Perimeter Rules, Proprietary Powers, and the Airline Deregulation Act: A Tale of Two Cities...and Two Airports

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I. INTRODUCTION

This case note examines the two most recent court decisions in the long-running battle over airline service at Dallas Love Field and Dallas-Fort Worth International Airport — American Airlines, Inc. v. Department of Transportation and Legend Airlines, Inc. v. City of Fort Worth, Texas. From its earliest inception in the 1960’s to the present, the goal of establishing and maintaining a regional airport in the Dallas-Fort Worth area has spawned a series of court cases and legislative enactments. The overarching issue in the two cases addressed in this article was whether a local government—in light of the preemption and proprietary powers provisions in the federal Airline Deregulation Act—may enforce a regulation designed to protect a regional airport from competition by imposing a perimeter rule on a neighboring airport.

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1 202 F.3d 788 (5th Cir. 2000), cert. denied, 120 S.Ct. 2740 (2000).


II. HISTORICAL BACKGROUND.

A. DALLAS AND FORT WORTH AGREE TO BUILD A REGIONAL AIRPORT.

For years, the neighboring Texas cities of Dallas and Fort Worth engaged in a fierce rivalry for the business of commercial aviation and air carriers. Love Field—owned and operated by Dallas since 1928—is only five to six miles from downtown Dallas. From time to time, as air traffic increased, Dallas enlarged and improved the facilities at Love Field. In 1953, Fort Worth responded by opening a new airport called "Greater Southwest International Airport" (GSIA), midway between the two cities. The two airports were a mere 12 miles from one another. Serving two airports so close together resulted in inadequate and incomplete air service to both cities and unnecessary expense to the carriers as well as the taxpayers.

In 1962, the federal Civil Aeronautics Board (CAB) began investigating whether the cities should be forced to designate a single airport as the point through which all interstate air carrier service to Dallas and Fort Worth would be provided. After numerous hearings, the CAB gave the cities six months to reach a voluntary agreement designating a single airport through which interstate air carriers would serve the area.

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6 See Atkinson, 353 S.W.2d at 278.

7 See Southwest Airlines Co., 371 F. Supp. at 1019; see also Allen, supra note 4, at 1014 n. 6.


9 See id.; see also Allen, supra note 4, at 1014.


advised that if the cities could not reach an agreement, it would designate either Love Field or GSIA.\textsuperscript{12}

Rather than choosing one of the two existing airports, Fort Worth and Dallas agreed to construct and operate a new regional airport to be located midway between the two cities.\textsuperscript{13} The cities jointly adopted the 1968 Regional Airport Concurrent Bond Ordinance ("the Bond Ordinance"), which authorized issuance of joint revenue bonds for the financing of the new airport, later christened "Dallas-Fort Worth International Airport" (DFW).\textsuperscript{14}

Among other things, the Bond Ordinance provided that the cities would take "such steps as may be necessary, appropriate, and legally permissible" to phase out "[c]ertificated [a]ir [c]arrier" service at Love Field and GSIA and to transfer such activities to DFW.\textsuperscript{15} To effectuate the phase out of service at Love Field, the Regional Airport Board (the DFW Board) executed use agreements with the eight CAB-certificated air carriers then serving the Dallas-Fort Worth area. The use agreements provided that the carriers would move their operations to DFW "to the extent required under [the Bond Ordinance]."\textsuperscript{16}

B. SOUTHWEST AIRLINES REFUSES TO MOVE TO THE NEW AIRPORT.

Subsequently, however, Southwest Airlines began providing intrastate service from Love Field to Houston and San Antonio under authority granted by the Texas Aeronautics Commission.\textsuperscript{17} Southwest advised the DFW Board that it would remain at Love Field when the eight CAB-certificated carriers moved their operations to DFW.\textsuperscript{18} Dallas, Fort Worth, and the DFW Board responded by suing Southwest in the Federal District Court for the Northern District of Texas.\textsuperscript{19} They sought a declaratory judgment authorizing them to exclude Southwest from Love Field after the opening of DFW. Southwest counter-

\textsuperscript{12} See Southwest Airlines Co., 371 F. Supp. at 1020.
\textsuperscript{13} See id.; see also In re The City of Dallas, 977 S.W.2d 798, 800 (Tex. App.–Fort Worth 1998, orig. proceeding); Airport Coach Serv., Inc. v. City of Fort Worth, 518 S.W.2d 566, 569 (Tex. App.–Tyler 1974, writ ref'd n.r.e.); Continental Bus. Sys., 386 F. Supp. at 361.
\textsuperscript{14} See Southwest Airlines Co., 371 F. Supp. at 1020.
\textsuperscript{15} See id.; see also In re The City of Dallas, 977 S.W.2d at 800-01.
\textsuperscript{17} See id. at 1021.
\textsuperscript{18} See id.; see also Allen, supra note 4, at 1016.
\textsuperscript{19} See Southwest Airlines Co., 371 F. Supp. at 1021.
claimed, seeking a declaration of the right to remain at Love Field.\footnote{20}

The district court ruled in Southwest's favor, holding that it could not be excluded from Love Field so long as Love Field remained open, and the Fifth Circuit affirmed.\footnote{21} The district court noted that while the Bond Ordinance defined the term "Certificated Air Carrier Services" in a manner that clearly included Southwest Airlines, it expressly exempted "air taxi" operators from the phase out requirement even though such operators were competitors of Southwest.\footnote{22} The court also observed that the purely intrastate services of the eight CAB carriers then operating at Love Field were also outside the scope of the ordinance.\footnote{23} Thus, the court concluded, the Bond Ordinance applied only to Southwest since—except for the specifically exempted air taxis — Southwest provided the only Texas Aeronautics Commission certificated interstate air service to Love Field.\footnote{24} Accordingly, the court held: "Since the phase-out provision of the [Bond Ordinance] applies only to interstate services provided by Southwest Airlines, and not to such interstate services provided by others, it must be deemed to be unjustly discriminatory."\footnote{25}

For the next several years, Southwest operated intrastate flights from Love Field to various locations within Texas.\footnote{26} Operating only intrastate flights, Southwest was exempt from federal regulation. But when Congress deregulated the airline industry by enacting the 1978 Airline Deregulation Act (ADA),\footnote{27} Southwest asked the CAB for authority to begin serving New Orleans from Love Field under the ADA's transitional automatic market entry program.\footnote{28} The CAB granted Southwest the right to do so, concluding the ADA preempted Fort Worth and Dallas

\footnote{20 See id. at 1019.}
\footnote{22 See Southwest Airlines Co., 371 F. Supp. at 1027.}
\footnote{23 In other words, Dallas and Fort Worth never agreed in the Bond Ordinance that operations at Love Field would be completely shut down.}
\footnote{24 Id. at 1028.}
\footnote{25 Id. at 1029.}
\footnote{27 49 U.S.C. § 41713 (1994).}
\footnote{28 See Cramer, 931 F.2d at 1023.}
from enforcing the Bond Ordinance provision aimed at prohibiting interstate service at Love Field and that banning the service proposed by Southwest would not be a valid exercise of proprietary powers. 29 The CAB rejected the cities' argument that a provision in the ADA was intended to bar the CAB from authorizing interstate service at an airport over the objections of a local airport proprietor. 30

C. CONGRESS ENACTS THE WRIGHT AMENDMENT TO LIMIT INTERSTATE SERVICE AT LOVE FIELD.

Congress responded to the CAB ruling by including—in a bill further deregulating the airline industry 31—legislation that has become known as the "Wright Amendment." 32 The Wright Amendment, which applies only to Love Field, carved out a limited exception to the deregulation accomplished by the ADA. Under the Wright Amendment, airlines are generally barred from offering interstate service from Love Field. 33 The Wright Amendment did not, however, ban all interstate flights. As a compromise, Congress included provisions authorizing turn-around service to the four states bordering on Texas and geographically unrestricted service by airlines operating aircraft with a capacity of 56 passengers or less. 34

D. CONGRESS CLARIFIES AND MODIFIES THE WRIGHT AMENDMENT

In 1996, Legend Airlines began making plans to provide service at Love Field under the 56-passenger exception by reconfiguring large aircraft to hold only 56 seats. 35 Those plans were temporarily thwarted, however, when the CAB's successor, the

31 See Cramer, 931 F.2d at 1023.
32 See INTERNATIONAL AIR TRANSPORTATION COMPETITION ACT OF 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980) (the amendment has never been codified). The Wright Amendment is sometimes referred to as "The Love Field Amendment."
33 See Allen, supra note 4, at 1019-20.
34 INTERNATIONAL AIR TRANSPORTATION COMPETITION ACT OF 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980); see also Allen, supra note 4, at 1020.
35 See American Airlines, Inc. v. Dep't. of Transp., 202 F.3d 788, 794 (5th Cir. 2000).
Department of Transportation (DOT), ruled that the exception applied only to aircraft originally configured to seat less than 57 passengers.36

In response, the following year, Congress enacted the Shelby Amendment.37 In that legislation, Congress clarified the meaning of the Wright Amendment's 56 passenger exception by specifying that airlines may provide geographically unrestricted interstate service in full-size jets reconfigured to carry no more than 56 passengers.38 The Shelby Amendment also specified that in addition to the four states bordering Texas, airlines could also provide service in any size aircraft to Kansas, Mississippi, and Alabama.39 Senator Richard Shelby of Alabama spearheaded the new legislation, claiming that the Wright Amendment kept fares between DFW and many U.S. cities much higher than average and stifled free enterprise.40 Soon after passage of the Shelby Amendment, Dallas city officials publicly conceded that federal law required it to allow expanded service at Love Field in accordance with the Shelby Amendment.41

III. THE CITY OF FORT WORTH FILES A STATE COURT LAWSUIT SEEKING TO PREVENT ADDITIONAL SERVICE AT LOVE FIELD.

The day after Congress passed the Shelby Amendment, Fort Worth filed a state court declaratory judgment action.42 Naming the City of Dallas, the DFW Board, Legend Airlines, and others, Fort Worth asked the court to declare that Dallas was obligated to ban airlines at Love Field from providing the types of service authorized under the Shelby Amendment.43 Ameri-

36 See id.
38 See id.
39 See id.
40 See Hugh Aynesworth, Fort Worth, Dallas in Court After Hill Fuels Airport Debate, WASH. TIMES, October 20, 1997 at A8.
41 See In re City of Dallas, 977 S.W.2d at 801.
43 Dallas and Legend Airlines moved to transfer venue arguing that although the suit was nominally an action for declaratory relief, the plaintiffs were in truth seeking injunctive relief and that venue was therefore mandatory in Dallas County. Under Texas law, a suit for injunctive relief must be brought in the
can Airlines, which is based at DFW, later intervened and joined Fort Worth’s request for declaratory relief. Fort Worth and American subsequently added Continental Airlines and Continental Express as defendants when Continental scheduled flights between Love Field and Cleveland, Ohio.\(^4^4\)

As the basis of their request for declaratory relief, Fort Worth and American relied on the Bond Ordinance requirement that the cities take legally permissible steps to phase out service at Love Field and GSIA and transfer such activities to DFW.\(^4^5\) They contended that neither the ADA nor the Wright or Shelby Amendments preempted the Bond Ordinance and that Dallas was therefore obligated under the Bond Ordinance to prevent any additional interstate service at Love Field.\(^4^6\)

Fort Worth also relied on a purported oral agreement the cities allegedly entered into when Congress enacted the Wright Amendment. According to Fort Worth, representatives from Dallas and Fort Worth agreed that Dallas would ban all interstate passenger service to and from Love Field other than restricted service to the four contiguous states.\(^4^7\) Fort Worth contended the oral agreement was an exercise of Dallas’s proprietary powers and could be enforced as a binding contract regardless of any contrary provisions in the Shelby Amendment.\(^4^8\) Dallas, however, denied the existence of the oral agreement,

\(^4^4\) See In re City of Dallas, 977 S.W.2d at 802.

\(^4^5\) See Id., at 801.

\(^4^6\) See City of Fort Worth’s Motion for Summary Judgment or Alternatively Motion for Partial Summary Judgment, City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., filed August 21, 1998).

\(^4^7\) See In re Continental Airlines, 988 S.W.2d at 735 (stating that “[a]ccording to the City of Fort Worth, the cities agreed in the late 1970’s to allow ‘turn around flights’ to states adjacent to Texas from Love Field.”). See also City of Fort Worth’s Third Amended Petition at 13, City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., filed May 19, 1998).

\(^4^8\) See City of Fort Worth’s Third Amended Petition at 20, City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., filed May 19, 1998).
pointing out that no official action of either city approved or even mentioned it.\textsuperscript{49}

\section{A. The State Court Refuses to Defer to the DOT}

Despite the lawsuit, Legend Airlines proceeded with its plans to begin providing interstate passenger service at Love Field, applying to the DOT for a Certificate of Public Convenience and Necessity.\textsuperscript{50} An air carrier may not provide interstate airline services without first obtaining DOT certification, a process that requires the DOT to determine whether to authorize an airline to provide its proposed service.\textsuperscript{51} Legend's application required the DOT to determine whether and under what circumstances federal law—namely the ADA and the Wright and Shelby Amendments—authorizes an air carrier to provide interstate service at Love Field.\textsuperscript{52} Accordingly, Legend requested that the state court sever it from the lawsuit and defer to the DOT by abating the severed portion of the case under the doctrine of primary jurisdiction.\textsuperscript{53}

\subsection{1. The Doctrine of Primary Jurisdiction}

Under Texas and federal law, the doctrine of primary jurisdiction is triggered when a court and an agency have concurrent original jurisdiction over a dispute.\textsuperscript{54} Primary jurisdiction is the

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\item \textsuperscript{49} See City of Dallas' Response to Plaintiffs' Motion for Summary Judgment, \textit{City of Fort Worth, Texas}, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., filed September 18, 1998). A Dallas City Attorney who was assigned to serve as legal counsel for DFW Airport Board in 1979 testified by affidavit that Dallas and Fort Worth never entered into an oral agreement. See City of Dallas' Response to Plaintiffs' Motion for Summary Judgment at Ex. 21, \textit{City of Fort Worth, Texas}, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., filed September 18, 1998).
\item \textsuperscript{50} Application of Legend Airlines, Inc. for a Certificate of Public Convenience and Necessity, Docket No. OST-1998-3667-1 (U.S. Dep't of Transp., filed March 25, 1998).
\item \textsuperscript{52} Fort Worth contested Legend's application on the grounds that airlines are barred from providing interstate service at Love Field as proposed by Legend. See Answer of the City of Fort Worth in Opposition to the Application of Legend Airlines, Docket No. OST-98-3667-2 (U.S. Dept. of Transp., filed April 22, 1998).
\item \textsuperscript{53} See Legend Airlines, Inc.'s Plea in Abatement and Motion to Sever, \textit{City of Fort Worth, Texas}, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., filed June 29, 1998).
\item \textsuperscript{54} See Reiter v. Cooper, 507 U.S. 258, 268 (1993); New England Legal Found. v. Massachusetts Port Auth., 883 F.2d 157, 171, 173 (1st Cir. 1989); Cash Am. Int'l, Inc. v. Bennet, 43 Tex. Sup. Ct. J. 1047, 1050 (July 8, 2000); Am. Pawn and Jew-
principle that determines whether the court or the agency should make the initial decision.\textsuperscript{55} The purpose behind the doctrine is to ensure that the administrative agency will not be bypassed in a matter committed to it by Congress or the legislature.\textsuperscript{56} Thus, when issues are pending before both a court and an agency, the agency should generally be permitted to make the initial decision if the dispute requires the resolution of issues that are within the special competence of the agency.\textsuperscript{57} Primary jurisdiction also comes into play when uniformity of ruling is essential to comply with the purposes of the statute administered.\textsuperscript{58}

Thus, the principles of primary jurisdiction dictate that courts should not adjudicate a controversy within the jurisdiction of an administrative agency before the agency makes its decision: (1) where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact; or (2) where uniformity of ruling is essential to comply with the purposes of the regulatory statute administered.\textsuperscript{59} Even if the agency cannot grant the same relief sought in the court, the doctrine nevertheless applies if the agency has the power to make incidental findings that may lead to the granting of relief in a later judicial action.\textsuperscript{60} For example, the Texas Supreme Court has acknowledged the doctrine applies even though the lawsuit was for damages and the agency could not award damages.\textsuperscript{61}

\begin{footnotesize}
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\item \textsuperscript{55} See id.; see generally Louis L. Jaffe, \textit{Primary Jurisdiction}, 77 \textit{Harv. L. Rev.} 1037 (1964).
\item \textsuperscript{56} See id.; see also Jordan v. Staff Water Supply Corp., 919 S.W.2d 833 (Tex. App.–Eastland 1996, no writ).
\item \textsuperscript{57} See \textit{Reiter}, 507 U.S. at 268; \textit{Cash Am., Int'l}, 43 Tex. Sup. Ct. J. at 1050-51; \textit{Kayal}, 923 S.W.2d at 673.
\item \textsuperscript{58} See \textit{Cash Am., Int'l}, 43 Tex. Sup. Ct. J. at 1051.
\item \textsuperscript{59} See id.; see also \textit{Lens Express, Inc. v. Ewald}, 907 S.W.2d 64, 71 (Tex. App.–Austin 1995, no writ).
\item \textsuperscript{60} See \textit{Kayal}, 923 S.W.2d at 674; see also State Bar of Tex. v. McGee, 972 S.W.2d 770, 772 (Tex. App.–Corpus Christi 1998, no pet.).
\item \textsuperscript{61} See \textit{Ferce v. Crown Cent. Petroleum Corp.}, 431 S.W.2d 312, 316 (Tex. 1968).
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2. The State Court Refuses to Apply the Doctrine of Primary Jurisdiction

Legend argued that the state court should defer under the doctrine of primary jurisdiction because there was a substantial overlap in the issues before the DOT in the certification proceeding and the issues before the state court.\(^6\) The state court disagreed and denied Legend's motion for severance and abatement.\(^6\) Legend's subsequent attempts to secure mandamus relief from the appellate courts were also unsuccessful.\(^6\)

Subsequently, the DOT initiated a separate proceeding styled "Love Field Service Interpretation Proceeding."\(^6\) In its order initiating the Love Field proceeding, the DOT specifically referred to the state court case and declared that the DOT would address virtually all of the controlling issues involved in the state court case.\(^6\) Legend therefore renewed its request that the state court abate the proceedings under the primary jurisdiction doctrine.\(^6\) Once more, the trial court refused,\(^6\) and subsequent attempts to secure mandamus relief were again unsuccessful.\(^6\) The stage was thus set for conflicting rulings by the state court and the DOT.\(^7\)

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\(^{6}\) See Legend Airlines, Inc.'s Plea in Abatement and Motion to Sever at 4-7, City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., filed June 29, 1998).

\(^{6}\) See Order on Legend Airlines, Inc.'s Plea in Abatement and Motion to Sever, City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., dated July 13, 1998).

\(^{6}\) See In re: Legend Airlines, Inc., No. 2-98-209-CV (Fort Worth Court of Appeals, filed July 16, 1998); In re: Legend Airlines, Inc., No. 98-0709 (Supreme Court of Texas, filed July 22, 1998). Both courts denied Legend’s petitions for writ of mandamus without issuing opinions.


\(^{6}\) See id. at 3-5.

\(^{6}\) See Legend Airlines, Inc.'s Second Plea in Abatement Concerning Federal Administrative Action, City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., filed Sept. 4, 1998).

\(^{7}\) Order on Legend Airlines, Inc.'s Second Plea in Abatement Concerning Federal Administrative Action, City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., dated Sept. 18, 1998).

\(^{7}\) See In re: Legend Airlines, Inc., No. 2-98-288-CV (Fort Worth Court of Appeals, filed Sept. 23, 1998 ); In re: Legend Airlines, Inc. No. 98-0974 (Supreme Court of Texas, filed October 6, 1998). Both courts denied Legend’s petitions for writ of mandamus without issuing an opinion.

\(^{7}\) The state court's refusal to defer to the DOT prolonged—at the expense of the parties and contrary to the principles of judicial economy—that ultimately proved to be an unnecessary proceeding. As discussed later, the state court of appeals: 1) abated the appeal from the state court judgment in light of the ap-
B. The State Court Rules that Dallas Must Ban Additional Service at Love Field

Slightly more than a year after Fort Worth filed suit, the state court granted Fort Worth’s and American’s motions for summary judgment and denied those filed by Dallas, Continental Airlines, and Continental Express. In its subsequent final judgment, the court found, among other things, that:

1. the Bond Ordinance is not preempted by federal law; Dallas and Fort Worth agreed not to enforce the Bond Ordinance to prevent service—as authorized by the Wright Amendment—from Love Field to points within Texas and the four border states;
2. Dallas is a multi-airport proprietor with a federally reserved proprietary right and power to restrict scheduled passenger service at Love Field to points within Texas and the four border states;
3. and the ADA, Wright, and Shelby Amendments do not convey affirmative rights that allow interstate passenger service from Love Field to points beyond Texas and its four border states.

Based on those findings, the court declared that Dallas was obligated to impose a perimeter rule by prohibiting any scheduled interstate passenger service to or from Love Field to points beyond the four states bordering on Texas and that failure to do so would violate the Bond Ordinance. In other words, the court held that Dallas was required to prohibit the types of service Congress had expressly authorized in the Shelby Amendment.

IV. The DOT Rules that Dallas Must Permit Additional Service at Love Field

A week after the state court rendered its final judgment, the DOT announced its ruling in the Love Field Service Interpretation.

\[\text{footnote:}71\text{See City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., Oct. 15, 1998).}\]
\[\text{footnote:}72\text{See City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex., Dec. 16, 1998).}\]
\[\text{footnote:}73\text{See id.}\]
After determining it had both the authority and the responsibility to address the issues involved in the dispute pending in the state court, the DOT found that "the restrictions on Love Field service sought by Fort Worth, American Airlines, and the DFW Board are contrary to federal law. . . ." The DOT also found that the Wright and Shelby Amendments permit geographically unrestricted longhaul service with aircraft having a capacity of 56 passengers or less. Based on those findings, the DOT concluded that "the City of Fort Worth may not enforce any commitment by the City of Dallas under the Bond Ordinance or other agreement to limit operations at Love Field authorized by federal law, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law."

The DOT also ruled, among other things, that:

1. the Wright and Shelby Amendments preempt the ability of Dallas to limit the type of airline service operated at Love Field;
2. the 1978 federal Airline Deregulation Act preempts the ability of Dallas to limit the type of airline service operated at Love Field; and
3. any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds may operate service of any length from or to Love Field, notwithstanding any claim that such service violates any agreement between the Cities of Dallas and Fort Worth.

In short, the DOT order directly conflicted with the state court judgment—the outcome Legend had attempted to prevent by invoking the doctrine of primary jurisdiction.

V. THE PARTIES APPEAL THE STATE COURT JUDGMENT AND THE DOT RULING

Fort Worth, American Airlines, and the DFW Board appealed the DOT ruling to the United States Fifth Circuit Court of Appeals. Likewise, Dallas, Legend, and the other defendants in

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75 See id. at 2.
76 See id.
77 See id. at 58-59.
78 See id.
79 See American Airlines, Inc. v. Dep't. of Transp., 202 F.3d 788 (5th Cir. 2000), cert. denied, 120 S.Ct. 2740 (June 29, 2000).
the state court lawsuit appealed to the Court of Appeals for the Second District of Texas. Initially, it appeared there might be a race to judgment when the state appellate court ordered the parties to present arguments a week before the Fifth Circuit arguments. A month after hearing oral argument, however, the state appellate court issued an order staying the appeal pending a ruling by the Fifth Circuit.

A. **American Airlines, Inc. v. Department of Transportation—The Federal Appeal**

Six months after oral argument, the Fifth Circuit issued an opinion in which it held that the DOT had, in all respects, correctly resolved the issues before it. Before reaching the substantive issues, however, the court first rejected two challenges to the DOT order based on federalism principles and addressed the issue of the appropriate standard of review for the DOT ruling.

1. **Federalism Issues**

Because the DOT issued its ruling after the Texas state court had already addressed many of the same issues, the Fort Worth Petitioners argued that the DOT violated the federal full faith and credit statute and the Anti-Injunction Act. Under those statutes, they argued, the DOT was required to give preclusive effect to the prior state court ruling.

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80 See Legend Airlines, Inc. v. City of Fort Worth, 23 S.W.3d 83 (Tex. App.—Fort Worth, 2000, no pet.).
83 The court’s determination of various procedural challenges under the Administrative Procedure Act and National Environmental Policy Act are beyond the scope of this article and will not be addressed.
84 The Fifth Circuit collectively referred to Fort Worth, the DFW Board, and American Airlines as the “Fort Worth Petitioners.” American Airlines, Inc., 202 F.3d at 709.
87 See American Airlines, Inc., 202 F.3d at 799.
a. Full Faith and Credit

The full faith and credit statute generally requires federal courts to give preclusive effect to a state court judgment. Because the statute limits its application to federal courts, however, the Fifth Circuit held that it did not apply to the DOT. The court noted that the only other circuit to address this question had reached the same conclusion. The court also observed that the Supreme Court had previously construed the statute's references to "courts" as not including "agencies." The court did not, however, end its full faith and credit analysis there. It also considered whether the policies favoring full faith and credit — including repose and federalism concerns — required application of a federal common-law rule of preclusion. Ultimately, the Fifth Circuit concluded that the competing policy considerations weighed against preclusion for three reasons.

First, the policy of repose was not controlling because the DOT proceedings were already underway when the state court issued its ruling. Second, the case involved interstate aviation, an area dominated by federal concerns that the DOT is charged with representing. Also, the case involved Love Field, and Congress had twice enacted legislation specifically tailored to that airport. Finally, the court concluded that applying full faith and credit principles would lead to inconsistent results. Some of the parties before the DOT were not involved in the state court case, and granting preclusive effect to the state court judgment would lead to inconsistent application of the Shelby Amendment to the parties that did not appear before the state court.

b. Anti-Injunction Act

The court also rejected the Anti-Injunction Act challenge to the DOT's order. The Fort Worth Petitioners argued that the

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88 See In re General Motors Corp. Pick-Up Truck Fuel Tanks Prod. Liability Litig., 134 F.3d 133, 141-42 (3rd Cir. 1997); see also James P. George, Parallel Litigation, 51 BAYLOR L. REV. 769, 888 (1999).
89 See American Airlines, Inc., 202 F.3d at 799.
90 See NLRB v. Yellow Freight Sys., Inc., 930 F.2d 316, 320 (3rd Cir. 1991).
92 See American Airlines, Inc., 202 F.3d at 800.
93 See id.
94 See id. at 800-01.
95 See id. at 801.
96 See id. at 802.
DOT's declaratory order had the same effect as an injunction and therefore fell within the scope of the act, which generally provides that a federal court may not enjoin state court proceedings. The court found that argument unpersuasive for two reasons. First, DOT proceedings are exempt from the Anti-Injunction Act because it applies only to proceedings in a "court of the United States." Second, even where an action is pending in a federal court, an agency's presence as a party, together with the federal interest the agency represents, trumps the Anti-Injunction Act.

The court also rejected the Fort Worth Petitioners' arguments based on Justice Rehnquist's dissent from the denial of certiorari in United Credit Bureau of America, Inc. v. National Labor Relations Board. There, the NLRB had ordered a party to dismiss a state court action without considering whether the state-court proceeding interfered with the NLRB's ability to consider or dispose of the matters before it. Dissenting from the Court's denial of certiorari, Justice Rehnquist expressed the view that the concerns of federalism and comity embodied in the Anti-Injunction Act should apply to a federal agency—the NLRB.

The Fifth Circuit distinguished United Credit, explaining that in the pending case, "the state court action, at least at the trial level, was completed, thus lessening DOT's intrusion and strengthening own reasons for issuing its own interpretation of the legal issues." Moreover, observed the court, the DOT's interest was not in resolving an individual petitioner's claim but instead in avoiding piecemeal application of a federal aviation statute.

2. Standard of Review for DOT Interpretation of the Airline Deregulation Act

Before embarking on its review of the DOT ruling, the Fifth Circuit addressed the parties' dispute over the proper standard

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97 See In re General Motors Corp., 134 F.3d at 143-44; see also George, supra note 88, at 881.
98 See In re General Motors Corp., 134 F.3d at 143-44; see also 28 U.S.C. § 2283 (1994).
99 See American Airlines, Inc., 202 F.3d at 802; see also Mitchum v. Foster, 407 U.S. 225, 235-36 (1972); Texas v. United States, 837 F.2d 184, 186 (5th Cir. 1988).
101 American Airlines, Inc., 202 F.3d at 802-03.
102 See id. at 803.
In the end, the court chose not to resolve the issue because it concluded that the DOT's decision withstood scrutiny under both the deferential standard of review for administrative agency rulings enunciated in Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.\textsuperscript{104} and the more exacting de novo standard of review.\textsuperscript{105} Nevertheless, because it left the issue for another day, it is useful to examine the court's discussion of the arguments advanced by the parties.

The Fort Worth Petitioners contended that the DOT's interpretation of the proprietary powers exception should be afforded no deference because the DOT lacks both the authority and the expertise to interpret that section of the ADA, arguments the Fifth Circuit characterized as "strong."\textsuperscript{106} The Fifth Circuit agreed that a preemption determination involves legal issues arguably more within the expertise of the courts.\textsuperscript{107} The court also noted that in reaching its decision, the DOT interpreted existing case law, a role more typically left to the judiciary. Additionally, the court observed, the task of defining what constitutes a proprietary power has traditionally been left to the judiciary.\textsuperscript{108} Finally, the court suggested that Congress might have intended to codify the proprietary powers existing when the ADA was enacted, rather than intending to allow the DOT to define proprietary rights.\textsuperscript{109}

The DOT, on the other hand, emphasized the Supreme Court's recognition that the DOT is charged with administering the aviation laws as a whole.\textsuperscript{110} More significantly, the Fifth Circuit noted, the DOT is the "superintending agency" assigned to administer the ADA.\textsuperscript{111} And, the court observed, the First Circuit has "come close" to holding that this power encompasses

\textsuperscript{103} See id. at 804-05.

\textsuperscript{104} 467 U.S. 837 (1984).

\textsuperscript{105} See American Airlines, Inc., 202 F.3d at 805.

\textsuperscript{106} See id. at 804.


\textsuperscript{108} See American Airlines, Inc., 202 F.3d at 804.

\textsuperscript{109} See id.

\textsuperscript{110} See, e.g., Northwest Airlines, Inc. v. County of Kent, Michigan, 510 U.S. 355, 366-67 (1994) ("The Secretary of Transportation is charged with administering the federal aviation laws. . . .").

\textsuperscript{111} See American Airlines, Inc., 202 F.3d at 805 (citing American Airlines, Inc. v. Wolens, 513 U.S. 219, 229 n.6 (1995)).
the authority to interpret the preemption section of the ADA. The Fifth Circuit concluded its discussion by stating that it was "nearly persuaded that DOT possesses the authority to interpret the preemption provision of the ADA and that, consequently, we should defer to its interpretation of that provision."

3. ADA Preemption

a. Legislative History of the ADA

Turning to the substantive preemption issues, the Fifth Circuit began its analysis with a brief review of the ADA's legislative history. Congress, the court observed, enacted the ADA in 1978 to end federal economic regulation of commercial aviation and to promote competition in the airline industry. To achieve that goal, it included within the act a preemption provision designed to "prevent the states from frustrating the goals of deregulation by establishing or maintaining economic regulations of their own. . . ." The preemption provision provides:

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.

The Fifth Circuit also recognized, however, that Congress intended to reserve some powers to airport proprietors, a goal it sought to achieve by including a limited exception to the preemption provision—the proprietary powers provision. In that provision, Congress specified that the preemptive effect of the ADA does "not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an air carrier that may provide air transportation under this subpart.

112 See id. (citing New England Legal Found. v. Massachusetts Port Auth., 883 F.2d 157, 167 (1st Cir. 1989)).
113 Id.
114 See generally Calvin Davison and Lorraine B. Halloway, The Two Faces of Section 105—Airline Shield or Airport Sword, 56 J. Air L. & Com. 93, 106-110 (1990).
airport . . . from carrying out its proprietary powers and rights." Congress recognized, the court explained, that "airport proprietors—the majority of which are municipalities—were best equipped to handle local problems arising at and around their facilities."

b. Interpretation and Application of the ADA

Having summarized the legislative history and congressional intent behind the ADA's preemption provision and its proprietary powers exception, the Fifth Circuit swiftly dispatched any notion that the preemption provision was not implicated by the restrictions in the Bond Ordinance: "The restrictions on service at Love Field under the Ordinance appear to operate as limitations 'relating to . . . routes' within the meaning of [the preemption provision], and the parties present no significant argument to the contrary." Consequently, the court limited its analysis to the issue of whether enforcement of the Bond Ordinance restrictions on service at Love Field would be a valid exercise of Dallas's proprietary powers.

(i) The Scope of the Proprietary Powers Provision Under Prior Decisions

Although the court prefaced its analysis by observing that "the precise scope of an airport owner's proprietary powers has not yet been clearly articulated by any court," it nevertheless found guidance in several cases examining when an airport owner's enactment of a "perimeter rule" or similar route restriction falls within the proprietary powers exception. The court turned its attention to perimeter rule cases because it concluded that both the Wright Amendment and the Bond Ordinance act as perimeter rules.

119 American Airlines, Inc., 202 F.3d at 805 (citation omitted).
121 American Airlines, Inc., 202 F.3d at 806.
122 See id. at 806 n.13.
Courts addressing perimeter rule cases, the Fifth Circuit noted, have stressed that local proprietors play an "extremely limited" role in the regulation of aviation.\textsuperscript{123} Moreover, the court emphasized, when defining the permissible scope of a proprietor's power to regulate under the proprietary powers exception, federal courts have repeatedly held that an airport proprietor can impose only "reasonable, nonarbitrary, and non-discriminatory rules that advance the local interest."\textsuperscript{124} Thus, courts have held that airport proprietors are vested only with the power to issue regulations targeting local environmental concerns, such as noise.\textsuperscript{125} To date, the Fifth Circuit explained, the types of local regulations that have been permitted are those aimed at: (1) monitoring noise levels;\textsuperscript{126} (2) tempering environmental concerns;\textsuperscript{127} and (3) managing congestion.\textsuperscript{128}

In each of those cases, observed the court, the proposed restriction was targeted at alleviating an existing problem at the airport or in the surrounding neighborhood.\textsuperscript{129} Thus, the Second Circuit approved a perimeter rule at La Guardia Airport as a reasonable means of both alleviating congestion and preserving the airport's shorthaul status.\textsuperscript{130} And in a later case involving restrictions on the use of a heliport,\textsuperscript{131} the Second Circuit allowed only the restrictions aimed at reducing noise or other environmental concerns and struck down those restricting sightseeing routes because: "Congress, the Supreme Court, and we

\textsuperscript{123} See id. at 806.
\textsuperscript{124} See id. (citing Western Air Lines, Inc. v. Port Auth. of New York and New Jersey, 658 F. Supp. 953, 958 (S.D.N.Y. 1986); National Helicopter Corp. of America v. City of New York, 137 F.3d 81, 88-89 (2d Cir. 1998)).
\textsuperscript{126} See Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100, 104 (9th Cir. 1981).
\textsuperscript{127} See National Helicopter, 137 F.3d at 88.
\textsuperscript{128} See Western Air Lines, Inc. v. Port Auth. of New York and New Jersey, 817 F.2d 222 (2d Cir. 1987).
\textsuperscript{129} See American Airlines, Inc., 202 F.3d at 806.
\textsuperscript{130} See Western Air Lines, 817 F.2d at 226.
\textsuperscript{131} See National Helicopter, 137 F.3d 81.
have consistently stated that the law controlling flight paths through navigable airspace is completely preempted.\(^{132}\)

The Fifth Circuit found only one case supporting the Fort Worth Petitioners' view of the scope of an airport operator's proprietary powers—Arapahoe County Public Airport v. Centennial Express Airlines, Inc.\(^{133}\) In Arapahoe, the Colorado Supreme Court approved a municipal proprietor's ban on all passenger service at Centennial Airport in Denver without finding any purpose for the restriction beyond what the Fifth Circuit referred to as the proprietor's "bald assertion" that it would strip the airport authority of its ability and authority to manage the airport.\(^{134}\)

The court brushed the Arapahoe case aside, explaining that under the Colorado Supreme Court's reasoning, virtually any regional regulation enacted by a proprietor would fall within the proprietary powers exception and expand the regulatory role of municipal owners far beyond the extremely limited role envisioned by the ADA.\(^{135}\) The court also noted that Arapahoe was factually distinguishable because the Colorado Supreme Court found that—unlike the Bond Ordinance—the ban on passenger service did not constitute a restriction on "rates, routes or services" within the meaning of the ADA.\(^{136}\) Additionally, unlike Love Field, passenger service had never been permitted at

\(^{132}\) Id. at 92. See also Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) ("Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive."); New York Airlines, Inc. v. Dukes County, 623 F. Supp. 1435, 1442 (D. Mass. 1985) ("[C]ourts have recognized the predominance of federal interests in the regulation of aviation."); Frontier Airlines, Inc. v. Nebraska Dep't. of Aeronautics, 122 N.W.2d 476, 488 (Neb. 1963) ("It appears Congress has preempted the field of interstate air transportation in regard to the routes and points to be served by interstate air carriers to the exclusion of conflicting regulations by the states.").

\(^{133}\) 956 P.2d 587 (Col. 1998).

\(^{134}\) See id. at 591, 595.

\(^{135}\) See American Airlines, Inc., 202 F.3d at 807. The Federal Aviation Administration (FAA) concluded that Arapahoe was incorrectly decided because the airport proprietor's goal of promoting service at Denver International Airport was not a legitimate basis for blocking Centennial Express from using Centennial Airport. The FAA also determined that the airport proprietor's ban on scheduled service was a form of route regulation prohibited by the ADA preemption provision. See Centennial Express Airlines v. Arapahoe County Public Airport Authority, U.S. Dep't. of Transportation, Federal Aviation Administration, Director's Determination, Docket No. 16-98-05 at 19-32 (August 21, 1998).

\(^{136}\) See id. at 807 n.15. But see Centennial Express Airlines, Federal Aviation Administration, Director's Determination, Docket No. 16-98-05 at 28-29 (August 21, 1998) (concluding that ban on passenger service at Centennial was a route regulation barred by the ADA's preemption provision).
Centennial Airport, a factor the Colorado Supreme Court weighed heavily in its holding.\(^{137}\)

(ii) The Bond Ordinance Restrictions Do Not Fit Within Existing Case Law

Based on its survey of case law, the Fifth Circuit concluded that the Bond Ordinance restrictions on Love Field service did not fit within the framework of existing federal case law defining the scope of proprietary rights. On its face, the court stated, the Bond Ordinance was clearly not aimed at alleviating noise, pollution, or congestion.\(^{138}\) Likewise, the Fifth Circuit rejected the Fort Worth Petitioners' attempts to extract from two prior perimeter rule cases\(^ {139}\) what the court called "an overly broad rule that it is within an airport owner's proprietary powers to allocate traffic between two airports so as to preserve the shorthaul nature of one facility."\(^ {140}\) The court explained that in both of those cases, the perimeter rules—although designed to allocate traffic between airports—were permissible only because they were intended to address local concerns such as congestion or overuse of one airport: "In neither case was reallocation of flights between airports a goal in and of itself."\(^ {141}\)

b. The Bond Ordinance Restrictions Are Not Justified by Permissible Local Concerns

The Fifth Circuit did not strike down the restrictions in the Bond Ordinance merely because they did not fit within the framework of existing case law. Citing authority suggesting that the proprietary powers provision is not limited to the regulation

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\(^{137}\) See id.

\(^{138}\) See id. at 807.

\(^{139}\) See Western Air Lines, 817 F.2d 222; City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982). The court distinguished its holding in City of Houston. See American Airlines, Inc., 202 F.3d at 807 n.14. In City of Houston, the Fifth Circuit upheld the FAA's authority to enact a perimeter rule at Washington National Airport. The FAA implemented the perimeter rule to limit traffic at National, preserve the shorthaul status of the airport, and assure the use of the flagging Dulles Airport nearby. But, the Fifth Circuit explained, in relying on City of Houston, the Fort Worth Petitioners overlooked the fact that the court explicitly avoided engaging in a full analysis of the ADA's preemption provision and instead held that the ADA preemption provision did not apply to the FAA.

\(^{140}\) See American Airlines, Inc., 202 F.3d at 807.

\(^{141}\) Id.; see also Allen, supra note 4, at 1023-32.
of noise, the court stated, "we are open to assessing whether the restrictions in the Ordinance are reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest." Despite that willingness to consider other justifications for an airport perimeter rule, however, the court promptly concluded that the Fort Worth Petitioners had not offered any viable alternative justification for route limitations. To allow a perimeter rule designed solely to allocate traffic between two airports so as to preserve the shorthaul nature of one facility, the court explained, would extend the proprietary powers exception beyond its limited reach.

4. The Wright Amendment's "Commuter Aircraft Exemption"

The Fort Worth Petitioners also challenged the DOT's ruling that the "commuter aircraft exemption" in the Wright Amendment—as clarified in the Shelby Amendment—permits any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds to provide geographically unrestricted service from or to Love Field. They contended that the exemption authorizes only short-haul service at Love Field. Applying the deferential Chevron standard, the Fifth Circuit affirmed the DOT's determination.

The starting point for the court's analysis was the relevant statutory language. Under the Wright Amendment, the general ban on interstate flights at Love Field does not apply to "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less." Under the

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142 See Western Air Lines, 658 F. Supp. at 957 ("Section 1305(b)(1) [recodified as 41713(b)(1)] does not expressly limit proprietary powers to the regulation of noise, although Congress would have so limited the section if that is what it had in mind.").

143 American Airlines, Inc., 202 F.3d at 808.

144 See id.


146 See American Airlines, Inc., 202 F.3d at 808 (the court applied the Chevron analysis because "the DOT is authorized to administer the Wright and Shelby Amendments") (citing Continental Air Lines, Inc. v. Dep't of Transp., 843 F.2d 1444, 1449 (5th Cir. 1988)).

147 See id. at 810.

148 See id. at 808-09.

Shelby Amendment, the term “passenger capacity of 56 passengers or less” is defined to include “any aircraft . . . reconfigured to accommodate 56 passengers or fewer if the total number of passenger seats installed on the aircraft does not exceed 56.”\textsuperscript{151} According to the court, a plain reading of these provisions permits longhaul service at Love Field by commuter airlines operating aircraft with a passenger capacity of fewer than 57.\textsuperscript{152}

The more complicated issue, the court explained, was the type of aircraft the commuter airline exemption covers.\textsuperscript{153} The DOT ruled that the exemption applies to any aircraft with fewer than 57 seats—whether a regional jet or turboprop plane.\textsuperscript{154} The Fort Worth Petitioners, however, argued that the exemption applies only to “commuter aircraft,” a term that it contended does not include regional jets. Those differing views, and the Congress’ failure to define the term “commuter airline,” convinced the Fifth Circuit that the term is ambiguous.\textsuperscript{155}

Asserting somewhat different arguments, Fort Worth and American urged the court to hold that the DOT should have interpreted “commuter airline” as a limitation.\textsuperscript{156} American Airlines’s position was that the term “commuter airline” cannot refer to an air carrier offering longhaul service, an argument previously rejected by the federal Court of Appeals for the District of Columbia Circuit.\textsuperscript{157} The Fifth Circuit agreed with the District of Columbia Circuit’s conclusion that the commuter airlines exemption restricts the type of aircraft that may operate at Love Field, not the class of airlines.\textsuperscript{158}

Fort Worth’s argument—that the term “commuter” limits the type of aircraft—was premised on the fact that when the Wright Amendment was enacted, commuter aircraft were turboprop planes. Thus, it argued, regional jets cannot qualify as “commuter” aircraft.\textsuperscript{159} Again, the Fifth Circuit disagreed, noting that when Congress enacted the Wright Amendment in 1979, it

\begin{footnotesize}
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\item \textsuperscript{151} Pub. L. No. 105-66, 111 Stat. 1425, 1447 (1997).
\item \textsuperscript{152} American Airlines, Inc., 202 F.3d at 809.
\item \textsuperscript{153} See id.
\item \textsuperscript{154} See American Airlines, Inc., 202 F.3d at 809 (citing Continental Airlines, 843 F.2d at 1454 (“The language of the [commuter airline exemption] is, we are persuaded, ambiguous.”)).
\item \textsuperscript{155} See id.
\item \textsuperscript{156} See Continental Airlines, 843 F.2d at 1454-55.
\item \textsuperscript{157} See American Airlines, Inc., 202 F.3d at 809.
\item \textsuperscript{158} See id.
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did not define "commuter airline" by referring to the types of aircraft with a limited passenger capacity in use at that time.\textsuperscript{160} To impose such a restriction, the court noted, would penalize airlines that updated their technology as the airline industry advanced during the past twenty years.\textsuperscript{161}

Additionally, explained the court, the Fort Worth Petitioners' definition of "commuter airline" would render the Shelby Amendment meaningless.\textsuperscript{162} According to Fort Worth, the Shelby Amendment merely permits the use of reconfigured jet aircraft if the aircraft otherwise qualified as a commuter aircraft, a view the court characterized as nonsensical. Under that view, a reconfigured jet would never qualify as a commuter plane. Instead, the court observed, the more rational view is that the Shelby Amendment's phrase "operating aircraft with a passenger capacity of 56 passengers or less" defines the term "commuter airlines" so as to include all planes weighing less than 300,000 pounds, including regional jets, with a passenger capacity of less than 57. Hence, under the court's reading of the commuter aircraft exemption, the DOT's ruling that carriers using jets with a 56 passenger capacity may engage in longhaul service at Love Field survived scrutiny under the \textit{Chevron} standard.\textsuperscript{163}

5. \textit{Enforceability of the Use Agreements}

Next, the court addressed the issue of whether the ADA preempts enforcement of the use agreements, \textit{i.e.}, the agreements under which the airlines serving the Dallas-Fort Worth area agreed to move their operations to DFW.\textsuperscript{164} The DOT determined that the DFW Board could not prohibit or limit an airline's use of a competing airport through the use agreements.\textsuperscript{165}

At the outset, the court described the two types of action a state or municipality takes in a proprietary capacity: (1) actions similar to those a private entity might take; and (2) actions a state or municipality takes that are attempts to regulate. Actions

\textsuperscript{160} See \textit{id.} (citing Continental Air Lines, 843 F.2d at 1454).
\textsuperscript{161} See \textit{id}.
\textsuperscript{162} \textit{Id}.
\textsuperscript{163} See \textit{id.} at 810.
\textsuperscript{165} Love Field Service Interpretation Proceeding, U.S. Dep't. of Transportation, Order No. 98-12-27 at 52 (Dec. 23, 1998).
similar to those a private entity might take, the court explained, are not subject to preemption. To illustrate, the court discussed two cases, Building & Trades Council v. Assoc. Builders and Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas. In Building & Trades, the Supreme Court held that a labor contract was not preempted by the National Labor Relations Act because it was not "government regulation" but rather "proprietary conduct." In Cardinal Towing, the Fifth Circuit held that a contract entered into under a municipal ordinance was not a law, regulation, or other provision having the force and effect of law. Therefore it was not preempted because it was a valid exercise of proprietary power rather than an impermissible attempt to regulate.

Thus, explained the court, the critical inquiry was whether the use agreements represented a valid exercise of the cities' proprietary powers, a question the court ultimately found easy to resolve. The use agreements, the court noted, are essentially coextensive with the Bond Ordinance, indicating in their breadth an intent to achieve everything achieved by the Bond Ordinance. They were enacted to effectuate the Bond Ordinance, and the most recent version of the agreements directly linked the airlines' obligations to the terms of the Bond Ordinance: "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth areas to, from and at the Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance."

Having concluded that the use agreements were inextricably bound up with the Bond Ordinance, the court held that they were "preempted as an impermissible attempt to regulate in an area where the federal government has preempted state regulation." The court also rejected the notion that the signatories

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166 See American Airlines, Inc., 202 F.3d at 810.
168 180 F.3d 686 (5th Cir. 1999).
169 507 U.S. at 232.
170 180 F.3d at 691, 693-94.
171 See American Airlines, Inc., 202 F.3d at 810.
172 See id. at 810-11 (citing Cardinal Towing, 180 F.3d at 694).
173 Id. at 811.
174 Id. (citing Skydiving Ctr. of Greater Wash., D.C. v. St. Mary's County Airport Comm'n, 823 F. Supp. 1273, 1284 (D. Md. 1993) (finding that when federal law preempted a municipal corporation's ban on off-site parachute landings, it
to the use agreements had waived their preemption rights by voluntarily entering in the agreements, holding that the ADA preemption provision does not expressly announce affirmative rights for airlines, but instead bars states from regulating certain areas.\textsuperscript{175} Said the court: "The airline signatories cannot 'waive' this preemption because there is no indication that the federal preemption is limited to granting them individual rights."\textsuperscript{176}

6. \textit{Through Service}

As a final matter, the Fifth Circuit addressed the DOT's ruling that the Wright Amendment permits an airline to offer through service from Love Field to points outside the Love Field service area as long as the airline uses a city within Texas as a connecting point and a 56 passenger aircraft to get to that point. The issue arose from Continental Express's decision to offer and advertise through service between Love Field and "the world." Continental Express's plan was to fly passengers from Love Field to Houston's Intercontinental Airport on aircraft with a maximum capacity of 56 passengers and then transfer them to worldwide flights on large jets. "Passengers taking advantage of this service would receive one ticket and, though required to change planes, would not have to reclaim and recheck their luggage at the connecting point."\textsuperscript{177}

Subsection (a)(2) of the Wright Amendment excludes, from its general prohibition against interstate transportation, flights out of Love Field that are operated on aircraft with capacity of 56 passengers or less.\textsuperscript{178} Under subsection (c) of the Wright Amendment, any size aircraft may be used for flights between

\textsuperscript{175} This holding could have important ramifications for parties seeking to enjoin state court actions or judgments arguably preempted by the ADA. Under the Anti-Injunction Act, a federal court may grant an injunction to stay court proceedings where "expressly authorized by Act of Congress." 28 U.S.C. § 2283 (1994). The test "is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by a stay of a state court proceeding." Mitchum v. Foster, 407 U.S. 225, 238 (1972). The Fifth Circuit's determination that the ADA's preemption provision does not create a federal right would appear to preclude application of the Anti-Injunction Act's "expressly authorized by Congress" exception.

\textsuperscript{176} \textit{Id.} (citing Niswonger v. American Aviation, Inc., 411 F. Supp. 769, 771 (E.D. Tenn. 1975)).

\textsuperscript{177} See American Airlines, Inc.,202 F.3d at 812.

Love Field and any point in Texas or one of the four contiguous states (later expanded to seven by the Shelby Amendment) as long as the carrier: (1) does not offer or provide any through service or ticketing with another air carrier or foreign air carrier; and (2) does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point that is outside the permissible states.\(^{179}\)

The DOT interpreted subsection (a)(2) as authorizing the service offered by Continental Express. Specifically, the DOT read the commuter airlines exception to exempt planes with a passenger capacity of less than 57 from all restrictions in the Wright Amendment.\(^{180}\) Thus, under the DOT's interpretation, the restrictions on service under subsection (c)—including the restrictions on through service—do not apply to aircraft operating under the commuter airline exemption.\(^{181}\) The Fort Worth Petitioners, Dallas, and Southwest Airlines contended that the DOT's interpretation violated the plain language of the Wright Amendment. It was their position that the restrictions on service in subsection (c)(2) apply to both commuter flights under subsection (a)(2) and flights on larger aircraft.\(^{182}\)

Characterizing both readings of the statute as plausible, and noting the lack of legislative history, the Fifth Circuit concluded that Congress did not speak directly to the issue and therefore moved to the second step of the *Chevron* analysis to inquire whether the DOT's interpretation was reasonable. Under *Chevron*, the court explained, an agency's interpretation is reasonable if it is "not patently inconsistent with the statutory scheme."\(^{183}\) The court also observed that it "need not agree with DOT's interpretation in order to uphold it as reasonable."\(^{184}\)

Although it emphasized that it did not find the DOT's interpretation to be the only or the best reading of the Wright Amendment, the court was persuaded that it was a permissible one under *Chevron*.\(^{185}\) The DOT, observed the court, grounded its ruling largely on the notion that by imposing an express re-

\(^{179}\) See id.

\(^{180}\) See Love Field Service Interpretation Proceeding, U.S. Dep't. of Transportation, Order No. 98-12-27 at 47-50 (Dec. 23, 1998).

\(^{181}\) See id.

\(^{182}\) See id.

\(^{183}\) See American Airlines, Inc., at 813 (citing Continental, 843 F.2d at 1452).

\(^{184}\) Id. (citing Exxon Corp. v. Lujan, 970 F.2d 757, 761 (10th Cir. 1992)).

\(^{185}\) See id.
striction on through service on large jets operating under subsection (c)(2) but declining to impose a similar restriction on commuter planes operating under (a)(2), Congress was evincing its intent to permit small aircraft to fly without such a restriction. The court concluded, "[w]e view this reading of the amendment as reasonable and not inconsistent with the statutory scheme aimed at preserving Love Field as a primarily shorthaul facility while still allowing some longhaul service."187

The court did not depart the issue, however, without first leveling the following criticisms at the DOT’s reasoning. To reach its decision, the DOT necessarily defined “air transportation on 56-passenger capacity planes” as including air service provided in part by 56-passenger aircraft. It also implicitly defined intrastate service as including flights with only an intrastate portion. These interpretations, the court stated, “strain the meaning of both terms.”188 The court also expressed concern about the potential effect of the DOT’s ruling. Although the court thought it unlikely to affect DFW’s role as the Dallas area’s primary longhaul facility, it perceived a likelihood that following the DOT’s ruling, airlines already operating small aircraft would commence interlining service connecting in Houston or another Texas airport. Nevertheless, the court was willing to concede that determinations of that nature were within the DOT’s expertise, rather than the court’s, and therefore refused to substitute its judgment on aviation-related issues.

B. LEGEND AIRLINES, INC. v. CITY OF FORT WORTH, TEXAS—THE STATE COURT APPEAL

Nearly four months after the Fifth Circuit issued its opinion, the Court of Appeals for the Second District of Texas ("Fort Worth Court of Appeals"), with one justice dissenting, reversed the state court judgment.189 The court held that the restrictions in the Bond Ordinance are preempted by the ADA and that the passenger service proposed by the defendant airlines is permissible under the Wright and Shelby Amendments.

186 See id.
187 Id. (citing H.R. Conf. Rep. 96-716, at 24 (1979), reprinted in 1980 U.S.C.C.A.N. 78, 86 (stating that the Wright Amendment "embodies a compromise which permits limited commercial passenger service in interstate transportation at Love Field.")).
188 Id.
189 See Legend Airlines, Inc. v. City of Fort Worth, 23 S.W.3d 83 (Tex. App.-Fort Worth 2000, pet denied.).
1. A New Ingredient in the Otherwise Familiar Historical Background

The Fort Worth Court of Appeals’ overview of the development of DFW airport and the controversies concerning Love Field differs from those contained in the court opinions issued in other Love Field cases in one notable respect—it discusses the DOT’s 1992 findings about the potential effect of expanded service at Love Field. In July of 1992, the court noted, the DOT published a study prepared by the Interdepartmental Task Force on the Wright Amendment concerning the likely effects of repealing or loosening the restrictions on Love Field service.190 The study addressed a number of questions about the relationship between Love Field and DFW.

In its report, the DOT concluded that expanding Love Field service through modification or repeal of the Wright Amendment would cause no significant harm to DFW and would greatly benefit the Dallas-Fort Worth metropolitan area.191 Among other things, the DOT determined that modifying the Wright Amendment would result in more service, more competition, and lower fares and that there would be neither an uncontrolled increase in the number of new flights from Love Field nor an increase in noise levels.192 The court underscored the DOT’s conclusion that, “[u]nder all possible scenarios, Dallas-Fort Worth Airport will continue to grow and remain the region’s dominant airport.”193

2. Primary Jurisdiction

As a preliminary matter, the Fort Worth Court of Appeals considered whether the state court erred in refusing to abate the case under the doctrine of primary jurisdiction.194 After identifying the legal principles and the policies underlying the doctrine, the court concluded that the federal law issues in the case

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190 See id. at 88 (citing ANALYSIS OF THE IMPACT OF CHANGES TO THE WRIGHT AMENDMENT, INTERDEPARTMENTAL TASK FORCE ON THE WRIGHT AMENDMENT (July 1992)). The court attached the task force report as an appendix to its opinion.
191 See id.
192 See id.
193 See id.; see also Allen, supra note 4, at 1050-52 (observing that “DFW has grown and prospered, now ranking as the second busiest airport in the world” and that “[c]urrently the airport’s operations are increasing at a rate of 5% per year” and concluding “[i]t is clear, then, that DFW’s long-term viability has been established.”)
194 See Legend, 23 S.W.3d at 91.
were inherently judicial in nature.\textsuperscript{195} Although it conceded that the DOT is clearly charged with administering the federal aviation laws, the court found no statutory grant of authority giving the DOT exclusive jurisdiction to interpret and apply either the ADA or the Wright and Shelby Amendments.\textsuperscript{196} To the contrary, the court observed, federal courts have routinely exercised their jurisdiction to determine preemption issues similar to those in the case before the court.\textsuperscript{197} Accordingly, the court held that the doctrine of primary jurisdiction did not apply to the federal law issue before it and that the lower court did not err by refusing to defer to the DOT.\textsuperscript{198}

3. \textit{ADA Preemption}

a. The Bond Ordinance Restrictions Relate to Routes

Next, the court turned its attention to the core issue in the appeal—ADA preemption. Unlike the Fifth Circuit, the Fort Worth Court of Appeals dispensed with an introductory review of the ADA’s legislative history and the policies underlying the act, opting instead for a succinct synopsis of the preemption and proprietary powers provisions and their interplay with one another.\textsuperscript{199} Like the Fifth Circuit, however, the court had little difficulty concluding that the Bond Ordinance restrictions implicated the preemption provision “because they require the transfer of all interstate flights from Love Field and other local airports to DFW.”\textsuperscript{200} The court was thus left with but one inquiry: would enforcement of the restrictions constitute a valid exercise of Dallas proprietary powers and rights under the ADA?

\begin{footnotes}
\item[195] See \textit{id.}.
\item[196] See \textit{id.}.
\item[197] See \textit{id.}.
\item[198] See \textit{id.}, at 92. In a footnote, the court acknowledged the conflicting nature of the Fifth Circuit’s observations that: 1) aviation regulation is an area where federal concerns are preeminent and that the DOT is charged with representing those concerns; and 2) allowing the state court to foreclose the DOT from addressing the issues in this case would trump the key federal interests that motivated Congress to create the DOT. \textit{See id.} at 92 n.29 (citing \textit{American Airlines, Inc.}, 202 F.3d at 800-01).
\item[199] See \textit{id.}.
\item[200] See Legend, 23 S.W.3d at 92.
\end{footnotes}
b. The Bond Ordinance Restrictions Are Not A Valid Exercise of Proprietary Powers

The Fort Worth Court of Appeals prefaced its analysis of the proprietary powers issue by referencing both the DOT’s determination that Dallas’s proprietary powers as an airport owner did not allow it to restrict services at Love Field authorized by federal law and the Fifth Circuit’s holding that the DOT findings were reasonable. Nonetheless, the court emphasized that it was not bound by the Fifth Circuit’s ruling and that it was not reviewing the validity of the DOT order.

At the outset, the Fort Worth Court of Appeals invoked a familiar talisman—that preemption of state or local law by a federal statute is generally disfavored. Preemption questions, the court observed, call for an examination of congressional intent. Thus, the court acknowledged, preemption arises from either express statutory language or from implied congressional intent where the federal law occupies a field to the exclusion of state law or where the state law actually conflicts with federal law and stands as an obstacle to accomplishment of the purposes and objectives of Congress.

The manifest purpose behind the ADA’s preemption provision, explained the court, was to ensure that the States would not undo federal deregulation with regulation of their own. The court also emphasized that even before the ADA was enacted, it was well-settled that airport proprietors play an extremely limited role in the national scheme of aviation. Congress mandated that limited role to avoid interference with the preeminent authority of the federal government in the field of aviation and to prevent local airport proprietors from infringing on the federal government’s “turf.” Accordingly, a local government’s exercise of its proprietary rights is limited to rea-

201 See id.
202 See id. (citing Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993)).
204 See Legend, 23 S.W.3d at 93. (citing Schneidwind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988)).
205 See id. (citing British Airways, 564 F.2d at 1010).
206 See id. (citing Wolens, 513 U.S. at 222).
207 See id. (citing City of Houston, 679 F.2d 1194).
sonable, nonarbitrary, and nondiscriminatory rules that advance an articulated local interest.\(^{209}\)

Echoing the Fifth Circuit, the Fort Worth Court of Appeals noted that courts applying the foregoing principles have upheld route restrictions imposed by local proprietors that were designed to address operation and safety concerns such as noise, pollution, and airport congestion.\(^{210}\) Additionally, the court observed, the Fifth Circuit has suggested that restrictions aimed at preventing an airport from having to shut down its operations might constitute a permissible exercise of proprietary power.\(^{211}\) The Fort Worth Court of Appeals had little difficulty distinguishing the case before it from the cases in which local regulations had been approved.\(^{212}\)

Fort Worth and American did not argue that enforcement of the Bond Ordinance restrictions were necessary to abate present or future noise levels, air pollution, airport congestion, or any other similar problem. Nor did they assert that the Bond Ordinance restrictions were necessary to protect DFW from becoming financially unviable.\(^{213}\) Instead, they argued that enforcement of the Bond Ordinance restrictions was necessary to protect the competitive position of DFW as the region’s dominant airport, a justification the court emphatically rejected: “Neither the federal courts nor any federal agency charged with the responsibility of administering the ADA has ever allowed a local government to impose restrictions at its own airport, or a neighboring airport, for the mere purpose of limiting competition with another airport preferred by that government.”\(^{214}\) To restrict routes on that basis, the court stated, “would be contrary to the competition inherent in a deregulated industry, as well as the Congressional intent of the ADA that airport proprietors not ‘undo federal deregulation with regulation of their own.’”\(^{215}\)

\(^{209}\) See id. (citing Nat’l Helicopter, 137 F.3d at 88-89; Western Air Lines, 658 F. Supp. at 958).
\(^{210}\) See Legend, 23 S.W.3d at 93 (citing Santa Monica Airport Ass’n, 659 F.2d at 104, National Helicopter, 137 F.3d at 88-89; Western Air Lines, 817 F.2d at 223).
\(^{211}\) See id. (citing City of Houston, 679 F.2d at 1191).
\(^{212}\) See id.
\(^{213}\) See id. at 93-94. See also J. Scott Hamilton, Allocation of Airspace as a Scarc Resource, 22 Transp. L.J. 251, 269 (1994) (stating that “no U.S. airport has ever failed to make a payment on a revenue bond and none has ever defaulted.”).
\(^{214}\) See id. at 94.
\(^{215}\) See id. at 94-95.
As in the Fifth Circuit appeal, Fort Worth and American relied on cases approving airport perimeter rules. But the perimeter rules in those cases, the Fort Worth Court of Appeals explained, were not upheld as valid attempts to limit competition between airports.\footnote{See Legend, 23 S.W.3d.} Rather, the airport proprietors demonstrated that the restrictions were necessary to prevent congestion, harsh environmental effects, or the shutting down of operations at a neighboring airport. The Bond Ordinance restrictions, the court observed, were not necessary to achieve those or any other legitimate goal, including maintaining the financial viability of DFW.\footnote{See id.} To emphasize this point, the court referred to the 1992 DOT study finding that DFW would “continue to grow and remain the region’s dominant airport” regardless of whether service at Love Field was expanded under the Shelby Amendment.\footnote{See id.}

Perhaps sensitive to the political ramifications of its decision,\footnote{Cf. Bob Ray Sanders, \textit{Fort Worth Mayor Speaks the Truth on Suits Between Entities}, \textit{Fort Worth Star Telegram}, July 9, 2000 at 1. \textit{See generally} Symposium, \textit{Political Aspects of Appellate Law}, 30 St. Mary’s L.J. 1137 (1999).} the court concluded its analysis of the proprietary powers issue with the observation that even if it were inclined to agree with Fort Worth and American, it could not substitute its judgment for that of the DOT. “Under the clear mandate of the United States Supreme Court, we must give ‘controlling weight’ to reasonable DOT interpretations of the ADA.”\footnote{See Legend at 23 S.W.3d at 95 (citing \textit{Chevron}, 467 U.S. at 844; \textit{Northwest Airlines, Inc.}, 510 U.S. at 366-67).} Retreating somewhat from its earlier declaration that it did not consider itself bound by the Fifth Circuit ruling, the Fort Worth Court of Appeals emphasized that the Fifth Circuit had concluded that the DOT carefully considered all relevant factors and arrived at a reasonable conclusion in deciding that the Bond Ordinance restrictions are unenforceable under the ADA. “We are therefore constrained to give the DOT order controlling weight even if we would decide the preemption issue differently.”\footnote{Id.}

4. \textit{The Commuter Airlines Exception}

As they did in the Fifth Circuit, Fort Worth and American argued that the air passenger service at Love Field proposed by
Legend and Continental was not within the commuter airlines exception in the Wright Amendment, as modified by the Shelby Amendment. They asserted that the Shelby Amendment authorized only shorthaul service from Love Field because the Wright Amendment was intended to limit Love Field to shorthaul service and only shorthaul turboprop aircraft had a passenger capacity of 56 or less when the Wright Amendment was enacted.222

Observing that the term "commuter airlines" is not defined in either the Shelby or Wright Amendments, the court began its analysis by explaining that when the Wright Amendment was enacted in 1979, only turboprop planes had a passenger capacity of 56 passengers or less.223 Those aircraft were only marketed for service on shorthaul routes because they were severely limited in range.224 Consequently, the court noted, the Wright Amendment has previously been interpreted to exclude larger aircraft with longhaul capabilities.225 "In recent years, however, aircraft manufacturers have developed regional jets that typically have no more than 56 seats and offer attractive service on long flights. Large aircraft can also be reconfigured to hold no more than 56 passengers."226

The Shelby Amendment, explained the court, modified the commuter airlines exemption by defining the phrase "passenger capacity of 56 passengers or less" 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."227 Noting that the Fifth Circuit had determined it to be reasonable, the court agreed with the DOT’s determination that the effect of the Shelby Amendment was to permit any airline, operating any aircraft with a capacity of no more than 56 passengers, to provide geographically unrestricted interstate service from Love Field.228

As the DOT explained, even if the Wright Amendment were unclear on the meaning of commuter airlines, the enactment of

222 See id. at 96.
223 See id.
224 See id.
225 See id. (citing Continental Air Lines, Inc. v. Dep’t of Transp., 843 F.2d 1444, 1454-55 (D.C. Cir. 1988)).
226 Legend, 23 S.W.3d at 96.
227 See id. (emphasis added to the quoted statutory language by the court).
228 See id. at 96-97.
the Shelby Amendment demonstrates that Congress no longer intends to limit the commuter aircraft exemption to shorthaul service. Summarizing its holding, the court explained, "[a] plain reading of the Shelby Amendment . . . shows that congressional intent has shifted toward allowing commuter airlines to operate many types of aircraft out of Love Field that are capable of providing long-haul service. Appellees' narrow definition of commuter airlines would frustrate this clear intent and render the express language of the Shelby Amendment meaningless."229

VI. CONCLUSION

Anyone believing that the cases discussed in this article mark the end of the legal battles over airline service at Love Field would do well to remember the words of Mark Twain: "The reports of my death are greatly exaggerated."230 Even so, one contentious issue has been resolved, and it is now clear that notwithstanding the agreements in the Bond Ordinance that gave birth to DFW Airport, Dallas and Fort Worth may not restrict service at Love Field to promote the use of DFW. The impact of these cases, however, will not be limited to the Dallas-Fort Worth area. In fact, officials in the Charleston, West Virginia area are already analyzing the Fifth Circuit's decision to determine what effect it may have on their plans to create a regional airport.231

The fundamental lesson from these cases is that local governments are likely to run afoul of the Airline Deregulation Act's preemption provision when enacting regulations designed solely to protect an airport from economic competition. True, the Fifth Circuit was unwilling to "limit the scope of proprietary powers to those which have been previously recognized" and expressed a willingness to consider reasonable and non-discriminatory regulations "aimed at advancing a previously unrecognized local interest."232 But, airport proprietors seeking refuge in the ADA's proprietary powers provision should bear in mind the Supreme Court's caveat: "[W]e do not believe Con-

229 See id. at 97.
230 Cable from Mark Twain in London to the Associated Press (1897), in JOHN BARTLETT, FAMILIAR QUOTATIONS 679 (13th ed. 1955).
231 Rick Steelhammer, Regional Airport's Chances Damaged? Court Ruling in Texas Case May Prove to be Huge Stumbling Block, CHARLESTON GAZETTE & DAILY MAIL, July 6, 2000 at 1A.
232 American Airlines, Inc., 202 F.3d at 808.
gress intended to undermine this carefully drawn statute through a general savings clause." 233

233 See Morales, 504 U.S. at 378.
Comments