Nos. 10-1108; 10-1167; 10-1264

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DON DIFIORE, LEON BAILEY, JAMES E. BROOKS, RITSON DESROSIERS, MARCELINO COLETA, TONY PASUY, LAWRENCE ALLSOP, CLARENCE JEFFREYS, FLOYD WOODS, ANDREA CONNOLLY, and all others similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

v.

AMERICAN AIRLINES, INC.

Defendant-Appellant/Cross-Appellee.

G2 SECURE STAFF, LLC,

Defendant.

On Appeal from an Amended Final Judgment of the United States District Court for the District of Massachusetts
(No. 1:07-cv-10070-WGY, Hon. William G. Young, U.S.D.J.)

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND AFFIRMANCE

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August 27, 2010

CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer and worker interests in litigation, and regularly files amicus curiae briefs in cases in the United States Supreme Court and the federal appellate courts.

Among Public Citizen's particular concerns is that defendants in a broad range of cases increasingly rely on arguments that federal laws preempt state statutes and common-law doctrines protecting consumers and workers against unfair practices and unsafe products. In many instances, those arguments reflect distortions of the policies and purposes of federal law that create a false impression of conflict between federal and state law. Often, the result of judicial acceptance of such overly broad preemption arguments would be the creation of regulatory gaps never intended by Congress, as states would be disabled from addressing problems that the federal government has neither addressed itself nor intended to prevent the states from addressing. *See, e.g.*, Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 Ecology L.Q. 1147 (2007).

Public Citizen submits this brief because of its concern that the argument of the airline industry in this case—that federal law displaces a state's protection of the compensation of airline industry workers—reflects exactly such an overbroad reading of the preemptive scope of the federal law at issue, the Airline Deregulation Act ("ADA"). Public Citizen believes that this brief may be helpful to the Court by placing the issue before it within the broader framework of the principles governing federal preemption—foremost among them the strong presumption against preemption of state laws that govern areas of traditional state concern, such as employer-employee relations. That presumption strongly counsels against extending the ADA's ambiguous preemption clause to displace worker protections that are far from the core of the ADA's policy of deregulation of the fares, routes, and service offered by air carriers and that have only a tenuous impact (if any) on the federal deregulatory policy.

Federal Rule of Appellate Procedure 29(a) authorizes the filing of this brief because all parties to this appeal have consented.

INTRODUCTION AND SUMMARY OF ARGUMENT

Suppose American Airlines were to place a jar with a hand-lettered label reading "TIPS" on each of its curbside check-in counters, but, instead of allowing its skycaps to keep the coins and bills placed in the jar for them by passengers, the airline collected the money and kept it for itself. Would a federal statute intended

to foreclose regulation of airline fares, routes and service preempt the application of a state statute providing that the tips collected by the airline must be given to the skycaps for whom the passengers intended them? Would it preempt state common-law principles preventing the airline from interfering with the skycaps' relationship with customers?

That is, in essence, the question posed by this case. Massachusetts law, as definitively construed by the Supreme Judicial Court, provides that when a business collects a tip, gratuity, or "service charge" (a term that includes any monies collected that the customer reasonably understands to be in lieu of or in addition to a tip), it must remit the tip, gratuity, or service charge to the employees who performed the service. *See DiFiore v. American Airlines, Inc.*, 910 N.E.2d 889 (Mass. 2009). In this case, a properly instructed jury found that when American began collecting cash payments from customers who checked their bags at the curbside with American's skycaps, American did so in a way that led customers reasonably to understand that the cash was a service charge in lieu of a tip—tips having been, up until that time, the only cash that changed hands at curbside check-in locations. In other words, the effect of American's actions was just the same as if American had placed a "tips" jar on its curbside check-in counters. Under those circumstances, Massachusetts law required that the money go to the skycaps, not to the airline.

Enter the ADA. Enacted in 1978 to replace a system of federal regulation of airline fares and routes with a competitive market, the ADA contains a preemption provision intended "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). The preemption clause, now found at 49 U.S.C. § 41713(b)(1), provides: "Except as provided in this subsection, a State … may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."

Construction of the ADA's preemption clause must begin with the well established presumption against preemption of state laws regulating traditional matters of state concern. The presumption requires a clear showing of congressional intent to foreclose application of such state laws. The Supreme Court has recently reiterated the fundamental importance of the presumption and has repeatedly applied it to the construction of express preemption clauses such as the one at issue in this case.

The presumption has particular force when a preemption clause is ambiguous. The ADA's preemption clause, modeled on that of ERISA, is triggered when a state law is "related to" an air carrier's prices, routes, or service. The Supreme Court and the courts of appeals have repeatedly recognized that such

statutory language is ambiguous and that "related to" cannot be read expansively because of its potentially limitless scope. In particular, the courts have held that matters having only a tenuous, insignificant or indirect effect on air carrier service are not within the preemptive scope of the ADA.

More specifically, courts have recognized that laws protecting the rights of workers generally fall outside the scope of the ADA's preemption clause, because such laws are well outside Congress' central concern with preventing price and route regulation of airlines, and usually have no more than a remote impact on airline fares, routes and service. The Massachusetts statute at issue here, which provides only that airlines may not take tips intended for their employees (or employees of their subcontractors) is, similarly, far beyond the preempted area, as it neither regulates nor significantly affects airlines' prices or routes or the provision of air carrier service. Indeed, the law does not purport to dictate how an airline must do anything. All it says is what an airline may *not* do: appropriate tips or service charges understood and intended by customers to be for employees. Similarly, the common-law claim of tortious interference on which the skycaps also prevailed does not tell the airlines how to offer their services, but only prevents them from interfering with the relationship between skycaps and the customers who tip them by intercepting the tips. The ADA offers not the slightest indication, let alone the clear showing demanded by the presumption against

preemption, that Congress intended to interfere with such basic statutory protection of workers' rights to compensation for their services, nor with the common-law protection of prospective advantageous relationships.

ARGUMENT

I. The Presumption Against Preemption Is the Starting Point for Analyzing Whether the ADA Preempts Application of Massachusetts Law.

The Constitution's Supremacy Clause (art. VI, cl. 2) provides that properly enacted federal statutes are "the supreme Law of the Land" and are binding throughout the United States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." At the same time, however, "the structure and limitations of federalism … allow the States great latitude under their police powers to legislate …." *Gonzales v. Oregon,* 546 U.S. 243, 270 (2006) (citations and internal quotation marks omitted).

Thus, although federal law preempts conflicting state laws, courts do not "lightly infer" that Congress has exercised its power to override state law, particularly in areas traditionally regulated by the states. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987). Respect for the important role of state law in our system of federalism, and understanding of the practical limits on the ability and desire of Congress to legislate comprehensively and exclusively on the myriad subjects also addressed by state statutes and common law, counsel a cautious

approach to assertions that Congress has chosen to displace state authority. Courts must not "seek[] out conflicts between state and federal regulation where none clearly exists." *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (citation omitted).

Accordingly, the Supreme Court has articulated a "presumption against the preemption of state police power regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). Under this doctrine, courts must begin their analysis of preemption issues "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Application of the presumption "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted). The Supreme Court has applied this presumption in a long line of decisions.[1]

[1] *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002); *Johnson v. Fankell*, 520 U.S. 911, 918 (1997); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813-14 (1997); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1994); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605, 611 (1991); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985).

The Court's most recent major decisions on preemption strongly reiterate the presumption, leaving no doubt that it is alive and well and plays a central role in shaping analysis of preemption issues. In *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), the Court stated that the presumption applies "[i]n *all* preemption cases, and *particularly* in those in which Congress has legislated ... in a field which the States have traditionally occupied." *Id.* at 1194 (emphasis added; citations and internal quotation marks omitted). And in *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2009), the Court explicitly stated that the presumption applies whether courts are "addressing questions of express or implied preemption." *Id*. at 543. Thus, where, as here, an express preemption clause is at issue, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* (quoting *Bates*, 544 U.S. at 449).

This Court, acknowledging the Supreme Court's most recent teachings, has emphasized that the Supreme Court has "reaffirmed" the "longstanding principles" embodied in the presumption against preemption, under which "the 'two cornerstones of our pre-emption jurisprudence'" are:

> First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

In re Pharm. Indus. Avg. Wholesale Price Litig., 582 F.3d 156, 178 (1st Cir. 2009). (quoting *Wyeth*, 129 S. Ct. at 1194-95 (citations, quotation marks, and alterations omitted)). Likewise, surveying the Supreme Court's most recent decisions, one scholar recently commented that "[t]he presumption against preemption is part of the landscape of preemption jurisprudence, perhaps now more than at any time in recent memory." Mary J. Davis, *The "New" Presumption Against Preemption*, 61 Hastings L.J. 1217, 1254 (2010). Thus, "[i]f a proponent of preemption has not established the 'clear and manifest' intent [of Congress] to preempt in areas involving the historic police powers of the states, a case for preemption has not been made." *Id*. at 1254-55.

II. The Presumption Is Fully Applicable to the ADA's Express Preemption Clause.

As the Supreme Court held in *Altria*, the presumption against preemption applies with full force to express preemption cases—that is, cases that involve construction of a federal statute containing a preemption clause. 129 S. Ct. at 543; *see also Bates*, 544 U.S. at 449; *Lohr*, 518 U.S. at 484-85. Although an express preemption clause may make "clear and manifest" that Congress intends to preempt *something*, the question in specific cases is what that something is: "If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria*, 129 S. Ct. at 543; *accord Lohr*, 518

U.S. at 484. The presumption against displacement of state law is not overcome unless it is clear and manifest that Congress intended to preempt the particular application of state law at issue, and courts have a duty to resolve ambiguities and doubts about the scope of a preemption clause against preemption. *See Altria*, 129 S. Ct. at 543; *Bates*, 544 U.S. at 449.

Thus, "[t]he presumption has substantial impact in express preemption cases as a meaningful default rule in the absence of congressional clarity." Davis, *The "New" Presumption*, *supra*, at 1220. It requires that courts construe express preemption clauses "narrowly based on the ordinary meaning of the statute's terms, its structure, purposes, and history, with an understanding that Congress would not defeat the operation of traditional, historic police powers of the states without quite explicitly saying so," and that courts "accept a reading of an express preemption provision that disfavors preemption." *Id.* at 1247. It is, in short, "a presumption with teeth." *Id.*

The ADA's preemptive scope, covering laws "related to a price, route, or service of an air carrier," is undoubtedly broad, *see Buck v. American Airlines, Inc.*, 476 F.3d 29, 34 (1st Cir. 2007), but it is not unlimited. Indeed, the Supreme Court's construction of the statute adopts a "middle course" between "minimal preemption" and "total preemption." *American Airlines, Inc. v. Wolens*, 513 U.S.

219, 234 (1995). It is precisely in determining the outer bounds of such a statute's scope that the presumption comes into play.

Moreover, the language that the statute uses to describe its preemptive scope, turning on whether a law is "related" to a set of subjects, is, by itself, indefinite. The Supreme Court has noted that the ADA's preemption provision is modeled on ERISA's, which similarly preempts state laws that "relate to any employee benefit plan," 29 U.S.C. § 1144(a), and that the "same standard" should apply to the two statutes "[s]ince the relevant language of the ADA is identical." *Morales*, 504 U.S. at 384. Despite early decisions emphasizing the "expansive sweep" of the ERISA preemption clause, *e.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47 (1987), the Supreme Court's more recent decisions have emphasized that the very expansiveness of the concept of "relatedness" is a source of ambiguity and a reason to exercise caution in construing the scope of preemption. As the Court explained in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course …." 514 U.S. at 655.

Thus, the Supreme Court has emphasized that the scope of the "relate to" preemption language used in ERISA (and the ADA) cannot be approached with "uncritical literalism." *Id*. at 656; *accord Egelhoff v. Egelhoff*, 532 U.S. 141, 147

(2001); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997). Instead, the Court has repeatedly begun its analysis of the scope of ERISA preemption with the admonition that "the starting presumption that Congress does not intend to supplant state law" applies. *Travelers Ins. Co.*, 514 U.S. at 654; *accord Rush Prudential HMO, Inc. v. Moran*, 536 U.S. at 365; *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. at 813. Courts must therefore apply the presumption against preemption in cases involving the "relate to" preemption language "[a]s is *always* the case in our pre-emption jurisprudence." *Dillingham*, 519 U.S. at 325 (emphasis added). And because of the indeterminacy of the statutory language, the search for the requisite clear and manifest congressional intention to supplant state law requires consideration of both "the objectives of the [federal] statute" and "the nature of the effect of state law" on the preempted subject-matter. *Id.* (citations omitted).

This Court, too, has heeded the Supreme Court's decisions and recognized that the scope of the "relate to" preemption clause used in ERISA, and essentially copied in the ADA, is "not self-defining," *Carpenters Local Union No. 26 v. U.S. Fidelity & Guar. Co.*, 215 F.3d 136, 139-40 (1st Cir. 2000), and that the language "is imprecise and … cannot be read literally." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 301 (1st Cir. 2005). Notwithstanding the ERISA provision's "expansive language," this Court has stated that it "is still subject to 'the starting

presumption that Congress does not intend to supplant state law.'" *Id*. (quoting *Travelers*, 514 U.S. at 654). Thus, "unless congressional intent to preempt clearly appears," that language "will not be deemed to supplant state law in areas traditionally regulated by the states." *Carpenters Local Union No. 26*, 215 F.3d at 139-40; *accord Pharm. Care Mgmt. Ass'n*, 429 F.3d at 301.

Although, as this Court has noted, the ADA's preemption clause and ERISA's need not receive entirely parallel constructions, *see United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 335 n. 19 (1st Cir. 2003); *Buck*, 476 F.3d at 34 n.6, the recognition by both the Supreme Court and this Court of the indeterminacy of the ERISA language in marginal cases and of the applicability of the presumption against preemption in such cases should apply equally to the ADA, particularly given this Court's recent affirmation that the Supreme Court's decisions require consideration of the presumption in "all" preemption cases. *In re Pharm. Indus. Avg. Wholesale Price Litig.*, 582 F.3d at 178.

It is, therefore, not surprising that federal appellate courts considering questions of ADA preemption—particularly in cases that appear to test the outer margins of its scope—have regularly invoked the presumption against preemption as the starting point of their analysis. *See, e.g., Ventress v. Japan Airlines*, 603 F.3d 676, 682 (9th Cir. 2010); *Gary v. Air Group, Inc.*, 397 F.3d 183, 190 (3d Cir. 2005); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1256, 1259 (11th Cir.

2003); *Air Transp. Ass'n. of Am. v. City & County of San Francisco*, 266 F.3d 1064, 1070 (9th Cir. 2001); *Wellons v. Northwest Airlines*, 165 F.3d 493, 494 (6th Cir. 1999); *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186-87 (9th Cir. 1998); *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465 (11th Cir. 1998); *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77, 82-83 (2d Cir. 1997). As the Second Circuit explained in *Abdu-Brisson*, the ADA's preemption language, like that of ERISA, "provides neither a predictable nor practical formula for distinguishing preempted from non-preempted state and local laws." *Id*. at 82. It is therefore appropriate to look to the Supreme Court's ERISA preemption jurisprudence for guidance, and, as in ERISA cases, to apply the presumption against preemption to limit the ADA's preemptive scope based on an analysis of the relationship between a challenged state law and the objectives of the federal statute. *See id.* Thus, an airline seeking to set aside otherwise applicable state laws must "bear the burden of overcoming the initial presumption against preemption by establishing that enforcing the state … laws would frustrate the purpose of the ADA." *Id*. at 83; *accord, e.g., Mendonca*, 152 F.2d at 1188-89.

This Court's statement in *Flores-Galarza* (*see* 318 F3d. at 336) that it would not apply the presumption in a case involving the Federal Aviation Administration Authorization Act (FAAAA), which extended the ADA's deregulatory policy to air

freight carriers and motor carriers by enacting identical preemption provisions for them, 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), does not require rejection of the presumption here. The Court emphasized that it was not applying the presumption in *Flores-Galarza* because the Puerto Rican law at issue directly regulated air transport, which the Court did not regard as an area of traditional state concern given the substantial federal presence in the area. *See* 318 F.3d at 336. Here, by contrast, the principles of Massachusetts law at issue govern employment relationships. Moreover, *Flores-Galarza* predates this Court's more recent acknowledgment that intervening Supreme Court decisions require application of the presumption in *all* preemption cases. *See In re Pharm. Indus. Avg. Wholesale Price Litig.*, 582 F.3d at 178.

III. The ADA Does Not Preempt State Laws That Are Only Tenuously or Incidentally Connected with Airline Prices, Routes or Service.

The fundamental purpose of the ADA was to replace a system of regulation of airline fares, routes and service with one that placed "maximum reliance on competitive market forces" to determine the prices, routes and availability of air carrier service. *Morales*, 504 U.S. at 378. Construing the ADA's preemption clause with sensitivity to the presumption against preemption requires that it be limited to state laws that genuinely interfere with that statutory purpose; beyond that sphere, there is no "clear and manifest" congressional intent to displace state law.

As the Supreme Court has stated, the preemption clause quite evidently "stops States from imposing their own substantive standards with respect to rates, routes, or services." *Wolens*, 513 U.S. at 232. Accordingly, in *Morales* and *Wolens*, the Supreme Court held that state laws that directly controlled the terms on which airlines made tickets available to passengers were preempted. *See Morales*, 504 U.S. at 387-88; *Wolens*, 513 U.S. at 228. Similarly, in *Buck*, this Court held that the ADA preempted the application of state laws that would directly impose requirements on airlines with respect to the refund of ticket prices. 476 F.3d at 34-35. In addition, the Supreme Court in *Morales* construed the ADA to preempt not only state laws that "actually prescrib[e] rates, routes, or services," but also laws that have a "significant effect upon fares." 504 U.S. at 385, 388. Specifically, *Morales* held that state laws regulating airline price advertising were preempted, finding it "clear as an economic matter" that such laws would affect fares in ways incompatible with the ADA's deregulatory, market-oriented goals—that is, that they "would have a significant impact upon the airlines' ability to market their product." *Id*. at 389, 390.

At the same time, *Morales* recognized that not all laws that might have some effect upon airline prices, routes or service are preempted: "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id*. at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85,

100 n.21 (1983)) (brackets in *Morales*). Similarly, in *Wolens*, while holding that state laws that would directly regulate airlines' ticketing transactions with customers were preempted, the Supreme Court upheld application of state common-law principles providing for enforcement of contracts between airlines and passengers, notwithstanding that such enforcement obviously has some effect on airline prices, routes and service, because the Court saw a need for a "sensible construction of the ADA," one "calculated to carry out the congressional design." 513 U.S. at 230, 234. The Court saw no indication that Congress, in deregulating the airlines, intended to supplant totally the regime of state contract law that governs the transactions of airlines as it does those of all other businesses. *See id.* at 232.

Thus, *Morales* and *Wolens* together indicate that state laws that directly regulate or significantly affect airline prices, routes and service are preempted, while laws that affect these subjects, and the underlying congressional deregulatory policy, only tenuously, remotely or indirectly are not. As the Second Circuit noted in *Abdu-Brisson*, the Supreme Court's decisions have "provided little guidance" on the *limits* of ADA preemption, 128 F.3d at 82, in part because in *Morales*, in particular, the Court found that the challenged state law did "not present a borderline question," and hence the Court "express[ed] no views about where it would be appropriate to draw the line" between laws that significantly affected the

preempted subject-matter and laws that had only a tenuous or indirect effect. *Morales*, 504 U.S. at 390 (quoting *Shaw*, 463 U.S. at 100 n. 21). Lower federal courts that *have* addressed "borderline" questions have regularly taken into account both the presumption against preemption and the purposes of the ADA to find that state laws that are not aimed at regulating airline prices, routes or service, but serve policies that are unrelated to and not incompatible with the ADA's aim of fare and route deregulation, have only a "tenuous" impact on the preempted subjects and hence are not displaced by the ADA. *See, e.g.*, *Abdu-Brisson*, 128 F.3d at 84. Under this approach, state laws that "will not affect competition among airlines—the primary concern underlying the ADA" and that have "little or nothing to do with competition or inefficiency" should not be found preempted. *Id*.

Nothing in the Supreme Court's decision in *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008), is incompatible with such a measured approach to ADA preemption. In *Rowe*, the Supreme Court held that the FAAAA's preemption clause (which, as noted above, tracks that of the ADA) displaced a Maine state law concerning delivery of tobacco products, which had the effect of requiring motor carriers to provide particular types of service. 552 U.S. at 372. Noting that the law "produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services

that motor carriers will provide," *id*., the Court concluded that the FAAAA "must pre-empt Maine's efforts to regulate carrier delivery services themselves." *Id*.[2]

Notably, as in *Morales*, the Supreme Court's consideration of the issues in *Rowe* did not require it to explore the outer limits of the preemption clause because the case did not present a "borderline" question. 552 U.S. at 376. Nor did the Court hold that the presumption against preemption of the states' exercise of traditional police powers was inapplicable to the FAAAA (or, by extension, the ADA). Rather, it held only that the preemption clause contained no "exception" rendering it categorically inapplicable to state laws aimed at protecting public health even when those laws were squarely within the manifest intent of the clause's language. *Id*. at 374-75. The Court had no occasion to, and did not, hold that the presumption against preemption would not apply to attempts to apply the preemption clause outside the heartland of the statute's deregulatory objectives.

Indeed, the Court stressed that the core of ADA and FAAAA preemption involved cases "where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Id*. at 371 (quoting *Morales*, 504 U.S. at 390). The Court reiterated that "federal law does not pre-empt state laws

[2] Likewise, in *Flores-Galarza*, this Court held that the FAAAA preempted a Puerto Rican law that directly regulated the provision of air and motor carrier service by forbidding deliveries unless the carriers complied with the local law's requirements. 318 F.3d at 335.

that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Id*. at 375 (quoting *Morales*, 504 U.S. at 390). And it emphasized that "the state laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services." *Id.* (quoting *Morales*, 504 U.S. at 390) (emphasis added by Court in *Rowe*).

IV. The ADA Does Not Preempt the Principles of Massachusetts Law Requiring American Airlines to Remit Tips to Its Skycaps.

Application of these principles compels the conclusion that the ADA does not preempt application of Massachusetts statutory or common law to require that American Airlines pay its skycaps any monies collected from customers that the customers understand to be a tip or service charge in lieu of or in addition to a tip for the skycaps. Because the ADA's preemption clause does not reflect a clear and manifest congressional intention to displace such protections for workers, the presumption against preemption requires that state law be allowed to operate unimpeded.

The presumption against preemption is at its height here because the state laws in question operate within a traditional area of state authority: regulation of wages and other aspects of the employment relationship. The Supreme Court has repeatedly emphasized that "the establishment of labor standards falls within the traditional police power of the State" and that, accordingly, "pre-emption should not be lightly inferred in this area." *Fort Halifax*, 482 U.S. at 21; *accord Hawaiian*

Airlines, 512 U.S. at 252. Indeed, in *Dillingham*, the Supreme Court specifically referred to state wage protection laws as falling within an area historically regulated by the states and subject to the presumption against preemption. *See* 519 U.S. at 325, 330. The federal appellate courts have similarly recognized that such state laws are within the scope of the states' traditional authority and thus strongly presumed not to be preempted absent clear congressional intent to displace them. *E.g.*, *Ventress*, 603 F.3d at 683; *Gary*, 397 F.3d at 190; *see also Carpenters Local Union No. 26*, 215 F.3d at 141 (protection of workers' contract rights is a matter of traditional state concern).

In this respect, it does not matter that regulation of employment relations, and protection of workers' rights to receive compensation for their labor, has *also* long been a subject of federal law. This Court has explained that, "[a]s the Supreme Court recently clarified, the presumption against preemption applies in any field in which there is a history of state law regulation, even if there is also a history of federal regulation. *Wyeth*, 129 S. Ct. at 1195 n. 3 ('The presumption ... accounts for the historic presence of state law but does not rely on the absence of federal regulation.')." *Pharm. Indus. Price Litig.*, 582 F.3d at 178.

Worker protection, and in particular the protection of workers' rights to receive compensation, is not only a subject historically within the scope of state law, it is also an area remote from the concerns that led to the enactment of the

ADA. The objective of the ADA, as described by the Supreme Court in *Morales* and *Wolens*, was to free air carriers from fare and route regulation and allow market forces to determine the prices, routes and service offered by airlines. *See Morales*, 504 U.S. at 378-79; *Wolens*, 513 U.S. at 230. Notably absent from the Court's description is any suggestion that the ADA's objectives include affecting air carriers' obligations toward workers in the airline industry, or that there was any desire on the part of Congress to displace state law in that area. Thus, not surprisingly, federal appellate courts have repeatedly held that the ADA (and the FAAAA) does not embody a clear and manifest congressional intent to preempt the application of various forms of worker protection. *See, e.g.*, *Ventress*, 603 F.3d at 683 (employee's claim of retaliatory discharge for whistle-blowing not preempted); *Gary*, 397 F.3d at 189 (same); *Branche*, 342 F.3d at 1259-60 (same); *Air Transp. Ass'n*, 266 F.3d at 1073-74 (ordinance prohibiting discrimination against airline employees in provision of travel benefits and employee discounts not preempted); *Wellons*, 165 F.3d at 496 (claim of employment discrimination based on race not preempted); *Mendonca*, 152 F.3d at 1189 (application of prevailing wage law to motor carriers not preempted); *Parise*, 141 F.3d at 1466-67 (claim of employment discrimination based on age not preempted); *Abdu-Brisson*, 128 F.3d at 86 (same); *Aloha Islandair Inc. v. Tseu*, 128 F.3d 1301, 1303 (9th Cir. 1997) (claim of employment discrimination based on perceived disability not

preempted); *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 597 (5th Cir. 1993) (claim of retaliation for filing workers' compensation claim not preempted).

Like the state laws at issue in these cases, the Massachusetts law principles upon which the plaintiffs sought relief here lack "a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Rowe*, 552 U.S. at 371. Affording protections to workers against the interception of tips or service charges understood by patrons to be for the purpose of compensating the workers is not imposition by a state of "substantive standards with respect to [airline] rates, routes, or services." *Wolens*, 513 U.S. at 232. Like the protection against employment discrimination held not preempted in *Abdu-Brisson*, the requirement that tips and their equivalents be paid to workers will affect all airlines operating in Massachusetts in the same way, and thus it "will not affect competition among airlines—the primary concern underlying the ADA"; indeed, it has "little or nothing to do with competition or inefficiency." 128 F.3d at 84.

Moreover, any theoretical effect applying Massachusetts law to protect the skycaps' entitlement to tips might have on airline prices is far too tenuous, remote and incidental to qualify as "significant" within the meaning of the case law construing the ADA's preemption clause. Because Massachusetts law does not pose any obstacle to airlines charging whatever they choose for baggage services as long as they do not interfere with the skycaps' entitlement to receive tips or

payments understood by customers to be in lieu of tips, state law does not appear to have any price impact, let alone a significant one. But even if one accepts the notion that the imposition of liability here, by imposing a cost on the airlines, may have some impact on fares or other prices charged by airlines (in the same way that any cost of doing business may have some price impact), such an indirect effect on prices is so unrelated to Congress' purpose in passing the ADA that it should be considered, as a matter of law, too tenuous to demonstrate the requisite clear and manifest congressional intent to preempt state law. For exactly this reason, the Ninth Circuit in *Mendonca* held that application of California's prevailing wage law to a motor carrier did not violate the preemption clause because the increased costs it imposed on the carrier (which, as a percentage of the carrier's overall costs, dwarfed the amounts at issue here) had too remote and indirect a relation to the carrier's pricing of its services and did not "frustrate[] the purpose of deregulation by *acutely* interfering with the forces of competition." 152 F.3d at 1189 (emphasis in original).

A contrary ruling would dramatically extend preemption to any state law, no matter how unrelated to airline price, route, or service regulation, that in any way increased an airline's costs. State minimum wage laws, and even state laws criminalizing the non-payment of wages, would be equally vulnerable because they, too, would impose costs on airlines and the trucking industry (and, indeed,

would do so more directly). Even state contract-law (or quasi-contract-law) principles requiring airlines to pay for goods or services they purchase would seemingly have a prohibited impact on airline prices under such an expansive theory. But as the Supreme Court noted in *Wolens*, there is no reason to think that Congress intended preemption to sweep that broadly. *See* 513 U.S. at 230-33. Indeed, it is nonsensical to suppose that Congress intended airlines to be free from state laws generally applicable to businesses whenever such laws may impose some cost that may indirectly affect airline pricing. Certainly Congress has evinced no clear and manifest intent to require such sweeping preemption of state law.

For similar reasons, the principles of Massachusetts statutory and common law underlying the plaintiffs' claims do not have a prohibited "significant effect" on American's "service." Even assuming that the word "service" in the ADA's preemption clause encompasses the provision of baggage handling amenities such as curbside check-in, *but see Charas*, 160 F.3d at 1265-66 (holding that "service ... refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided"), Massachusetts law affects such service only tenuously, if at all. Importantly, Massachusetts law does not "compel or bind" an airline to provide or not provide a service, or to provide a service in a particular way, and thus it does not "interfere[] with competitive market forces within the air carrier industry." *Air Transp. Ass'n*, 266

F.3d at 1071, 1072. Unlike the law held preempted in *Rowe*, the state statutory and common-law principles at issue here do not effectively "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 do they "freeze into place services that carriers might prefer to discontinue in the future." 552 U.S. at 372.

The principles of Massachusetts law on which the plaintiffs rely leave airlines entirely free either to offer curbside check-in by skycaps or not. If they choose to offer it, they can do so in a wide array of ways of their own choosing. They can charge a fee for bags checked by skycaps, and they can use any system of payment of that fee that they wish, as well as any effective means of communicating to customers the nature of the fee. The only thing they *cannot* do is intercept tips intended by customers for skycaps, or service charges reasonably understood by customers to be payments for the skycaps in lieu of or addition to tips. Although that limitation may have *some* effect on the way airlines conduct, or charge fees for, curbside check-in operations (or on the way they communicate with customers about the nature of the fees charged), the impact is hardly a significant one, particularly from the standpoint of the ADA's broad purpose of introducing a system of competitive pricing and routing by airlines. That purpose will be entirely unaffected by such trifling impacts on the way airlines offer skycap assistance to passengers. It is by no means clear and manifest that Congress

intended the ADA's protection of airline service to reach so far as to encompass the minimal effects on the conduct of airlines that such worker protections may entail.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's holding that the plaintiffs' claims are not preempted by the Airline Deregulation Act.

Respectfully submitted,

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August 27, 2010

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief complies with the applicable type-volume limitation because uses a proportionally spaced font with a type-face of 14 points (Times New Roman 14-point), and, as calculated by my word processing software (Microsoft Office Word 2007), contains 6,468 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

August 27, 2010

/s/Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on August 27, 2010.

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