STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-2024-101

CAMPBELL CLEGG AND JENNIE CLEGG
Appellants

v.

AMERICAN AIRLINES, INC.
Appellee

ON APPEAL FROM DECISION OF THE SUPERIOR COURT
(CUMBERLAND COUNTY)

BRIEF OF APPELLEE, AMERICAN AIRLINES, INC.

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BRIEF OF APPELLEE

I. STATEMENT OF FACTS AND UNDERLYING SUMMARY JUDGMENT RULING

a. Statement of Undisputed Facts

The operative material undisputed facts before the trial court and underlying the summary judgment motion include the following: Plaintiffs purchased five first class tickets from AA on or about February 1, 2022 for a flight departing on the morning of May 14, 2022 from Albany, New York to San Francisco California. There was a return flight on May 21, 2022. RA52.

On May 13, 2022, plaintiffs attempted to check-in on-line three times but the on-line system did not permit them to do so. RA53;57. The AA on-line system advised and instructed that plaintiffs "Check in at Airport." Id. Plaintiffs arrived at the airport on May 14th at 4:47 a.m. and reached the ticket counter "sometime" before 5:00 a.m. RA53. The flight was scheduled to depart at 6:04 a.m. on May 14, 2022. Id. When the plaintiffs arrived at the ticket counter a customer service agent advised that while she could see the reservation and see seats had been assigned, the AA computer system would not allow completion of the check-in process. RA58. The cut-off time for checking in under the COC is 45 minutes prior to departure and this includes the time necessary for checking any bags. RA56-57;54. The computer boarding/ticketing issues preventing the check-in, ticketing, and boarding process

were unable to be resolved before the expiration of the cut-off time and boarding passes were not issued. RA54.

In a discussion with an AA customer service representative, plaintiffs claim that they were told or advised that there was an AA flight leaving from Boston that afternoon that had availability. RA58. The agent advised that if she booked the flight from Boston, plaintiffs would lose their return tickets, but if they book the new flight themselves, the return tickets would be preserved. Id. Plaintiffs proceeded to attempt to book the AA flight from Boston but due to difficulties with the mobile application and price increases, opted to book a flight with a different airline. RA58. Plaintiffs assert that the customer service agent informed them that if they book a flight on a different airline their return flight would not be affected if the agent did not rebook the flight. RA58.

The holders of the three other tickets in plaintiffs' party were able to check in on-line successfully on May 13, 2022 and arrived at their gate for their outbound flight at approximately 5:20 am. RA58. Plaintiffs assigned seats on the flight were empty. Id.

As to the return flight, plaintiffs received an email from AA, on the night before the return flight, prompting them to check in for their return flight. RA59. They attempted to check-in on-line but received an "error" message and were unable to check-in via AA's computer on-line system. Id. Plaintiffs called AA and spoke to

a customer service representative and were advised that their return tickets had been cancelled because they did not board the original outbound flight. RA59. There was no prior notification of this cancellation with plaintiffs not receiving any refund for the outbound or return flights. Id.

Plaintiffs' complaint contains three claims: breach of contract (Count I); fraud (Count II); and violation of the Maine Unfair Trade Practices Act-5 MRS 213 (Count III). RA17-24. The gravamen of the claims is the failure of AA through its customer services to provide proper ticketing including boarding passes or refusing to timely provide boarding passes for the AA outbound flight they purchased and for otherwise cancelling and making false statements pertaining to the scheduled return flight. Ibid.

b. Summary Judgment Motion and Opposition

AA moved for summary judgment asserting that the state claims were preempted by the Airline Deregulation Act (ADA); that the *Wolens* exception for certain breach of contract claims was not applicable, and regardless, there was no evidence of any breach of any of the terms of the governing Conditions of Carriage (COC). RA25-36. It was also argued that even assuming any viable breach of contract claim under the COC, plaintiffs' damages were limited by the limitation of damage provision contained in the COC. Id.

In their opposition, plaintiffs summarily asserted that the claims were not preempted as they did not "sufficiently relate to rates, routes and services" contending that "plaintiffs' claims are too specific to the specific chain of events underlying this case to warrant invocation of ADA preemption." RA43-51. There was no claim, argument, or assertion that the claims were not preempted because they lacked sufficient "regulatory effect." Id. Plaintiffs otherwise contended that the *Wolens* exception applied to their breach of contract claim and that AA had breached its conditions of carriage by failing to: (a) issue a boarding pass; (b) assist plaintiffs in rebooking their flights; and (c) refund their ticket. Id.

c. <u>Superior Court Ruling on Summary Judgment</u>

The Superior Court (Kennedy, J.) entered summary judgment finding that, consistent with established federal law applicable to ADA preemption, all three claims were preempted by ADA as they are "clearly 'related to a . . . services of an air carrier.'" RA7-16. It rejected the plaintiffs' argument that the claims were unrelated to "service" because they concern a "failure to render service." RA12-13. As to the *Wolens* exception and the breach of contract claim, the court found that plaintiffs' reliance on certain provisions of the COC were inapplicable and had failed to identify any breach of the COC. RA13-15.

d. Contentions on Appeal

Plaintiffs contend that the Superior Court erred in finding the claims preempted by ADA. It is contended that the trial court engaged in an "improper analysis" and "ignored policy purposes of ADA." It is argued that ADA preemption requires that the claims be related to "rates, routes and services" and that the state claims sought to be preempted have "regulatory effect." The argument only summarily and cursorily states that the claims have no regulatory effect contending that the trial court's finding that the claims relate to ticketing to be conclusory. Plaintiffs likewise argue that the *Wolens* exception applied to the breach of contract claim.

II. STATEMENT OF ISSUES PRESENTED

Whether the Superior Court committed an error of law in entering summary judgment on the grounds that plaintiffs' claims for breach of contract, fraud, and under the Maine Unfair Trade Practices Act were preempted by the Airline Deregulation Act (ADA) and that the *Wolens* Exception to ADA Preemption is otherwise inapplicable.

III. STANDARD OF REVIEW

The review of questions of law including as to the applicability of federal preemption as well rulings on summary judgment are *de novo*. *See e.g.*, Nadeau v.

Twin Rivers Paper Co., 247 A. 3d. 717 (2021); Holmes v. Eastern Maine Medical Center, 208 A. 3d. 792 (2019).

IV. SUMMARY OF ARGUMENT

There was no error by the Superior Court in entering summary judgment. ADA preemption is purposely broad with it indisputable that the factual predicate for all of plaintiffs' claims pertain and relate to airline services. The reservation, ticketing, and boarding process and procedures central to plaintiffs' claims are all matters over which airlines compete and are an integral part of air travel and the services airlines provide falling squarely within the expansive scope of ADA preemption. The reliance on Hall v. Delta Airlines is misplaced as it involved claims of bodily injury an area commonly found excluded from ADA preemption.

Further, and leaving aside that plaintiffs did not make the arguments below now being made on appeal, the nexus between the state-based claims and the impact on airline operations is not attenuated or *de minimis* and is otherwise inconsistent with ADA preemption objectives. The claims directly challenge the type, timing, and quality of customer services pertaining to ticketing and the flight check-in process and how those services are provided including as to both manner and time. In no uncertain terms, the claims have the forbidden regulatory impact mandating preemption.

There was otherwise no error of law in finding the *Wolens* exception to ADA preemption inapplicable to the breach of contract claim. The *Wolens* exception from ADA preemption for express self-imposed contractual obligations is "limited" with it impermissible to seek to enlarge an airline's obligation to include standards, policies, or legal duties beyond the express terms of the COC. There is no contractual self-imposed obligation that guarantees check-in and issuance of boarding passes in the circumstances presented and summary judgment was properly granted.

V. ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THE CLAIMS PREEMPTED

a. The ADA's Broad Preemptive Scope

Congress determined in 1978, "'... that "maximum reliance on competitive market forces' "would favor lower airline fares and better airline service, and it enacted the Airline Deregulation Act." Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364, 367–68 (2008), *citing* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992) (in enacting the ADA, Congress determined that "maximum reliance on competitive market forces' would best further, efficiency, innovation, and low prices' as well as "variety [and] quality of air transportation services").

To ensure that states would not undo federal deregulation with regulation of their own, the Airline Deregulation Act ("ADA") included a preemption provision

that "no State ... shall enact or enforce any law ... relating to **price, routes, or services** of any air carrier." Rowe, *supra* at 368, *citing* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992) 49 U.S.C. § 41713 (b)(1) (emphasis added) (Add. 1); American Airlines v. Wolens, 513 U.S. 219, 223 (1995); Bower v. Egyptair Airlines Co., 731 F. 3d. 85, 92-98 (1st Cir. 2013).

ADA preemption is "purposely expansive" and applies to statutory and common law causes of action. Brown v. United Airlines, Inc., 720 F.3d 60, 64-65 (1st Cir. 2013); Overka v. Am. Airlines, Inc., 790 F.3d 26, 37 (1st Cir. 2015); Bower, 731 F.3d at 94; Tobin v. Federal Express, 775 F. 3d 448, 453-54 (1st Cir. 2014). Consistent with the broad preemptive scope of the ADA, the vast majority of the courts have held that the term "service" is expansive.[1] The First Circuit, for instance,

[1] The over-whelming majority of the circuits that have construed "service" including the First Circuit, have held that the term refers to the provision or anticipated provision of labor from the airline to its passengers and encompasses matters such as boarding procedures, ticketing, baggage handling, food and drink as well as other customer service matters incidental to and distinct from the actual transportation of passengers. See Tobin, 775 F.3d at 453 (*citing* Bower, 731 F.3d at 93-98); Air Transp. Ass'n of Am. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008) (holding that claims arising from provisions for passengers during lengthy ground delays relate to services of an air carrier and were therefore preempted); Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1257 (11th Cir. 2003) (finding the arguments for a broader definition of services more compelling than the alternative); Arapahoe Cty. Pub. Airport Auth. v. Fed. Aviation Admin., 242 F.3d 1213, 1222 (10th Cir. 2001) (finding that a ban on scheduled passenger service related to both routes and services and was thus preempted); Weiss v. El Al Israel Airlines, 309 Fed. Appx. 483 (2nd Cir. 2009) (bumping of passengers from flights preempted). The Third (Taj Mahal) and Ninth Circuits, in contrast, have construed service to refer more narrowly to "the prices, schedules, origins and destinations of the point-to-point transportation of

has confirmed that the term "service" for purposes of ADA preemption has a "side sweep" encompassing schedules, origins, destinations, ticketing, boarding procedures, luggage handling and flight related services. *See* Tobin, 775 F. 3d at 453; Bower, 731 F. 3d at 80; Chukwu v. Bd. of Dirs. British Airways, 889 F.Supp. 12, 13 (D.Mass.1995) *aff'd mem. sub nom*. Azubuko v. Bd. of Dirs., British Airways, 101 F.3d 106 (1st Cir.1996) (ticketing, boarding, in-flight "and the like" service relate to service). Even intentional torts which are based on services are preempted

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passengers, cargo, or mail," but not to "include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities." Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir.1998) (en banc); Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 193-94 (3d Cir. 1998).

While plaintiffs cite to *Taj Mahal* in their brief they made no argument below that the more narrow view of services should be followed by this Court and otherwise relied on various decisions in the First Circuit as to preemption under the ADA which circuit has endorsed and adopted the more expansive view of services. Notably as well, *Taj Mahal* involved a defamation claim brought by a travel agency against an airline which gave a letter to various passengers that had purchased airline tickets from the agency, advising them that their tickets were considered stolen. Id. In holding there was no preemption of the defamation claim, it found that ADA preemption did not apply to common law claims as opposed to statutory claims and otherwise followed a circumscribed meaning of "service." The vast bulk of the case law has rejected that analysis, including the First Circuit. It is well established that common law claims are subject to preemption and that "service" is to be given a much broader scope.

by the ADA. *See, e.g.*, Smith v. Comair Inc., 139 F.3d 254, 259 (4th Cir. 1998) (intentional tort claims which relate to service are preempted).[2]

Unsurprisingly, the decisions are legion in holding state (non-bodily injury) common law claims concerning failed, inadequate, negligent or otherwise faulty customer service pertaining to flight transportation preempted under the "expansive" scope of the ADA including state-based claims pertaining to airline agent representations, flights, ticketing, cancellations, scheduling, boarding, seating, as well as the failure to provide a refund. *See, e.g.*, Bower, 731 F.3d at 94-95 (alleged failure of airline to conduct adequate investigation of pre-flight documentation of passenger and prevent abduction of child preempted by ADA); Am. Airlines, 513 U.S. at 232-33 (passenger claims relating to "access to flights" relate to service under ADA"); Onoh v. Northwest Airlines, Inc., 613 F.3d 596 (5th Cir. 2010) (state claims against airline for agent statements and refusal to allow plaintiff to board preempted by ADA); Branch v. Air Tran Airways Inc., 342 F. 3d 1248, 1258 (11th Cir. 2009) (holding that airlines compete over boarding procedures and thus such claims are preempted); In re JetBlue Airways Corp. Privacy Litig., 379 F.Supp.2d 299, 316 (E.D.N.Y. 2005) (ADA preemption as "an attempt to regulate the representations and commitments that JetBlue makes in connection with reservations and ticket sales

[2] See *Tobin*, *supra* at 775 F.2d at 454 (rejecting argument that tortious conduct not subject to preemption).

directly affects the airline's provision of those services"); Dogbe v. Delta Airlines, Inc., 969 F. Supp. 2d 261 (E.D.N.Y. 2013) (claim challenging ticketing and boarding procedures preempted).[3]

[3]*See also* Travel All Over the World v. Kingdom Saudi Arabia, 73 F3d 1423, 1433 (7th Cir. 1996) (fraud claim premised on airline's purported false statements were related in part to ticket cancellation and thus preempted); Delta Airlines, Inc. v. Black, 116 S. W. 3d 745, 754-56 (Tex. 2003)(claims based on failure to provide first class seat preempted); Galbut v. American Airlines, Inc., 27 F.Supp.2d 146 (E.D.N.Y. 1997) (state claims pertaining to booking, seating and upgrading procedures including statements related to same all preempted by ADA); Williams v. Express Airlines, I, Inc., 825 F.Supp. 831 (W.D. Tenn. 1993) (claims stemming from airline's refusal to allow plaintiffs on board preempted by ADA); Ruta v. Delta Airlines, Inc., 322 F.Supp. 2d 391 (S.D.N.Y.2004) (state claims related to removal of passenger from aircraft preempted by ADA); Lawal v. British Airways, LLC, 812 F.Supp. 713 (E.D. Tex. 1992) (state law claims against carrier related to sale of tickets and alleged mistreatment preempted by ADA); Cuomo, 520 F.3d 218 (state law requiring airline to provide food, water, electricity and restrooms related to flight delays relates to service and is preempted); Farah v. Continental Airlines, Inc., 574 F.Supp. 2d 356 (E.D.N.Y. 2008) (state claims based on quality of in-flight service and post-flight service preempted by ADA); Flaster/Greenberg P.C. v. Brendan Airways, LLC, 2000 WL 1652456 (D.N.J. 2009) (state claims including for fraud, consumer protection, breach of implied covenant of good faith and fair and dealing related to cancellation of flight and purported services including alleged failure to find alternative flight preempted by ADA); Shulick v. United Airlines, 2012 WL 315483 (E.D. Penn. 2012)(same); Shipwash v. United Airlines, Inc., 28 F.Supp. 3d 740 (E.D. Tenn. 2014) (passenger claim under Tennessee consumer protection statute based on alleged cancellation of flight and services related to cancellation preempted by ADA); Howell v. Alaska Airlines, Inc., 99 Wash. App. 646 (2000) (claim based upon airline's refusal to provide a refund for a nonrefundable ticket was preempted); Banga v. Gundumolgula, 2013 WL 3804046 (E.D. Cal. July 19, 2013)(claims for fraud, unfair competition, deceit, misrepresentation based on failure to provide refund all preempted by ADA); Madorsky v. Spirit Airlines, 2012 WL 6049095 (E.D. Mich. 2012)("Plaintiff's claims regarding the cancellation and refund provisions governing Plaintiff's access to discounted fares are preempted by the ADA"); Boon Ins. Agency, Inc. v. Am Airlines, Inc., 17 S.W.3d 52, 58-59 (Tex. App. 2000) (claim regarding a reissue fee was preempted where party relied on state

As one recent federal court has noted:

> Customers anticipate that, when they purchase an airline ticket, carriers will provide customer assistance, just as customers expect "baggage handling" or "food and drink." *See Travel All Over the World*, 73 F.3d at 1433. And, like these other aspects of airline travel, airlines "compete" over customer service. Customer assistance—either before or after the flight—is an "integral part of the customer's experience of air travel," which customers consider "in evaluating the quality" of that experience. *See Branche*, 342 F.3d at 1258 (holding that airlines compete over boarding procedures).

Kislov v. American Airlines, Inc., 2022 WL 846840 (N.D. Ill 2022).

As the First Circuit has noted, the operative inquiry "does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA." Tobin, 775 F. 3d at 455. Rather, "[t]he relevant inquiry is whether enforcement of the plaintiffs' claims would impose some obligation on an airline defendant with respect to conduct when properly undertaken, is a service."

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law to modify the contract); Statland, 998 F.2d 539 (holding that passenger's state law claims are preempted because canceled ticket refunds relate to rates); Schulick v. United Airlines, Inc., 2012 WL 345483*4-5 (9th Pa. 2012) (claim which included assertion of wrongful cancellation and wrongful failure to refund preempted by ADA); Blackner v. Continental Airlines, 311 N.J.Super. 10, 709 A.2d 258 (1998)(holding that passenger's state law claims arising from a $60 surcharge to replace a lost ticket are preempted); Leonard v. Northwest Airlines, 605 N.W.2d 425 (Minn.Ct.App.2000) (holding that passenger's state law claims to recover reissuance fees charged for tickets are preempted); Farash v. Cont'l Airlines, Inc., 574 F. Supp. 2d 356, 360, 366 (S.D.N.Y. 2008), *aff'd*, 337 F. App'x 7 (2d Cir. 2009) (tort claim about plaintiff's post-flight telephone complaints to the airline and the airline's responding customer service "clearly relate[ ] to an airline service").

Tobin 775 F.3d at 454 *citing* Bower, 731 F.3d at 97. As such, the broad and "expansive" preemptive reach of the ADA reaches even "intentional torts" including fraud[4] and consumer protection or trade practices statutes[5] as well as any other claim

[4] Shrem v. Southwest Airlines, Co., 2016 WL 4170462 (N.D. Cal. 2016) (fraud claim against airline for cancellation of non-refundable tickets preempted by ADA); Weber v. U.S. Airways, Inc., 11 Fed. Appx. 56 (4th Cir. 2001) (fraud claim against airline preempted); Musson Theatrical, Inc. v. Federal Express Co., 89 F.3d, 244 (6th Cir. 1995); (same); Travel All Over the World, Inc. v. Saudi Arabia, 731 F.3d 1423 (7th Cir. 1996) (same); Mastercraft Interiors, 284 F. Supp. 2d at 288 (finding preempted state tort claims for misrepresentation); Abdel-Karim v. Egypt Air, 116 F. Supp. 3d 389 (S.D.N.Y. 2015) (fraud and breach of fiduciary duty claim by passenger against airline preempted by ADA); Stratland v. American Airlines, Inc., 998 F.2d 539 (7th Cir. 1993). Abdel-Karim v. Egypt Air, 116 F. Supp. 3d 389 (S.D.N.Y. 2015) (fraud and breach of fiduciary duty claim by passenger against airline preempted by ADA).

[5] Wolens, 513 U.S. at 232-33 (ADA preempts state consumer protection statute claims); Morales, 504 U.S. at 388-89 (affirmed injunction preventing state attorney general from enforcing state deceptive practice laws against airline); Bower, 731 F. 3d at 93 (noting state imposed consumer protection statutes and standards are preempted under ADA). *See also* Eke v. Deutsche Lufthansa, 2013 WL 12201891, *8 (D. Mass. 2013)(noting G.L. c. 93A claim related to baggage and fees preempted); Rivera v. JetBlue Airways Corp., 2018 WL 264735 (D. Conn. 2018)(Connecticut unfair and deceptive consumer protection claim preempted by ADA); Shipwash, 28 F. Supp. 3d at 740(passenger claim under Tennessee consumer protection statute and premised on flight cancellation preempted by ADA); Flaster/Greenberg, 2009 U.S. Dist. LEXIS 48653 at *6-7 (ADA leaves no room for consumer fraud claim); Vail v. Pan Am. Corp., 616 A.2d 523 (N.J. App. Div. 1992) (same); Gordon v. United Continental Holdings, Inc., 73 F. Supp. 3d 472 (479-80) (D.N.J. 2014) (New Jersey Consumer protection statute preempted by ADA); Madorsky v. Spirit Airlines, 2012 WL 6049095 (E.D. Mich. 2012) (ADA preempts claim under consumer protection statute); Butler v. United Airlines, Inc., 2008 WL 1994896, at *6 (N.D. Cal. 2008) **(finding it unsurprising that plaintiffs have not cited a single cases in which a consumer protection statute claim against an airline was held not preempted by ADA)**; In re: Jet Blue Airways Privacy Litig., 379 F. Supp. 2d 299, 315 (E.D.N.Y. 2005) (claims brought under state consumer

that concern or regulate how a service is performed. *See* Tobin, *supra* (the mishandling of delivery of package preempted as claims related to how airline delivered, labeled and handled packages).

b. ADA Preemption Applies As Plaintiffs' Claims Relate To Airline Services

In their brief, plaintiffs contend that the trial court erred in finding preemption because it "declined to consider whether the claims had regulatory effect" and otherwise make fleeting reference to the minority view as to the scope of the terms "services." Yet plaintiffs never made such an argument in its opposition to the motion for summary judgment before the trial court. Even on appeal the proffered argument is conclusory and fleeting with it simply asserted, with little analysis, that

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protection laws represent a "direct effort to regulate" the airlines communications with its customers in connection with reservations and ticket sales); Air Transport Ass'n of Am., Inc. v. Cuomo, 520 F.3d 218, 220 (2nd Cir. 2008) (New York State Passenger Bill of Rights preempted by ADA); Joseph v. Jet Blue Airways, 2012 WL 1204070 (N.D.N.Y. 2012) (New York consumer protection statute claims preempted by ADA); In re: Northwest Privacy Litigation, 2004 WL 1278459 at *4 (Minnesota consumer protection claim against airline preempted by ADA); Copeland v. Northwest Airlines, Inc., 2005 WL 2365255 (W.D. Tenn. 2005) (Tennessee consumer protection statutory claim preempted by ADA); Stratland v. Am. Airlines, Inc., 998 F.2d 539 (7th Cir. 1993) (fraud and consumer protection claim preempted by ADA); Hallam v. Alaska Airlines, Inc., 91 P. 3d 279 (Alaska 2004)(Unfair Trade Practices Act claim against airline including challenges to policy of classifying tickets as refundable or non-refundable, as to overbooking and ticket terms preempted by ADA).

there is no ADA preemption when the connection between the claims and rates, routes or services is "too remote, tenuous or peripheral."

As to the reliance upon Hall v. Delta Airlines, that decision involved a claim for personal/bodily injury—an area commonly and nearly universally found outside the preemptive scope of the ADA and which was readily recognized and relied upon by the Court in *Hall*. 2018 WL 1570788 (D. Me. 2018). The Hall Court referenced that not one case was cited by the airline to support preemption of a personal bodily injury claim; that it would he illogical or incongruous to hold personal injury claims preempted under the ADA when the ADA specifically requires airlines to maintain bodily injury insurance as to such claims; that "[t]here is little reason to believe that the [ADA preemption] clause was intended to extend to personal injury actions, which were not the subject of federal regulation in the first place; and that the First Circuit has otherwise properly "characterized the state of the caselaw to wit "nearly all courts agree [that personal injury tort claims] are not preempted by the ADA." Id. at *18 citing Bower, 731 F. 3d at 95. As the Eleventh Circuit has noted: "Unsurprisingly, airlines do not compete on the basis of a likelihood of personal injury, i.e. onboard safety, as such it is does not undermine the pro-competitive purpose of the ADA as set forth in *Wolens,* 513 U.S. at 230, to permit state to regulate this aspect of carrier operations." Blanche v. Airtran Airways, Inc., 342 F. 3d 1248, 1258 (11th Cir. 2003).

Here, there is no personal injury claim. Rather, the claims are for breach of contract, fraud and under the Maine Trade Practices Act. All of the claims are premised on the failure or inability of AA's customer service to timely provide boarding passes as part of the boarding, check-in and/or ticketing process procedure for the out-bound flight and asserted fraud based on the representations of AA customer service representative as to the availability of the return flight.[6] In no uncertain terms, the claims all relate to services under the ADA.

As to the contention that the claims' connection to services is "too remote, tenuous or peripheral," the Supreme Court has "used as such examples limitation on gambling, prostitution or smoking in public places—state regulation comparatively remote to the transportation function." Rowe, 552 U.S. at 371; DiFore v. Am. Airlines, Inc., 646 F. 3d 81 (1st Cir. 2011). Moreover, it remains that the breadth of ADA preemption is purposely broad. Tobin, 775 F. 3d at 455 (congressional intent as to ADA preemption "is driven by the desire to further "efficiency, innovation, and low prices" as well as "variety [and] quality" of services and to ensure that the states do not "undo federal deregulation with regulation of their own").

[6] The gravamen of the claims is the ticketing/flight check in process including the failure of AA through its customer services to provide boarding passes or refusing to provide boarding passes for the AA outbound flight they purchased and for otherwise cancelling and making false statements pertaining to the scheduled return flight. Such claims are firmly grounded on services which are part of the bargain for exchange between the airline and its customers.

The claims here are premised on the ticketing process including the failure to timely provide boarding passes as part of the flight check-in process and an alleged fraud as to the status or availability of the return flight; claims which directly impact AA's interaction with its customers and which directly regulate the airline's provision of services thereby interfering with ADA's preemption purposes. The nexus between the state-based claims and their impact on airline operations is not remotely attenuated. Rowe, 552 U.S. at 371 *quoting* Morales, 504 U.S. at 390 (state regulation preempted, even though it allegedly "impose[d] no significant additional costs upon carriers," because it was still "inconsistent" with the ADA's preemption objectives").

The argument in briefing that plaintiffs are not challenging the ticketing, check-in and/or boarding services as a general matter but only as to such services on the day in question has no support and misunderstands the broad preemptive sweep of ADA "related to" preemption and its purposes. Such logic would mean that there would be no ADA preemption even where, like here, the claims center on fundamental services to the flight transportation (ticketing, check-in and boarding procedures) because there are limited to a single claimant or instance. It is the very purpose of ADA preemption to prevent a fifty-state patchwork of obligations through individualized or separate common law or statutory lawsuits, claims or actions brought by customers either individually or collectively. *See* Rowe, 552 U.S.

at 372-73; Tobin, 775 F. 3d at 445 (claim involving single mis-delivery and labeling of package preempted: "And the risk of a patchwork effect is heightened where, as here, the claims are of the sort typically tried to a jury"). The regulatory effect of individual state common law claims and damage awards have "powerful and direct" "regulatory bite." Id. "[W]hen a state law directly substitutes the state's own policies for competitive market forces, the state law produces precisely the effect the preemption clause seeks to avoid: a patchwork of state service determining laws, rules and regulations." Tobin *supra quoting* Rowe, 551 U.S. at 372, 373. [7]

While it remains that the ADA preemptive "framework calls for an individualized assessment of the facts underlying each case to determine whether a particular state-law claim will have a forbidden effect," Tobin, 775 F.3d at 456, the "forbidden effect" of the plaintiffs' claims is undeniable. In no uncertain terms, the breach of contract, fraud, and statutory trade practices claims premised as they are on the alleged failure to provide expected check-in, ticketing, and boarding process and/or misrepresentations as to the availability of a return flight—sufficiently impact

[7] Plaintiffs' construction is directly counter to the broad preemptive scope of the ADA and which is necessary to give effect to congressional intent. Tobin, 775 F. 3d at 455. "That intent is driven by the desire to further "efficiency, innovation, and low prices" as well as "variety [and] quality" of services and to ensure that the states do not "undo federal deregulation with regulation of their own." *Id. citing/quoting Morales 504 U.S* at 378, 112 S.Ct. 2031.

services to require preemption. *See* Venegas v. Global Aircraft Services, Inc., 2916 WL 5349723 (D. Maine 2016) (courts are to "consider the logical effect that a state law claim would have on an airline's rates, routes or services"). They directly challenge the customer service and procedures and process of an airline as to ticketing, check-in, and boarding impacting how the airline provides such services including training. *See* Tobin, *supra*; Covino v. Spirit Airlines, Inc., 406 F. Supp. 3d. 147 (D. Mass. 2019) (allowing state common law claim "arising from the manner in which she was denied access to a service would upend the ADA's preemption of all claim related to the provision of airlines services"); Dogbe, 969 F. Supp. 2d 261 ("there can be no question that plaintiff's challenge to Delta's boarding procedures is preempted by the ADA"); Koutsouradis v. Delta Air Lines, Inc., 427 F.3d 1339, 1344 n. 2 (11th Cir.2005) ("Baggage handling, passenger handling and courteousness relate to the heart of services that an airline provides. These services are inherent when you board an airplane.").

Plaintiffs' claims go to the very heart of core services and the access, manner, timing, and quality of those services and over which airlines compete. The claims seek to impose state law liability upon an airline over how its ticketing, boarding and check-in procedures including customer service representations about a status or availability of a flight are provided. Disparate state policies and treatment of liability in handling of check-in, boarding passes and/or ticketing, an activity that is central

to the business of the airlines, would greatly complicate the operation of airlines. *See e.g.*, Schultz v. United Airlines, Inc., 797 F. Supp. 2d 1103, 1106 (W.D. Wash. 2011). The potential impact on or relation to services is not remotely *de minimis* requiring a finding of preemption. There was no error by the trial court.

II. THE *WOLENS* NARROW EXCEPTION DOES NOT APPLY WITH THERE OTHERWISE NO BREACH OF ANY PROVISION OF THE CONDITIONS OF CARRIAGE

Plaintiffs contend that the trial court erred in failing to find that they have a viable breach of contract claim asserting that the Court wrongly relied on the assertion that the boarding passes were not issued because of the time when the plaintiffs arrived at the airport. It is otherwise contended that AA breached a self-imposed or stipulated undertaking by failing to issue boarding passes. The argument is misplaced.

As an initial matter, the *Wolens* exception to ADA preemption for certain breach of contract claims is a limited one. Brown v. United Airlines, Inc., 720 F.3d 60, 70 (1st Cir. 2013) (observing that "[t]he Wolens exception is very narrow," involving only "private terms agreed to by the parties" but not terms that "arise out of state-imposed obligations"); Buck v. American Airlines, Inc., 476 F. 3d 29, 37-38 (1st Cir. 2007); Bevacqua v. Southwest Airlines, Co., 2023 WL 5918924 (N.D. Tex. 2023) (*Wolens* exception to ADA preemption is "narrow"). The exception only applies where the airline is in breach of a specific

self-imposed contractual stipulation/obligation. Wolens at 233, 115 S.Ct. 817 (courts are confined "in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement").[8] Where the breach of contract is an effort to impose an obligation not in the contract and which pertains or relates to "rates, routes or services" it remains preempted. Ibid; *see e.g.,* Delta Airlines, Inc. v. Black, 2003 Tex. Lexis 92 (June 26, 2003) (ADA preemption applies to breach of contact claim and misrepresentation claim pertaining to alleged failure of airline to provide first class seats based on tickets); Seymour v. Continental Airlines, Inc., 2010 WL 3894027, *9-10 (D. R.I. 2010) (as "factual predicate of claims" was to challenge airlines late check-in policy or procedure it was preempted); Nazarian v. Compagnie Nationale Air France, 989 F.Supp. 504, 510(S.D.N.Y.1998) ("ticketing, boarding, in-flight services, or the implementation of airline policies, such as 'bumping' of passengers, denial of

[8] In *Wolens,* the dispute centered on the terms of an airline's self-imposed frequent-flyer program. The Court relied on the limited nature of the contract at issue in holding that the ADA's preemption clause did not extend to a breach of contract claim "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Wolens*, 513 U.S. at 228, 115 S.Ct. 817. In contrast, plaintiffs here seek to challenge the on-line computer check-in, ticketing, and boarding procedures, and services including service representative representations as to flights well beyond the limitations of the so-called "*Wolens* exception."

boarding, and segregation of smoking passengers, relate to services and are preempted."); see case cited infra.[9]

Here, as the trial court found, there was no breach of any provision of the COC. The airline was not contractually obligated to provide boarding passes in the undisputed circumstances. Plaintiffs did not arrive at the airport at the recommended time of two hours before departure. It is also undisputed that plaintiffs were not "checked in" within 45 minutes of the flight's departure. While plaintiffs say they arrived at the ticket counter a little over an hour before departure, check-in could not be accomplished before the 45 minutes before departure cut-off. The fact that an foreseen problem arose and that the specific reason for the inability to be able to be checked in within the small window between when plaintiffs say they arrived at the counter and the 45 minute cut-off (approximately 15 minutes) is not specifically identified in the record, does not alter the undisputed fact that there remains no breach of any express term of the COC. There is no obligation in the COC that guarantees check-in and the issuance of boarding passes in such circumstances. To find a viable breach of contract

[9] The two-prongs of the limited *Wolens* exception analysis are: 1) whether the claim is limited to a self-imposed contractual obligation; and 2) whether there is any enlargement or enhancement of the contract based on state law or policies external to the agreement. Onoh v. Northwest Airlines, Inc., 613 F.3d 596, 600 (5th Cir.2010).

claim is to impose a duty not part of the COC and otherwise runs afoul of the broad preemptive scope of the ADA and its deregulation purpose. It is the fundamental purposes of the ADA to leave to market forces and competition the quality of services of an airline including as to such fundamental aspects as ticketing, boarding passes, check-in, boarding, and customer service. As the trial court implicitly recognized, to apply or read in an obligation to issue boarding passes in such circumstances is to impose a state-based duty or standard of fault as to AA's ticketing, boarding and customer services squarely precluded by the ADA and outside the limited exception of the *Wolens* self-imposed exception. Nothing in the COC required AA to guarantee check-in where plaintiffs did not abide by the recommendation to arrive at least two hours before departure or where they were at the ticket counter only 15 minutes or so before the 45 minutes prior to departure cut-off. The fact that plaintiffs contend that the record provides no explanation as to why the check-in could not be accomplished in this limited time or that they claim they did nothing wrong is immaterial as there remains no breach of any express term of the COC. There was no error by the trial court.

CONCLUSION

Based on the foregoing, defendant American Airlines, Inc respectively requests that judgment below be AFFIRMED.

Respectfully submitted, dated at Bangor, Maine this 2nd day of July, 2024.

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CERTIFICATE OF SERVICE

I, William N. Smart, certify that I served one copy of this Reply Brief of Appellee upon Lee H. Bals, Esq., Counsel for Appellants, by regular U.S. mail, postage paid, and via email to: lhb@marcusclegg.com and kbj@marcusclegg.com.

Dated: July 2, 2024

/s/ William N. Smart
William N. Smart, Esq.

ADDENDUM
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49 U.S.C. S. 41713

(a)DEFINITION.—
In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.
(b)PREEMPTION.—
(1)
Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 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.
(2)
Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.
(3)
This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.
(4)TRANSPORTATION BY AIR CARRIER OR CARRIER AFFILIATED WITH A DIRECT AIR CARRIER.—
(A) General rule.—
Except as provided in subparagraph (B), 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 or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).
(B) Matters not covered.—Subparagraph (A)—
(i)
shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii)
does not apply to the transportation of household goods, as defined in section 13102 of this title.
(C) Applicability of paragraph (1).—
This paragraph shall not limit the applicability of paragraph (1).
(Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 1143; Pub. L. 103–305, title VI, § 601(b)(1), (2)(A), Aug. 23, 1994, 108 Stat. 1605, 1606; Pub. L. 105–102, § 2(23), Nov. 20, 1997, 111 Stat. 2205.)