No.

IN THE

Supreme Court of the United States

DON DIFIORE, LEON BAILEY, RITSON DESROSIERS, MARCELINO COLETA, TONY PASUY, LAWRENCE ALLSOP, CLARENCE JEFFREYS, FLOYD WOODS, and ANDREA CONNOLLY,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Airline Deregulation Act's preemption provision preempts state laws that are "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The Court has explained that this provision is broad, but that some state actions affect prices, routes, or services "in too tenuous, remote, or peripheral a manner to have preemptive effect." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (internal quotation marks and citation omitted). The question presented in this case is:

Does the Airline Deregulation Act's preemption provision preempt claims by skycaps against an airline for violating the Massachusetts Tips Law, which prohibits employers from keeping tips and service charges given to employees by customers, or are such claims too tenuously, remotely, or peripherally related to air carrier prices, routes, or services to have preemptive effect?

PARTIES TO THE PROCEEDING

Petitioners are Don DiFiore, Leon Bailey, Ritson Desrosiers, Marcelino Coleta, Tony Pasuy, Lawrence Allsop, Clarence Jeffreys, Floyd Woods, and Andrea Connolly. Don DiFiore, who was a plaintiff in the district court and an appellee/cross-appellant in the court of appeals, died on June 5, 2011. Pursuant to Fed. R. Civ. P. 25(a)(1), petitioners have filed a statement noting his death in the United States District Court for the District of Massachusetts. Michael Kerrins, who is designated in Mr. DiFiore's will as the executor of his estate, has filed a motion requesting appointment as executor of the estate in the Massachusetts Probate Court for Middlesex County. After the probate court appoints Mr. Kerrins as executor of Mr. DiFiore's estate, petitioners will file a motion to substitute him for Mr. DiFiore as a petitioner in this case.

Respondent is American Airlines, Inc.

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INTRODUCTION

In the decision below, the First Circuit held that skycaps' claims against an airline under the Massachusetts Tips Law, which prohibits employers from keeping tips or service charges given to an employee by a customer, are preempted by the Airline Deregulation Act (ADA), which preempts state laws related to air carrier prices, routes, or services. Although the Tips Law is an employment law of general applicability that does not reference air carrier prices or services and which could be complied with by the airline without changing the nature of the skycaps' services or the prices charged for them, the court of appeals determined that the Tips Law was preempted because it "has a direct connection to" and "directly regulates" air carrier prices and services.

The First Circuit's holding conflicts with decisions in other circuits in three ways. First, it widens a deeply entrenched circuit split over the definition of "services" in the ADA. Second, it multiplies confusion over how to determine whether a state law is "connected to" prices, routes, or services, conflicting with the tests used in five circuits for determining whether a state employment law is sufficiently connected to prices, routes, or services to be preempted. And, third, it conflicts with six circuits over whether a presumption against preemption applies in determining whether the ADA preempts state employment laws.

State laws protecting employees' rights to compensation are far removed from the deregulatory concerns that motivated the ADA. The decision below exacerbates existing uncertainty over when the ADA preempts state laws of general applicability and over when state laws affect prices and services in too tenuous, remote, or peripheral a manner to be preempted. This Court

should grant certiorari to provide needed further guidance on the scope of preemption under the ADA.

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit will be reported at 646 F.3d 81 and is reproduced in the appendix at 1a. The decision of the United States District Court for the District of Massachusetts denying American Airline's motion to dismiss is reported at 483 F. Supp. 2d 121, and is reproduced in the appendix at 18a. The decision of the United States District Court for the District of Massachusetts denying American Airline's motion for reconsideration is reported at 688 F. Supp. 2d 15, and is reproduced in the appendix at 29a.

JURISDICTION

The court of appeals entered its judgment on May 20, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), states:

> 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 Massachusetts Tips Act, Mass. Gen. Laws ch. 149, § 152A(b), states:

> No employer or other person shall demand, request or accept from any wait staff employee, service employee, or service bartender any payment or deduction from a tip or service charge given to such wait staff employee, service employee, or service bartender by a patron. No such employer or other person shall retain or distribute in a manner inconsistent with this section any tip or service charge given directly to the employer or person.

The statute defines "service charge" as:

> a fee charged by an employer to a patron in lieu of a tip to any wait staff employee, service employee, or service bartender, including any fee designated as a service charge, tip, gratuity, or a fee that a patron or other consumer would reasonably expect to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip.

Id. § 152A(a).

STATEMENT OF THE CASE

This petition arises out of an action by American Airlines skycaps for American's violation of the Massachusetts Tips Law, which forbids employers from keeping tips or service charges given to an employee.

A. Factual Background

Skycaps work at airport curbs, checking in bags for passengers who do not want to carry their luggage inside and providing wheelchair and other passenger assistance. Traditionally, the skycaps in this case earned most of their income in tips from passengers. Pet. App. 31a. In September 2005, however, American began charging $2 for each bag that customers checked with the skycaps. *Id.*

Although the skycaps did not get to keep the fee, American charged it in a way that led many passengers to believe it was a tip: the charge could only be paid in cash, could not be paid in advance, was for roughly the same amount as passengers had tended to tip, and was given directly to the skycaps, who put the cash in their pockets because there was no cash register or other container in which to place it. Pet. App. 43a; 1st Cir. App. 850, 854, 863, 900, 937, 961, 979-80, 1066. When paying the fee, some passengers made comments such as, "Oh, by the way, this is for you," and "[H]ere you go, that's for you," in the same manner as passengers had when they had previously given tips. 1st Cir. App. 853, 941. Other passengers made comments such as, "[T]hat's good. You are doing a little bit better now because you're getting $2 a bag," indicating that they thought the skycaps were receiving the proceeds of the charge. *Id.* at 1005. Because many passengers believed the $2 charge went directly to the skycaps, many fewer passengers than before tipped the skycaps, whose earnings decreased dramatically. Pet. App. 32a.

B. The District Court Decisions

Nine skycaps at Boston's Logan Airport brought this action, alleging, among other claims, that American's $2 per bag charge was a "service charge," as defined by the Massachusetts Tips Law, Mass. Gen. L. ch. 149, § 152A, because a passenger would reasonably have believed it was being kept by the skycaps, and that American had violated that statute by retaining the proceeds of the charge. The case was originally brought in Massachusetts Superior

Court, but was removed to federal court on the basis of diversity jurisdiction.[1]

American moved to dismiss, claiming the skycaps' claims are preempted under the ADA, which expressly preempts state laws "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The district court denied the motion. The court explained that although the ADA's preemption provision expresses "'a broad preemptive purpose,'" its scope is "not unlimited." Pet. App. 21a (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)). In particular, the district court noted that, in *Morales*, this Court stated that "'some state actions may affect airline fares in too tenuous, remote, or peripheral a manner' to have preemptive effect.'" *Id.* (quoting *Morales*, 504 U.S. at 390). Pointing out that "[e]very circuit court but one to consider employee claims has held the claims at issue not preempted," the court concluded that "a law that states that voluntary tips are for employees has only a very attenuated relationship, if at all, to airline prices, routes, or services." *Id.* at 22a, 24a. It therefore held that the skycaps' claims are not preempted.

The case went to trial, and the jury returned a verdict in the skycaps' favor on their Tips Law and common law tortious interference with advantageous relations claims, awarding damages equal to the proceeds the skycaps had collected from the $2 per bag charge but had not been permitted to retain. Pet. App. 6a. American moved for a new trial, arguing that the district court had erred in its interpretation of the Tips Law. The district court certified the question to the Massachusetts Supreme Judicial Court,

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[1]A tenth plaintiff, a skycap in St. Louis, Missouri, brought claims only under common law, not under the Massachusetts Tips Law, and is not a petitioner in this case.

which affirmed the district court's interpretation, stating that the purpose of the Tips Law is "to ensure that service employees receive the tips, gratuities, and service charges that customers intend them to receive." *DiFiore v. Am. Airlines, Inc.*, 454 Mass. 486, 491 (2009).

American then moved for reconsideration of its motion to dismiss. The district court denied the motion, again holding that the claims are not preempted. The court explained that, to establish preemption, American had "to show that explaining to customers that the curbside check-in fee is not a tip will have a forbidden significant effect on airline prices or services." *Id.* at 43a. It concluded that American had failed to show that the Tips Law would have such an effect. The law would not affect prices, the court determined, because the "Skycaps dispute not the fee itself, but only the manner in which this fee is charged. Merely changing the manner in which the fee is charged will have no significant effect on airline prices." *Id.* at 44a.

Moreover, the court explained, American had not shown that the law would affect services because "[a]lteration in the way the fee for the service is charged does not necessarily affect service itself." *Id.* at 45a. The court pointed out that American did not have to charge the fee in such a "sneaky, disingenuous fashion," which it concluded was "a crass attempt to snooker the public into parting with the fee under the guise of a tip (which most travelers were accustomed to paying)." *Id.* It noted, for example, that the airline could use more "effective signage" or that the fee "could be charged simultaneously with the airline's $15 baggage fee which usually is paid by a credit card at curbside during the check-in process." *Id.* at 45a, 46a. The court explained that such alternatives (along with others) would not significantly affect the

skycaps' services. Even if the method of payment changed, the court concluded, the skycaps would still provide the service of "a fast, easy, and convenient check-in for people who do not want to carry their own baggage or wait in lines." *Id.* at 45a, 46a.

C. The Decision Below

The First Circuit reversed. The court began by observing that the statutory language of the ADA's preemption provision is "broad but vague" because the key term "related to" is "highly elastic" and thus "of limited help." Pet. App. 9a. The court then noted that although three Supreme Court cases have addressed the statutory language—*Morales,* 504 U.S. 374, *American Airlines v. Wolens*, 513 U.S. 219 (1995), and *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008)—"none provides an easily applied test." Pet. App. 9a.[2]

Noting that there is a set of court of appeals cases holding that state anti-discrimination laws, retaliation laws, and prevailing wage laws are not preempted, the court of appeals stated that it thought "the Supreme Court would be unlikely . . . to free airlines from most conventional common law claims for tort, from prevailing wage laws, and ordinary taxes applicable to other businesses . . . . [which] indirectly, may affect fares and services." *Id.* at 12a. Nonetheless, the court held that the Massachusetts Tips Law, which is also a law of general applicability, was

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[2]*Morales* and *Wolens* addressed the ADA directly, while *Rowe* addressed language in the Federal Aviation Administration Authorization Act (FAAAA) that was copied from the ADA's preemption provision and that is nearly identical to the ADA's language, but applies to motor carriers instead of air carriers. *See* 49 U.S.C. § 14501(c)(1) (preempting state laws "related to a price, route, or service of any motor carrier").

preempted. Although the tips law does not refer to airline prices or services, the court decided that it was preempted because, in the court's view, it "has a *direct connection* to air carrier prices and services and can fairly be said to regulate both." *Id.* (emphasis in original). "To avoid having state law deem the curbside check-in fee a 'service charge,'" the court stated, "would require changes in the way the service is provided or advertised." *Id.* at 13a.

The First Circuit recognized that its holding depended on an issue on which "the lower court decisions have not been uniform"—whether "'price' [includes] more than the ticket price and 'service' [includes] steps that occur before and after the airplane is actually taxiing or in flight." *Id.* at 12a-13a; *see also id.* at 13a n. 9 (*contrasting Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218, 222 (2d Cir. 2008), *with Charas v. Trans World Airlines*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc)). Although *Rowe* did not address this issue, the First Circuit stated that "this dispute has been superceded . . . by *Rowe*'s expansive treatment of the term 'service.'" *Id.* at 13a.

The First Circuit also recognized that this Court has stated that the ADA does not preempt state laws that have only a "'tenuous, remote, or peripheral'" impact. *Id.* at 14a (quoting *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390)). The court did not analyze, however, whether the Tips Law would have only a tenuous effect. Such an analysis, it stated, would be "walking into a rotating propeller." *Id.* According to the court, "the advertising and service arrangements are just what Congress did not want states regulating, whether at high cost or at low." *Id.*

The court concluded by stating that its outcome was not altered by the alternative basis for the jury's verdict—interference with advantageous relations—because the

jury's verdict on that claim rested on its determination that American had violated the Tips Law. *Id.* at 16a.

In holding the skycaps' claims preempted, the court of appeals rejected the position, adopted by the district court, that a presumption against preemption should apply in areas historically occupied by state law. *Id.* at 10a.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Divided over the Test for Determining Whether the ADA Preempts State Employment Laws.

In *Morales*, this Court stated that the statutory language of the ADA's express preemption provision embodies "a broad preemptive purpose." 504 U.S. at 383. At the same time, it explained that some "state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner to have pre-emptive effect" and described as "significant" the effect a state law must have to be preempted. *Id.* at 388, 390 (internal quotation marks and citation omitted). Because the restrictions on airline fare advertising at issue in *Morales* did "not present a borderline question," the Court "express[ed] no views about where it would be appropriate to draw the line." *Id.* at 388 (internal quotations marks and citation omitted).

Since *Morales*, the courts of appeals have varied in their approaches to determining whether a state law "relate[s] to" an air carrier "price, route, or service." The decision below creates or exacerbates three circuit splits related to the application of the ADA's preemption provision to state employment laws: 1) a split over the definition of "services" in the ADA; 2) a split over the connection a state law must have to prices, routes, and services to be preempted; and 3) a split over whether a

presumption against preemption applies when the state laws fall within an area historically occupied by the state.

A. The First Circuit's Decision Broadens a Circuit Split over the Definition of "Services."

The First Circuit acknowledged that its decision implicates a disagreement among the circuits over the definition of "prices" and "services." In *Charas v. Trans World Airlines*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc), the Ninth Circuit held that "services" "refer[s] to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail." It concluded that the term "was not intended to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities." *Id.* The Third Circuit has since agreed that the ADA was meant to preempt "public utility-style regulation," *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998), "i.e., the provision of air transportation to and from various markets at various times." *Charas*, 160 F.3d at 1266.

In contrast, in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (en banc), the Fifth Circuit adopted a definition of services that extends beyond the provision of point-to-point service to include other "[e]lements of the air carrier service bargain . . . such as ticketing, boarding procedures, provision of food and drink, and baggage handling." *Id.* at 336 (citation omitted). The court explained that because "'[s]ervices' generally represent a bargained-for or anticipated provision of labor," the "concern [should be] with the contractual arrangement between the airline and the user of the service," and that items such as ticketing and baggage handling should be included in the definition of services because they are

"appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline." *Id.* The Second, Fourth, Seventh, and Eleventh Circuits have adopted similar approaches. *See Air Transport Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257-59 (11th Cir. 2003); *see also Nw. Airlines, Inc. v. Duncan*, 531 U.S. 1058, 1058 (2000) (O'Connor, J., dissenting from denial of certiorari and noting that the meaning of "services" is "an important issue that has divided the Courts of Appeals").

The First Circuit stated below that the dispute over the definition of services has been superceded "by *Rowe*'s expansive treatment of the term 'service.'" Pet. App. 13a. *Rowe*, however, involved state-law regulation of transportation and delivery services themselves, not amenities appurtenant to such services. And, since *Rowe*, the Ninth Circuit has reaffirmed its definition of services as limited to "'prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail.'" *Ventress v. Japan Airlines*, 603 F.3d 676, 682, 683 (9th Cir. 2010) (quoting *Charas*, 160 F.3d at 1261); *see also Ginsberg v. Northwest*, __ F.3d __, 2011 WL 3374229 (9th Cir. Aug. 5, 2011) (explaining that a state law claim "does not relate to 'services' [when] it has nothing to do with schedules, origins, destinations, cargo, or mail"). Under this approach, the skycaps would have prevailed below, because their baggage-handling functions would not have been included within "services," and the charge for those functions would not have been included in "prices." *See* Pet. App 12a.

Thus, the split between the circuits continues. Indeed, the decision below widens the split, relying on a definition of "services"—and a corresponding definition of "prices"—that goes far beyond even the Fifth Circuit's broad definition in *Hodges* to include baggage handling services that the airline specifically did *not* include in its contract with its passengers. The Court should grant certiorari to resolve the circuit courts' disagreement over the definitions of prices and services in the ADA.

B. The First Circuit's Decision Conflicts with Decisions of Five Other Circuits over the Connection with Prices, Routes, or Services Necessary for a State Law to Be Preempted.

The First Circuit created a conflict with five other circuits in concluding that the Massachusetts Tips Law has a "direct connection" to and "directly regulates" air carrier prices and services—and is therefore preempted—without examining whether the law would have a significant effect on such prices and services or whether it would frustrate the ADA's deregulatory purposes. The decision below would have come out differently under the tests used for determining whether a state law has a connection with prices, routes, or services in these five circuits, which have applied their tests to hold state employment laws not preempted by the ADA.

Specifically, in *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465-66 (11th Cir. 1998), the Eleventh Circuit explained that "[f]or a law to be expressly preempted by the ADA, a state [law] must . . . 'relate[] to airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them.'" *Id.* at 1465-66 (internal quotation marks and citation omitted) (holding ADA did not preempt airline employee's age

discrimination claim). Thus, in *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1255 (11th Cir. 2003), in which the court held a state whistleblower claim not preempted, the court noted that "because Florida's Whistleblower Act does not explicitly address airline services . . . the only possible basis for pre-emption is if it has a sufficient—i.e., significant—impact on those services."

Likewise, in the Third Circuit, the "requisite connection exists either where the law expressly references the air carrier's prices, routes or services, or has a forbidden significant effect upon the same." *Gary v. Air Group, Inc.*, 397 F.3d 183, 186 (3d Cir. 2005) (internal quotation marks and citation omitted). And the Ninth Circuit has explained that for the ADA to preempt a state law, the state law must either reference or have a connection with prices, routes, or services, *Air Transp. Ass'n of Am. v. City and County of S.F.*, 266 F.3d 1064, 1071 (9th Cir. 2001), and has elaborated that for a state law to be preempted "under the connection-with test" it must "compel or bind the Airlines to a particular route or service." *Id.* at 1074.

Emphasizing the ADA's deregulatory purposes, the Second Circuit, in *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77, 84 (2d Cir. 1997), held that pilots' state and city age discrimination claims were not preempted because "[p]ermitting full operation of New York's age discrimination law will not affect competition between airlines—the primary concern underlying the ADA." "[W]hether an airline discriminates on the basis of age (or race or sex) has little or nothing to do with competition or efficiency." *Id.* The court of appeals explained that its test was different than simply looking at the effect of the state laws on the airline's prices, though it said it would reach

the same result under that test as well, because, given the economics of airline prices, not every increase in costs to the airline results in an increase in fares. *Id.* Similarly, although recognizing that there was an "undeniable logic" to an airline's argument that its selection of its reservation clerks had a "connection with" its services, the Sixth Circuit held in *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493 (6th Cir. 1999), that state-law race discrimination claims were not preempted because "[n]either air safety nor market efficiency is appreciably hindered by the operation of state laws against racial discrimination." *Id.* at 495, 496.

Outside of the state employment law context, the First Circuit has stated that a "sufficient nexus" exists between a state law and prices, routes, and services "if the law expressly references the air carrier's prices, routes or services, or has a 'forbidden significant effect' upon the same." *E.g., United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323, 335 (1st Cir. 2003). The decision below makes clear, however, that, at least in the context of state employment laws, the First Circuit does not *require* a law either to reference or have a significant impact on prices, routes, or services to be preempted. *See* Pet. App. 9a (describing the requirement of a "'significant impact' . . . , rather than one merely 'tenuous, remote, or peripheral'" as a "gloss supplied by the cases") (quoting *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390)). Although the Massachusetts Tips Law does not expressly reference air carrier prices, routes, or services, the First Circuit declined to consider whether the law would have a significant effect on them. *Id.* at 14a (stating that Congress did not want states to regulate services, or even advertisements of services, "at high cost or at low"—that is, whether the effect on services is significant or not).

Had the First Circuit required a significant effect on prices, routes, or services, like the Third, Eleventh, and Ninth Circuits, the result below would have been different because, as the district court explained, the tips law does *not* have such an effect. Pet. App. 43a-46a. Indeed, applying the significant-effects test, a court in the Third Circuit held that skycaps' claims against U.S. Airways based on its charging $2 per bag for curbside check-in were not preempted by the ADA. *Thompson v. U.S. Airways, Inc.*, 717 F. Supp. 2d 468, 478 (E.D. Pa. 2010). The result below also would have been different had the First Circuit, like the Second and Sixth, looked to the deregulatory purposes of the ADA, because requiring American to modify the manner in which it advertised or charged the $2 curbside check-in fee would not affect competition between the airlines. This Court should grant certiorari to resolve the differences in the circuits over the connection needed between a state law and airline carrier prices, routes, or services for the law to be preempted.

C. The First Circuit's Decision Conflicts with Decisions from Six Other Circuits over Whether a Presumption Against Preemption Applies in Determining Whether the ADA Preempts State Employment Laws.

The First Circuit's rejection of a presumption against preemption in areas that have historically been regulated by states squarely conflicts with the decisions of six other circuits that have applied the presumption in cases involving state employment-law claims against airlines. In *Wellons*, the Sixth Circuit began its analysis "by noting the existence of a presumption that Congress does not intend to supplant state law." 165 F.3d at 494 (internal quotation marks and citation omitted). Likewise, in *Abdu-Brisson*, the Second Circuit discussed how the employer airline

bore "the burden of overcoming the initial presumption against preemption." 128 F.3d at 83.

Similarly, the Eleventh Circuit has noted "the presumption[] [that] . . . courts should not lightly infer preemption of actions within the traditional police powers of a state," *Parise*, 141 F.3d at 1465, and explained that "employment standards fall squarely within the traditional police powers of the states, and as such should not be disturbed lightly." *Branche*, 342 F.3d at 1259. The Ninth Circuit has relied on "the presumption that because the States are independent sovereigns in our federal system, . . . Congress does not cavalierly preempt state-law causes of action," noting that "[t]his is especially true in the area of employment law, which falls within the traditional police power of the State." *Ventress*, 603 F.3d at 682 (internal quotation marks and citations omitted). The Eighth Circuit has started its analysis of preemption under the ADA with the presumption that "the States' historic police powers are not to be superseded," explaining that it "do[es] not lightly infer pre-emption in the area of employment law, for it falls within the traditional police power of the State." *Botz v. Omni Air Int'l*, 286 F.3d 488, 493-94 (8th Cir. 2002) (internal quotation marks and citations omitted). And, in *Gary*, the Third Circuit explained that its holding that the ADA did not preempt a state whistleblower claim was "reinforced by the well-established principle that courts should not lightly infer preemption" and that this principle was "particularly apt in the employment law context which falls squarely within the traditional police powers of the states, and as such should not be disturbed lightly." 397 F.3d at 190 (internal quotation marks and citations omitted).

The First Circuit stated below that none of the Supreme Court cases interpreting the statutory language

"related to a price, route, or service" adopted the position "that we should presume strongly against preempting in areas historically occupied by state law." Pet. App. 10a. But this Court has consistently reaffirmed that a presumption against preemption applies in fields of traditional state regulation, *see, e.g., Altria Group, Inc., v. Good*, 555 U.S. 70, 77 (2008), including in cases interpreting the term "related to." *See, e.g., N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995). That *Morales*, *Wolens*, and *Rowe* did not discuss the presumption does not demonstrate that it applies any less in determining whether the ADA preempts state law than in determining whether any other federal law preempts state law. It simply shows that the presumption was not necessary to the resolution of those cases. Here, where the underlying claims were state employment claims that fall squarely within the traditional police powers of the state, the First Circuit should have applied a presumption against preemption, as the Second, Third, Sixth, Eighth, Ninth, and Eleventh Circuits do in determining whether the ADA preempts state employment-law claims.

II. The Decision Below Is Irreconcilable with This Court's Case Law, Is Wrong on the Merits, and Presents Issues of Exceptional Importance That Require the Court's Intervention.

1. In *Rowe*, this Court described Congress's goal in enacting the ADA "as helping assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces.'" 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378). It explained that "federal law does not preempt state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Id*. at 375 (quoting *Morales*, 504 U.S. at 390). It noted that

"state regulation that broadly prohibits certain forms of conduct and affects, say, [air carriers] only in their capacity as members of the public" might not be preempted. *Id.* It emphasized that the state laws that are preempted because of their '"forbidden'" effect are only those that have a '"*significant* impact'" on carrier prices or services. *Id.* (emphasis in original) (quoting *Morales*, 504 U.S. at 388, 390). And it examined whether the state law had a '"significant' and adverse 'impact' in respect to the federal Act's ability to achieve its pre-emption-related objectives." *Id.* at 371-72 (*quoting Morales*, 504 U.S. at 390).

Below, however, the First Circuit held the state law claims preempted without determining whether doing so would affect competition between airlines or have a significant impact on rates, routes, or services. Instead, the First Circuit held that the tips law is preempted because it has a "*direct connection* to air carrier prices and services and can fairly be said to regulate both." Pet. App. 12a (emphasis in original). However, although this Court has stated that state laws are preempted if they "hav[e] a connection with . . . 'rates, routes, or services,'" *Morales*, 504 U.S. at 384 (citation omitted), it has explained that an "uncritical literalism" in applying the "connection with" standard "is no more help than in trying to construe 'related to,'" because, like "related to," "connection with" can have infinite bounds. *Travelers*, 514 U.S. at 656. Thus, for example, to determine whether a state law that does not reference an employee benefit plan has a "forbidden connection" with such a plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a), which preempts state laws that "relate to" such plans, this Court does not look just at whether there is a connection between the law and the plan or

whether it can be said that the law regulates the plan. Rather, it looks "both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' . . . as well as to the nature of the effect of the state law on ERISA plans." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 325 (1997) (quoting *Travelers*, 514 U.S. at 658-59).

The Massachusetts Tips Law affects airline prices, routes, and services, if at all, in "too tenuous, remote, or peripheral a manner" to be preempted. *Morales*, 504 U.S. at 390. To begin with, worker protection, particularly the protection of workers' rights to receive compensation, is an area far removed from Congress's objectives, in enacting the ADA, of freeing air carriers from fare and route regulation and allowing market forces to determine the prices, routes, and services offered by airlines. *See id.* at 378; *see also* S. Rep. 95-631, 95th Cong., 2d Sess. 114 (1978) (Senate Report on ADA stating that Congress should ensure that the benefits of deregulation "are not paid for by a minority—the airline employees and their families"). Moreover, the curbside check-in functions performed by the skycaps are remote from the economic deregulation of the airline industry that Congress sought to achieve in the ADA. Indeed, American charged for curbside check-in separately from its charge for the airline ticket, so that the skycaps' services were not even part of the bargained-for exchange included in the transportation contract that passengers entered into with the airline.

Further, the Tips Law would not have a significant effect on either the skycaps' services or their prices. Unlike the law held preempted in *Rowe*, the Tips Law does not "require carriers to offer a system of services that the market does not now provide (and which the carriers would

prefer not to offer)," nor does it "freeze into place services that carriers might prefer to discontinue in the future." 552 U.S. at 372. In fact, as the district court explained, there were multiple ways that the airline could follow the law without increasing its price or altering the nature of its service, such as by using signs that did a better job explaining that the charge was not a tip or by allowing the curbside check-in fee to be paid by credit card. Pet. App. 45a-46a.

2. In holding a law as tenuously and remotely connected to airline prices, routes, or services as the Tips Law preempted, the First Circuit decision exacerbates uncertainty over the scope of the ADA's preemption provision. This Court's review is necessary to provide guidance to states about which state laws of general applicability they can enforce against airlines, to airlines about which state laws they must follow, and to airline workers about which employee protections they can count on receiving.

The First Circuit's conclusion that the Massachusetts Tips Law "has a direct connection" with and "directly regulates" prices and services—even though the law does not mention air carrier prices or services, does not rely on such prices or services for its operation, and could be complied with by airlines without any change to the nature of the skycaps' services or the prices charged for them—sets forth few standards for determining the scope of the ADA's preemption provision. This lack of standards has the potential to sweep a large number of state employment laws of general applicability within the preemption provision's reach. It threatens to deprive employees of vital protections against exploitation and discrimination by their employers, an area long regulated

by states and remote from the market efficiency and competitive concerns that motivated the ADA.

Moreover, the potential effect of the decision below extends beyond the airline industry. Because the FAAAA uses similar language to the ADA to preempt state trucking regulation, the decision could lead to preemption of basic wage-and-hour laws for truck drivers as well. *See Rowe*, 552 U.S. 364 (looking to caselaw on ADA to interpret FAAAA's preemption of state laws "related to a price, route, or service of any motor carrier"). Absent this Court's intervention, accidents of geography will determine whether airline and motor carrier employees are protected by basic state employment laws. *Compare Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998) (holding that a prevailing wage law that motor carrier claimed increased its prices by 25% is not pre-empted) *with* Pet. App. 1a (holding a tips law with no significant effect on prices, routes, or services is pre-empted).

In addition, as the First Circuit explained, "[s]eparate charges for services that had once been bundled together—for example, for in-flight meals or extra bags—[have become] common in airline operations." Pet. App. 3a. Clarifying the scope of "services," and the relationship that state laws must have to those services to be preempted, is particularly important given these changes in the scope of what is included within the transportation contract.

As the First Circuit noted, the ADA's preemption language is vague, and this Court's cases interpreting the ADA's preemption provision do not "provide[] an easily applied test." Pet. App. 9a; *see also Abdu-Brisson*,128 F.3d at 81, 82 ("The 'related to' language of the ADA provides neither a predictable nor practical formula for

distinguishing preempted from non-preempted state and local laws" and the "Supreme Court has not drawn any distinct preemption lines for guidance[.]"). This Court should grant certiorari to provide much-needed further guidance on the scope of preemption under the ADA, particularly on how the preemption provision applies to state employment laws of general applicability.

CONCLUSION

The petition for a writ of certiorari should be granted.

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