No. 12-462

In the

Supreme Court of the United States

NORTHWEST, INC. ET AL.,

Petitioners,

v.

RABBI S. BINYOMIN GINSBERG,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR JOBS WITH JUSTICE AND THE NATIONAL EMPLOYMENT LAW PROJECT AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Jobs With Justice is a national network of local coalitions that bring together community, labor, student, and faith organizations and seek to educate and mobilize the public on issues of workers' rights. Jobs With Justice submits this amicus brief out of concern that the trucking and airline industries are seeking overbroad application of the preemptive provisions of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713, and the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1). The organization has supported national claims brought by skycap employees against several airlines that have raised ADA preemption as a defense, where the plaintiffs challenged the airlines' deceptive imposition of a $2 per bag charge for curbside check-in which passengers mistook for skycaps' tips and caused devastating injury to the skycaps' income. The Massachusetts Jobs With Justice chapter submitted a similar amicus brief in a recent case before the Court, Dan's City Used Cars, Inc. v. Pelkey, 133 S.

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. The respondent has provided its consent to the filing of this amici curiae brief, which amici have filed with the Clerk's office. The petitioner's letter consenting to the filing of all amici curiae briefs was filed with the Clerk's office on July 9, 2013.

Ct. 1769 (2013). The Court did not address the arguments that Jobs With Justice raised at that time.

The National Employment Law Project (NELP) is a non-profit legal organization with nearly 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP's areas of expertise include the workplace rights of workers under state and federal employment and labor laws, with an emphasis on wage and hour rights. NELP also submits this amicus brief out of concern that the trucking and airline industries are seeking overbroad application of the preemptive provisions of the ADA and FAAAA.

In this brief, amici seek to present to the Court further argument supporting the conclusion that the ADA does not preempt the respondent's implied covenant of good faith and fair dealing claim. The ADA contains a preemption clause that prevents a State from enacting or enforcing "a law, regulation, or other provision having the force and effect of law. . ." 49 U.S.C. § 14501(c)(1); 49 U.S.C. § 41713. Amici contend that, based on statutory analysis and an examination of Congressional intent, this preemption clause does not apply to common law.

The argument presented in this brief is consistent with the Court's interpretation of preemption clauses in other federal statutory schemes.

BACKGROUND AND SUMMARY OF ARGUMENT

This case involves an interpretation of the preemptive scope of 49 U.S.C. § 41713(b)(1), the Airline Deregulation Act of 1978. Although this case specifically addresses the termination of a frequent flyer program membership, the Court's decision may have an impact on the general preemptive scope of the ADA. In Ginsberg v. Northwest, Inc., 695 F.3d 873, 881 (9th Cir. 2012), the Ninth Circuit Court of Appeals held that "[n]othing in the ADA's language, history, or subsequent regulatory scaffolding suggests that Congress had a 'clear and manifest purpose' to displace State common law contract claims" that only peripherally affect deregulation of the airline industry. The decision was founded upon the principle of statutory interpretation that the historic police powers of the States are not to be superseded by federal acts in the absence of clear and manifest Congressional intent to do so. Id. at 876. The Ninth Circuit reasoned that the ADA's savings and preemption clauses, taken together, evidenced an intent to preserve remedies at common law existing at the time that Congress passed the ADA. Id. at 880. Using Morales v. Trans World Airlines Inc., 504 U.S. 374 (1992) as a guidepost, the

Ninth Circuit held that the ADA did not preempt Mr. Ginsberg's implied covenant of good faith and fair dealing claim.

The Ninth Circuit's decision in this case should be affirmed. As respondent has argued, preemption analysis under the ADA should begin with this statutory language, and the ADA's preemption clause provides only that "a State, political subdivision of a State, or political authority of at least 2 or more 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. . ." 49 U.S.C. § 41713(b)(1) (emphasis added). Through this language, Congress established that ADA preemption would be limited to positive state enactments and would not extend to common law. This interpretation is consistent with the Court's analysis of preemption clauses in other federal statutory schemes.

The Supremacy Clause of the United States Constitution empowers Congress to preempt state law "by enacting a statute containing an express preemption provision." Arizona v. United States, 132 S. Ct. 2492, 2500-01 (2012). However, "[f]ederalism, central to the constitutional design, adopts the principle that both the National and State governments have elements of sovereignty the other is bound to respect." Id. at 2500. Thus, in conducting preemption analysis, courts should assume that the States' historic police powers are

not superseded "'unless that was the clear and manifest purpose of Congress.'" Id. at 2501.

Furthermore, this Court has repeatedly established that common law preemption should only be found where the preemption language indicates such intent. For instance, in United States v. Texas, 507 U.S. 529 (1993), the Court concluded that the federal Debt Collection Act, 7 U.S.C. § 2011, et seq., did not abrogate the United States' common-law right to collect prejudgment interest on debts owed by the States. In reaching this conclusion, the Court acknowledged the "longstanding. . .principle that '[s]tatutes which invade the common law. . .are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is present.'" Id. at 534 (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)). The Court further held that "[in] order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." Id. The Second Circuit made a similar argument in Matter of Oswego Barge Corp., noting that "Congress is less likely to have intended preemption of 'long-established and familiar principles' of 'the common law . . . '" 664 F.2d 327, 339 (2d Cir. 1981).

Because "'the purpose of Congress is the ultimate touchstone' of pre-emption analysis," the Court must first and primarily focus on the language of the preemption clause. Cipollone v. Liggett

Group, Inc., 505 U.S. 504, 516-17 (1992); see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1986) ("Congress' intent. . .primarily is discerned from the language of the pre-emption statute. . ."); see also generally Zuni Pub. School Dist. No. 89 v. Dept. of Educ., 550 U.S. 81, 93 (2007) ("[I]f the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of the analysis.").

The ADA's preemption clause states as follows:

> Except as provided in [this subsection], a State, political subdivision of a State, or political authority of 2 or more 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.

49 U.S.C. § 14501 (emphasis added).

As explained in detail below, the ADA's preemption clause does not extend to claims brought pursuant to state common law. Indeed, that is clearly not what Congress intended, in light of the language it chose to use. If Congress had intended the ADA to preempt common law claims as well as claims arising under positive enactments, it could have done so by explicitly listing "the common law,"

see, e.g., 17 U.S.C. § 301(a), or by using other broader language, as it has done in other statutes. Finally, in light of the ADA's purpose of deregulating the airline industry and avoiding diverse state "regulatory" schemes from undermining that deregulation, finding preemption of common law claims under the ADA would contravene the purpose of the statute.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ADA PREEMPTION CLAUSE DICTATES THAT THE STATUTE PREEMPTS ONLY POSITIVE STATE ENACTMENTS, NOT COMMON LAW.

As noted above, the ADA's preemption clause applies to three categories of state claims: those arising under: (1) "a law"; (2) "a . . . regulation"; or (3) "a[n] . . . other provision having the force and effect of law . . ." 49 U.S.C. § 14501(c)(1). As the Court recognized in Sprietsma v. Mercury Marine, the first two categories do not encompass common law. 537 U.S. 51, 63 (2002). In that case, the preemption provision at issue (part of the Federal Boat Safety Act) stated that "'a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance . . .'" Id. at 58-59 (quoting 46 U.S.C. § 4306) (emphasis added). The Court held in

Sprietsma that the phrase "law or regulation" did "not encompass[] common-law claims." Id. at 63. The Court cited two reasons for this conclusion:

> First, 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. Second, because "a word is known by the company it keeps," . . . the terms "law" and "regulation" used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If "law" were read so broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to "regulation" in the pre-emption clause superfluous.

Id. at 63.

The Court's conclusion in Sprietsma applies with equal force here. Certainly that holding applies to "a law" and "a . . . regulation" as stated in the ADA, as that is the exact language addressed by the Court in Sprietsma. Id. Moreover, for the same reasons articulated by the Court, that analysis must also apply to "a[n] . . . other provision having the force and effect of law . . ." First, the ADA's preemption provision refers to three distinct, separate categories of legal enactments, each

modified by "a," which "implies a discreteness . . . that is not present in the common law." Id. at 63.[2] Additionally, as in Sprietsma, "[i]f 'law' were read so broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the pre-emption clause superfluous." Id. Precisely this same reasoning applies to the third category in the ADA's preemption clause; "other provision having the force and effect of law" would be rendered superfluous if "law" were read so broadly to include common law as well as other types of legal enactments.

Furthermore, as the Court recognized in Sprietsma, the three categories in the ADA's preemption clause are all "known by the company [they] keep." 537 U.S. at 63. Congress' language in the ADA's preemption clause—its use of three

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[2] There can be no question that the modifier "a" applies to all three categories, as it is a basic principle of grammar and punctuation that the use of a series of three categories, all separated by commas, clearly indicates that those three categories are to be considered distinctly and all modified by "a" (as opposed to the first two categories being grouped together and the third category standing alone). See, e.g., In re Renshaw, 222 F.3d 82, 92 (2d Cir. 2000) ("[W]hen Congress wishes to indicate that a series of items is a set of alternatives, it consistently separates the items by commas and uses an 'or' before the last one."). It would make no sense grammatically for "a" to modify "law" and "regulation" but not "other provision having the force and effect of law," nor would it make grammatical sense for "law" to be modified by "a," but not "regulation" or "other provision having the force and effect of law."

separate categories of laws—would have been an odd way to refer to common law. Congress chose to delineate three specific and separate categories of preempted state enactments, and it chose not to list "common law" among those categories.

Moreover, the doctrine of ejusdem generis dictates that the third term must be interpreted to be the same type of category as the first two terms. It would violate this canon of statutory interpretation for the last category on the list to be interpreted more broadly than the first two. See Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129 (1991) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."); 2A J. Sutherland, STATUTES AND STATUTORY CONSTRUCTION § 47.17 (C. Sands 4th ed. 1973) (where "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words"); see also Washington State Dept. of Social & Health Servs. v. Ex rel Keffeler, 537 U.S. 371 (2003) ("[U]nder the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words"). Thus, "other provision having the force and effect of law" should not be read to

mean a far broader category of law, encompassing common law, where the first two terms refer only to positive law.

Further, under a plain-language reading of the statute, the phrase "other provision having the force and effect of law" cannot include common law, as common law is simply not a "provision" of law. Indeed, common law does not meet the Black's Law Dictionary definition of "provision": "a clause in a statute, contract, or other legal instrument." Black's Law Dictionary, 1262 (8th ed. 2004). Instead, "other provision having the force and effect of law" must refer to actual intentional enactments, such as agency rules or guidelines.

Other language in the ADA preemption clause confirms that it does not cover common law. First, the statute lists three categories of entities—"a State, political subdivision of a state, or political authority of 2 or more States," § 14501(c)(1)—none of which would appear to mean courts, as opposed to legislative or regulatory bodies. Moreover, the statute speaks of affirmative pronouncements, in that it governs the "enact[ment and] enforce[ment]" of laws, regulations and other provisions. Id. On its face, this language does not appear to apply to judge-made common law. Courts do not "enforce" law; that role is for the executive branch. See, e.g., Stieberger v. Heckler, 615 F. Supp. 1315, 1356-57 (S.D.N.Y. 1985) (there are "three distinct branches of government with independently derived legal

authority and substantially separate functions—the legislature, to enact the law; the judiciary, to interpret the law, and the executive (and its administrative agencies), to enforce the law.") (emphasis added). In contrast, the language of ERISA's preemption clause (discussed in more detail in Section II, infra) explicates that it includes decisional law issued by courts, defining "State law" to include, inter alia, "decisions" and "other State action." 29 U.S.C. § 1144. The ADA contains no such language and does not otherwise give any indication that its preemption clause applies to judicial decisions.

This Court has held that statutory language closely resembling that used in the ADA does not preempt common law claims. For instance, in Cipollone v. Liggett Group, Inc., the Court held that the Federal Cigarette Labeling and Advertising Act (FCLAA) of 1965, 15 U.S.C.A. § 1334, "is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." 505 U.S. at 518-19. In the 1965 Act's preemption clause, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required . . .'" Id. at 518 (emphasis original). Accordingly, the Court's decision in Cipollone that the 1965 FCLAA, "is best read as having superseded only positive enactments by legislatures or administrative agencies . . ." id. at 518-19, applies here as well.

Furthermore, when interpreting the ADA, this Court has applied the preemption clause to enactments that quite clearly do fit into the definition of "other provision[s] having the force and effect of law," establishing that the term is not deprived of meaning if it excludes common law. For example, in Morales v. Trans World Airlines, Inc., the Court held that Travel Industry Enforcement Guidelines that had been established by the National Association of Attorneys General were preempted under the ADA, presumably as an "other provision having the force and effect of law." 504 U.S. 374, 391 (1992); see also Arapahoe County Pub. Airport Authority v. F.A.A., 242 F.3d 1213, 1222-23 (10th Cir. 2001) (holding that ban on air carrier service imposed by Arapahoe County Public Airport Authority was preempted under ADA); American Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 808 (5th Cir. 2000) (agreements between interstate air carriers and board of Dallas-Fort Worth regional airport preempted under ADA). These cases illustrate the type of enactments that would fall into the category "other provision having the force and effect of law."

II. OTHER FEDERAL STATUTES CONFIRM THAT THE ADA'S PREEMPTION CLAUSE APPLIES ONLY TO POSITIVE LAW, NOT COMMON LAW.

The Court's decisions regarding the scope of preemption clauses in other statutory schemes further confirms that the ADA's preemption clause applies only to positive law enactments, not common law. First, it is quite clear that when Congress intends to include common law claims in the scope of a preemption clause, it can do so explicitly. For example, ERISA's preemption clause states that ERISA preempts "[a]ny and all State laws," 29 U.S.C. § 1144(a), and ERISA's preemption clause expressly defines "State law" as including "all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1) (emphasis added). As the Court has recognized, "the ERISA civil enforcement mechanism is one of those provisions with such 'extraordinary preemptive power' that it 'converts an ordinary state common law complaint into one stating a federal claim. . .'" Aetna Health, Inc. v. Davila, 542 U.S. 200, 209 (2004) (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987)). Congress accomplished this "extraordinary preemptive power" quite simply, with the language "[a]ny and all State laws," 29 U.S.C. § 1144(a), and the specification that "State law" includes "decisions," 29 U.S.C. § 1144(c)(1), inter alia. In light of the broader language that Congress

chose to use in ERISA, it reasonably can be assumed that Congress understands how to create an all-encompassing preemption clause, including decisional law. It chose not to go so far with the ADA, instead carefully enumerating only specific categories of positive law that were preempted.

Congress also knows how to include common law claims expressly within a preemption clause. In the Copyright Act, for instance, the preemption clause states: "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright. . .no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." 17 U.S.C. § 301(a) (emphasis added). As the Court has recognized, Congress' objective with this clause was to create "national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation." Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989). Congress accomplished this broad preemption by use of the phrase "all legal or equitable rights" and by further specifying the inclusion of "the common law or statutes of any State." 17 U.S.C. § 301(a).

Similarly, other cases in which courts have held that federal statutes preempt state common law typically involve broad, unrestricted language in the preemption clause. The Court's decision in Cipollone highlights the importance of the specific language used in the preemption clause, as the Court only

found common law to be preempted when precise language ("statement") was replaced with broader, unrestricted language ("requirement or prohibition"). 505 U.S. at 504. Specifically, after holding that the narrowly tailored "statement" language of the 1965 FCLAA did not preempt common law, the Court held that the preemption clause in the subsequent version of the statute, the Public Health Cigarette Smoking Act of 1969, did preempt common law claims as well as positive enactments. Id. That clause held that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act," 15 U.S.C. § 1334(b) (emphasis added).[3] The Court's holding in Cipollone further confirms that the ADA's preemption clause does not include common law claims. First, the Court held in Cipollone that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily

[3] Moreover, the Court made clear in Cipollone that the language of the preemption clause, not the legislative history, controls in determining the scope of preemption. Specifically, the Court noted that "portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities," but nevertheless held that common law claims were preempted because "the language of the Act plainly reaches beyond such enactments." Id. at 521.

encompass obligations that take the form of common law rules." 505 U.S. at 521. In contrast, the ADA's preemption clause does not speak broadly of "requirements" or "prohibitions" (in any form) but focuses solely on three categories of enactments—"law[s]," "regulation[s]," and "other provision[s]" that are "enact[ed]" or "enforce[d]" by the states. 49 U.S.C. § 14501(c)(1).

As in Cipollone, the Court held in Riegel v. Medtronic, Inc. that the broad language "requirement[s]" included common law claims. 552 U.S. 312, 332 (2008) (analyzing 21 U.S.C. § 360k(a)). Notably, in reaching its conclusion in Riegel, the Court reasoned: "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments." Id. at 324. Just as Congress is entitled to know that the Court will interpret the broad term "requirement" broadly, it is entitled to know that courts generally will give meaning to its more carefully drawn preemption clauses, including those such as the ADA, which refers only to specific categories of positive law enactments. It avoids broad terms such as those in ERISA ("[a]ny and all State laws," 29 U.S.C. § 1144(a)) that is defined to include decisional law, the Copyright Act ("right. . .under the common law," 17 U.S.C. § 301(a)), and the statutes discussed in Cipollone ("requirement or prohibition," 15 U.S.C. § 1334(b)) and Riegel ("requirement, 21 U.S.C. § 360k(a)).

III. THE ONLY WAY TO EFFECT THE PURPOSE BEHIND THE ADA'S PREEMPTION CLAUSE IS TO CONCLUDE THAT IT PREEMPTS ONLY POSITIVE LAW ENACTMENTS.

The only way to give effect to the purpose behind the ADA's preemption clause is to conclude that "other provision having the force and effect of law" refers only to positive enactments. Prior to 1978, the transportation industry was subject to extensive economic regulation which insulated incumbent airlines and ground carriers from competition and produced higher prices and inefficiencies. See H.R. Rep. No. 95–1211, at 2-3 (1978) (noting the "highly anticompetitive" results from pre-1978 federal regulation of airline industry, including limited approvals of route applications and high fares).

Congress addressed these problems by deregulating both the airline and trucking industries. First, it enacted the ADA, replacing federal economic regulation of the airline industry with a policy of "'maximum reliance on competitive market forces.'" Morales, 504 U.S. at 378 (quoting the ADA). To prevent the States from undoing deregulation with their own regulatory enactments, the ADA included a preemption provision, prohibiting states from enforcing any law "relating to rates, routes, or services" of any air carrier. Id. (quoting the ADA). As recognized by the Court, the

ADA's preemption clause applied only to "state-imposed obligations." American Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995).

Two years later, Congress deregulated the trucking industry through the Motor Carrier Act of 1980, but Congress did not initially include a preemption provision in the Act. Congress later decided that preemption was necessary in order to eliminate the inefficiencies, costs, and inhibition of innovation caused by the "patchwork" of anticompetitive regulations in various jurisdictions. H.R. Conf. Rep. 103-677 at 87 (1994) (on the FAAAA). Accordingly, in 1994, Congress enacted the FAAAA's preemption provision, using wording almost identical to that in the ADA. Congress' purpose was "to prevent States from undermining federal deregulation of interstate trucking." American Trucking Ass'ns, Inc. v. City of Los Angeles, 660 F.3d 384, 395 (9th Cir. 2011), as amended (Oct. 31, 2011) (citing Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 368 (2008)). The ultimate goal was to address "the sheer diversity of [state] regulatory schemes." H.R. Conf. Rep. 103-677 at 877 (emphasis added).

The history and purpose of both the ADA and the FAAAA make it clear that Congress wrote preemption clauses to protect the industries from affirmative state enactments—not from common law claims. Both the ADA and FAAAA were enacted to remedy the variety of anticompetitive regulations

across jurisdictions, whereas common law claims play no role in the "patchwork" of "regulations" Congress sought to avoid. H.R. Conf. Rep. 103-677 at 87 (1994). A common law claim would not have the feared effect of undermining federal deregulation of airlines. Therefore, in light of the particular harms the ADA's preemption clause was designed to resolve, it would run contrary to Congressional purpose for the Court to ignore the statutory language that Congress chose to enact and to hold that the ADA preempts common law claims as well as claims based on positive state law enactments.

CONCLUSION

For the reasons described above, the Court should hold that the ADA does not preempt common law claims.

Respectfully submitted,

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