No. 19-352

In the Supreme Court of the United States

ROBIN BRINDLE, KATHLEEN BROWN, SANDRA CARTER, MARCIE LAPORTE, AND KELVIN RAMIREZ,

Petitioners,

V.

DELTA AIRLINES, INC., AND THE RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING,

Respondents.

On Petition for a Writ of Certiorari to the Rhode Island Supreme Court

REPLY BRIEF FOR PETITIONERS

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A Rhode Island statute requires employers to pay time-and-a-half for work on Sundays and holidays. In the decision below, the Rhode Island Supreme Court held that this statute is preempted by the Airline Deregulation Act. The court reasoned that the state statute is "related to" the "service" provided by airlines, on the ground that if airlines have to pay higher wages, they will hire fewer workers.

This was a fundamental error, for two related reasons.

First, the Airline Deregulation Act preempts state regulation of the market in which airlines compete for customers, not the market in which they hire employees. This distinction is evident from the text of the ADA's preemption provision, which preempts state regulation of airlines' *outputs*—the "price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1)—but not their *inputs*, such as labor, materials, real estate, and so on. The distinction is also evident from the ADA's purpose, which was to improve consumer welfare by making airlines compete for customers, just like firms in most other industries do. *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 288 (2014). That purpose is served by preempting the states from regulating the relationship between airlines and their passengers, but it is not served at all by barring the states from continuing to regulate the employment market as they traditionally have.

Second, the logic of the decision below has no stopping point. If the ADA preempts any state law that raises the cost of labor and thus causes airlines to hire fewer workers, airlines will be immune from

vast areas of state law—not just wage regulation but also occupational safety rules, payroll taxes, unemployment insurance provisions, and the like. Indeed, airlines will be immune from *any* state law that raises the cost of *any* input enough to affect an airline's services. For example, if state property law (zoning, nuisance, etc.) limits the size of an airport, an airline may have to use smaller or fewer planes. Such state laws and many more would be preempted under the logic of the decision below, because they would all "relate to" a "service" provided by the airline.

The ADA's distinction between state regulation of airlines' outputs (preempted) and state regulation of airlines' inputs (not preempted) avoids this line-drawing problem. Under the ADA as properly and traditionally interpreted, there *is* a stopping point. The ADA bars the states from regulating the relationship between airlines and their passengers, but it does not grant airlines any special immunity from state employment laws that other employers lack.

Until this case, the foregoing was uncontroversial. Every federal court of appeals and state supreme court to address the issue had held that the ADA and its analogue, the FAAAA, do not preempt state and local wage regulation. The Rhode Island Supreme Court has now upset this consensus.

ARGUMENT

Delta offers three reasons for denying certiorari, but Delta is mistaken with respect to all three.

I. The Question Presented is indeed presented in this case.

The only issue litigated below was whether the ADA preempts Rhode Island's time-and-a-half statute. Delta nevertheless argues (BIO 5-8) that this issue is *not* present in the case, on the theory that below we "objected only to the sufficiency of the evidence Delta proffered." *Id.* at 7. Not so. Delta is quoting quite selectively from the record.

In the Rhode Island Superior Court, the main substantive point heading in our brief was: "The DLT erred when finding that ADA pre-emption was triggered by the possible increase in costs posed by the Sunday and holiday premium pay requirement of R.I.G.L. § 25-3-3." Petrs. Super. Ct. Br. 7. The brief's first subheading was: "The ADA was intended to promote competition, not immunize airlines from state regulations in general." *Id.* The next subheading was: "A state-mandated increase in labor costs, standing alone, does not trigger ADA pre-emption." *Id.* at 11. The text of the brief of course expanded on these headings.

We renewed these arguments in the Rhode Island Supreme Court. Our brief's first substantive point heading was, once again: "The mere fact that a state statute will increase labor costs does not, standing alone, prove a prohibited 'significant impact' on rates, routes, and services." Petrs. Sup. Ct. Br. 15. As we explained in the text of the brief, "an examination of the case law across the country … makes it abundantly clear that courts have not accepted the proposition that a mere increase in labor cost wrought by a state statute, standing alone, will work the prohibited 'significant impact' on airline rates,

routes and services, and thus trigger ADA preemption." *Id.*

To be sure, we also argued in both courts below that Delta failed to introduce enough evidence to establish the impact of the Rhode Island statute. But it is normal practice, and indeed it is desirable, for a party to make multiple arguments in the lower courts and then to sharpen the argument in a certiorari petition. That's what we did.

II. The split is real.

As we showed in our certiorari petition (Pet. 5-10) this case would have come out differently in every other federal court of appeals and state supreme court that has addressed the issue, because these courts have all correctly concluded that the ADA and the FAAAA do not preempt state and local wage regulation. Delta argues (BIO 8-15) that these cases do not conflict with the decision below, but Delta is mistaken.

Delta's first error is its insistence that our case is distinguishable from every other case on this issue because Rhode Island's time-and-a-half statute is the surviving remnant of a "blue law" that once barred work on Sundays. The ADA does not make any such distinction. It does not sort state laws into categories—preempted or not preempted—based on whether they originated as blue laws. A state law is either preempted or not based solely on whether it is "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). State and local wage regulation, regardless of its origin, does not fit this criterion.

Delta also errs in its description of the cases. In each, the court made clear its view that the ADA (or the FAAAA) does not preempt state and local wage regulation. The Seventh Circuit provided an accurate picture of the cases when it observed that airlines' "labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations. … Yet no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws." *S.C. Johnson & Son, Inc. v. Transp. Corp. of America, Inc.*, 697 F.3d 544, 558 (7th Cir. 2012). As the First Circuit summarized the cases, with equal accuracy, "the preemption dividing line [is] between state laws that regulate how [a] service is performed (preempted) and those that regulate how an airline behaves as an employer or proprietor (not preempted)." *Tobin v. Federal Express Corp.*, 775 F.3d 448, 456 (1st Cir. 2014) (citation and internal quotation marks omitted).

Until the decision below, every federal court of appeals or state supreme court to address the issue concluded that the ADA and FAAAA do not preempt state and local laws governing the wages paid by employers. *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 135-38 (3d Cir. 2018) (no preemption of state law barring unauthorized deductions from employees' wages); *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1055 (7th Cir. 2016) (no preemption of state law barring unauthorized deductions from employees' wages); *Californians for Safe and Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (no preemption of state prevailing wage statute); *Amerijet Int'l, Inc. v. Miami-Dade*

Cty., 627 F. Appx. 744, 747-51 (11th Cir. 2015) (per curiam) (no preemption of local minimum wage ordinance); *People ex el. Harris v. Pac Anchor Transp., Inc.*, 329 P.3d 180, 185-90 (Cal. 2014) (no preemption of state minimum wage law); *Filo Foods, LLC v. City of SeaTac*, 357 P.3d 1040, 1057-59 (Wash. 2015) (no preemption of local minimum wage ordinance).

The decision below cannot be reconciled with these cases. Had our case arisen in the First, Third, Seventh, Ninth, or Eleventh Circuits, or in the California or Washington Supreme Courts, the outcome would have been different. The split is real.

III. Delta's merits argument is directed at the wrong branch of government.

Finally, Delta argues (BIO 15-17) that the decision below is factbound and correct. It is neither.

The decision below is not factbound. It does not rest on any idiosyncratic feature of Rhode Island's time-and-a-half law. Rather, it rests on the fact that the time-and-a-half law may cause airlines to hire fewer employees because the law makes each employee more costly. This is precisely the rationale that has been rejected by every other court to confront this issue.

Nor is the decision below correct. The text and purpose of the Airline Deregulation Act indicate that Congress intended to deregulate the relationship between airlines and their passengers, not the relationship between airlines and their employees. The Fair Labor Standards Act specifically authorizes state and local governments to set minimum wages higher than the federal minimum. 29 U.S.C. § 218(a). The ADA could not preempt state and local

wage regulation without repealing this provision as to airlines, but there does not appear to be any evidence that Congress intended any such repeal.

Rather than reckoning with the text or the purpose of the ADA, Delta offers a policy argument. Delta worries (BIO 16) that if the state statute is not preempted, its Rhode Island operations will grind to a halt on Super Bowl Sunday because its employees will choose to watch the game rather than show up for work. Delta is addressing this argument to the wrong branch of government. If absenteeism during the Super Bowl proves to be a problem, Delta can ask the Rhode Island legislature to amend the state statute to exempt airlines, as the legislature has already done for a few other kinds of firms, including the car rental companies at the Providence airport. *See* R.I. Gen. Laws § 25-3-3(e). Or Delta can ask Congress to add wage regulation to the list of state laws preempted by the ADA. But Delta cannot ask the courts to rewrite the ADA's preemption provision, which, until the decision below, was never thought to grant airlines immunity from state and local wage regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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