying in today's airspace. To that end, the FAA often relies upon the AIM in Advisory Circulars (AC) published for flight crews. In AC 90-66a, for example, the FAA amended a previous AC to reflect modern procedures, including amending the appendix to "remain consistent with the Airman's Information Manual (AIM)." *Advisory Circular 90-66a, Recommended Standard Traffic Patterns and Practices for Aeronautical Operations and Airports without Operating Control Towers*, August 26, 1993 *at* <http:www.faa.gov/avr/afs/acs/90-66a.txt> (last visited Nov. 30, 2000). For that reason, flight crew reliance upon the procedures in the AIM should be encouraged, not disregarded.

[44] *See* AIM, supra note 43, *Pilot Responsibility Upon Clearance Issuance*, at § 4-4-6(b) (second and third emphasis added); *see also* Pilot Responsibility for Compliance with Air Traffic Control Clearances and Instructions, 64 Fed. Reg. 62 (April 1, 1999) (discussing the "shared responsibilities" of pilots and controllers in interpreting and complying with air traffic control clearances) [hereinafter Pilot Responsibility].

Furthermore, the FAA itself declared that the "FAA has long considered that aviation requires air traffic control to function as a cooperative system, in which *all participants must share the responsibility for accurate communication.*"[45] The FAA wants the best of both worlds: a cooperative system of communication between pilots and controllers, but full responsibility for compliance (and ultimately safety) only with the pilots. The Administrator's interpretation thereby provides an incentive to only one team member to ensure compliance with A.T.C. instructions. Not only is this interpretation inconsistent with information published by the FAA, but it ultimately undermines aviation safety. A team is only as strong as its weakest player, and the *Garvey* court allowed self-imposed deterioration. For that reason, the *Garvey* interpretation is incompatible with the goal of every aviation regulation: the safe and efficient use of our airspace.

Second, the *Garvey* decision also erodes the ability of airmen to obtain fair appellate review of enforcement actions. The court's regulatory interpretation therefore is contrary to law and should be overturned. By providing airmen with the ability to appeal enforcement orders to a neutral third party, Congress clearly intended to provide impartial review of FAA enforcement proceedings.[46] And while admitting that deference "does not mean blind obedience,"[47] the *Garvey* court failed to recognize that it has undermined Congress's intent by providing yet another advantage to the Administrator in prosecuting airmen. Unsurprisingly, a grateful FAA already has capitalized on its advantage by issuing a regulatory interpretation that likely will force the NTSB to comply with the *Garvey* interpretation.

On March 26, 1999, the FAA issued an "interpretive rule" refuting the NTSB's reasoning in *Garvey* and its predecessors.[48] Paralleling the *Garvey* court's logic, the rule states that "[c]ontrary to the NTSB's reasoning, pilots do not meet [the] regulatory imperative [of 14 C.F.R. § 91.123] by offering a full and complete readback or by taking other action that would tend to expose their error and allow for it to be corrected."[49] Accordingly, "the simple act of giving a readback does not shift full responsibility to air traffic control and cannot insulate pilots

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[45] *See* Pilot Responsibility, *supra note 44* (emphasis added).

[46] *See* 49 U.S.C. § 44709(d) (2000).

[47] *See Garvey*, 190 F.3d at 580.

[48] *See* Pilot Responsibility, *supra* note 43.

[49] *Id.*

from *their primary responsibility* under 14 C.F.R. § 91.123 . . . to listen attentively, to hear accurately, and to construe reasonably in the first instance."[50] Because this ruling has been officially published in the Federal Register and the *Garvey* court sanctioned its use, the NTSB must now defer to the ruling and may be precluded from advancing any other interpretation of 14 C.F.R. § 91.123.[51] As a practical matter, therefore, *Garvey* eased the FAA's task in further pre-determining the outcome of appellate review of airman enforcement actions.

Promoting safety undoubtedly underlies all aviation regulations. It is incumbent on all who work and play in aviation to abide by these regulations so that all may safely use the nation's airspace. Flight crews are merely one player in this team effort. Placing liability for noncompliance solely on one player greatly undermines the ability of the entire team to reach its goals. Unfortunately, by misconstruing 49 U.S.C. § 44709(d) and its deference requirements, the *Garvey* court provided the initial step toward this end.

*Evan Singer**

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[50] *Id.* (emphasis added).

[51] *See* 49 U.S.C. § 44709(d)(3) (2000) (requiring "written policy guidance available to the public related to sanctions to be imposed under this section"); *see also* Smith v. N.T.S.B., 981 F.2d 1326, 1327 (D.C. Cir. 1993) (overturning an NTSB order because "the FAA sanctions policy upon which it was based was not available to the public at the time of the conduct."); Yodice, *supra* note 6 ("The official publication of this interpretation, coupled with this law, now enables the FAA to argue that the Board is powerless to make similar decisions in future cases.")

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Articles


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