No. 11-221

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

PETITIONERS' REPLY

SHANNON LISS-RIORDAN
HILLARY SCHWAB
LICHTEN & LISS-RIORDAN, P.C.
100 Cambridge Street
20th Floor
Boston, MA 02114
617-994-5800
sliss@llrlaw.com

ADINA H. ROSENBAUM
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
202-588-1000
arosenbaum@citizen.org

Counsel for Petitioners

October 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Pages**

STATUTES

INTRODUCTION

In its brief in opposition, Respondent American Airlines suggests that it should be relieved from having to comply with any state laws that establish requirements that might differ from state to state. But although the express preemption provision of the Airline Deregulation Act (ADA) is broad, it is not unlimited. It applies only to state laws "related to [an airline] price, route, or service." 49 U.S.C. § 41713(b)(1). And some state actions affect prices, routes, or services "in too tenuous, remote, or peripheral a manner" to be preempted. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (internal quotation marks and citation omitted).

The First Circuit held below that the ADA preempts the Massachusetts Tips Law, although the law does not reference airline prices, routes, or services and although an airline could comply with the state law without changing its prices or the nature of its services. In so holding, the First Circuit created or expanded three circuit splits: over the definition of "service"; over the test for determining whether an employment law of general applicability is "connected with" a price, route, or service; and over whether a presumption against preemption applies in ADA cases. American's attempts to downplay these splits fail, as do its efforts to reconcile the decision below with this Court's precedents.

ARGUMENT

1. The court of appeals acknowledged that its decision rested on "issues [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." Pet. App. 12a-13a. American concedes that there

is a "historic conflict" over the definition of "service." Opp. 7. It claims, however, that there is no conflict over the definition of "price" and, therefore, that because the court of appeals held that the Tips Law was related to both prices and services, resolution of the conflict over the definition of "service" would not change the outcome of the case. Opp. 9. As the court of appeals recognized in discussing a dispute over the definitions of both "price" and "service," however, Pet. App. 12a-13a, the two definitions are related. For example, in *Charas v. Trans World Airlines*, 160 F.3d 1259, 1265-66 (9th Cir. 1998) (en banc), the Ninth Circuit based its definition of "services" on the fact that the word was "juxtaposed to 'rates' and 'routes,'" and "'rates' and 'routes' generally refer to the point-to-point transport of passengers."[1] Although American argues that the definition of "price" is broad, it does not cite any case in which a law was held preempted because it was related to an air carrier "price" where the price was not the price of an air carrier "service." (Indeed, American does not cite any case besides the decision below in which a law was held preempted because it was related to an air carrier "price" where the price was not the price of the airfare.) Thus, the First Circuit's treatment of "price" cannot be separated from its definition of "service."

American also claims that *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), "resolved the conflict over the meaning of 'service,'" defining "service"

---

[1]As American notes, Opp. 9 n.3, the ADA originally preempted laws relating to air carrier "rates, routes, or services." Congress revised the language in 1994 to refer to an air carrier "price, route, or service" but "intended the revision to make no substantive change." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995). The current statutory term "price" is thus synonymous with the former term "rate."

necessarily to be broader than the definition adopted by the Ninth Circuit in *Charas*, 160 F.3d at 1260. Opp. 9. But *Rowe*'s application of the comparable preemption provision applicable to motor carriers to activities integrally tied to the "service" of package delivery by motor carriers hardly resolves whether the word "service" in the ADA applies to activities that are merely incidental to the transport of passengers by air.

Furthermore, since *Rowe*, the Ninth Circuit has twice reaffirmed *Charas*'s definition of "service." *See Ginsberg v. Northwest, Inc.*, 653 F.3d 1033, 1042 (9th Cir. 2011); *Ventress v. Japan Airlines*, 603 F.3d 676, 682, 683 (9th Cir. 2010). Thus, the conflict among the circuits remains. American acknowledges one of these Ninth Circuit opinions, but nonetheless claims that there is no "viable, unresolved conflict," Opp. 13, because the airline in that case has filed a petition for rehearing en banc, and because there is another appeal on the issue pending in the Ninth Circuit. That the cases in which the Ninth Circuit has reaffirmed *Charas* post-*Rowe* were not decided en banc, however, and that cases on the topic continue to arise does not, as American claims, mean that the Ninth Circuit's position "is not yet concrete." Opp. 13.

In any event, even if the Ninth Circuit decided to hear the issue en banc, reversed course, and adopted the First Circuit's definition of "service," the decision below would still conflict with those of other courts of appeals on the definition of "service." In *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (en banc), the Fifth Circuit held that "service" extends to matters that are "necessarily included with the contract of carriage between the passenger or shipper and the airline." *Id.* at 336 (citation omitted). Below, however, the First Circuit applied the term "service" to baggage handling activities that were

intentionally *excluded* from the airline's contract of carriage with the passenger. Particularly given airlines' increased unbundling of baggage-handling, in-flight meals, and similar matters from the contract providing transportation services, Pet. App. 3a, this Court should grant certiorari to determine whether "price" includes more than the ticket price, and whether "service" includes matters beyond point-to-point transportation, including services that are not included in the contract of carriage.

2. The petition demonstrated that by determining that the Tips Law had a "connection with" airline prices and services without examining whether the law would have a significant effect on such prices and services or whether the law would affect the ADA's deregulatory purpose, the decision below conflicts with decisions of five other circuits. American attempts to downplay this conflict by fighting a straw man, arguing that there should be no per se exemption from ADA preemption for employment cases. Opp. 14. Petitioners did not argue that such a per se exemption exists. Nor, as American suggests, Opp. 15, did Petitioners argue that a per se exemption applies to state laws of general applicability. Instead, Petitioners pointed out a conflict among the circuits over how to determine whether employment laws of general applicability are preempted by the ADA.

American notes that the different cases cited by the Petitioners had different facts, and that all "undertake[] to apply the language of 49 U.S.C. § 41713(b)(1) as interpreted by this Court in *Morale*s and *Wolens*." Opp. 17. Of course different cases have different facts, and lower courts attempt to follow this Court's opinions. What matters is that in the process of doing so, the courts of appeals have adopted different tests for determining whether a state employment law is "connected with" air

carrier prices, routes, and services. The decision below would have come out differently under the tests applied by five other circuits.

For example, in *Air Transport Ass'n of America v. City and County of San Francisco*, 266 F.3d 1064, 1072 (9th Cir. 2001), the Ninth Circuit concluded that "a local law will have a prohibited connection with a price, route or service if the law binds the air carrier to a particular price, route or service and thereby interferes with competitive market forces within the air carrier industry." *See also Am. Trucking Ass'ns v. City of Los Angeles*, ___F.3d ___, 2011 WL 4436256, at *7 (9th Cir. Sept. 26, 2011) (quoting *Air Transport Ass'n* and explaining that "the proper inquiry is whether the provision, directly or indirectly 'binds the . . . carrier to a particular price, route or service'"). Had this case arisen in the Ninth Circuit, the outcome below would have been different because the Tips Law did not bind the airline to charging a specific price for the skycaps' work or to offering specific baggage handling services (even assuming that these are "prices" and "services" within the meaning of the ADA).

Similarly, in *Parise v. Delta Airlines, Inc.*, the Eleventh Circuit explained that for the ADA to preempt a state law, the 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." 141 F.3d 1463, 1465-66 (11th Cir. 1998) (internal quotations marks and citation omitted). Had the First Circuit applied that standard—which is also used in the Third Circuit, *see Gary v. Air Group, Inc.*, 397 F.3d 183, 186 (3d Cir. 2005)—this case would have come out differently because the Massachusetts Tips Law does not expressly reference airline prices, routes, or services, and its application to the skycaps would not have had a significant economic effect

on such prices, routes, or services. *See Thompson v. U.S. Airways, Inc.*, 717 F. Supp. 2d 468, 478-79 (E.D. Pa. 2010) (holding skycaps' claims not preempted under significant-effects test). Indeed, American could have complied with the Tips Law without changing the charge for the skycaps' work or the nature of the curb-side check-in it offered its customers.

Likewise, the decision below would have been different under the tests used by the Sixth Circuit in *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493, 496 (6th Cir. 1999) (holding employment claims not preempted because "[n]either air safety nor market efficiency is appreciably hindered by the operation of state laws against racial discrimination"), and by the Second Circuit in *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77, 84 (2d Cir. 1997) (holding employment claims not preempted where the airline could not establish that enforcing state laws would "frustrate the purpose of the ADA").[2] Compliance with the Tips Law, which prohibits employers from keeping service charges or tips, would not prevent airline prices, routes, and services from reflecting "maximum reliance on competitive market forces." *Rowe*, 552 U.S. at 371 (quoting *Morale*s, 504 U.S. at 378).

In short, the split among the circuits is not simply a matter of "different appellate panels[] considering different state employment statutes in the context of

---

[2]American attempts to dismiss *Abdu-Brisson* by arguing that *Abdu-Brisson* involved a retreat from *Morales* that was later rejected by *Rowe*. Opp. 17 n.7. *Abdu-Brisson*, however, relied extensively on *Morales*, and its focus on the ADA's purposes was not rejected by *Rowe*, which based its preemption decision on the states law's impact "in respect to the federal Act's ability to achieve its pre-emption-related objectives." 552 U.S. at 371-72.

specific facts." Opp. 18. Rather, the circuits have applied conflicting tests for determining whether a state employment law is sufficiently connected with airline prices, routes, or services to be preempted. The Court should grant the petition to resolve this conflict.

3. As detailed in the petition, the First Circuit's refusal to apply a presumption against preemption conflicts with decisions of six other circuits that have applied such a presumption in considering whether the ADA preempts state employment laws. Although American asserts that this conflict "do[es] not exist," Opp. 2, it does not address any cases from other circuits in its discussion of the presumption, let alone attempt to distinguish the cases cited in the petition or explain why those cases' application of the presumption does not conflict with the decision below.

Instead, American focuses solely on the merits, claiming that the court below was correct in refusing to apply the presumption against preemption because *Morales, Wolens*, and *Rowe* did not discuss the presumption. That the presumption was not necessary to resolve any of those cases, however, does not mean that the Court rejected the application of the presumption in ADA cases. And the Court applied the presumption in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 432 (2002), which, like *Rowe*, analyzed preemption under the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c).

Moreover, *Morales*, *Wolens*, and *Rowe* provide no reason why the presumption would not apply just as much in determining whether the ADA preempts state law as it does in determining whether other federal statutes preempt state law. American attempts to supply such a

reason, claiming that the presumption should not apply because the ADA contains an express preemption clause. But this Court has explicitly stated that the presumption applies to questions of express preemption. S*ee Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). And although American claims that the particular language of the ADA's preemption provision makes reliance on the presumption inappropriate, Opp. 20, this Court has applied the presumption in cases considering the "similarly worded pre-emption provision of the Employee Retirement Income Security Act of 1974 (ERISA)." *Morales*, 504 U.S. at 383. *See, e.g.*, *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995).

American also argues that the presumption should not apply in ADA cases because regulating airlines traditionally falls to the federal government. Opp. 20. The question under the presumption, however, is not whether the *federal* law falls within an area that the federal government regulates, but whether the *state* law at issue falls within the "historic police powers of the State." *City of Columbus,* 536 U.S. at 432 (citation omitted); *cf. Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009) (explaining that the presumption "accounts for the historic presence of state law but does not rely on the absence of federal regulation"). The Massachusetts Tips Law falls squarely within those powers.

Finally, American speculates that the First Circuit would have reached the same result even if it had applied the presumption against preemption. Applying the presumption, however, the district court held 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." Pet App. 24a. Although the

presumption is not necessary to hold that the ADA does not preempt the Massachusetts Tips Law, the district court's analysis shows that a proper application of the presumption leads to the conclusion that a state employment law with which airlines could comply without altering their prices or changing the nature of their services is insufficiently related to prices, routes, or services to be preempted by the ADA.

4. In *Rowe*, this Court held that the ADA preempted state laws that had a "'significant' and adverse 'impact' in respect to the federal Act's ability to achieve its pre-emption-related objectives." 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390). American contends that the Massachusetts Tips Law has a similar "significant, adverse impact." Opp. 22. But the First Circuit did not examine whether the Tips Law would have a significant effect on prices, routes, or services. Instead, the court stated that Congress did not want states regulating "advertising and service arrangements . . . whether at high cost or at low." Pet. App. 14a.

American argues that because it could have complied with the Tips Law by altering its advertising, the law's regulation is "of the same type" as the advertising guidelines held preempted in *Morales*. Opp. 23. In *Morale*s, however, the Court concluded that the guidelines "would have a significant impact upon . . . the fares [the airlines] charge." 504 U.S. at 390. In contrast, although American states that compliance with the Massachusetts Tips Law would require it to change "what [it] must *say*" about curb-side check-in and "the manner in which [it] must *collect* its price," Opp. 23 (emphases added), it does not argue that compliance with the state law would have any effect on what the skycaps do or on the amount the airline charges for curb-side check-in.

The state law at issue in this case forbids employers from keeping workers' tips or service charges reasonably expected by customers to be given to workers in addition to or in lieu of tips.[3] By holding preempted a state law so divorced from Congress's goal of "lower[ing] airline fares and better[ing] airline services" through "maximum reliance on competitive market forces," *Rowe*, 552 U.S. at 367 (internal quotation marks and citations omitted), the court below jeopardized a wide range of basic employee protections. This Court should grant the petition to resolve the lower courts' disagreements and provide greater clarity on how to determine if a state employment law is related to an air carrier price, route, or service.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[3]American notes that many of the Petitioners did not work directly for American, but for an independent contractor. Opp. 4. However, the Supreme Judicial Court of Massachusetts held, when the question was certified to it in this case, that the Tips Law applies whether the entity keeping the tips is the workers' direct employer or whether the workers are employed through a contractor. *DiFiore v. Am. Airlines, Inc.*, 454 Mass. 486 (2009).

Respectfully submitted,

SHANNON LISS-RIORDAN
HILLARY SCHWAB
LICHTEN & LISS-RIORDAN, P.C.
100 Cambridge Street
20th Floor
Boston, MA 02114
617-994-5800
sliss@llrlaw.com

ADINA H. ROSENBAUM
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
202-588-1000
arosenbaum@citizen.org

Counsel for Petitioners

October 2011