No. 12-2056

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BEN MITCHELL, *et al.*,
and all others similarly situated,

Plaintiffs-Appellants,

v.

US AIRWAYS, INC.,

Defendant-Appellee.

On Appeal from the United States
District Court for the District of Massachusetts
Case No. 1:08-cv-10629
The Honorable William G. Young, U.S.D.J.

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND LEGISLATIVE HISTORY

OTHER AUTHORITIES

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 it 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. Public Citizen submits this brief, which is limited to the question of whether common law is "a law, regulation, or other provision having the force and effect of law" within the meaning of the Airline Deregulation Act's (ADA's) preemption provision, because it is concerned that the argument of the airline industry in this case and related cases—that federal law broadly displaces state common-law remedies—reflects an overly broad reading of the ADA's preemptive scope. This brief seeks to provide a broader understanding of the language, purposes, and goals motivating the ADA and its express preemption clause, which did not include a sweeping displacement of common-law remedies.

Federal Rule of Appellate Procedure 29(a) authorizes the filing of this brief because all parties to this appeal have consented. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution that was intended to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

BACKGROUND AND SUMMARY OF ARGUMENT

In 1978, tired of high air fares and rigidly controlled routes, Congress deregulated the airline industry. "To ensure that the States would not undo federal deregulation with regulation of their own," Congress included a preemption provision in the Airline Deregulation Act (ADA). *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). In its current version, the clause provides that 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 . . . ." 49 U.S.C. § 41713(b)(1).

This case concerns whether the ADA preempts common-law claims brought by skycaps against US Airways based on the airline's imposition of a cash charge for curbside luggage checking that captured much of the skycaps' compensation from tips. The district court below recognized that a preemption clause providing that a state "'may not enact or enforce a law [or] regulation,' preempts only

positive state enactments, not common law actions." *Mitchell v. US Airways, Inc.*, 858 F. Supp. 2d 137, 150 (D. Mass. 2012) (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002)). Nonetheless, it held that the ADA preempts the skycaps' common-law claims, interpreting the term "other provision having the force and effect of law" to mean "a common law remedy." *Id*. at 151. In both everyday conversation and legal documents, however, "provision" has a well-accepted meaning: It refers to a discrete clause or stipulation set out in a legal agreement or document. Thus, like the terms "law" and "regulation" in "a law [or] regulation," the term "other provision" refers only to positive enactments, and does not include the common law. Indeed, if anything, rather than expanding "a law or regulation" to include common law, the addition of the term "other provision" underscores that "law" and "regulation" in the ADA refer only to positive enactments.

The district court's interpretation of "provision" to include common law strains the meaning of "provision." In the preemption context, where courts "start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted), such a strained reading of the statute's language cannot support a finding of preemption.

Recognizing that "a law, regulation, or other provision" does not include common-law claims would not only give effect to the plain text of the statute; it would also best suit the purposes motivating the ADA. As *Morales* and other decisions have recognized, Congress enacted the ADA preemption provision to ensure that states would not engage in reregulation of the industry that Congress had just freed from federal regulation. Congress was concerned that states, like the federal Civil Aeronautics Board (CAB) it had de-fanged through the ADA, would limit entry to the industry, set prices, and control routes. Congress did not address common-law claims at all.

This silence should be read against the distinct and important role of state common-law remedies in compensating injured parties. Time after time, courts have emphasized that common law plays a remedial function that can supplement federal statutory schemes. And time after time, courts have required more from Congress than mere silence before finding preemption of traditional common-law claims.

In holding that the ADA preempted the skycaps' claims, the district court failed to adhere to either the best reading of the statute or the purpose of Congress. This Court should reverse the decision below and hold that the skycaps' claims are not preempted.

ARGUMENT

I. STATE COMMON LAW IS NOT "A LAW, REGULATION, OR OTHER PROVISION."

The Supreme Court has long assumed that "the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Here, focusing on the plain language of the text, and giving the word "provision" its ordinary meaning, the phrase "a law, regulation, or other provision having the force and effect of law" does not encompass state common-law claims.[1]

[1] In *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007), this Court held that the ADA preempted various common-law claims that were brought against multiple airlines based on their failure to refund certain taxes and fees when plane tickets were not used. However, the Court did not address whether common-law claims fit within the preemption provision's "a law, regulation, or other provision" language. Instead, the Court focused on the airline customers' arguments that their claims fell outside the ADA's ambit because they sought to impose federal, rather than state, requirements; that the claims did not affect prices, routes, and services; and that the federal requirement could be read as implied contract terms. *Id*. The Court likewise did not address whether the ADA's "a law, regulation, or other provision" language extends to common-law claims in *DiFiore v. American Airlines, Inc.*, 646 F.3d 81 (1st Cir. 2011), another case brought by skycaps based on the imposition of a fee for curbside checking, in which the Court reversed a jury award based on violations of a Massachusetts statute governing tips and on tortious

First, the word "a" in "a law, regulation, or other provision" indicates that the provision includes only discrete, positive enactments. As the Supreme Court observed in *Sprietsma v. Mercury Marine*, "the article 'a' before 'law or regulation' implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law." 537 U.S. at 63. Below, the district court acknowledged *Sprietsma*, but nonetheless held that the ADA's preemption provision applies to common-law claims because, in addition to "law" and "regulation," the provision includes the phrase "other provision having the force and effect of law." *Mitchell*, 858 F. Supp. 2d at 150-51. But the article "a" in the ADA governs "other provision" no less than it governs "law" and "regulation": The provision applies to *a* law, *a* regulation, or *an* other provision. Accordingly, like "a law" and "[a] regulation," "[an] other provision" should be read to include only discrete, positive enactments.

Second, even apart from the introductory article, the term "other provision" does not include common law. In both its everyday and its legal meaning, "provision" refers to a specific clause in a law or other legal instrument. *See* Black's Law Dictionary (9th ed. 2009) (defining provision as "[a] clause in a statute, contract, or other legal instrument . . . [a] stipulation made beforehand");

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interference with advantageous relations. Rather, the Court explained that the jury's judgment on the tortious interference claim had been premised on a violation of the tips statute. *Id*. at 89.

www.dictionary.com (defining provision as "a clause in a legal instrument, a law, etc., providing for a particular matter; stipulation; proviso"). One might easily speak of a "provision" in an employment contract, a local health code, or an apartment lease. But the word "provision" is an unnatural fit for an uncodified body of law such as the common law. It is a "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Here, the ordinary meaning of "provision" does not include the common law.

Rather than expanding the meaning of "a law [or] regulation" to include common law, the addition of "other provision" confirms that the words "law" and "regulation" in the ADA do not include the common law. By referring to "other provision" after "law" and "regulation," the statute makes clear that the only laws and regulations that are preempted are those contained in "provision[s]" —that is, those contained in positive enactments, not in the common law.

The district court interpreted "other provision" to include the common law based on the belief that, otherwise, "other provision" would be superfluous. *Mitchell*, 858 F. Supp. 2d at 151, 154. But although canons of interpretation, such as the canon counseling courts to avoid redundancy, can inform construction of ambiguous language, they should not be invoked to muddle otherwise clear text.

See, e.g., *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]anons of construction are no more than rules of thumb . . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

In any event, holding that "other provision" does not include the common law does not render it an empty set. The word "other provision" plays the role of ensuring that if a state enacts or enforces a written rule or standard in a manner that has the force or effect of law, it will fall within the preemption provision's purview even if it is not denominated a statute or regulation. Indeed, the preemption provision as originally enacted in 1978 stated that "rule[s]" and "standard[s]" were also preempted. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4, 92 Stat. 1705 ("No state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law . . . ."). Upon recodification in 1994, these terms were subsumed into "law, regulation, or other provision," and the accompanying House Report explained that the recodification was made to "revise, codify, and enact without substantive change." H.R. Rep. No. 103-180, at 1 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818. Thus, the term "other provision" would include, for example, positively enacted or promulgated standards that are binding but are not codified within a statute or regulation.

The district court relied on this history as support for its holding that "other provision" includes common law, noting that "it appears Congress intended the preemptive language 'law, regulation, or other provision having the force and effect of law' to have the same legal effect as it did when the clause included the words 'rule' and 'standard,'" and finding it "difficult to imagine why Congress would include the words 'rule' and 'standard' if it intended to denote only positive state enactments." *Mitchell*, 858 F. Supp. 2d at 151. But Congress removed the words "rule" and "standard" precisely because it saw no reason to include them. That Congress viewed the words "rule" and "standard" as adding nothing to "law, regulation, or other provision" is a reason to read "rule" and "standard" as having referred only to positive enactments—that is, only to rules and standards included within statutes, regulations, or other provisions—not a reason to distort the meaning of "provision" to include common law. Both "rule" and "standard" can refer only to positive enactments. *See, e.g., Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 867-68 (2000) (holding that an express preemption provision that preempted "any safety standard" did not preempt common-law actions). And the House Report on the recodification specifies that the reason Congress removed "rule" from the ADA was that it was "synonymous with 'regulation,'" H.R. Rep. No. 103-180, at 305, demonstrating that Congress interpreted "rule" in the prior version of the ADA to include only positive enactments. Here, where the most

natural reading of the preemption clause does not encompass common-law claims, the Court should not go beyond that reading to find preemption.

II. CONGRESS DID NOT CLEARLY INTEND TO PREEMPT STATE COMMON LAW.

A. Congress's Concern in Enacting the Preemption Provision Was to Ensure that Federal Deregulation of the Airline Industry Was Not Undermined Through State Regulation.

In any preemption case, "[t]he purpose of Congress is the ultimate touchstone" of the analysis. *Medtronic*, 518 U.S. at 485 (citation omitted). The history of the ADA demonstrates that Congress enacted the Act to free the airlines from federal economic regulation. The purpose of the preemption provision, in turn, was to prevent conflicts between federal and state regulation and to ensure that states would not undermine deregulation by enacting economic regulation of their own. Congress showed no broad intent to restrain traditional state claims and remedies.

In enacting the ADA, Congress sought to relieve the airline industry from the public-utility-model oversight of the Civil Aeronautics Board (CAB). The Senate Report accompanying the ADA begins with the observation that "[f]ew American industries have had as close a relationship to and dependence upon regulation by the federal government as the domestic air transport industry." S. Rep. No. 95-631, at 1 (1978). It repeatedly describes the failings of CAB regulation, asserting that "Board regulation of fares and rates has discouraged price

competition at every turn." *Id.* at 2. The House Report likewise focuses on the "extensive economic regulation by the CAB," noting that "airline management does not have the same control over basic operational decisions as management in other industries," and explaining that "if an airline wishes to change the cities it serves or the price it charges, it must first seek permission from the CAB." H.R. Rep. No. 95-1211, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737. Congress enacted the ADA to create an air transportation system that relied not on economic regulation of the airlines, but on "competitive market forces to determine the quality, variety, and price of air services." H.R. Conf. Rep. No. 95-1779, at 53 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3773.

Congress included the preemption provision in the ADA to prevent conflicts between federal and state regulation and "assure that the new regime was not trammeled by state re-regulation." *DiFiore*, 646 F.3d at 85. As the Supreme Court has explained, the provision was enacted "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. In explaining the purpose of the preemption provision, the legislative history discusses direct state regulation of fares, such as "situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State."

H.R. Rep. No. 95-1211, at 15. The Senate Report cites as an example Pennsylvania's disallowance of fare increases between Pittsburgh and Philadelphia. *See* S. Rep. No. 95-631, at 98. And the conference report describes the preemption provision as providing that "no state may *regulate* [an air] carrier's prices, routes, and services." H.R. Conf. Rep. No. 95-1779, at 94 (emphasis added).

By contrast, the congressional reports are silent with regard to state common-law remedies. As the Eastern District of New York has noted, "[t]he statute's legislative history suggest that removing the barriers to competition created by state statutory and regulatory law of this type was Congress' principal object in drafting the ADA's preemption clause." *Spinrad v. Comair, Inc.*, 825 F. Supp. 2d 397, 413 (E.D.N.Y. 2011). "Congress does not appear to have considered the effect of state common-law tort claims." *Id*. Congress was concerned with conflicting federal and state regulation and with whether states would reregulate the airline industry, not with whether the industry would be subject to the general background duties encompassed in state common law.

Congress's silence on state common law is especially indicative of an intent to preserve those actions in light of the statute's saving clause. When Congress enacted the ADA, it retained the existing saving clause in the Federal Aviation Act, which stated: "Nothing contained in this [Act] shall in any way abridge or alter the

remedies now existing at common law or by statute, but the provisions of this [Act] are in addition to such remedies." 49 U.S.C.App. § 1506 (1976). (The clause has since been revised and now reads "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c).). As the district court acknowledged, "the very presence of the saving clause 'assumes that there are some significant number of common-law liability cases to save.'" *Mitchell*, 858 F. Supp. 2d at 152 (quoting *Geier*, 529 U.S. at 868). The continued presence of this clause suggests the ongoing importance of common-law remedies to the statutory scheme, even after deregulation. The saving clause makes it even less likely that Congress would have blocked common-law remedies without a clear statement of its intent to do so.

B. It Is Reasonable for Congress to Preempt Positive State Enactments While Preserving Common-Law Remedies.

Reading "provision" to exclude common-law claims is not only the interpretation most faithful to Congress's language and intent, it is also reasonable in light of the role that common law plays in establishing background principles of behavior and in compensating injured parties. As the Supreme Court explained in *Sprietsma*, it is "perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims." 537 U.S. at

64; *see also, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 579 (2009) (observing that state tort actions "serve a distinct compensatory function"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984) (in the nuclear regulatory context, noting that "Congress did not believe that it was inconsistent to vest the [agency] with exclusive regulatory authority . . . while at the same time allowing plaintiffs . . . to recover for injuries caused by nuclear hazards").

The Supreme Court has already recognized that the ADA does not preempt some state common-law claims that are related to air carrier prices, routes, or services, specifically state-law breach-of-contract claims. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). Without addressing whether common law fit within the ADA's "law, rule, regulation, standard, or other provision" language, the Court in *Wolens* held that a remedy for an airline's breach of a private contract did not amount to a state's "enact[ment] or enforce[ment] [of] any law . . . " within the meaning of the ADA. *Id*. at 229. The Court explained that the preemption provision "read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." *Id*. at 232–33. Like contract-law claims, other common-law claims are not concerned with imposing substantive standards, but with providing relief to a party when another party violates the background rules

against which the parties were operating. Just as the ADA does not preempt relief for the violation of the terms of a contract, the ADA's preemption provision should not be read to deny relief when other common-law duties are violated.

The Supreme Court has repeatedly recognized the importance of preserving state-law remedies. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U.S. at 251. "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). These arguments apply with particular force in the context of the ADA, in which Congress's goal was to prevent states from replicating the public-utility style regulations the ADA had just undone. Given this objective, and given the long-acknowledged importance of state tort law, the ADA's preemption provision should not be read to cut off recourse to traditional remedies without a clear expression of intent by Congress to do so.

CONCLUSION

For the above reasons, the Court should reverse the district court and hold that plaintiffs' common-law claims are not preempted by the Airline Deregulation Act.

Respectfully submitted,

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January 29, 2013

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,600 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2013, I am electronically filing 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, which will electronically serve counsel for all parties.

/s/ Scott L. Nelson
Scott L. Nelson