SUPREME COURT OF THE UNITED STATES

No. 90–1604

DAN MORALES, ATTORNEY GENERAL OF TEXAS, PETITIONER *v.* TRANS WORLD AIRLINES, INC., ET AL.

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

[June 1, 1992]

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

In cases construing the "virtually unique pre-emption provision" in the Employee Retirement Income Security Act (ERISA), see *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 24, n. 26 (1983), we have given the words "relate to" a broad reading. The construction of that unique provision was supported by a consideration of the relationship between different subsections of ERISA that have no parallel in other federal statutes, see *Shaw* v. *Delta Airlines, Inc.*, 463 U. S. 85, 98 (1983), and by the legislative history of the provision. *Id.*, at 98–99. Today we construe a pre-emption provision in the Airline Deregulation Act of 1978 (ADA), 49 U. S. C. App. §1301 *et seq.*, a statute containing similar, but by no means identical, language. Instead of carefully examining the language, structure, and history of the ADA, the Court decides that it is "appropriate," given the similarity in language, to give the ADA pre-emption provision a similarly broad reading. *Ante*, at 7. In so doing, the Court disregards established canons of statutory construction, and gives the ADA pre-emption provision a construction that is neither compelled by its text nor supported by its legislative history.

"In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue."

Metropolitan Life Ins. Co. v. *Massachusetts*, 471 U. S. 724, 738 (1985) (internal quotation marks omitted). At the same time, our pre-emption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 522 (1981). We therefore approach pre-emption questions with a "presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation." *Metropolitan Life*, 471 U. S., at 740.

Section 105(a) of the ADA provides, in relevant part, "no State or political subdivision thereof . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation." 49 U. S. C. App. §1305(a). By definition, a state law prohibiting deceptive or misleading advertising of a product "relates," "pertains," or "refers" first and foremost to the *advertising* (and, in particular, to the deceptive or misleading aspect of the advertising) rather than to the product itself. That is not to say, of course, that a prohibition of deceptive advertising does not also relate indirectly to the particular product being advertised. It clearly does, for one cannot determine whether advertising is misleading without knowing the characteristics of the product being advertised. But that does not alter the fact that the prohibition is designed to affect the nature of the advertising, not the nature of the product.[1]

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[1]The court in a similar case arising in New York explained this distinction well:

"[A]ny relationship between New York's enforcement of its laws against deceptive advertising and Pan Am's rates, routes, and services is remote and indirect. In challenging Pan Am's advertising, New York does not care about how much Pan Am charges, where it flies, or what amenities it provides its passengers. Its sole concern is with the manner in

Thus, although I agree that the plain language of §105(a) pre-empts any state law that relates directly to rates, routes, or services, the presumption against pre-emption of traditional state regulation counsels that we not interpret §105(a) to pre-empt every traditional state regulation that might have some indirect connection with or relationship to airline rates, routes, or services unless there is some indication that Congress intended that result. To determine whether Congress had such an intent, I believe that a consideration of the history and structure of the ADA is more illuminating than a narrow focus on the words "relating to."

The basic economic policy of the Nation is one favoring competitive markets in which individual entrepreneurs are free to make their own decisions concerning price and output. Since 1890 the Sherman Act's prohibition of collusive restrictions on production and pricing have been the central legislative expression of that policy. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 695 (1978). In 1914 Congress sought to

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which Pan Am advertises those matters to New York consumers. Thus, as far as New York is concerned, Pan Am is free to charge $200 or $2,000 for a flight from LaGuardia to London, but it cannot take out a full-page newspaper advertisement telling consumers the fare is $200 if in fact it is $2,000. Similarly, Pan Am remains free to route a plane from Ithaca to Istanbul with as many stops in between as it chooses, but it cannot market that flight to New York consumers as a `direct' flight." *New York* v. *Trans World Airlines, Inc.,* 728 F. Supp. 162, 176 (SDNY 1989); see also *People* v. *Western Airlines*, 155 Cal. App. 3d 597, 600, 202 Cal. Rptr. 237, 238 (1984), cert. denied, 469 U. S. 1132 (1985); Note, To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation, 102 Harv. L. Rev. 842, 857 (1989).

promote that policy by enacting the Federal Trade Commission Act (FTCA), which created the Federal Trade Commission and gave it the power to prohibit "[u]nfair methods of competition in commerce." 38 Stat. 719, codified as amended, 15 U. S. C. §45(a)(1). That type of prohibition is entirely consistent with a free market in which prices and production are not regulated by Government decree.

In 1938 Congress enacted two statutes that are relevant to today's inquiry. In March, it broadened §5 of the FTCA by giving the Commission the power to prohibit "unfair or deceptive acts or practices in commerce" as well as "[u]nfair methods of competition in commerce." 52 Stat. 111, codified at 15 U. S. C. §45(a)(1). Three months later it enacted the Civil Aeronautics Act of 1938. §411, 52 Stat. 1003. That statute created the Civil Aeronautics Board and mandated that it regulate entry into the interstate airline industry, the routes that airlines could fly, and the fares that they could charge consumers.[2] 52 Stat. 987–994. Moreover, the statute contained a provision, patterned after §5 of the FTCA, giving the Civil Aeronautics Board the power to prohibit "unfair or deceptive practices or unfair methods of competition in air transportation." 52 Stat. 1003; see also *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U. S. 79, 82 (1956). But the Board's power in this regard was not exclusive, for the statute also contained a "savings clause" that preserved existing common-law and statutory remedies for deceptive practices.[3] See 52 Stat. 1027; *Nader* v. *Allegheny Airlines, Inc.*, 426 U. S. 290, 298–300 (1976).

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[2]The Civil Aeronautics Board was created and established under the name "Civil Aeronautics Authority," but was redesignated as the "Civil Aeronautics Board" by Reorganization Plan No. IV of 1940. See 49 U. S. C. App. §1321 (a)(1) (1982 ed.), repealed effective January 1, 1985 by 49 U. S. C. App. §1551(a)(3).

[3]Section 1106 of the Civil Aeronautics Act of 1938 provided:

"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." 52 Stat. 1027.

Although the 1938 Act was replaced by a similar regulatory scheme in 1958,[4] the principal provisions of the statute remained in effect until 1978. In that year, Congress decided to withdraw economic regulation of interstate airline rates, routes, and services. Congress therefore enacted the ADA "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." H. R. Conf. Rep. No. 95–1779, p. 53 (1978). Because that goal would obviously have been frustrated if state regulations were substituted for the recently removed federal regulations, Congress thought it necessary to pre-empt such state regulation. Consequently, Congress enacted §105(a) of the Act, which pre-empts any state regulation "relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation." 49 U. S. C. App. §1305(a)(1).

At the same time, Congress retained §411, which gave the Civil Aeronautics Board the power to prohibit "unfair or deceptive practices or unfair methods of competition in air transportation." 49 U. S. C. App. §1381(a). Congress also retained the savings clause that preserved common-law and statutory remedies for fraudulent and deceptive practices. See 49 U. S. C. App. §1506; *Nader*, 426 U. S., at 298–300. Moreover, the state prohibitions against deceptive practices that had coexisted with federal regulation in the airline industry for 40 years, and had coexisted with federal regulation of unfair trade practices in other areas of the economy since 1914,[5] were not

[4]Federal Aviation Act of 1958, Pub. L. 85–726, 72 Stat. 731.

[5]The FTCA does not, by its own force, pre-empt state prohibitions of unfair and deceptive trade practices. Thus, unless a state prohibition conflicts with a

mentioned in either the ADA or its legislative history.

In short, there is no indication that Congress intended to exempt airlines from state prohibitions of deceptive advertising. Instead, this history suggests that the scope of the prohibition of state regulation should be measured by the scope of the federal regulation that was being withdrawn. This is essentially the position adopted by the Civil Aeronautics Board, which interpreted the scope of §105 in light of its two underlying policies—to prevent state economic regulation from frustrating the benefits of federal deregulation, and to clarify the confusion under the prior law which permitted some dual state and federal regulation of the rates and routes of the same carrier. 44 Fed. Reg. 9948, 9949 (1979). The Board thus explained that:

> "Section 105 forbids state regulation of a federally authorized carrier's routes, rates, or services. Clearly, states may not interfere with a federal carrier's decision on how much to charge or which markets to serve. . . . Similarly, a state

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Federal Trade Commission rule, state laws and regulations are not pre-empted. See, *e.g.*, *American Financial Services Assn.* v. *FTC*, 247 U. S. App. D. C. 167, 199–200, 767 F.2d 957, 989–991 (1985); Verkuil, Preemption of State Law by the Federal Trade Commission, 1976 Duke L. J. 225.

Because the Department of Transportation has authority to prohibit unfair or deceptive practices and unfair methods of competition in air transportation, 49 U.S.C. App. §1381, it, too, could promulgate regulations that would pre-empt inconsistent state laws and regulations. But the Court does not rest its holding on the fact that the state prohibitions of unfair and deceptive advertising conflict with federal regulations; instead, it relies on the much broader holding that the ADA itself pre-empts state prohibitions of deceptive advertising.

> may not interfere with the services that carriers offer in exchange for their rates. . . .
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> "Accordingly, we conclude that preemption extends to all of the economic factors that go into the provision of the *quid pro quo* for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing . . . ." *Id.*, at 9950–9951; see also Freeman, State Regulation of Airlines and the Airline Deregulation Act of 1978, 44 J. Air L. & Com. 747, 766–767 (1979).

Because Congress did not eliminate federal regulation of unfair or deceptive practices, and because state and federal prohibitions of unfair or deceptive practices had coexisted during the period of federal regulation, there is no reason to believe that Congress intended §105(a) to immunize the airlines from state liability for engaging in deceptive or misleading advertising.

The Court finds in Congress' choice of the words "relating to" an intent to adopt a broad pre-emption provision, analogous to the broad ERISA pre-emption provision. See *ante*, at 6–7. The legislative history does not support that assumption, however. The bill proposed by the Civil Aeronautics Board provided that "[n]o State . . . shall enact any law . . . relating to rates, routes, or services in air transportation." Hearings on H. R. 8813 before the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 95th Cong., 1st Sess., pt. 1, 200 (1977). Yet the Board's accompanying prepared testimony neither focused on the "relating to" language nor suggested that those words were intended to effect a broad scope of pre-emption; instead, the testimony explained that the pre-emption

section was ``added to make clear that no state or political subdivision may defeat the purposes of the bill by regulating interstate air transportation. This provision represents simply a codification of existing law and leaves unimpaired the states' authority over intrastate matters." *Id.*, at 243.

The "relating to" language in the bill that was finally enacted by Congress came from the House bill. But the House Committee Report—like the Civil Aeronautics Board—did not describe the pre-emption provision in the broad terms adopted by the Court today; instead, the Report described the scope of the pre-emption provision more narrowly, saying that it "provid[ed] that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services." H. R. Rep. No. 95–1211, p. 16 (1978).

The pre-emption section in the Senate bill, on the other hand, did not contain the "relating to" language. That bill provided, "[n]o State shall enact any law, establish any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgate economic regulations for, any air carrier . . . ." S. 2493, §423(a)(1), reprinted in S. Rep. No. 95–631, p. 39 (1978). The Senate Report explained that this section "prohibits States from exercising economic regulatory control over interstate airlines." *Id.,* at 98.

The Conference Report explained that the Conference adopted the House bill (with an exception not relevant here), which it described in the more narrow terms used in the House Report. H. R. Conf. Rep. No. 95–1779, pp. 94–95 (1978). There is, therefore, no indication that the Conferees thought the House's "relating to" language would have a broader pre-emptive scope than the Senate's "determining . . . or otherwise promulgate economic

regulation" language.[6] Nor is there any indication that the House and Conferees thought that the pre-emption of state laws "relating to rates, routes, or services" pre-empted substantially more than state laws "regulating rates, routes, or services."

Even if I were to agree with the Court that state regulation of deceptive advertising could "relat[e] to rates" within the meaning of §105(a) if it had a "significant impact" upon rates, *ante*, at 13, I would still dissent. The airlines' theoretical arguments have not persuaded me that the NAAG guidelines will have a significant impact upon the price of airline tickets. The airlines' argument (which the Court adopts, *ante*, at 11–13) is essentially that (1) airlines must engage in price discrimination in order to compete and operate efficiently; (2) a modest amount of misleading price advertising may facilitate that practice; (3) thus compliance with the NAAG guidelines might increase the cost of price advertising or reduce the sales generated by the advertisements; (4) as the costs increase and revenues decrease, the airlines might purchase less price advertising; and (5) a reduction in price advertising might cause a reduction in price competition, which, in turn, might result in higher airline rates. This argument is not supported by any legislative or judicial findings.

Even on the assumption that the Court's economic reasoning is sound and restrictions on price advertising could affect rates in this manner, the airlines have not sustained their burden of proving that compliance with the NAAG guidelines would have a "significant" effect on their ability to market their

[6]Because the Court overlooks the phrase "or otherwise promulgate economic regulations" in the Senate bill, see *ante*, at 9, n. 2, it incorrectly assumes that the Senate bill had a narrower pre-emptive scope than the House bill.

product and, therefore, on their rates.[7] Surely Congress could not have intended to pre-empt every state and local law and regulation that similarly increases the airlines' costs of doing business and, consequently, has a similar "significant impact" upon their rates.

For these reasons, I respectfully dissent.

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[7]They have not demonstrated, for example, that the costs of purchasing the space for the "Restrictions box" required by §2.1, or the broadcast time to state the two-sentence disclosure required by §2.2, will have a significant effect on rates. Nor can it realistically be maintained that §2.7's requirement that words such as "sale," "discount," or "reduced" may only be used if the fare is, in fact, on sale (*i.e.*, is available for a limited time and is substantially below the usual price) will hinder the airlines' ability to market and sell their low-priced fares. Finally, they surely have not proved that §2.4's requirement that fares be advertised only if sufficient seats are available to meet demand or the extent of unavailability disclosed will make it impossible for the airlines to market and sell different seats at different prices. That section expressly permits the airlines to advertise low-priced fares that are available in limited quantities; it simply requires that they include a disclaimer, such as "This fare may not be available when you call." See National Association of Attorneys General, Task Force on Air Travel Industry, Guidelines § 2.4 (1988), reprinted in App. to Brief for United States as *Amicus Curiae* 24a-25a.